No. 84-1160

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

BERTOLD J. PEMBAUR, M.D.,
Petitioner,

vs.

CITY OF CINCINNATI, OHIO, HAMILTON COUNTY, OHIO, HON. NORMAN A. MURDOCK, HON. JOSEPH M. DeCOURCY, JR., AND HON. ROBERT A. TAFT, II,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF OF PETITIONER

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PETITION FOR CERTIORARI FILED JANUARY 15, 1985
CERTIORARI GRANTED JUNE 17, 1985

QUESTION PRESENTED

Can a single, discrete decision of an elected county prosecutor which directly causes an unconstitutional search of a private medical office fairly be said to represent official policy so as to render a county liable under 42 U.S.C. § 1983?

PARTIES TO THE PROCEEDING

The parties to the proceedings in the Court of Appeals include those parties named as respondents in the caption of this case: the City of Cincinnati, Ohio; Hamilton County, Ohio; and Honorable Norman A. Murdock, Honorable Joseph M. DeCourcy, Jr., and Honorable Robert A. Taft, II, who are the Board of County Commissioners for Hamilton County, Ohio, sued in their official capacity as the county itself. *State ex rel. Board of County Commissioners of Marion County* v. *Allen*, 86 Ohio St. 244, 99 N.E. 312 (1912); Findings of Fact, Opinions and Conclusions of Law (Petition Appendix B at 14A).

Defendant William Whalen, Assistant Prosecuting Attorney for Hamilton County, Ohio, was an appellee in the Sixth Circuit Court of Appeals proceedings. The District Court granted judgment on his behalf on the grounds that he was entitled to qualified immunity from liability. The Court of Appeals affirmed the judgment as to defendant Whalen. Petitioner did not seek a writ of certiorari as to the issue of that defendant's entitlement to qualified immunity.

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OPINIONS BELOW

The opinion of the Court of Appeals, filed October 18, 1984, is reproduced in Appendix A to the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit. That decision also appears at 746 F.2d 337 (6th Cir. 1984).

The Findings of Fact, Opinion and Conclusions of Law of the United States District Court, filed on April 5, 1983, is reproduced in Appendix B to the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

JURISDICTION

The Judgment of the Court of Appeals was entered on October 18, 1984. The Petition for Writ of Certiorari was timely filed in the Supreme Court of the United States on January 15, 1985. The Petition for Writ of Certiorari was granted on June 17, 1985. The jurisdiction of this Court is founded upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTION OF THE UNITED STATES

FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FOURTEENTH AMENDMENT

Section 1. Citizens of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983. Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any

citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. (As amended December 29, 1979, P.L. 96-170, § 1, 93 Stat. 1284.)

STATEMENT OF THE CASE

A. Facts

Petitioner, Bertold J. Pembaur, M.D., is licensed to practice medicine by the State of Ohio and specializes in family medicine; he has been practicing in the City of Cincinnati since 1958. (R. 61-62.) The doctor is the sole proprietor of a medical office known as the Rockdale Medical Center, located in the City of Cincinnati, Hamilton County, Ohio. (R. 62.)

Two unidentified persons dressed in plain clothes arrived in the reception area of petitioner's medical office on May 19, 1977, and sought to enter the inner offices. Learning of this, Dr. Pembaur barred shut the door between the public reception area and the private working areas of the medical office. (R. 51, 69-70.) Dr. Pembaur was then told that the two individuals were deputy sheriffs armed with capiases[1] to bring

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[1] A capias is a writ of attachment issued purusant to Ohio Rev. Code Ann. Section 2417.21 to have a sheriff bring a person before the court or notary before whom a subpoenaed witness has failed to appear to answer for civil contempt. In *State* v. *Pembaur*, No. C-790380, unreported (Hamilton County Court of Appeals Feb. 18 1981), see District Court Docket Entry 10, the state appellate court discussed the distinction between arrest and search warrants and capiases. As that Court noted, a capias may be issued by a notary public, there is no requirement for a neutral judge or magistrate, there need be no probable cause hearing, no affidavits or sworn testimony need be submitted, there is no limitation on hearsay and no restrictions on specificity. Thus, the court concluded that a

two of the doctor's employees before the grand jury. (Joint Exhibits II and III, R. 318, 319, 132-134, J.A. 20-21.) As both the trial court and the Court of Appeals recognized, each of the capiases set forth the home address for the persons sought, not the address of petitioner's private medical center. (Petition Appendix [hereinafter "P.A."] 2a; 17a-18a.)

The deputies asked the doctor to let them into the inner areas of the medical office to search for the named employees. Learning that the deputies had no search warrant (R. 48-49), Dr. Pembaur refused entry. (R. 52.) Shortly thereafter, Cincinnati police officers arrived in response to Dr. Pembaur's call. They too told the doctor to permit the deputies to enter to search for the persons named in the capiases. Dr. Pembaur again refused entry. (R. 52.) The police officers called for a supervisor, and when a sergeant arrived, he repeated the request to permit entry. (R. 53.) Dr. Pembaur continued to refuse to open his door absent a search warrant directed to him. (R. 53, 135.)

The deputies, pursuant to department policy, then called the sheriff's execution officer and were advised by him to call an assistant county prosecutor, defendant William Whalen. They called Whalen and advised him of the situation. Whalen spoke with Simon Leis, the Hamilton County Prosecutor, advised him of the situation and told him that petitioner would not permit entry; County Prosecutor Leis told Whalen to tell the deputies to "go in and get them." (R. 53-54, 366, Plaintiff's Exhibit 38, J.A. 23-25, R. 318, 319.) [2]

Finally, more than two hours after their arrival (R. 56), the deputies, still without a warrant and after again being refused entry, sought to batter against the door to break it

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capias is not the equivalent of either a search warrant or an arrest warrant. (Decision at 19-22.)

[2] Defendant Whalen, serving under the county prosecutor, was handling the grand jury at the time the capiases were sought. (R. 9, 11.) In addition, he arrived at the scene after the door had been axed open so as to identify the persons sought, if found. (R. 13-14.)

down. This failing, a Cincinnati police officer went to a fire station, obtained a fire axe and chopped the door down. (R. 54.) The deputies and police officers entered the private inner areas of the medical center and searched for the persons named in the capiases. (R. 55, 71.) The persons sought were not found. (R. 55.)[3]

One of the officers who had sought to execute the capiases, Deputy Sheriff Webb, testified that in the past he had frequently served capiases without a search warrant on the property of persons other than the subject of the capias. (R. 56-57.) While Sheriff Stokes testified that he could not recall a specific example, he assumed that forcible entries had been made in the past to serve capiases on the property of third persons. (R. 222-223.) In addition, the Sheriff testified that his deputies acted "fully and competently within their authority" (R. 216), and that the procedure followed by his deputies in calling the execution officer and then the prosecutor's office for advice was "the proper thing to do." (R. 218.) Defendant Whalen testified that the breaking down of

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[3] After the incident the prosecutor obtained from the grand jury an indictment of Dr. Pembaur for, "without privilege to do so," obstructing or delaying the deputies in the performance of "an authorized act within their official capacity." (Jt. Ex. IV, R. 318, 319)

Upon his conviction for this offense, the First District Court of Appeals for Hamilton County, Ohio, reversed on the ground that Dr. Pembaur enjoyed a constitutional privilege to be secure from unreasonable searches and seizures and that the deputies' warrantless search violated the Fourth Amendment. *State* v. *Pembaur*, No. C-790380, unreported (Hamilton County Court of Appeals Feb. 18, 1981), see District Court Docket Entry 10. While this decision was reversed on other grounds, *State* v. *Pembaur*, 69 Ohio St.2d 110, 430 N.E. 2d 1331 (1982), a second panel of the appellate court reached the same conclusion. *State* v. *Pembaur*, No. C-790380, unreported (Hamilton County Court of Appeals Nov. 3, 1982), See District Court Docket Entry 32. The Ohio Supreme Court, however, reinstated the conviction on the ground that the doctor had no right to refuse entry but rather was obliged to seek redress in a civil action for damages. *State* v. *Pembaur*, 9 Ohio St.3d 136, 459 N.E.2d 217 (1984), *cert. denied*, ____ U.S. ____, 104 S.Ct. 2668, 81 L.Ed.2d 373 (1984). Petitioner was acquitted of all other charges. (R. 83-84.)

Dr. Pembaur's door was not inconsistent with the Prosecutor's instructions. (R. 26-27.)

Petitioner commenced this civil rights action pursuant to 42 U.S.C. § 1983 in the Southern District of Ohio, Western Division, against Hamilton County, Ohio, the City of Cincinnati, Ohio, and against certain individuals alleged to have violated the doctor's constitutional rights. Jurisdiction was based on 28 U.S.C. §§ 1331 and 1343(a)(3). After a trial to the court, Judge Carl B. Rubin issued his Findings of Fact, Opinion and Conclusions of Law on April 5, 1983. The court ruled in favor of all the defendants, finding that the individual defendants were entitled to immunity and that the County and City were not liable because plaintiff had not suffered a constitutional deprivation committed pursuant to some official policy.

Upon appeal to the Sixth Circuit Court of Appeals, that court affirmed the trial court's holding as to Hamilton County, but reversed as to the City of Cincinnati, Ohio.

B. Trial Court's Judgment

The trial court found that assistant prosecuting attorney Whalen, the deputy sheriffs, and the City police officers involved in the forcible entry and search were all entitled to qualified immunity. (P.A. 23a-25a, 28a.) In addition, Judge Rubin found that the Hamilton County Board of County Commissioners is a "quasi-corporation" which "constitutes both agents of the county and the county itself" (P.A. 14a), and that the county was thus a "person" within the meaning of § 1983. (P.A. 25a, 28a.)[4]

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[4] There is simply no dispute that a county is amenable to suit under 42 U.S.C. § 1983. In *Monell* v. *Department of Social Services of the City of New York*, 436 U.S. 658, 690 and fn. 54 (1978), it was noted that local government units not entitled to Eleventh Amendment immunity can be sued directly under § 1983. The Eleventh Amendment, of course, does not extend to counties. *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274, 280 (1977); *Edelman* v. *Jordan*, 415 U.S. 651 (1974).

The trial court recognized that "[t]he capiases involved were issued by a *county* court and were executed by *county* officers. Authorization to enter Dr. Pembaur's offices was obtained from a *county* official." (P.A. 27a, emphasis in original.) Nonetheless, the trial judge concluded as a matter of law that plaintiff had "suffered no Constitutional deprivation visited pursuant to a policy or custom" of the county. (P.A. 28a-29a.) This holding was based on the reasoning that since the county commissioners do not establish or control the policies of the sheriff or prosecutor, the county itself could not be liable for the "specific action" of such officials. Rather, the court implied that this civil action should have been filed against the Sheriff or Prosecutor. (P.A. 26a-27a.)[5]

C. Decision of the Court of Appeals

The Sixth Circuit Court of Appeals reviewed the facts as they appear in the record, acknowledging that when Dr. Pembaur refused entry the deputy sheriffs called Assistant Prosecuting Attorney Whalen who was then instructed by the county prosecutor to tell the officers to serve the capiases. Only then were attempts made to forcibly enter the private medical office and a search conducted. (P.A. 2a.)

The Court noted that under *Steagald* v. *United States*, 451 U.S. 204 (1981), "it is clear that authorities may not legally search for the subject of an arrest warrant in the home or office of a third party without first obtaining a search warrant . . . ." The Court then characterized the action as an "obvious constitutional violation." (P.A. 6a fn. 1.)[6]

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[5] This proposition is of course incorrect. As this court noted in *Monell* v. *Department of Social Services of the City of New York*, 436 U.S. 658, 690 fn. 55 (1978), and specifically held recently in *Brandon* v. *Holt*, ____ U.S. ____, 105 S.Ct. 873, 83 L.Ed.2d 878 (1985), a suit against an official in his official capacity is an action against the governmental entity. See also *Edelman* v. *Jordan*, 415 U.S. 651 (1974). Curiously, Judge Rubin had noted plaintiff's stipulation that the county commissioners had been sued only in their official capacity. (P.A. 19a fn. 1.)

[6] The county has never challenged this finding. In *Steagald*, this Court held that, absent exigent circumstances or consent, a search of a third per-

The appellate court rejected the District Court's conclusion that the policies of the sheriff and prosecutor cannot impose liability upon the county *per se*; the lack of control by the Board of County Commissioners over the sheriff and prosecutor "does not necessarily preclude a finding of liability on the part of the County." (P.A. 7a.) Rather, looking at the nature and duties of the officials, the court concluded that county policy may be established by both the sheriff[7] and the prosecutor. The court specifically recognized that "there appears to be no dispute . . . that the Prosecutor also establishes county policy." (P.A. 7a fn. 3.)[8]

The Sixth Circuit, however, affirmed the trial court's judgment as to the county on the ground that plaintiff had not shown that any county policy existed. Petitioner's proof of

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son's premises, conducted under authority of an arrest warrant, violates the Fourth Amendment. See also *Dunn* v. *State of Tennessee*, 697 F.2d 121 (6th Cir. 1982).

[7] The court recognized that the sheriff is an elected official under Ohio Rev. Code Ann. § 311.01 who serves as the "chief law enforcement officer of the county." The sheriff's budget for his office, furniture, books, all salaries, training and expenses is furnished by the county. Ohio Rev. Code. Ann. §§ 311.20, 311.06, 325.01-.02, 325.06-071. In addition, the duties of the Sheriff under Ohio Rev. Code Ann. § 311.67 and his responsibility for his officers under Ohio Rev. Code Ann. § 311.05 were noted. (P.A. 7a.)

[8] The Ohio Supreme Court has held that a county prosecutor is a county official whose election and duties are prescribed by statute. *State ex rel. Findley* v. *Lodwich*, 137 Ohio St. 329, 29 N.E.2d 959 (1940). Like the sheriff, the prosecutor is an elected county official, pursuant to Ohio Rev. Code Ann. § 309.01, whose budget is furnished from the county treasury. Ohio Rev. Code Ann. §§ 309.06, 325.11-13. The prosecutor has the specific statutory power to inquire into crimes and to prosecute complaints, suits, controversies and other matters. Ohio Rev. Code Ann. § 309.08. The prosecutor is also the "legal advisor" for all county officers. Ohio Rev. Code Ann. § 309.09. (A deputy sheriff has been held to be a county officer for purposes of § 309.09. See 1980 Op. Att'y Gen. Ohio 80-076 approving 1933 Op. Att'y Gen. Ohio 1750, p. 1603.)

Furthermore, in *Crane* v. *State of Texas*, 759 F.2d 412, 429-430 (5th Cir. 1985), the court held that an elected county attorney's decisions with respect to the use of capiases constitutes "official policy attributable to the County."

county policy failed only because Dr. Pembaur was the first victim of the decision of the Prosecutor to force an unconstitutional entry into the private medical offices.

> "We believe that Pembaur failed to prove the existence of a county policy in this case. Pembaur claims that the deputy sheriffs acted pursuant to the policies of the Sheriff and Prosecutor by forcing entry into the medical center. Pembaur has failed to establish, however, anything more than that, on this *one occasion*, the Prosecutor and the Sheriff decided to force entry into his office . . . That single, discrete decision is insufficient, by itself, to establish that the Prosecutor, the Sheriff, or both, were implementing a governmental policy." (P.A. 8a, citation omitted, emphasis in original.)

The Sixth Circuit, in adopting this novel rule denying relief to the first victim of an unconstitutional official policy, did not address relevant Supreme Court decisions; nor did it consider the legislative history and common law underpinnings for § 1983. Rather, the appellate court relied exclusively on its own prior ruling in *Rowland* v. *Mad River Local School District*, 730 F.2d 444 (6th Cir. 1984), *cert denied* __ *U.S.* __, 105 S.Ct. 1373, 84 L.Ed.2d 392 (1985) (P.A. 8a), involving a failure to rehire a non-tenured teacher because of her sexual preferences. *Rowland*, unlike the matter under consideration, did not involve a clear command by an elected policymaking official.[9]

This case is not one where the link between the governmen-

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[9] *Rowland*, in turn, relied solely on two other Sixth Circuit decisions, *Dunn* v. *State of Tennessee*, 697 F.2d 121, 128 (6th Cir. 1982), *cert. denied*, 460 U.S. 1086 (1983); and *Johnson* v. *Granholm*, 662 F.2d 449 (6th Cir. 1981), *cert. denied*, 457 U.S. 1120 (1982). Neither of these cases supports the decision reached in *Pembaur* where a policymaking official personally ordered the constitutional misconduct.

In *Dunn*, a state trooper and deputy sheriff conducted a non-consensual search of the plaintiff's home based upon a misdemeanor arrest warrant for the plaintiff's son. The son did not reside in the plaintiff's home, yet the officers, without direction or authorization from their superiors, forced entry,

tal entity and the constitutional violation is based upon some inference of an alleged official policy from a single wrongful act by non-elected employees or an allegation of inadequate hiring, training or supervision.[10] In such a case, the link between the alleged official policy and the wrongful conduct may indeed be tenuous. *City of Oklahoma City* v. *Tuttle*, ___ U.S. ___, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985). Rather, the wrong-doing in this case, the unconstitutional axing of the doctor's door and search of the private medical offices, was caused by the command of the elected county prosecutor to "go in and get them." (R. 53-54, 366.)

The sole issue before this Court is the Sixth Circuit's refusal to hold the county responsible for a constitutional deprivation caused by a clear command of an elected policymaking official. The appellate court has adopted a new form of governmental immunity, a "first bite" rule,[11] denying a § 1983

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searched the premises, and arrested plaintiff for interfering with a police officer. 697 F.2d at 123-124.

While the Court of Appeals recognized that the plaintiff had alleged a Fourth Amendment deprivation, 697 F.2d at 126, it held that the sheriff and the county were not proper defendants because there had been no direct involvement by the sheriff, no showing of direct responsibility for the officers' improper action, and because local governments may not be liable under § 1983 under the theory of *respondeat superior*. 697 F.2d at 128.

In *Johnson* v. *Granholm*, *supra*, 662 F.2d at 449-450, the court again simply stated that a county could not be held liable under § 1983 on a theory of *respondeat superior* where the county was a named defendant "solely on the ground that it was the employer of the individual defendants." While a prosecutor was a named defendant and found to enjoy absolute immunity, the gist of the plaintiff's case appears to have been the prosecutor's failure to deal with a husband's non-payment of child support rather than any specific decision as to a course of conduct to be followed by government employees.

[10] See, e.g. *Smith* v. *Ambrogio*, 456 F.Supp. 1130 (D. Conn. 1978); *Turpin* v. *Mailet*, 619 F.2d 196, 202 (2d Cir. 1980), *cert. denied*, 449 U.S. 1016 (1980); *Languirand* v. *Hayden*, 717 F.2d 220 (5th Cir. 1983); *Sanders* v. *St. Louis County*, 724 F.2d 665 (8th Cir. 1983); and *Gilmere* v. *City of Atlanta*, 737 F.2d 894 (11th Cir. 1984).

[11] The "first bite" rule is derived from English common law protecting a dog's owner from liability until after the animal has bitten someone and

remedy to the first victim of an unconstitutional official policy. It is this ultimate legal conclusion[12] that petitioner believes to be both incorrect and ill-advised.

SUMMARY OF ARGUMENT

This case presents the question of whether a single, discrete decision of an elected county prosecutor which directly causes an unconstitutional search of a private medical office may fairly be said to represent official policy so as to render a county liable under 42 U.S.C. § 1983. The Sixth Circuit Court of Appeals, in affirming the judgment of the trial court on the issue of the liability of Hamilton County, Ohio, enunciated a rule insulating units of local government from liability for the first incident of unconstitutional conduct authorized and directed by an elected official.

The Sixth Circuit has agreed that county policy may be established by the elected county prosecutor by virtue of the authority vested in the office by statute. To deny a remedy to the first victim of a constitutional deprivation caused by a decision of an elected official is to establish a "first bite" rule

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thus put the owner on notice of its dangerous propensities. *Smith* v. *Pelah*, 2 Strange 1264 (1747); *Charlwood* v. *Krieg*, 3 Carrington & Kirwan 46 (1851); *Burton* v. *Moorhead*, 8 Sess. Cas., 4th Ser. 892 (1881). See also *The Law Relating to Dogs*, Montague R. Emanuel, Stevens & Sons, Ltd., London (1908) at 4; and *The Principles of Legal Liability for Trespasses and Injuries By Animals*, William Newby Robson, University Press, Cambridge (1915) at 90.

That rule has been abrogated in this country for common-sense reasons.

> "To require that a plaintiff, before he can have redress for being bitten, should show that some other sufferer had previously endured harm from the same dog, would be always to leave the first wrong unredressed, and to lose sight of the thing to be proved, in attention to one of the means of proof." *M'Caskill* v. *Elliot*, 36 S.C.L. (5 STROBH) 196, 198 (1850).

[12] As the Court of Appeals noted, while a district court's findings of fact may be set aside only when clearly erroneous, ultimate findings of fact and conclusions of law are subject to *de novo* review. (P.A. 3a.)

allowing local governments their first constitutional violation with impunity.

It is petitioner's position that the rule adopted by the Court of Appeals is supported by neither precedents set by this Court nor reasoned decisions of the other Circuit Courts of Appeals. In addition, both the legislative history behind 42 U.S.C. § 1983 and the common law in effect at the time that the Civil Rights Act of 1871 was adopted indicate that such a rule as that relied upon by the Sixth Circuit is not consistent with the purposes and goals of the statute. The Sixth Circuit's rule denigrates the remedial purposes of § 1983 and vitiates the deterrent effects that the statute was meant to have.

This Court held in *Monell* v. *Department of Social Services of the City of New York*, 436 U.S. 658 (1978), that units of local government not entitled to Eleventh Amendment immunity (including counties) may be held liable under § 1983 where the unconstitutional action "implements or executes a policy statement, ordinance, regulation, *or decision* officially adopted and promulgated by that body's officers." 437 U.S. at 690 (emphasis supplied). When a constitutional deprivation is caused by a policy or custom made by a local government's "lawmakers or by those whose edicts or acts may fairly be said to represent official policy" the governmental entity may thus be responsible under § 1983. *Monell*, *supra*, 436 U.S. at 694.

In the matter *sub judice*, the courts below recognized that petitioner, Dr. Bertold Pembaur, suffered a constitutional deprivation (an illegal axing of the door to and search of his private medical center in violation of the Fourth and Fourteenth Amendments) that was authorized and directed by an elected county official. Hamilton County, Ohio, should not be permitted to avoid liability simply because no forcible illegal search had been specifically ordered by any elected county official prior to the one giving rise to this case.

In conclusion, it is respectfully requested that the judgment of the Sixth Circuit Court of Appeals affirming the trial court's judgment on behalf of Hamilton County, Ohio, be reversed and the matter be remanded for a determination of damages.

ARGUMENT

A single, discrete decision of an elected county prosecutor which directly causes an unconstitutional search of a private medical office may fairly be said to represent official policy so as to render a county liable under 42 U.S.C. § 1983.

It is the petitioner's position that county policy was the "moving force" that caused Dr. Pembaur to be deprived of his constitutional right to be secure from unreasonable searches and seizures. It was not until the county prosecutor personally directed the deputy sheriffs to "go in and get them" that the door to the private working areas of the medical center was axed down and a search conducted. Clearly, the facts set forth in the record establish that the county itself should be liable for the constitutional deprivation suffered by Dr. Pembaur.

1. No decision of this Court has ever suggested that local governments are entitled to avoid liability for the first occurrence of a constitutional violation authorized and directed by a policymaking official.

The decisions of this Court have never denied relief to the first victim of a constitutional violation simply because the victim was the first to suffer a constitutional deprivation caused by an elected official's decision. Rather, the opinions of this Court support petitioner's claim for relief.

In *Monell* v. *Department of Social Services of the City of New York*, 436 U.S. 658 (1978), this Court held that units of local government are "persons" within the meaning of § 1983.

> "Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies. Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the ac-

> tion 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." 437 U.S. at 690 (emphasis supplied, footnotes omitted).

This Court concluded:

> "it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." 436 U.S. at 694.

The "touchstone" of governmental liability is thus where official policy, be it a "policy statement, ordinance, regulation or decision," is the "moving force" of the constitutional violation. *Monell*, 436 U.S. at 690-694;[13] *Polk County* v. *Dodson*, 454 U.S. 312, 326 (1981). See also *Rizzo* v. *Goode*, 423 U.S. 362, 371 (1976), requiring an "affirmative link" between the misconduct and the government's approval or authorization of that misconduct.[14]

Thus, under this Court's reasoning and language in *Monell* alone, the edict[15] of the county prosecutor to "go in and get

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[13] Justice Powell, in his concurring opinion in *Monell*, also recognized that Congress intended units of local government, not just public officials, to be liable for constitutional injuries resulting from actions by officials "acting under the command or the specific authorization of the government employer. . . ." 436 U.S. at 707.

[14] There, the District Court had in fact found that "the responsible authorities had played no affirmative part in depriving any members of the two respondent classes of any constitutional rights." 423 U.S. at 377. This Court's decision in *Rizzo* suggests, however, that the actual exercise of the right to control or direct, rather than the failure to exercise that power, is sufficient to support a § 1983 claim against a government entity. See *Monell*, 437 U.S. at 694 fn. 58.

[15] The term "edict" has been defined as "an official public proclamation or order issued by authority" and is synonymous with "decree," "order," and "command." See Webster's New Twentieth Century Dictionary, Unabridged Second Edition.

them" constitutes official policy for which the county should be held liable.[16] However, *Monell* was not intended to address the "full contours" of the governmental liability question. 436 U.S. at 695. This Court went a step further in defining the nature and scope of government liability under § 1983 in *Owen* v. *City of Independence*, 445 U.S. 622 (1980). A unit of local government not only is a "person" amenable to suit under § 1983, but it was held in *Owen* to enjoy no immunity from liability. 445 U.S. at 657.

While the *Owen* Court did not directly address the issue as to whether a single decision of a policymaker constitutes official policy so as to render the governmental entity liable, the facts of that case clearly answer the question. There, the chief of police was terminated by the city manager, without being afforded due process, at the same time as city council approved the release to the media of certain investigative reports pertaining to the police department.

Clearly, *Owen* involved a single incident, a wrongful termination, for which the municipality was held liable. There was never any suggestion that there was, or needed to be, a showing that the city had a past practice of terminating employees without due process. There is no doubt that *Owen* contemplated the possibility of a local government being held liable for a constitutional violation caused by a "decision" of an elected official since the Court reasoned that a decision maker should consider the impact of his action on the public fisc. *Owen*, 445 U.S. at 656.[17]

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[16] Governmental liability may be based upon legislative, executive, or judicial action. *Mitchum* v. *Foster*, 407 U.S. 225, 240 (1972). Thus, in *Lombard* v. *Louisiana*, 373 U.S. 267, 273 (1963), this Court equated the "official command" of a government official to a municipal ordinance. The Sixth Circuit has refused to acknowledge this equation.

[17] This same rationale appears in *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981), where this Court refused to permit punitive damage awards against municipalities. That case, like *Owen*, involved a single decision by policymakers (to cancel a contract). One reason for rejecting the award of punitive damages against cities was that it was unclear that such an award would deter a policymaker from committing recurrent constitutional violations. 453 U.S. at 269-270.

Finally, this Court's recent pronouncement in *City of Oklahoma City* v. *Tuttle*, ____ U.S. ____, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985), indicates that there is no justification for the Sixth Circuit's "first bite" rule. In *Tuttle* a jury instruction permitted the inference of an official policy of inadequate training or deliberate indifference from an isolated incident of excessive use of force by a police officer.

As the Court aptly noted.

> "the inference allows a § 1983 plaintiff to establish municipal liability without submitting proof of a single action taken by a municipal policymaker." 105 S.Ct. at 2435, 85 L.Ed.2d at 803.

Based upon *Monell*, such a nebulous link between municipal policy and unlawful conduct was properly rejected. However, this Court suggested that proof of a single incident of unconstitutional activity would be sufficient to impose § 1983 liability on a unit of local government when it is shown that "it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker." 105 S.Ct. at 2436, 85 L.Ed.2d at 804. Official policy may thus be found where a policymaking official has consciously chosen a course of action from among various alternatives to guide present as well as future decisions. 105 S.Ct. at 2436, 85 L.Ed.2d at 804 and fn. 6.

In the case at hand, the county prosecutor was advised of the situation and chose to order a forcible entry. He did not choose, for example, to obtain a search warrant (as the doctor suggested), to wait until the end of the employees' workday, or any alternative method of executing the capiases, particularly where there was obviously no exigent circumstances demanding immediate action. There can be no denying the "causal relation" or "affirmative link" here between the prosecutor's instructions to the deputies to "go in and get them" and the constitutional violation, the patently illegal search of private medical offices. *Tuttle*, 105 S.Ct. at 2436, 85 L.Ed.2d at 803-804; *Rizzo* v. *Goode*, 423 U.S. 362, 371 (1976).

The concurring opinion in *Tuttle*, which characterized as

an "unlikely or extravagant premise" the argument that a unit of local government is entitled to be protected from liability for its first constitutional violation, also supports petitioner's position here.

> "Respondent objects that in *Monell* and *Owen* v. *City of Independence*, 445 U.S. 622 (1980), we found a municipality liable despite evidence that showed only a single instance of misconduct. If the city's argument here depended on the premise that municipal conduct that resulted in only a single incident was immune from liability, I would have to agree with respondent that *Monell* and *Owen* provide authority to the contrary. A rule that the city should be entitled to its first constitutional violation without incurring liability — even where the first incident was the taking of the life of an innocent citizen — would be a legal anomaly, unsupported by the legislative history or policies underlying § 1983. A § 1983 cause of action is as available for the first victim of a policy or custom that would foreseeably and avoidably cause an individual to be subjected to deprivation of a constitutional right as it is for the second and subsequent victims; by exposing a municipal defendant to liability on the occurrence of the first incident, it is hoped that future incidents will not occur. 105 S.Ct. at 2440-2441, 85 L.Ed.2d at 809-810 (Brennan, J., concurring).

The Sixth Circuit's ruling in this case is clearly incorrect and the holding of the Court of Appeals must be reversed. As has been shown above, this Court has never approved or condoned a rule requiring repeated decisions or multiple incidents directed by policymakers before governmental liability could attach.

2. Nothing in the legislative history for the Civil Rights Act of 1871 suggests that the Act was not intended to provide a remedy to the first victim of a constitutional violation caused by a governmental entity.

In *Monell* v. *Department of Social Services of the City of New York*, 436 U.S. 658 (1978), this Court overruled *Monroe* v. *Pape*, 365 U.S. 167 (1961),[18] and held that municipalities and other units of local government not entitled to Eleventh Amendment immunity are "persons" who may be held liable under § 1983. This holding was based upon an exhaustive analysis of the legislative history of the Civil Rights Act of 1871[19] and the proposed Sherman Amendment. *Monell*, 436 U.S. at 665-689. While the legislative debate on § 1 of the Civil Rights Act of 1871, the predecessor to 42 U.S.C. § 1983, is relatively limited, it is quite clear that the provision was intended to be remedial in nature and thus to be interpreted as broadly as possible to give a remedy for violations of federally protected rights. See *Monell*, 436 U.S. at 684-685.

Representative Shellabarger of Ohio, for example, declared in the course of the debates that:

> "This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation. As has been again and again

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[18] In *Monroe*, this Court held that municipalities did not fall within the ambit of § 1983. 365 U.S. at 187. The Court did hold, however, that the allegations of an unreasonable search, seizure and arrest by Chicago police officers stated a claim under § 1983 against the other defendants. Quoting *United States* v. *Classic*, 313 U.S. 299, 326 (1941), this Court recognized that "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law is action taken 'under color of' of state law." 365 U.S. at 184.

[19] Act of April 20, 1871, Ch. 22, § 1, 17 Stat. 13 (1871).

> decided by your own Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people. These provisions of the fourteenth amendment are wholly devoted to securing the equality and safety of all the people, as is this section, and, indeed, the entire bill. In deciding whether the section or the bill is warranted by this fourteenth amendment, ought not the fact that it is so eminently just and fair, so eminently in accordance with the spirit of our institutions, so wholly devoted to the single and sublime work of preserving the rights and liberties and government of all the people, and which gives not a power, except such as is, by the language employed, carefully confined and consecrated to the sacred duty of protecting the people and their Government, to have mighty weight in determining the question of the power to make it? Chief Justice Jay and also Story say:
>
> > 'Where power is remedial in its nature there is much reason to contend that it ought to be construed liberally, and it is generally adopted in the interpretation of laws.' 1 Story on Constitution, sec. 429"
>
> CONG. GLOBE, 42d Cong. 1st SESS. APP. 68 (1971) (Hereinafter "Globe App.")

Representative Shellabarger compared § 1 to the criminal proceedings under the Act and noted that § 1 applies not only to former slaves, "but also to all people where, under color of State law, they or any of them may be deprived of rights to which they are entitled under the Constitution by reason and virtue of their national citizenship." Globe App. 68.

Similarly, Representative Bingham of Ohio reasoned that Congress has the power to legislate

> "to provide by law for the enforcement of the Constitution, on behalf of the whole people, the nation, and for the enforcement as well of the Constitution on behalf of every individual citizen of the Republic in every State and Territory of the Union to the extent of the rights guaranteed to him by the Constitution." Globe App. 81.

Finally, even Senator Thurman of Ohio, in opposing the adoption of § 1 because it transferred cases into the Federal courts, stated:

> "I am certainly not in favor of denying to any man who is deprived unlawfully of his right, his privilege, or his immunity, under the Constitution of the United States, that redress to which every man is entitled whose rights are violated. . . ." Globe App. 216.

Clearly, nothing in the legislative history of the Civil Rights Act suggests that the Act was not intended to remedy the first constitutional violation committed by a governmental entity. The rule adopted by the Sixth Circuit in fact defeats the Congressional intent to provide a remedy for *all* people deprived of their constitutional rights.

3. The common law in effect at the time section 1 of the Civil Rights Act of 1871 was adopted recognized governmental liability for single incidents of misconduct directed by officials having authority to act by virtue of their offices.

The common law in effect at the time the Civil Rights Act of 1871 was adopted also recognized governmental liability for single incidents of misconduct authorized or directed by proper officials of local governments. In *Thayer* v. *Boston*, 36 Mass. 511 (1837), relied upon in *Owen* v. *City of Independence*, 445 U.S. 622, 641 (1980), an action for damages was brought against the City of Boston for injuries caused as a result of a single action by officials having authority to act by virtue of their offices. 36 Mass. at 514. The court stated:

> "There is a large class of cases, in which the rights of both the public and of individuals may be deeply involved, in which it cannot be known at the time the act is done, whether it is lawful or not. The event of a legal inquiry, in a court of justice, may show that it was unlawful. Still, if it was not known and understood to be unlawful at the time, *if it was an act done by the officers having competent authority, either by express vote of the city government, or by the nature of the duties and functions with which they are charged, by their offices, to act upon the general subject matter*, and especially if the act was done with an honest view to obtain for the public some lawful benefit or advantage, reason and justice obviously require that the city, in its corporate capacity, should be liable to make good the damage sustained by an individual, in consequence of the acts thus done. 36 Mass. at 515 (emphasis supplied).

The Supreme Judicial Court of Massachusetts adopted the rule that a municipality will be liable for an act causing injury

> "provided such act is done by the authority and order of the city government, or of those branches of the city government, invested with jurisdiction to act for the corporation, upon the subject to which the particular act relates, or where after the act has been done, it has been ratified, by the corporation, by any similar act of its officers." *Thayer* v. *Boston*, 36 Mass. at 516.

This rule was adopted, creating municipal liability, because otherwise

> "all agents, officers and subordinate persons, might well refuse to act under the directions of its government in all cases. . . ." *Thayer* v. *Boston*, 36 Mass. at 516.

The case was remanded for a determination as to whether the particular injurious act had been authorized by the city. 36 Mass. at 516-517.

Similarly, in *Goodloe* v. *City of Cincinnati*, 4 Ohio 500, 514 (1831), the court recognized that a municipality may be held liable for a single injurious incident committed by a city agent acting in good faith "according to the directions of his employers." See also *Smith* v. *City of Cincinnati*, 4 Ohio 514 (1831); *Rhodes* v. *City of Cleveland*, 10 Ohio 160 (1840). Finally, in *Town Council of Akron* v. *McComb*, 18 Ohio 229, 230-231 (1849), relying on *Rhodes* v. *City of Cleveland*, and *Thayer* v. *Boston*, the court held that a town may be found liable for an injurious act committed "under an authorized order of the town."[20]

Thus, historically, there is no doubt that local governments were liable for injurious acts authorized or directed by an official "invested with jurisdiction to act for the corporation." *Thayer* v. *Boston*, 36 Mass. at 516.

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[20] This proposition also finds support in the leading treatises concerning municipal law.

> "A municipal corporation is liable to the same extent as an individual for any act done by the express authority of the corporation, or of a branch of its government, empowered to act for it upon the subject to which the particular act relates, and for any act which, after it has been done, has been lawfully ratified by the corporation." T. Shearman & A. Redfield, A Treatise on the law of Negligence § 120, p. 139 (1869).

See also, 4 DILLON, MUNICIPAL CORPORATIONS § 1651, p. 2874 (5th Ed. 1911), (municipal corporation liable for injuries and trespasses committed by officials "under its authority or direction").

4. Federal Courts have consistently found that a single, discrete decision by a policymaking official constitutes the official policy of the governmental entity.

It is not surprising that other Circuit Courts that have addressed the question have concluded that a single decision by a policymaking official directed at a single individual and causing a deprivation of a constitutional right may form the basis for governmental liability under § 1983. This Court's precedents, as well as the legislative history and common law in effect at the time the Civil Rights Act of 1871 was adopted, simply do not support denial of a remedy to the first victim of a constitutional violation. Federal Courts have almost uniformly rejected the proposition relied upon by the Sixth Circuit to affirm the trial court's judgment in favor of the county. Where governmental liability is based not on the inference of official policy from a single incident of misconduct by a low-level employee but arises from a specific decision by a policymaker, every court that has addressed the issue, save one, has found that the governmental entity may be held liable under § 1983.

Perhaps the earliest discussion of this issue appears in *Smith* v. *Ambrogio*, 456 F.Supp. 1130 (D. Conn. 1978). There, the court noted that

> "it seems reasonable to conclude that its [*Monell's*] teachings are equally applicable to a specific policy directed at just one individual, as long as the pleaded facts support the inference that unconstitutional action was taken against the individual pursuant to such a policy." 456 F.Supp. at 1134 fn. 3.

Relying upon this language, the court in *Himmelbrand* v. *Harrison*, 484 F.Supp. 803, 810 (W.D. Va. 1980), concluded that "discrete" acts of governmental officials may constitute official policy if the conduct of the single official represents the official position of the governmental unit.

In *Van Ooteghem* v. *Gray*, 628 F.2d 488 (5th Cir. 1980),

a government employee was fired from his employment by an elected county treasurer because of the plaintiff's attempts to exercise his First Amendment rights. The court, upon recognizing that a county may be held liable under § 1983 for the decisions of an elected county official, 628 F.2d at 494-495, held that since Gray, as an elected county official, had "complete authority" for his action in firing plaintiff, "when he so acted, he acted for Harris County; when he so erred, he erred for the County." 628 F.2d at 495. Thus, a single, discrete decision by Gray, an elected county official, causing a constitutional deprivation, formed the basis for county liability under § 1983.

Similarly, in *Familias Unidas* v. *Briscoe*, 619 F.2d 391, 404 (5th Cir. 1980), the court held that as to an elected official,

> "at least in those areas in which he, alone, is the final authority or ultimate repository of county power, his official conduct *and decisions* must necessarily be considered those of one 'whose edicts or acts may fairly be said to represent official policy' for which the county may be held responsible under section 1983. . . ." (emphasis supplied, citations omitted)

See also *Bowen* v. *Watkins*, 669 F.2d 979, 989-90 (5th Cir. 1982), holding that where an official "has final authority in a matter involving the selection of goals or of means of achieving goals, his choices represent governmental policy. . . ." (citations omitted)

The Fifth Circuit echoed this conclusion in *Languirand* v. *Hayden*, 717 F.2d 220 (5th Cir. 1983), and again in *Bennett* v. *City of Slidell*, 728 F.2d 762 (5th Cir. 1984). The *Languirand* court stated:

> "We also observed that it is well settled that a municipality may be liable under section 1983 for the intentional conduct of its governing body, even though such conduct is an *ad hoc*, isolated, individual action not

> taken pursuant to any overall municipal custom or policy . . . This is also true regarding deprivations directly caused by the intentional actions of individual officials respecting a subject matter where they have the legal 'final authority,' and are the 'ultimate repository of . . . power,' of the governmental unit in question." 717 F.2d at 227 (citations omitted)

In *Bennett*, the court recognized that where a city council violates a person's rights "by direct orders or by setting a course of action" the entity may be liable. 728 F.2d at 767. This principle was specifically stated to apply to officers of county government who are elected and thus derive policy-making authority from the electorate. 728 F.2d at 765 fn. 1.

The Second Circuit has also recognized that a single incident directed by a high-ranking official causing a constitutional violation may result in governmental liability. *Quinn* v. *Syracuse Model Neighborhood Corp.*, 613 F.2d 438 (2d Cir. 1980). There, an employee was discharged as a scapegoat to cover a scandal over missing funds. The court held that where a policymaking official, a mayor, directs a campaign of harassment against someone in derogation of his constitutional rights, the municipality may be liable under § 1983. 613 F.2d at 448.

More recently, the Second Circuit specifically held, in a case involving the firing of a municipal employee, that

> "[a] single unlawful discharge, if ordered by a person 'whose edicts or acts may fairly be said to represent official policy,' *Monell*, 436 U.S. at 694, 98 S.Ct. at 2037, may support an action against the municipal corporation." *Rookard* v. *Health and Hospitals Corp.*, 710 F.2d 41, 45 (2d Cir. 1983).

For the *Rookard* court, the difficulty lay in identifying which officials are policymakers whose actions may be treated as those of the unit of local government, not in finding

the existence *vel non* of such an official policy. 710 F.2d at 45.[21]

The Seventh Circuit, in *Reed* v. *Village of Shorewood*, 704 F. 2d 943, 953 (7th Cir. 1983), recognized that a municipality could be held liable under § 1983 for acts of a policymaking official even where the official enjoys absolute immunity. Relying on *Reed*, the district court in *DeLaCruz* v. *Pruitt*, 590 F.Supp. 1296, 1306-1307 (N.D. Ind. 1984), found the county liable for a constitutional deprivation caused by a single act of termination by the county auditor.

Similarly, the Eighth Circuit in *Sanders* v. *St. Louis County*, 724 F.2d 665, 668 (8th Cir. 1983), noted:

> "It may be that one act of a senior county official is enough to establish the liability of the county, if that offical was in a position to establish policy and if that official himself directly violated another's constitutional rights. . . ." (citations omitted)

Finally, both the Ninth Circuit in *McKinley* v. *City of Eloy*, 705 F.2d 1110, 1116-1117 (9th Cir. 1983), and the Eleventh Circuit in *Berdin* v. *Duggan*, 701 F.2d 909, 914 (11th Cir. 1983), have also held that where a senior government official (a mayor and a city manager, respectively) unconstitutionally discharges a municipal employee, the official's single action constitutes the official policy of the city.

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[21] As noted above, there is no dispute here that the county prosecutor, an elected official, is a policymaker for the county. See Decision of Court of Appeals, P.A. 7a fn.3. The county defendants never argued that the sheriff and prosecutor are not policymaking officials. Rather, citing *Turpin* v. *Mailet*, 619 F.2d 196 (2d Cir. 1980), the county defendants argued the position adopted by the Court of Appeals that

> "A single, isolated instance of illegality does not constitute a custom or policy on which liability can be imposed." Brief of Defendants/Appellees Hamilton County, et al. at 7.

Turpin involved an attempt to hold a municipality liable for inadequate supervision and training based upon a single incident of misconduct by a police officer. There was no evidence in *Turpin* that a policymaking official personally directed the unconstitutional conduct. 619 F.2d at 202.

Only the Third Circuit, in *Losch* v. *Borough of Parkersburg*, 736 F.2d 903 (3rd Cir. 1984), has suggested otherwise. There, a police chief and two of his officers signed a criminal complaint, allegedly to harass plaintiff. In rejecting plaintiff's § 1983 action alleging malicious prosecution, the court questioned whether the police chief was a "final authority" with respect to these activities and whether the action in filing a complaint was sufficient to constitute official policy. Citing *Walters* v. *City of Ocean Springs*, 626 F.2d 1317, 1323 (5th Cir. 1980) and *Turpin* v. *Mailet*, 619 F.2d 196, 202 (2d Cir. 1980), *cert. denied*, 449 U.S. 1016 (1982), each involving an attempt to infer official policy from a single incident of wrongdoing by a police officer, the court stated that "[a] policy cannot ordinarily be inferred from a single instance of illegality such as a first arrest without probable cause." 736 F.2d at 911. It is not clear how that court would rule where, as in the matter *sub judice*, a policymaking official, acting within his official capacity, personally directs and authorizes a specific constitutional violation.

In sum, virtually every court that has confronted the issue *sub judice*, other than the Sixth Circuit, has explicitly or at least tacitly recognized that a single, discrete decision by a policymaking official that directly causes a person to be deprived of constitutional rights represents official policy so as to render the unit of local government liable under § 1983.

5. The Sixth Circuit's rule immunizing the county from liability for the first constitutional violation authorized and directed by a policymaking official is against public policy and eviscerates the legislative goals of 42 U.S.C. § 1983.

It has often been recognized that § 1983 serves a dual purpose, compensation for redress of constitutional deprivations and deterrence. See, e.g. *Monroe* v. *Pape*, 365 U.S. 167, 172-187 (1961); *Mitchum* v. *Foster*, 407 U.S. 225, 238-242 (1972); *Carey* v. *Piphus*, 435 U.S. 247, 254 (1978); *Robertson* v. *Wegmann*, 436 U.S. 584, 590-591 (1978); *Owen* v. *City of*

Independence, 445 U.S. 622, 651 (1980); *Carlson* v. *Green*, 446 U.S. 14, 21 (1980); and *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 268-269 (1981).

As discussed above, the remedial purpose of the Civil Rights Act is evident from the Congressional debates. Representative Shellabarger stressed that § 1 of the Act should be broadly construed to effectuate its remedial nature. Globe App. 68. This Court recognized in *Owen* that it would be "uniquely amiss" if the governmental entity could avoid § 1983 liability since

> "[a] damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees. . . ." 445 U.S. at 651.

Victims of constitutional wrongs would be left without remedy, in light of the immunities available to government officials, if the governmental entity is permitted to avoid liability caused by its policymaking officials. *Owen*, 445 U.S. at 651. In the matter *sub judice*, the lower courts held that the individual officials were entitled to qualified immunity.[22] By insulating the county itself from liability simply because this was the first occasion on which the policymaker had authorized and directed the unconstitutional conduct, Dr. Pembaur was denied a remedy for his constitutional deprivation. This is particularly ironic here where the Ohio Supreme Court held that Dr. Pembaur should not have exercised his Fourth and Fourteenth Amendment rights by refusing entry (in the absence of bad faith and unreasonable conduct on the

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[22] Although the elected county prosecutor was not a named defendant, an assistant prosecuting attorney, defendant Whalen, was held to enjoy qualified immunity. (P.A. 21a-23a, 4a-5a.) Presumably, the prosecutor himself would have been found to enjoy that same qualified immunity, if not absolute immunity, pursuant to *Imbler* v. *Pachtman*, 424 U.S. 409 (1976). That the official might be entitled to immunity, qualified or absolute, of course does not insulate the governmental entity itself. See *Owen*, 445 U.S. at 657; *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U.S. 391, 405, n. 29 (1979).

part of the law enforcement officers), but rather should have sought redress in the courts. *State* v. *Pembaur*, 9 Ohio St.3d 136, 138, 459 N.E.2d 217 (1984), *cert. denied*, ____ U.S. ____, 104 S.Ct. 2668, 81 L.Ed.2d 373 (1984).

The Sixth Circuit in this case has effectively created a form of governmental immunity for constitutional wrongs, even those ordered by policymaking officials, except in cases of recurrent violations. This is in spite of the total lack of legal or historical support for its new rule. The court has thus recreated the governmental immunity that this Court laid to rest in *Owen*. The result is the undermining of the remedial purposes of § 1983.

Section 1983 was intended "to serve as a deterrent against future constitutional deprivations as well . . . ." *Owen*, 445 U.S. at 651 (citations omitted). A policymaker should be required to consider, in choosing a course of action, the constitutional implications of his decisions.

> "[C]onsideration of the *municipality's* liability for constitutional violations is quite properly the concern of its elected or appointed officials. Indeed, a decisionmaker would be derelict in his duties if, at some point, he did not consider whether his decision comports with constitutional mandates and did not weigh the risk that a violation might result in an award of damages from the public treasury." *Owen*, 445 U.S. at 656 (emphasis in original).

The Sixth Circuit's rule protecting a unit of local government from liability for its first constitutional wrong in a given area also defeats this deterrent purpose for § 1983. A government official is personally immune under § 1983 for his actions unless the constitutional rights at stake were clearly established at the time, *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818-819 (1982) (enunciating the standard for qualified immunity), or the nature of the office imposes an absolute immunity. *Imbler* v. *Pachtman*, 424 U.S. 409 (1976). The official certainly would not be liable for punitive damages ab-

sent "recurrent constitutional violations by reason of his office." *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. at 269-270. Therefore, if a policymaking official is permitted to make his first decision in a given area without concern of liability on either his part or that of the governmental entity there would be no incentive to consider or respect the constitutional rights of citizens.

The Sixth Circuit's rule clearly permits, if not encourages, officials to ignore the constitutional rights of the public. Yet § 1983 was adopted to protect the public's constitutional rights from just such official callousness. As this court recognized in *Owen*,

> "The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights." *Owen* v. *City of Independence*, *supra*, 445 U.S. at 651-652

The Sixth Circuit has removed this incentive for government officials to respect the rights of citizens. Both the remedial and the deterrent goals of 42 U.S.C. § 1983 are emasculated when a unit of local government is not held responsible for a decision by a policymaking official which directly causes a person to be deprived of his constitutional rights. The Sixth Circuit rule is absolutely at odds with the public policies underlying the Civil Rights Act.

CONCLUSION

There is simply no support, legal or historical, for the Sixth Circuit's ruling. Public policy likewise militates against this new form of government immunity. A single, discrete decision of an elected county prosecutor which directly causes an unconstitutional search of a private medical office may fairly be said to represent official policy so at to render a county liable under 42 U.S.C. § 1983.

The judgment of the Court of Appeals with respect to the liability of Hamilton County, Ohio, should be reversed and the matter should be remanded for a determination of damages.

Respectfully submitted,

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