Case No. 20-55093

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PASADENA REPUBLICAN CLUB,
Plaintiff-Appellant,

v.

WESTERN JUSTICE CENTER, et al.
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
(2:18-cv-09933-AWT-AFM)

BRIEF OF *AMICUS CURIAE* LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF DEFENDANT-APPELLEE, CITY OF PASADENA

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INTEREST OF AMICUS CURIAE[1]

The League of California Cities ("League") is an association of 476 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

STATEMENT REGARDING FED. R. APP. P., 29(a)(4)(E)

This brief has been authored solely by counsel for amicus curiae, the League. No counsel for any party authored the brief in whole or in part. Neither the parties nor their counsel nor any other person,

[1] The parties have consented to the filing of this brief. This brief was not authored in whole or in part by counsel for any party. No person or entity other than amicus curiae made a monetary contribution to this brief's preparation or submission. The parties were notified more than ten days prior to the due date of this brief of the intention to file.

besides the League and their counsel, contributed money that was intended to fund the preparation or submission of this brief.

STATEMENT OF THE CASE

The League adopts the Statement of the Case set forth in the Appellee City of Pasadena's Brief. The following facts are presented for background. Plaintiff-Appellant, Pasadena Republican Club ("Club" or "Appellant"), is a voluntary membership organization that supports the election of Republican candidates to local, state, and national office. FAC, ¶ 4. Defendant-Appellee Western Justice Center ("Center") is a private § 501(c)(3) non-profit corporation. FAC, ¶ 6. Defendant-Appellee Judith Chirlin was the executive director of the Center at the time of the events at issue in this action. FAC, ¶ 7. Defendant-Appellee, City of Pasadena ("City") is a municipality in the State of California. FAC, ¶ 5.

The Club alleges that the Center discriminates on the basis of political and religious viewpoint in the rental of event space to outside groups, in violation of the First Amendment.

The Club sued the Center, the Center's former executive director, and the City, which owns the property and leases it to the Center,

under 42 U.S.C. § 1983 ("section 1983"). The City filed a motion for summary judgment, which was granted by the district court. In its order of dismissal, citing *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 694 (1978) and its progeny, the district court concluded that there was no evidence of a "policy or custom" that was the "moving force behind any alleged violation of the Club's constitutional rights." Order at 33: 18-20. The district court rejected Appellant's argument that it did not need to satisfy *Monell*'s policy or custom requirement as long as it can establish "joint action" under *Burton*. Order at 34: 3-9.

SUMMARY OF THE ARGUMENT

The premise behind this appeal is a simple one, but one in which strong public policy considerations apply. A city's decision to lease property to a private entity does not—in and of itself—subject the city to liability, nor does the city inherit liability for the discretionary decisions of its lessees. Municipalities are not "jointly," nor vicariously, liable under principles of *respondeat superior* pursuant to section 1983. Nor have they ever been. The legislative history regarding section 1983, as well as the extensive case history from the United States

Supreme Court, and the Ninth Circuit, have confirmed these well-established standards regarding the limits of municipal liability.

Appellant's theory of liability under a tortuous *Burton* argument undermines the strong policies that are at the core of section 1983 and *Monell*. To adopt Appellant's theory would not only wreak havoc on municipal liability standards, but it would dis-incentivize cities from ever leasing property to outside entities in the first place.

Summary judgment should be affirmed in favor of the City. Not only did Appellant fail to prove that the City was liable under section 1983, but strong policy considerations support the district court's decision.

ARGUMENT

A. A Municipality Is Not "Jointly" Or Vicariously Liable Under 42 U.S.C. § 1983.

Despite claiming that its theory of liability does not implicate *respondeat superior*, the Club contends that the City should be held "jointly liable" with the Center. See AOB at 20. However, there is no "joint" or vicarious liability standard under section 1983.

The United States Supreme Court, and the Ninth Circuit, have consistently held that "vicarious liability is inapplicable to § 1983 suits,"

and *respondeat superior* cannot serve as the basis for section 1983 liability against local government entities. *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009); *see also Monell*, 436 U.S. at 691; *Connick v. Thompson*, 131 S.Ct. 1350, 1359 (2011). This long-standing principle is revealed in the legislative history regarding section 1983, for which brief background is provided.

1. Historical context

The issue of whether vicarious liability applies to a municipality was widely proposed, debated, and rejected prior to the enactment of section 1983.

The Senate debates and history regarding § 1 of the 1871 Act—i.e., the statutory precursor to section 1983—is relevant, contextually, for purposes of the question now pending before this Court. In short, the 42nd Congress of the Sherman amendment had proposed the imposition of a form of vicarious liability on municipal governments. This history was thoroughly canvassed in the Supreme Court's opinion in *Monell*, as well as in *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 726-731 (1989). Its lengthy history will not be reproduced here. However, certain points are noteworthy.

Immediately prior to the vote on the bill in the Senate, Senator Sherman introduced an amendment that would have constituted a seventh section of the 1871 Act. Cong. Globe, 42d Cong., 1st Sess., 663 (1871). In its original form, the amendment did not place liability on municipal corporations *per se*, but instead rendered the inhabitants of a municipality liable in civil damages for injury inflicted to persons or property in violation of federal constitutional and statutory guarantees "by any persons riotously and tumultuously assembled together." The initial Sherman amendment was passed by the Senate, but was rejected by the House and became the subject of a conference committee. Opposition to the amendment was vehement, and ran across party lines, extending to many legislators who had voted for § 1 of the 1871 Act, as well as earlier Reconstruction legislation, including the Civil Rights Act of 1866. See *id.* at 758 (Sen. Trumbull); *id.* at 798-799 (Rep. Farnsworth).

The Sherman amendment was widely regarded as imposing a new and dangerously untested form of liability on municipal governments. As Representative Blair put it:

> The proposition known as the Sherman amendment—and to that I shall confine myself in the remarks which I may

> address to the House—is entirely new. It is altogether without a precedent in this country. Congress has never asserted or attempted to assert, so far as I know, any such authority. That amendment claims the power in the General Government to go into the States of this Union and lay such obligations as it may please upon the municipalities, which are the creations of the States alone.

Id. at 795 (Rep. Blair), partially quoted in *Monell*, 436 U.S. at 673-674; see also Cong. Globe, 42d Cong., 1st Sess., 758 (1871) (Sen. Trumbull) (referring to the conference committee version of the Sherman amendment as "asserting principles never before exercised, on the part of the United States at any rate").

Despite the unprecedented nature of the legislation, liability against state actors became codified under federal law in the provisions of section 1983.

2. 42 U.S.C. § 1983

Section 1983 provides as follows:

> Every person who, under color of any [state] statute, ordinance, regulation, custom, or usage ... subjects, or causes to be subjected, any ... other person ... to the deprivation of any rights ... secured by the Constitution and laws [of the United States], shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

In 1961, in *Monroe v. Pape*, 365 U.S. 167, the Supreme Court held that municipal entities were not "person[s]" under section 1983. The Court based this conclusion on the history of the Civil Rights Act of 1871's enactment. It noted that Congress had rejected the aforementioned Sherman amendment, which would have made municipalities liable for damage done by private persons " 'riotously and tumultuously assembled.' " *Id.* at 188-190, and n. 38 (quoting Cong. Globe, 42d Cong., 1st Sess., 663 (1871)). This rejection, the Court thought, reflected a determination by the 1871 House of Representatives that " 'Congress had no constitutional power to impose any obligation upon county and town organizations, the mere instrumentality for the administration of state law.' " *Monroe*, 365 U.S. at 190 (quoting Cong. Globe, *supra*, at 804 [statement of Rep. Poland]).

The Court concluded that Congress must have doubted its "constitutional power ... to impose civil liability on municipalities." *Id.* at 190. For that reason, the Court further presumed that Congress must have intended to exclude municipal corporations as section 1983 defendants. The statute's key term "person" therefore did not cover municipal entities. *Id.* at 191.

3. *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658 (1978)

This changed in 1978. That year, in *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 694 (1978), the United States Supreme Court reconsidered the question of municipal liability.

After re-examining the 1871 legislative history in detail, the Court concluded that Congress had rejected the Sherman amendment not because it would have imposed liability upon municipalities, but because it would have imposed liability upon municipalities *based purely upon the acts of others*. In other words, the rejected amendment would have imposed liability upon local governments "without regard to whether a local government was in any way at fault for the breach of the peace for which it was to be held for damages." 436 U.S. at 681, n. 40 (emphasis added). This was an important consideration for the *Monell* Court, with the view that while municipal liability should be recognized, a broader vicarious standard would operate rather like a runaway train.

In the *Monell* Court's view, Congress may have initially thought that it lacked the power to impose that kind of indirect liability upon municipalities, *id.* at 679, but "nothing said in debate on the Sherman

amendment would have prevented holding a municipality liable ... *for its own violations* of the Fourteenth Amendment," *id.* at 683 (emphasis added). Therefore, the Court, overruling its prior decision in *Monroe*, held that municipalities were, in fact, "persons" under section 1983. 436 U.S. at 690.

However, the Court clarified unambiguously that a municipality could not be held liable under section 1983 solely because it employed a tortfeasor. The Court's conclusion rested on "the language of § 1983, read against the background of the same legislative history." *Id.* at 691. Section 1983's causation language imposes liability on a " 'person who ... shall subject, or cause to be subjected, any person' " to a deprivation of federal rights. *Id.* (quoting 17 Stat. 13; emphasis deleted). That language, the Court observed, could not "be easily read to impose liability vicariously ... solely on the basis of the existence of an employer-employee relationship with a tortfeasor." 436 U.S. at 692. The statute's legislative history—and, in particular, the constitutional objections that had been raised to the Sherman amendment—bolstered this conclusion. *Id.* at 692-694, and n. 57.

As a result, the Court concluded that a municipality could be held liable under section 1983 only for its own violations of federal law. *Id.* at 694. To aid in the determination, the Court described what made a violation attributable to the municipality:

> Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers ... [They can also be sued for] deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decision-making channels.

Id. at 690-691 (footnote omitted).

The Court also included the terms "usage" and "practice" as "customs" for which liability is appropriate. See *id.* Indeed, *Monell* itself—as well as subsequent case law—have referred to those terms in the shorthand as "policy or custom." See *id.* at 694 (using the shorthand "policy or custom"); *see also Fitzgerald v. Barnstable School Comm.*, 555 U.S. 246, 257-258 (2009) (using the phrase "custom, policy, or practice," to describe municipal liability under section 1983).

In sum, *Monell*, stands for the proposition that "a municipality cannot be held liable" solely for the acts of others, e.g., "solely because it employs a tortfeasor." *Monell*, 436 U.S. at 691. Rather, the municipality may be held liable "when execution of a government's policy or custom ... inflicts the injury." *Id.* at 694.

4. Post-*Monell* decisions

Following *Monell*, the Supreme Court has repeatedly underscored that there is no "joint," nor vicarious, liability standard with respect to section 1983 suits against a municipality.

For example, in *Los Angeles County, Cal. v Humphries*, 562 U.S. 29, 39 (2010), the Supreme Court analyzed the question of whether the "policy or custom" requirement under *Monell* also applies when plaintiffs seek prospective relief, such as an injunction or a declaratory judgment. The Court held that "*Monell's* 'policy or custom' requirement applies in section 1983 cases irrespective of whether the relief sought is monetary or prospective." *Id.*

Furthermore, in *Board of County Com'rs of Bryan County, Okl. v. Brown*, 520 U.S. 397 (1997), the Supreme Court emphasized that in enacting section 1983, Congress did not intend to impose liability on a

municipality unless deliberate action attributable to the municipality itself is the "moving force" behind the deprivation of federal rights. *Monell*, 436 U.S. at 694. In so holding, the Court highlighted the fact that municipal liability under section 1983 is not based upon *respondeat superior*. Specifically, the Court stated as follows:

> We have consistently refused to hold municipalities liable under a theory of respondeat superior. See *Oklahoma City v. Tuttle*, 471 U.S. 808, 818, 105 S.Ct. 2427, 2433, 85 L.Ed.2d 791 (1985) (plurality opinion); *id.*, at 828, 105 S.Ct., at 2438 (opinion of BRENNAN, J.); *Pembaur*, *supra*, at 478-479, 106 S.Ct., at 1297-1298; *St. Louis v. Praprotnik*, 485 U.S. 112, 122, 108 S.Ct. 915, 923, 99 L.Ed.2d 107 (1988) (plurality opinion); *id.*, at 137, 108 S.Ct., at 931 (opinion of BRENNAN, J.); *Canton v. Harris*, 489 U.S. 378, 392, 109 S.Ct. 1197, 1206, 103 L.Ed.2d 412 (1989).

Board of County Com'rs of Bryan County, Okl., 520 U.S. at 403.

As has been reinforced time and again, liability against a municipality under section 1983 requires more than a mere identification of conduct that could be loosely attributable to the municipality. A plaintiff must demonstrate that:

> … through its deliberate conduct, the municipality was the "moving force" behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights.

Id. at 404-405.

These principles have been consistently applied. See *Board of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 403 (1997) ("We have consistently refused to hold municipalities liable under a theory of *respondeat superior*"); see also *Ashcroft v. Iqbal*, 556 U.S. 662, (2009) (discussing appropriate pleading standards, to wit, "[b]ecause vicarious liability is inapplicable to *Bivens* and § 1983 suits, … , the plaintiff in a suit such as the present one must plead that each Government-official defendant, through his own individual actions, has violated the Constitution.")

The same is true in the Ninth Circuit. Recently, in *Horton by Horton v. City of Santa Maria*, this Court underscored the proper standard for imposition of municipal liability under section 1983. 915 F.3d 592 (9th Cir. 2019). Specifically, the Court held as follows:

> *Monell* established that municipalities can be liable for infringement of constitutional rights, under certain circumstances. 436 U.S. at 690-95, 98 S.Ct. 2018. In particular, municipalities may be liable under § 1983 for constitutional injuries pursuant to (1) an official policy; (2) a pervasive practice or custom; (3) a failure to train, supervise, or discipline; or (4) a decision or act by a final policymaker. A municipality may not, however, be sued under a *respondeat superior* theory. *Id.* at 693-95, 98 S.Ct. 2018. A plaintiff must therefore show "deliberate

> action attributable to the municipality [that] directly caused a deprivation of federal rights." *Bd. of Cty. Comm'rs v. Brown*, 520 U.S. 397, 415, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997)." *Id.*

Horton by Horton, 915 F.3d at 602-603; see also *Flores v. County of Los Angeles*, 758 F.3d 1154, 1158 (9th Cir. 2014) ("[n]either state officials nor municipalities are vicariously liable for the deprivation of constitutional rights by employees"); *Fairley v. Luman*, 281 F.3d 913, 916 (9th Cir. 2002).

B. There Is No Evidence That The Center "Established Policy" On Behalf Of The City of Pasadena.

At its core, Appellant lacked evidence. The district court's grant of summary judgment was proper, because Appellant failed to establish that the City was liable under *Monell* for purposes of section 1983. There was no evidence of a custom, policy, or practice of civil rights deprivations, nor was there evidence that the Center was acting pursuant to any City policy or directive.

Nonetheless, in support of its position on appeal, the Club advances a somewhat jumbled "joint liability" argument, claiming—under the rubric of "state actor" principles—that because the City leased property to the Center, and because the Center, in turn, rented

meeting rooms to other entities, the City somehow "delegated to the Western Justice Center policymaking for the rental for its publicly owned facility." AOB at 22.[2] The Club argues that the Center's alleged discriminatory practices regarding meeting room rentals at the Maxwell House should, therefore, be attributable to the City. The Appellant's argument is erroneous.

Principally, Appellant's argument mischaracterizes how a municipality can be held liable under section 1983. Appellant presumes that the City should be responsible for the Center's independent decisions, as a result of having leased property to the Center. However, any such argument bypasses *Monell*, rests its laurels on sheer presumption, and confuses the proper standard.

As the Ninth Circuit stated in *Horton*, municipalities may be liable under section 1983 for constitutional injuries "pursuant to (1) an official policy; (2) a pervasive practice or custom; (3) a failure to train,

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[2] Appellant's theory appears to borrow heavily from the decision in *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961), discussed *infra*, which examines—under "state actor" principles—whether private actors are willful participants in joint action with the government or its agents. *See also Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980) (recognizing suit for a private party's violation of another's Fourth Amendment rights).

supervise, or discipline; or (4) a decision or act by a final policymaker." *Horton by Horton*, 915 F.3d at 602-603. Furthermore, as the Supreme Court discussed in *Pembaur*, with respect to the consequence of official conduct:

> … like other governmental entities, municipalities often spread policymaking authority among various officers and official bodies. As a result, particular officers may have authority to establish binding county policy respecting particular matters and to adjust that policy for the county in changing circumstances. To hold a municipality liable for actions ordered by such officers exercising their policymaking authority is no more an application of the theory of respondeat superior…
>
> We hold that municipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question. See *Tuttle*, *supra*, at 823, 105 S.Ct., at 2436 (" 'policy' generally implies a course of action consciously chosen from among various alternatives")."

Pembaur, 475 U.S. at 481-484.

Here, just as in *Pembaur*, there was no evidence that anyone from the Center was establishing final policy on behalf of the City, or that the City had delegated *any* policy making functions to anyone affiliated with the Center. While the record discloses that the Center possessed final policy making authority regarding whether—and to whom—the

Maxwell House may have been rented during non-business hours, there was no showing that the Center's policies *were those of the City*. ER at 39-40. This was the central deficiency identified by the district court. *Id.* Appellant furnished no evidence to support liability under *Monell* or its progeny. Rather, the Club conflated state actor principles and appeared to suggest that liability should be inferred from a mere leasehold relationship. Its position was wrong-headed in summary judgment briefing, and again here on appeal. Absent evidence from the Club to satisfy the required *prima facie* showing under *Monell*, it was correct for the district court to enter summary judgment in favor of the City.

In support of the City's position here, the Ninth Circuit has repeatedly underscored the specific showing that is necessary to impute liability against a municipality. For example, in *Villegas v. Gilroy Garlic Festival Ass'n,* 541 F.3d 950 (9th Cir. 2008), motorcycle club members filed a section 1983 action against the City of Gilroy and a festival association, alleging deprivation of its First Amendment rights of free expression and free association based upon a police officer's

expulsion of motorcycle club members from a garlic festival based upon the violation of a dress code.

First, the Ninth Circuit found that the festival association was not a state actor. The Court concluded that running festivals is not a traditional municipal function. Further, the City of Gilroy had required a permit for the festival, but there was no indication that it "play[ed] a dominant role in controlling the actions of the organization or the content of the festival." *Villegas*, 541 F.3d at 956.

Thereafter, applying the standard from *Monell*, the Court found that the City of Gilroy was not the "moving force" behind an alleged constitutional violation. (*Id.* at 957, citing *Galen v. County of Los Angeles*, 477 F.3d 652, 667 (9th Cir. 2007)). Specifically, the Court held as follows:

> Here, the Top Hatters point to the fact that the permit requires that the City's police provide a portion of the Festival's security, that the City is reimbursed for providing such security, and that Officer Bergman complied with the request of the [Gilroy Garlic Festival Association's (GGFA's)] chair of security to remove individuals who did not comply with GGFA's dress code. None of these facts gives rise to the conclusion that the City had a policy or custom of enforcing GGFA's dress code.

Villegas, 541 F.3d at 959.

The same tenuous arguments have been presented here. The Club seems to suggest that simply because the City leased property to the Center, the City should thereby inherit the consequences of the Center's decision making—including its allegedly discriminatory or politically biased decision to deny a meeting room to the Club. AOB at 22. There is no evidence that the City had a policy or custom of endorsing, condoning, or enforcing the Center's decisions as to whom, how, and in what manner rooms were rented at the Maxwell House. The City was not involved in the decision whatsoever.

For this reason, the district court's entry of summary judgment must be affirmed in favor of the City. To hold otherwise would contravene *Monell*, and would create conflict in the law.

C. From A Policy Standpoint, A Municipality Cannot Be Liable For Merely Leasing Property To Another Entity.

As held by the district court—and argued cogently by the City in its merits brief—the Club lacked evidence and failed to meet its burden. That finding must be affirmed, as there is no evidence to demonstrate that the Center was acting at the behest of the City, or that it was promulgating policies that were attributable to the City.

In an effort to fill this void, Appellant has advanced various specious arguments. Namely, Appellant argues that liability should be imposed against the City based on *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). Appellant's reliance on *Burton* is misplaced.

In *Burton*, the Court held, in a declaratory relief action, that the exclusion of an African American from a restaurant operated by a private owner under lease in a building financed by public funds and owned by a state parking authority, constituted discriminatory state action in violation of the Equal Protection Clause. The Court determined that the relationship between the state and the restaurant was "symbiotic" and characterized by "economic interdependence." *Burton*, 365 U.S. at 725. The Court's conclusion was based upon a strand of the "state actor" theory and was supported by several important factors that are not present here.

First, in *Burton*, the offending restaurant was located in a parking building owned by the Wilmington Parking Authority (i.e., "the Authority"), which was a state agency "created" by the City of Wilmington pursuant to Delaware law, and was a "public body

corporate and politic, exercising public powers of the State as an agency thereof." *Burton*, 365 U.S. at 717.

Second, the Authority relied on the lease income to finance the construction costs of the parking facility. *Burton*, 365 U.S. at 719. This income was not surplus state property, but "constituted a physically and financially integral and, indeed, indispensable part of the State's plan to operate its project as a self-sustaining unit." *Id.* at 723-24.

Further, the land and building were "publicly owned," and "the building was dedicated to 'public uses' in performance of the Authority's 'essential governmental functions.' " *Id.* at 719.

For these reasons, the Court found that it was a "grave injustice" that in one portion of the building, all persons had equal rights, but in a separate portion of the building, an African-American was not permitted to enjoy full and equal access to a restaurant. *Id.* at 724-725. Given the unassailable fact that the building was used for essential governmental functions, the Authority was reaping a financial benefit from the operation of the restaurant. As such, the restaurant's

discriminatory conduct was rationally imputable to the Authority. *Id.* at 723-25.

Yet, in so holding, the Court further held that:

> Because readily applicable formulae may not be fashioned, the conclusions drawn from the facts and circumstances of this record are by no means declared as universal truths on the basis of which every state leasing agreement is to be tested.

Burton, 365 U.S. at 725.[3]

It is for this very reason that, in 1978 (seventeen years following *Burton*), the Supreme Court defined "readily applicable formulae" in *Monell*, 436 U.S. 658, for purposes of section 1983, requiring that liability against a municipality be based upon a custom, policy, and practice of civil rights deprivations.

In a distracting effort, Appellant argues that *Burton* is "remarkably similar" to the case at bar, and that the City "'has elected to place its power, property and prestige behind' the undisputed

[3] "The *Burton* theory has been criticized for providing judges with too much discretion in deciding what facts will establish a symbiotic relationship between a private entity and the state." Spurlock, LIABILITY OF STATE OFFICIALS AND PRISON CORPORATIONS FOR EXCESSIVE USE OF FORCE AGAINST INMATES OF PRIVATE PRISONS (1987) 40 Vand. L. Rev. 983, 989.

constitutional violations." AOB at 10. Yet, there is no evidentiary support for this contention. Moreover, it ignores the correct *Monell* standard.

For example, there is no evidence in the record that the Center was functioning as a "state actor" at the behest of the City, or that the City reaped a financial benefit from the Center's after-hours rentals. More importantly, for purposes of *Monell*, there was no evidence adduced that the City had delegated policy-making authority to the Center, such that the City could be liable for the allegedly discriminatory conduct at issue. Appellant failed to prove its case under *Monell*, and *Burton* does not operate as an independent avenue to impute liability under section 1983.

Lastly, the policy consequences of Appellant's position cannot be overstated. Adopting Appellant's theory would wreak havoc on a municipality's decision to lease property to private entities. It would contravene *Monell* while unjustifiably expanding *Burton* contrary to the provisions of section 1983 and the subsequent, narrow reading of the

case by courts.[4] See Order at p. 26:8-27:20; *see, e.g., Blum v. Yaretsky*, 457 U.S. 991, 1010-1011 (1982) (finding that the state was not a "joint participant' with the private nursing homes under *Burton* even though there were state subsidization of the operating and capital costs of the facilities, payment of the medical expenses of more than 90% of the patients in the facilities, and the licensing of the facilities by the state); *Rendell-Baker v. Kohn* (1982) 457 U.S. 830, 831, 836, 842–843 (rejecting the teacher-petitioner's argument that there is a "symbiotic relationship" between the private school and the state similar to the relationship involved in *Burton* though the school had a fiscal relationship with the state and was heavily regulated); *Scott v. Eversole Mortuary*, 522 F.2d 1110, 1114 (9th Cir. 1975) (finding that the contract between the private mortuary that committed the discriminatory act and Mendocino County was mutually beneficial, but it was insufficient to establish "interdependence" under *Burton*).

[4] "The Court has cited and discussed *Burton* in most of its state action decisions, but in most it has not found state action to exist in the challenged conduct." Strickland, THE STATE ACTION DOCTRINE AND THE REHNQUIST COURT (1991) 18 Hastings Const. L.Q. 587, 666.

If a city were to inherit all consequences of its lessees' conduct when it leased property to a private entity, a city would be significantly disincentivized from leasing its property in the first place. Yet, cities are not absolved from liability in all instances. Under *Monell*, the defined framework for liability exists, and it was correctly applied by the district court in rendering its decision here.

Where there was no evidence to support liability against the City, summary judgment was properly granted. The district court's judgment must be affirmed.

CONCLUSION

Municipalities are not jointly or derivatively liable as a result of the conduct of lessees of its property. Where no liability has been proven under *Monell*, no liability exists under 42 U.S.C. § 1983. These well-defined, historical principles remain a consistent standard for application and proof. To find otherwise would not only eviscerate long-standing precedent, but would undermine the strong policy concerns that support limits on municipal liability.

Amicus curiae, League of California Cities, respectfully requests that this Court affirm the district court's entry of summary judgment in favor of the City.

Respectfully submitted,

DENTONS US LLP

Dated: August 11, 2020 By: /s/ Justin R. Sarno

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP., 29(a), 32(a)(7)(C) AND NINTH CIRCUIT RULE 32-1, FOR CASE NUMBER 20-55093

Pursuant to the Federal Rules of Appellate Procedure, Rules 29(a) and 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that Amicus Curiae League of California Cities' brief is proportionately spaced, has a typeface of 14 points or more and contains 5,382 words.

Respectfully submitted,

DENTONS US LLP

Dated: August 11, 2020 By: /s/ Justin R. Sarno

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Amicus Curiae, League of California Cities, states that it is not aware of any related cases pending in this Court.

CERTIFICATE OF SERVICE

(Case No. 20-55093)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 601 S. Figueroa Street, Suite 2500, Los Angeles, California 90017-5704.

Pursuant to Circuit Rule 31-1, I hereby certify that on August 11, 2020, I electronically filed the foregoing BRIEF OF *AMICUS CURIAE* LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF DEFENDANT-APPELLEE, CITY OF PASADENA with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that each appellant and appellee in this case is represented by counsel who are registered CM/ECF users and will be served by the appellate CM/ECF system.

DATED this 11th day of August, 2020.

/s/ Pamela Coates

Pamela Coates