No. 20-1773

In the
Supreme Court of the United States

PASADENA REPUBLICAN CLUB,
Petitioner,

v.

WESTERN JUSTICE CENTER, JUDITH CHIRLIN, AND CITY OF PASADENA,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the
Ninth Circuit

REPLY BRIEF

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Contrary to respondents' attempt to make this a case about disputed facts, there is no such dispute. This case is before the Court after judgment on Western Justice Center and Judith Chirlin's motion to dismiss and the City of Pasadena's motion for summary judgment. The record is set and neither the City nor the Western Justice Center can dispute the facts. All of the facts are in the appendix and each fact in the petition is supported by a citation to the appendix.

There is no dispute as to the fact that Western Justice Center was not legally qualified to purchase the Maxwell House Property. App at 96. That property could only be purchased by a government entity for public purposes. 40 U.S.C. §484(e)(3)(H); App. at 178.

There is no dispute as to the fact that the City of Pasadena purchased the property for the public purposes of the City (App. at 96, 160) nor is there a dispute as to the fact that the City committed to those public purposes in submissions to the United States General Services Administration (App. at 169, 174). There is no dispute that the General Services Administration reported the City's commitment to use the property for public purposes to Congress. App. at 174.

There is no dispute as to the fact that the Maxwell House property remains under the ownership of the City of Pasadena and that the Western Justice Center manages that property for the City according to the City's Plan of Public Use. App. at 96, 160, 173.

The Pasadena Republican Club has consistently argued – from the original complaint, through the District Court, the Ninth Circuit, and in the petition to this Court – that this case is about the exclusive use and management of the public property of the City of Pasadena. Similarly, the Club has consistently argued that the City can be liable for the viewpoint and religious belief discrimination committed by the Center either through the theory of joint action outlined in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961), or because the City delegated authority to Western Justice Center to make policy for how this City-owned property would be used after normal business hours. The arguments that these are new claims are simply without merit.

I. The Record Establishes that the City Conferred on Western Justice Center Exclusive Use and Management of City Property Which Allowed the Center to Engage in the Religious and Political Viewpoint Discrimination at Issue in this Case

The City would like to pretend that the lease to the Western Justice Center of the Maxwell House property only surrendered a property interest, and nothing more. City of Pasadena's Brief in Response to Petition for Certiorari (City) at 26, Western Justice Center's Brief in Opposition (WJC) at 5.

Respondents do not dispute (nor could they) that the City represented to the General Services Administration that the property was being purchased for the public purposes of the City. App. 96, 168. The Western Justice Center did not qualify as an entity

that could legally purchase the property from the federal government. App. at 96. Not even its status as an organization initiated by judges of the Ninth Circuit Court of Appeals qualified it as an entity that could lawfully purchase the property. *See* App. at 161.

When it proposed to purchase the property, the City included the proposed lease with the Western Justice Center in the proposal submitted to the General Services Administration. App. at 168. The GSA, in turn, provided the documents to Congress. App. at 174.

That lease recounted that it was not a commercial transaction. App. at 96. Instead, the City was seeking to accomplish the public purposes of the City in the purchase and lease arrangement. App. at 96, 160. This was not a generic statement of public purpose as Western Justice Center now claims. WJC at 5. Instead, the lease included specific limitations on the use of the property. App. at 96, 101-02, 160. Subleasing portions of the property was only permitted if the sublease fulfilled the plan of public purpose attached to the lease. *Id*. To enforce this provision, the Western Justice Center was required to give notice to the City of all of the subleases. App. at 134.

This detailed plan of public use showed that the City continued to exercise control over the property to ensure that its public purposes where fulfilled. Western Justice Center may have had exclusive use of the property, but it was managing the property for the public purposes of the City.

Further, the City used taxpayer funds to purchase the property and finance its repair and refurbishment. App. at 217-18. Yes, the Western Justice Center was contractually obligated to repay the City – but that does not change the fact that the City considered this entire project as one that advanced the public purposes of the City.[1]

II. The Court Should Grant Review to Rule that Local Governments Cannot Avoid their Constitutional Obligations by Offloading Management of City Property to Putatively Private Entities

The City insists that it can only be held liable under Section 1983 and then only if the Western Justice Center was acting in accord with City policy. City at 11. The City's arguments in this regard raise important questions for this Court's review. In *Burton*, this Court held that the state was jointly liable for the discrimination in that case both by its inaction and because it placed its "power, property, and prestige" behind that discrimination. *Burton*, 365 U.S. at 725. Other Circuit Courts of Appeals have acknowledged this rule. *Frazier v. Bd. of Trustees of Nw. Mississippi Reg'l Med. Ctr.*, 765 F.2d 1278, 1288 n.22 (5th Cir. 1985), amended, 777 F.2d 329 (5th Cir. 1985). *Gerena v. Puerto Rico Legal Servs., Inc.*, 697 F.2d 447, 451 (1st Cir. 1983).

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[1] Under the California Constitution, the City can only lend its credit to a private entity for a public purpose. *Alameda Cty. v. Janssen*, 16 Cal. 2d 276, 281; 106 P.2d 11, 14 (1940).

The City argues that the Club misrepresented the Ninth Circuit's ruling – but the Club quoted directly from the Ninth Circuit ruling on the requirement of City knowledge. The lower court concluded that there was no liability for the City because "[t]he City did not participate in, or know in advance about, the initiation or the cancellation of the Club's speaking event." App. 20. The City provides no contrary citation.

For its part, the Western Justice Center simply invents a finding of state knowledge of the discrimination at issue in *Burton*. WJC at 19. But there is no such finding in this Court's *Burton* decision and the invention of such a requirement by the Ninth Circuit conflicts with both *Burton* and the Fifth and First Circuit opinions cited above. This Court should grant review to determine whether *Monell v. Department of Social Services*, 463 U.S. 658 (1978), overruled the decision in *Burton* on this point.

Further, the lease gives the Western Justice Center unbridled discretion to set the policy for the after-hours rental of this City-owned property. App. at 102. The City dictated the policy for subletting the property to other organizations (App. at 96, 101-02, 160), demonstrating the City's intent to maintain ownership and control, with Western Justice Center in the position of manager to accomplish the City's public purposes. When it came to after-hours rentals, however, the City delegated policy-making authority to the Western Justice Center. App. at 102. This is sufficient under *Monell* for city liability. *City of St. Louis v. Paprotnik*, 485 U.S. 112, 126 (plurality) and 137 (Brennan, J., concurring) (1988).

III. The Court Should Grant Review to Resolve the Conflicts Created by the Ninth Circuit with Decisions of this Court and other Circuit Courts of Appeals on an Important Question of Federal Law

As noted in the Petition, the court below altered the requirements of *Burton* by ruling that there can be no state action unless the private actor is financially indepensable to the entire municipal government of the City of Pasadena. App. 19. The Western Justice Center and the City attempt to dispute this plain ruling of the court below, but it is clearly laid out in the ruling below. Indeed, the Ninth Circuit noted this "financial indispensability" requirement no less than six times. App. 13, 14, and 19.

Contrary to the argument of the Western Justice Center, and the ruling of the Ninth Circuit, the *Burton* case centered on a single parking garage. *Burton*, 365 U.S. at 719. The Eagle Coffee Shoppe, the diner that engaged in the discrimination, was only one of the tenants to which the Parking Authority leased space in order to raise funds for the garage. The rent paid by the coffee shop defrayed only "a portion of the operating expense of an otherwise unprofitable enterprise." *Id*. at 723.

The court below, however, added an additional financial indispensability to the entire government unit. App. at 14, 19. Contrary to Western Justice Center's assertion, this was not an ordinary application of *Burton*. Instead, it is a new requirement that effectively overrules *Burton*.

Respondents' claim surprise at the Petition's citation to *Gilmore v. City of Montgomery, Ala.*, 417 U.S. 556 (1974). Yet Gilmore is a straightforward application of *Burton*, relying on the facts of public ownership of property leased to a private entity that have been at the core of this case from the beginning. In *Gilmore,* this Court noted that when a city makes city-owned property "available for use by private entities," courts should look to the analysis in *Burton* to determine whether the city is liable for the discrimination of the private entity. 417 U.S. at 573. The likelihood of finding a "symbiotic relationship" greatly increases when the city grants exclusive use of city-owned property to the private entity. *Id.* at 574.

The Western Justice Center complains that this is a new argument. WJC at 13. Yet public ownership of the property (as opposed to mere regulation) has always been the core of the Pasadena Republican Club's argument. It is because the property is owned by the City of Pasadena that the activity of the Western Justice Center in managing that property bears increased scrutiny. The Club has consistently argued that the scrutiny is required because the City purchased the property to promote a plan of public use – a plan that the Western Justice Center was required to manage and implement for the City under the terms of the lease.

This Court should grant review to determine whether long-term exclusive use of public property of city property removes the property from the requirements of the Constitution.

CONCLUSION

The facts are clear and not subject to dispute. The City represented to the federal government that it was purchasing this property for the public purposes of the City. Under the terms of the lease the Western Justice Center manages the the City-owned property and is tasked with ensuring that the City's "Plan of Public Use" was fulfilled.

The court below failed to give proper scrutiny to these undisputed facts and instead added new requirements to this Court's ruling in *Burton*, in effect overruling that decision. The decision of the Ninth Circuit conflicts with the decisions of this Court and the decisions of other Courts of Appeals. Review should be granted to resolve the conflicts and to answer the important questions presented by the case.

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Respectfully submitted,

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