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No. 86-772

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CITY OF ST. LOUIS,

Petitioner,

v.

JAMES PRAPROTNIK,

Respondent.

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

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BRIEF OF THE INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, AND NATIONAL GOVERNORS' ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

CARTER G. PHILLIPS
BARBARA MARKHAM SMITH
MARK D. HOPSON
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

BENNA RUTH SOLOMON *
JOYCE HOLMES BENJAMIN
BEATE BLOCH
STATE AND LOCAL LEGAL CENTER
Suite 349
444 North Capitol Street, N.W.
Washington, D.C. 20001
(202) 638-1445

* Counsel of Record for *Amici Curiae*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether a municipality is liable under 42 U.S.C. § 1983 for the unconstitutional actions of its agents solely because they act within the scope of delegated authority and their actions are not subject to further *de novo* review by an official of the municipality?

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INTEREST OF *AMICI CURIAE*

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments.

This case concerns the definition of "policy" that will expose a City to liability under 42 U.S.C. § 1983 for unconstitutional actions of its officials. A divided panel of the Eighth Circuit affirmed a jury verdict awarding damages against the City for alleged improper retaliation against respondent for the exercise of his First Amendment rights. The court of appeals held the City liable for the acts of supervisory employees because those acts fell within their discretionary authority. The court failed to undertake the further inquiry, mandated by this Court's decisions, whether those officials were acting to implement a policy established by the City, or whether they were themselves authorized to make personnel policy for the City.

Amici are concerned that the sweeping definition of "policy" in the decision below will subject municipalities to suit by countless employees or citizens who believe they have been injured by acts of officials who have some discretionary authority, even though they lack the authority to set the policy governing these acts. Specifically, the court held that a City is liable if discretionary acts of supervisory employees within the scope of their authority violate a subordinate's constitutional rights. This standard does no more than restate the very theory of *respondeat superior* that this Court has repeatedly rejected as a basis for liability under Section 1983.

The theory applied by the court of appeals will not only result in an expansion of actual liability under Section 1983, but will also undermine the ability of local governments to manage properly the public business, particularly with respect to personnel matters involving their employees. Under the Eighth Circuit's theory, virtually every decision by a supervisor that affects a municipal employee could become the "policy" of the local government.

Amici believe that this case presents an opportunity for the Court to further clarify the definition of munic-

ipal "policy" and "custom" that will impose liability on a City under Section 1983 for the actions of its officials. Uncertain standards of Section 1983 responsibility expose municipalities to a flood of litigation instituted on the chance that claims can be brought within the penumbra of "municipal policy." The potentially heavy financial penalties stemming from such litigation disrupt local budgeting and planning. Attempts to contain liability by establishing clear lines of official authority and responsibility are threatened by decisions, such as the one below, that leave local governments helpless to avoid actions that may subject them to substantial damage awards.

Amici submit that the decision below is wrong. Because this Court's decision will have a direct impact on matters of importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.[1]

STATEMENT

Amici adopt petitioner's statement of the case and would emphasize the following facts.

Between 1968 and 1983, respondent, James Praprotnik, was an employee of petitioner, the City of St. Louis. In 1980, respondent held a management position as an architect in the Community Development Agency ("CDA"). At that time, he became involved in a dispute with his supervisors over his failure to obtain permission before performing architectural work for private clients. As a result of this dispute, respondent was suspended from his job for 15 days by his immediate supervisor. On respondent's appeal, the City Civil Service Commission ("Commission") reprimanded respondent, but set aside the suspension and ordered him reinstated with back pay. Appendix to Petition for Certiorari (Pet. App.) A-2.

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[1] Pursuant to Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

After the dispute, a previously recommended superior performance rating was reduced to "good," and accompanied by a recommendation for a two-step decrease in salary level. Pet. App. A-2. Again, respondent appealed, and the Commission reduced the decrease in his salary level. Pet. App. A-3. In 1981, respondent was rated "inadequate" in "relationships" on his annual review. *Ibid.* On his appeal, that rating was raised by the Commission to "adequate." *Ibid.*

In the spring of 1982, the City was forced to make major staff and budget reductions; respondent was transferred to a new position, equivalent to his CDA position, at the City's Heritage and Urban Design Division ("H&UD"). *Ibid.* Respondent objected to the transfer and appealed this job action. Pet. App. A-4. The Commission declined to hear the appeal on the ground that respondent had lost nothing by the action because it was a lateral transfer that preserved his grade and salary. *Ibid.*

Respondent then filed this lawsuit, alleging that the transfer was retaliatory for his appeal of the original job suspension, and violated both his First Amendment rights and his due process rights. Pet. App. A-5 to A-6 n.1. After the transfer, respondent's duties were substantially changed, as his supervisor took over his architectural work. Pet. App. A-4. He was then found "overqualified" for the duties he was performing, rated "inadequate" overall, and recommended for reclassification and a salary decrease. *Ibid.* On his appeal, the Commission raised the rating to "adequate" and reversed the pay reduction recommendation. *Ibid.*

In December 1983, respondent received notice that he would be laid off. *Ibid.* The director characterized the layoff as a "minor reorganization" which did not require any discussion with higher officials. *Ibid.* According to testimony, such reorganizations are appropriate

when there is "a lack of work or a lack of funds within [the] agency." Pet. App. A-5. Respondent's superior also cited respondent's job performance as justification for the layoff. *Ibid.* Respondent appealed the layoff to the Civil Service Commission, which has stayed the appeal pending resolution of this lawsuit. Pet. App. A-6 n.1.

Respondent then amended his complaint to add the layoff as an additional violation. Pet. App. A-6 n.1. Respondent claimed that his transfer and eventual layoff were in retaliation for his challenge to his original suspension. He asserted that these adverse employment actions violated (1) his First Amendment rights to pursue his appeal from the suspension and (2) his due process rights. The jury returned a special verdict, exonerating each of the individual supervisors named in the complaint, but awarding respondent damages against the City of $15,000 each on his First Amendment and due process claims. A divided court of appeals affirmed the award on the First Amendment claim, but reversed on the due process claim.

The majority below articulated a two-part test for determining whether the conduct of the officials responsible for the transfer and eventual layoff could be attributed to a municipal "custom or policy" so as to subject the City to liability. According to the Eighth Circuit, the City could be held liable if: (1) the relevant officials possessed delegated authority either by custom or policy, directly or indirectly, to act on the City's behalf; *and* (2) the acts of the relevant officials were "final," *i.e.*, not subject to *de novo* appeal.[2] Pet. App.

[2] In ruling that the City could be held liable notwithstanding the exoneration of all of the individual defendants, the court distinguished the decision in *City of Los Angeles v. Heller*, 106 S.Ct. 1571 (1986), on the ground that two supervisors other than the named defendants had implemented City policy in the layoff.

A-8. Because respondent's supervisors had discretionary authority to initiate transfers and layoffs, the court found that they were acting on behalf of the City, thereby satisfying the first prong of the test.

With respect to the requirement of finality, the court acknowledged that review by the Civil Service Commission was available. However, because such an "appeal is decided solely on the basis of written submissions," a procedure "indicative of a highly circumscribed scope of review," the court concluded that "final authority for a layoff may fairly be said to rest with the initiating supervisor." Pet. App. A-11. The court concluded that "[t]he jury thus had sufficient evidence from which to conclude that the City may be subject to liability for the supervisor's acts." *Ibid.*

Judge Ross dissented. Pet. App. A-20 to A-25. He argued that there was no evidence the City had a *policy* of retaliating against employees who exercised their First Amendment rights by appealing personnel decisions. Pet. App. A-22. Instead, respondent's claim was based entirely on his own experience and the isolated actions of his supervisors. Moreover, the City Charter and the Civil Service Commission rules made clear that, while respondent's supervisors had some discretion in making certain personnel decisions, they had no authority to set City personnel *policy*. *Ibid.* at A-23. The dissent concluded that respondent's *four* successful appeals to the Civil Service Commission undermined completely any

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We assume that, if all the actors who could have caused the deprivation of respondent's rights had been exculpated of any unconstitutional conduct, the court would have reversed the judgment against the City. Obviously, a City cannot be held liable if no prohibited conduct occurred.

Amici will not further address the issue of the effect of the exoneration of the individual named defendants, but note that the concept of retaliation includes an element of motivation, and that motivation can exist only in the mind of an individual or individuals.

claim that respondent's supervisors exercised "final authority" in City personnel matters. *Ibid.*

The only issue before this Court is whether the conduct of the City's employees which allegedly caused the violation of respondent's First Amendment rights may properly be attributed to a "custom or policy" of the City as required by the standards for municipal liability under Section 1983 enunciated in *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

SUMMARY OF ARGUMENT

In *Monell v. Department of Social Services*, 436 U.S. 658 (1978), this Court set forth the basic standard for imposing municipal liability under Section 1983. The Court held that a City could be held liable only for *its own acts.* Accordingly, municipal liability can be imposed if the unconstitutional act in question occurs pursuant to (1) municipal "policy" or (2) a consistent municipal "custom or practice." Liability on the basis of *respondeat superior* is specifically precluded. *Monell*, 436 U.S. at 691-93.

Under the test for determining whether a particular action or decision represents municipal "policy," a City may be held liable for a decision or act of general application decided upon by a policymaker. *Pembaur v. City of Cincinnati*, 106 S. Ct. 1292, 1298-99 (1986). A City may also be held liable for unconstitutional acts taken pursuant to a *process* that may fairly be said to represent city policy, such as a vote by a city council to deprive a single individual of constitutional rights. *See Owen v. City of Independence*, 445 U.S. 622 (1980). Respondent has put forth—and the court below found—no evidence which would show that the City of St. Louis has a generalized policy of retaliating against employees who exercise their First Amendment rights. Indeed, the notion that a City would have such an explicit and generalized policy of retaliation is inherently improbable.

Cf. City of Oklahoma City v. Tuttle, 105 S. Ct. 2427 (1985). Respondent cites no municipal ordinance or order from the Mayor or the City's personnel director supporting the existence of such a policy. Instead, this case arose from a single series of job actions by one set of City supervisors clearly not exercising policymaking authority on behalf of the City.

The fact that the City established the Civil Service Commission to insulate individual employees from their supervisors demonstrates that the policy of the City is not to retaliate against the exercise of First Amendment rights. On the contrary, the City attempts to protect employees from retaliation, as respondent's four successful appeals attest.

The court below applied a wholly incorrect test for determining municipal responsibility under Section 1983. Specifically, the court of appeals held that if an official's actions were (1) within the official's delegated authority and (2) not subject to *de novo* review, the official could be considered to be acting pursuant to municipal "policy" for purposes of Section 1983.

Imposing municipal liability in those situations where a supervisor acts within an area of delegated authority is nothing more than *respondeat superior* liability. *Pembaur*, 106 S. Ct. at 1300. The requirement that the act in question must be "final" adds nothing to the test. The Eighth Circuit's rule thus improperly expands the potential liability of Cities beyond anything Congress intended; it also undermines municipal decisionmaking processes by making it virtually impossible for local governments to avoid potential civil rights claims through use of reasonable measures of control over public employees' conduct. Moreover, even if the "finality" test were appropriate, it is the Civil Service Commission that in fact exercises "final" authority, and thus the decisions about which respondent complains do not satisfy even the Eighth Circuit's test for municipal responsibility.

In addition to failing to provide any evidence to satisfy the policy test for municipal liability, respondent similarly has failed to demonstrate a City *custom* of depriving employees of constitutional rights. Under the custom standard, respondent must demonstrate (1) a common or widespread practice violative of constitutional rights; and (2) constructive or actual knowledge of the practice by City officials. A single incident cannot create an inference that a widespread practice exists. *Tuttle*, 105 S. Ct. at 2436, *City of Springfield v. Kibbe*, 107 S. Ct. 1114, 1115 (1987). Respondent in this case has presented no evidence of any conduct beyond that of his own experience. Moreover, there is no evidence that the relevant policymaking officials knew or should have known about respondent's situation, much less about any alleged practice of supervisory retaliation against the exercise of First Amendment rights by the City's employees.

ARGUMENT

THE STANDARDS OF DISCRETION AND FINALITY EMPLOYED BY THE COURT OF APPEALS ARE INCONSISTENT WITH THE PRINCIPLES ESTABLISHED BY THIS COURT FOR DETERMINING MUNICIPAL LIABILITY UNDER 42 U.S.C. § 1983.

In *Monell v. Department of Social Services*, 436 U.S. 658 (1978). this Court reversed its previous decision in *Monroe . Pape*, 365 U.S. 167 (1961), and concluded that municipal governments are "persons" subject to liability under 42 U.S.C. § 1983. *Monell*, 436 U.S. at 690. Upon reviewing the legislative history of the Civil Rights Act of 1871, the predecessor of Section 1983, the Court further concluded that Congress intended municipal governments to be held liable only for *their own* unconstitutional acts and not upon a theory of *respondeat superior*. 436 U.S. at 691-694. The Court made plain that it is only

> "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. Thus, the Court held that municipal liability under that provision may be imposed only if the unconstitutional act in question occurred pursuant to (1) municipal policy or (2) a consistent municipal custom or practice.[3] *Ibid.*

As this Court has stated, municipal liability is only appropriate if the City itself, as opposed to its agents and employees, can fairly be said to be "responsible" for the constitutional injury. *Monell*, 436 U.S. at 694. This rule of limited liability is faithful to the holding in *Monell* that Congress intended to restrict liability of local governments for the acts of their employees. In so doing, Congress has not left injured parties without remedies; they still have available both a federal civil rights cause of action under Section 1983 and a state tort cause of action against the *municipal employees* who actually violated their rights. As this case demonstrates, employees may also have administrative remedies, such as review by a civil service commission. *See* page 6 *supra*. Thus, *Monell* found that Section 1983 reflects a reasonable compromise between the need to compensate for constitutional harms and the need to protect municipalities from damage claims whenever a governmental employee inflicts constitutional injury.[4] The court of appeals has altered that balance in a way that conflicts with *Monell*.

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[3] *See also Pembaur v. City of Cincinnati*, 106 S. Ct. 1292 (1986); *City of Oklahoma City v. Tuttle*, 105 S. Ct. 2427 (1985); *City of Springfield v. Kibbe*, 107 S. Ct. 1114, 1117 (1987) (O'Connor, J., dissenting).

[4] *See Monell*, 436 U.S. at 693-94 (refusing to impose municipal liability for employee constitutional torts under "insurance theory").

A. The Actions Of Respondent's Supervisors Did Not Establish Or Implement A City Policy Of Retaliation Against Employees Exercising Their Constitutional Rights.

The test for determining whether a particular action or decision represents municipal policy may focus on (1) the *nature* of the action or decision, *i.e.*, whether the decision is one of general application; or (2) the *identity* or *status* of the municipal officer or entity who makes the decision or initiates the action, *i.e.*, whether the official or entity "speaks for" the municipality. A City may be held liable for a single unconstitutional act if that act constitutes—or is taken pursuant to—a *rule of general application.* As the Court noted in *Pembaur v. City of Cincinnati*, 106 S. Ct. 1292, 1299 (1986), the term "policy" often refers to rules that are "intended to, and do, establish fixed plans of action to be followed under similar circumstances consistently and over time."

In the absence of a rule of general application, the proof of a municipal "policy" depends upon the status or identity of the person who sets in motion the particular action causing the constitutional harm so that it may be attributed to the City itself. In *Pembaur*, the majority recognized that a definition of municipal policy solely as a rule of general application would, in certain circumstances, be too limited.[5] 106 S. Ct. at 1298-1299. On some occasions, government will choose "a course of ac-

[5] Justice Powell, dissenting in *Pembaur*, similarly defined a policy in part by the nature of the decision made, 106 S.Ct. at 1309 ("most policies embody a rule of general applicability"), but would also permit proof of municipal policy in the absence of a rule of general application. According to Justice Powell, proof of municipal policy turns not only on the nature of the decision, *i.e.*, one that is of general application, but also on the *process* by which the decision was made or the action was taken. A decision developed through a *process* involving formal municipal decisionmakers, such as a city council, may properly be found to represent city policy, even if the decision does not establish a rule of general application. 106 S. Ct. at 1309.

tion tailored to a particular situation and not intended to control decisions in later situations." *Ibid.* at 1299. If, on those occasions, a decision of specific application is properly made "by that government's authorized decisionmakers" in the area in question, the City may be held liable for that decision. *Ibid.* Thus, for example, when an individual is terminated by city council resolution, it is appropriate to hold the City responsible for that termination. In such circumstances the process and the status of the decisionmaker, rather than the generally applicable nature of the decision, make it a matter of city policy for purposes of Section 1983. *See Owen v. City of Independence*, 445 U.S. 622 (1980).[6]

Under these standards, the *first* issue is whether the unconstitutional action in question was undertaken pursuant to a rule of general applicability. This Court has indicated the importance of common sense in determining what constitutes municipal "policy." In this case, respondent's theory of municipal liability—that the City of St. Louis has a generalized policy of retaliating against employees who exercise their First Amendment rights—is inherently improbable.[7] Common sense sug-

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[6] *See also Pembaur*, 106 S. Ct. at 1309 (Powell, J., dissenting) (focusing on the "nature of the decision" and the "process by which the decision at issue was reached" as the factors to be used in distinguishing municipal policy from *ad hoc* decisions of individual municipal actors).

[7] Indeed, respondent's theory of the case requires more than simple proof that such a municipal policy of retaliation exists. Respondent must also prove that the "policy of retaliation"—and not some other factor, such as his relationship with his supervisors—was the "moving force" in the alleged injury. *Polk County v. Dodson*, 454 U.S. 312 (1981). *See City of Springfield v. Kibbe*, 107 S. Ct. 1114, 1121 (1987) (O'Connor, J., dissenting), noting that the connection between an alleged municipal policy of inadequate police training and the misconduct of an officer in a particular matter appeared to be "largely a matter of speculation and conjecture."

gests that few Cities would adopt a policy of encouraging supervisors to take such action against employees at the supervisors' discretion. *Cf. Tuttle*, 105 S. Ct. at 2436 (it is "difficult in one sense even to accept the submission that [a city] pursues a 'policy' of 'inadequate training', unless evidence be adduced which proves that the . . . policymakers deliberately chose [an inadequate program]").

Respondent cites no municipal ordinance or order from the mayor or the City's personnel director supporting the existence of such a policy. Yet, in matters of employment *policy*, such city officials are the most appropriate sources of evidence concerning the City's general approach to various issues. *See* Pet. App. A-22 (mayor, aldermen and Civil Service Commission have power to establish general personnel policy); *see also Monell*, 436 U.S. at 690 (policy is statement, regulation or decision "officially adopted and promulgated by [municipal] officers").

The existence and operation of the Civil Service Commission in this case demonstrate clearly that the City has recognized that individual supervisors might not act with complete dispassion toward those who work for them; in some circumstances, supervisors might retaliate against employees for actions protected by the Constitution. To insulate individual employees from their supervisors, the City created a Civil Service Commission so that adverse employment actions could be reviewed by an independent body. Indeed, in this case, the fact that respondent prevailed on four appeals to the Commission demonstrates that the policy of the City to protect municipal employees operated effectively. Even if the Commission was ultimately ineffective in preventing the loss of respondent's job—which is far from clear since the Commission proceeding has been stayed during the pendency of this law suit—the very existence of civil service rights, and of a Commission to enforce those rights,

undermines any finding of a municipal policy of retaliation.

As the nature of the decision in this case does not demonstrate that the decision represents policy, the *second* issue is whether the status of the decisionmaker makes the City responsible.

> [M]unicipal 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*[s] . . . *responsible for establishing final policy with respect to the subject matter in question.*

Pembaur, 106 S. Ct. at 1300 (emphasis added).

The Court, in *Pembaur*, emphasized that it is not enough simply to find that one of the municipal actors in question had some "policymaking authority." The court must also find that the official in question had authority to make municipal policy with respect to the decision or action in question. In fact, the Court in *Pembaur* anticipated virtually the exact situation presented in this case and explained why there is no municipal responsibility:

> Thus, for example, the County Sheriff may have discretion to hire and fire employees without also being the county official responsible for establishing county employment policy. If this were the case, the Sheriff's decisions respecting employment would not give rise to municipal liability, although similar decisions with respect to law enforcement practices, over which the Sheriff *is* the official policymaker, *would* give rise to municipal liability. Instead, if county employment policy was set by the Board of County Commissioners, only that body's decisions would provide a basis for county liability. This would be true even if the Board left the Sheriff discretion to hire and fire employees and the Sheriff exercised that discretion in an unconstitutional manner; the decision to act un-

> lawfully would not be a decision of the Board. However, if the Board delegated its power to establish final employment policy to the Sheriff, the Sheriff's decisions *would* represent county policy and could give rise to municipal liability."

Pembaur, 106 S. Ct. at 1300, n.12.

In the present case, respondent's supervisors clearly were not acting in a policymaking capacity with respect to the personnel decisions at issue. They classified their decisions as "minor reorganizations" which did not require the attention of high level officials. Obviously, their decisions did not create a rule of general application for future implementation.

There is no evidence that the City officials delegated their authority to make employment policy to the supervisors involved in respondent's transfer and layoff.[8] Indeed, the record suggests that the supervisors engaged in conduct inconsistent with City policy, as demonstrated by four decisions of the Civil Service Commission reversing the decisions of the supervisors. Pet. App. A-23.

All that is established by the record is that respondent's supervisors exercised their discretion to hire, transfer, or discharge individual employees in a manner that was found by the jury to be retaliatory. Pet. App. A-9. But this Court clearly has distinguished such *discretionary* conduct within an official's delegated authority from policymaking conduct:

> The fact that a particular official—even a policymaking official—has discretion in the exercise of particular functions does not, without more, give rise

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[8] The theory that respondent's supervisors were establishing City policy by their actions in this case plainly is incompatible with the fact that their personnel decisions repeatedly were reversed by the Civil Service Commission.

> to municipal liability based on an exercise of that discretion.

Pembaur, 106 S. Ct. at 1299. In the absence of proof of policymaking authority on the part of the supervisors in question and proof that City policy was either implemented or established in their treatment of respondent, the City of St. Louis cannot be held liable under Section 1983 for the acts of these supervisory employees.[9]

The Eighth Circuit failed to apply the analysis of policymaking set forth above. Instead, the court held it sufficient that the officials' actions were (1) within their delegated authority and (2) immune from *de novo* review. Pet. App. A-8 to A-11. As discussed below, such a theory is plainly inconsistent with the prior decisions of this Court. Moreover it is wholly unfaithful to the underlying theory of municipal liability under Section 1983.

At the outset, imposing municipal liability in those situations where a supervisor acts within an area of delegated authority, *i.e.*, within the scope of his employment, significantly expands a City's exposure to liability under Section 1983. Cities can *only* operate through their agents and employees and therefore, they must delegate authority in order to conduct their business. Thus, the first element of the court of appeals' test, imposing municipal liability for the acts of employees within their delegated authority, is nothing more than *respondeat superior* liability. *Tuttle*, 105 S. Ct. at 2433.

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[9] By adopting a definition of policy that restricts the concept to upper level officials, this Court has not immunized local governments from liability for constitutional violations by mid-level employees. But liability for the acts of such employees is warranted only when those employees are engaged in a practice that has attained the status of a municipal custom. For the reasons stated pp. 19-20, *infra*, it is clear that respondent's rights were not violated because of any custom of the city to retaliate against municipal employees for exercise of their First Amendment rights.

Under the Eighth Circuit's test for unconstitutional policy, virtually any action that is taken by a city employee constitutes city policy unless the action clearly is *ultra vires*. Such an approach to determining what constitutes municipal policy for purposes of Section 1983 liability not only undermines the normal process of delegation of responsibility, it also undermines the choices of every municipal government's elected officials. Simply stated, the reasoning of the court of appeals converts every municipal employee who makes day-to-day decisions into a policymaker. The clear effect of the rule is to shift financial responsibility for constitutionally impermissible acts from individual wrongdoers to state and local taxpayers through the artificial attribution of "policymaker" status. This results in substantial redistribution of the City's scarce resources. In addition, such a rule improperly dilutes the real policymaking authority of the City's elected officials.

The requirement that the act in question must be "final" adds nothing to the test. The fact that a particular official has discretionary authority necessarily implies that the official has authority to make decisions and take actions that are, in some respects, final. If an action does not constitute the policy of the City, then the simple fact that the action is final cannot convert it into city policy.[10] "[P]olicymaking authority is more than discretion, and it is far more than the final say-so . . . ." *Bennett v. City of Slidell*, 728 F.2d 762, 769 (5th Cir. 1984). A "finality" test is flatly inconsistent with the result in *Tuttle* where a finding of municipal liability was reversed notwithstanding the fact that the respondent's decedent had been killed by the allegedly unconstitutional act of a police officer. Clearly, no act is more "final" than a police officer's use of deadly force. Yet this Court held that the respondent was still required

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[10] *See Pembaur*, 106 S.Ct., at 1301 (White, J., concurring) ("not . . . every act of municipal officers with final authority . . . represents the policy of the municipality").

to prove affirmatively that the shooting took place pursuant to an unconstitutional City policy.[11] *Tuttle*, 105 S. Ct. at 2436.

Moreover, a definition of policy that is based on finality interferes with the appropriate functioning of municipal decisionmaking. A rule which requires local government to subject every discretionary act to review by the highest official policymakers, or risk the imposition of liability, will force Cities to alter significantly the decisionmaking process by creating additional layers of mandatory review. Such a system would be reasonable only on the assumption (and contrary to this Court's admonition to use common sense) that supervisory officials regularly violate municipal employees' constitutional rights. *Amici* submit that the relatively infrequent problem of retaliation can best be handled by permitting the injured party to pursue available administrative remedies or, if necessary, recover directly from his supervisor.

Even if the "finality" test were an appropriate measure of municipal "policy," it is clear that liability was unjustifiably imposed by the court below. In considering whether the actions of respondent's supervisors were "final," the court of appeals completely misanalyzed the significance of the role of the Civil Service Commission. The court suggested that the failure of the Commission to review respondent's transfer converted the actions of his supervisors in ordering the transfer into City policy. In other words, the fact that the Commission failed to rule in a manner that the Eighth Circuit believed sufficiently protective of respondent's rights was, as a matter of law, sufficient to prove that respondent's injury fairly could be attributed to a City policy.

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[11] Proof of a single incident of unconstitutional activities is not sufficient to impose liability on a City absent proof that municipal policymakers made a "conscious choice" to adopt the unconstitutional policy. *Tuttle*, 105 S.Ct. at 2436.

However, the significance of the Commission does not lie only, as the court of appeals seemed to assume, in determining whether the actions of the respondent's supervisors were "final." On the contrary, the very existence of the Commission—and its four rulings in favor of respondent—indicates that the City has a policy of protecting employee rights. In the absence of evidence that the Commission is a sham, the existence of the Commission should weigh heavily against a finding of a *policy* of retaliation. *Cf. Pembaur*, 106 S. Ct. at 1301 (White, J., concurring) ("[w]here the controlling law places limits on their authority, [municipal employees] cannot be said to have the authority to make contrary policy").[12]

In sum, the court of appeals ignored the restrictions upon municipal liability intended by Congress and embodied in this Court's decisions in *Monell*, *Tuttle*, and *Pembaur*. The effect of this departure from settled principles will be to expose municipalities to significant liability for actions which cannot reasonably be controlled by even the most extensive, and expensive, efforts of their governments. For these reasons, the court below erred in finding that respondent's injuries stemmed from municipal policy.

B. There Was No Evidence Of A City Custom Or Practice Of Retaliation Against Employees For Exercising Their First Amendment Rights.

Unlike the standard for determining municipal policy, the test for municipal custom typically focuses on the activity of city employees who do not have policymaking authority, such as police officers. In order for a City to

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[12] Unfortunately, the Civil Service Commission's proceedings have been stayed because of this litigation. By shortcutting the procedures established by the City to set and enforce policy on the issues in question, the respondent has deprived the City of St. Louis of the opportunity to articulate, through its Civil Service Commission, a clear and authoritative statement of City policy.

be held liable for injury inflicted pursuant to municipal "custom or usage," evidence must be adduced to demonstrate: (1) a common or widespread practice violative of constitutional rights; and (2) constructive or actual knowledge of the practice by city officials who have authority to end the practice.[13] As this Court has recognized in a similar context, custom denotes "persistent and widespread" practices. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167 (1970). The City is held responsible for actions taken pursuant to municipal custom on the theory that the City has acquiesced in the custom.

A single incident cannot create an inference that a widespread practice exists. *See Tuttle*, 105 S. Ct. at 2435; *Kibbe*, 107 S. Ct. at 1115. In order to establish municipal liability on the basis of an unconstitutional custom or practice, respondent must demonstrate a widespread practice violative of constitutional rights *and* constructive or actual knowledge by City policymakers who have authority to end the practice in order that tacit authorization of the unconstitutional practice can be inferred. *See Tuttle*, 105 S. Ct. at 2435; *Kibbe*, 107 S. Ct. at 1115 (O'Connor, J., dissenting); *Wellington*, 717 F.2d at 936; *Languirand*, 717 F.2d at 227-228.

Even if respondent could demonstrate that a widespread practice to inhibit speech exists, he would still have to prove that the custom caused the prohibited conduct in this instance. In other words, respondent would have to show that his supervisors transferred him *because* of the custom or practice of retaliating against protected activity. If their actions were taken for reasons independent of a City custom or practice, the City could not be held liable. *See Kibbe*, 107 S. Ct. at 1120 (O'Connor, J., dissenting).

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[13] *See Languirand v. Hayden*, 717 F.2d 220, 228-229 (5th Cir. 1983) (municipal liability requires proof of widespread practice and tacit authorization or deliberate indifference); *Wellington v. Daniels*, 717 F.2d 932, 936 (4th Cir. 1983) (same).

Under these standards for municipal liability under Section 1983, respondent cannot make a valid claim under the "practice or custom" theory of *Monell*. Respondent presented no evidence beyond his own experience of any putative violations of municipal employees' rights by supervisory retaliation. This record amply supports the conclusion that respondent's experience was personal and aberrational, and the courts below made no factual finding to the contrary. Not only is the record barren of any evidence of widespread retaliatory practices by supervisors; it shows affirmatively that, when policymakers became aware of respondent's problems through his administrative appeals, they took corrective action. Accordingly, respondent may not recover against the City on a theory that a municipal "custom or practice" caused the alleged injury to his constitutional rights.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

CARTER G. PHILLIPS
BARBARA MARKHAM SMITH
MARK D. HOPSON
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

BENNA RUTH SOLOMON *
JOYCE HOLMES BENJAMIN
BEATE BLOCH
STATE AND LOCAL LEGAL CENTER
Suite 349
444 North Capitol Street, N.W.
Washington, D.C. 20001
(202) 638-1445

* Counsel of Record for *Amici Curiae*

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