UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Freedom from Religion Foundation, Inc., Jane Doe, John Roe, and Jane Noe,

Plaintiffs,

v.

Judge Wayne Mack, in his official capacity as Justice of the Peace, and Montgomery County, Texas,

Defendants.

Civil Action No. 4:17-cv-881

[PROPOSED] BRIEF OF AMICUS JUDGE WAYNE MACK IN HIS INDIVIDUAL CAPACITY IN SUPPORT OF DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

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INTRODUCTION

Amicus Judge Wayne Mack fully agrees with, and supports, the Defendants' motion for judgment on the pleadings. However, Judge Mack believes it is appropriate, indeed essential, for his viewpoint to be considered in the litigation of the propriety of his own judicial conduct. Judge Mack has a strong interest in protecting his autonomy as a judge from legislative or executive influence. This interest is independent of any interest held by the County. Accordingly, Judge Mack respectfully submits this *amicus* brief to put before the Court argument and authority demonstrating an additional, fatal flaw in Plaintiffs' theory of liability, which is of particular concern to Judge Mack individually.

In particular, Plaintiffs, having failed in their effort to convince this Court that Judge Mack is a policymaker for the County, now seek to hold the County liable on the theory that Judge Mack's courtroom proceedings are a persistent and widespread practice that can be attributed to the County under *Monell v. Department of Social Services*, 436 U.S. 658 (1978). *See* Dkt. No. 52 at 35–36. That theory of liability, however, runs headlong into one of *Monell*'s most fundamental precepts: local governments may be held liable under 42 U.S.C. § 1983 only for *their own* conduct. As courts have repeatedly held, that requirement can only be fulfilled if the government possesses authority to *control* the officials or employees engaged in the (allegedly) unlawful practice.

Plaintiffs cannot meet this requirement. Texas law does not grant the County authority to control Judge Mack or the manner in which he conducts his courtroom proceedings. Without the ability to control Judge Mack's activities, those activities cannot be treated as the activities of the County under *Monell*. This critical limitation on liability under *Monell* should be considered and resolved by this Court. This Court should therefore grant Judge Mack's motion to file an *amicus* brief and grant Defendants' motion for judgment.

ARGUMENT

I. Local Governments Cannot Be Held Liable Under *Monell* for the Actions of Officials or Employees They Do Not Control.

It is now well-established that local governments can be sued under § 1983 for violations of constitutional or other federally protected rights that are caused by official government policy. *See Monell*, 436 U.S. at 690, 694. The Fifth Circuit has identified two primary sources of official policy. First, official policy can derive from a "policy statement, ordinance, regulation or decision . . . by an official to whom the [government] lawmakers have delegated policy-making authority." *Webster v. City of Houston*, 735 F.2d 838, 841 (5th Cir. 1984) (en banc); *see also Pineda v. City of Houston*, 291 F.3d 325, 328 (5th Cir. 2002). Second, official policy can derive from a "persistent, widespread practice of [government] officials or employees, which, though not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents [government] policy." *Webster*, 735 F.2d at 841. Under this latter theory, the government can be held responsible only where it has "[a]ctual or constructive knowledge" of the practice. *Id*.

Plaintiffs alleged that the County is liable for Judge Mack's actions under both of these theories. In ruling on the County's motion to dismiss, this Court correctly held that Judge Mack is not a "policymaker" for the County. *See* Dkt. No. 52 at 33–34 ("The Fifth Circuit and district courts . . . have uniformly held that justices of the peace are not county policymakers."). As a result, Plaintiffs are limited to the second theory—*i.e.*, that Judge Mack's opening ceremonies amount to a "persistent, widespread practice" that "fairly represents [the] policy" of the County. *Webster*, 735 F.2d at 841. This Court previously concluded that Plaintiffs sufficiently pled that Judge Mack's practice of opening his courtroom proceedings with prayer is a "persistent" and "widespread" practice for which the County may be held liable. *See* Dkt. No. 52 at 35–37.

This theory of liability, however, is no more viable than Plaintiffs' first theory because Plaintiffs cannot establish one of *Monell*'s most fundamental requirements: government *control* over the official or employee responsible for the allegedly unlawful action.

While *Monell* exposed local governments to a torrent of new litigation, it also placed strict limitations on the scope of this liability. Most importantly, *Monell* made crystal clear that a local government may not be held vicariously liable for the actions of its officials or employees. 436 U.S. at 691 ("[A] municipality cannot be held liable under § 1983 on a *respondeat superior* theory."). Instead, local governments may only be held liable under *Monell* where "[t]he interference [with] the rights of the plaintiff [is] due to a violation for which the . . . government *itself* is responsible." *Bennett v. City of Slidell*, 728 F.2d 762, 767 (5th Cir. 1984) (emphasis added); *see also Pineda*, 291 F.3d at 328 (*Monell* authorizes liability only for "official policies or acts by a governing body fairly attributable as the acts of the local government itself").

To implement this requirement, courts have consistently emphasized that local governments must exercise "control" over the government actor(s) performing the allegedly unlawful acts in order to be liable for those actions. *See infra* at 4–7. Courts have most often addressed this requirement in cases where liability is premised on the unlawful actor being someone "to whom the lawmakers have delegated policy-making authority," rather than on an alleged "persistent, widespread practice" by those who do not possess policymaking authority. *See Webster*, 735 F.2d at 841. But under either theory of *Monell* liability, the critical question is the same: Can the allegedly unlawful conduct be "fairly attributable as the acts *of the local government itself*." *See Pineda*, 291 F.3d at 328 (emphasis added); *see also Bennett,* 728 F.2d at 767 ("In any event[,] the course of conduct, *whether formally declared or informally accepted*, must be the policy of the city government if it is to be the basis of city liability." (emphasis added)). Thus, just as a local government

cannot be held liable for the unlawful acts of a policymaker over whom it lacks control, neither can a local government be held liable for a "persistent" and "widespread" unlawful practice of government actors it does not control. *See Webster*, 735 F.2d at 841. Imposing liability in the absence of such control would directly undercut *Monell*'s requirement that local governments can only be liable for actions "for which the . . . government itself is responsible." *Bennett*, 728 F.2d at 767.

The Supreme Court's decision in *McMillian v. Monroe County, Alabama*, 520 U.S. 781 (1997) confirms the centrality of control to *Monell*'s framework. There, the Supreme Court considered a suit against an Alabama county based on allegedly unlawful actions by a county sheriff. *Id*. at 783. While the parties agreed that a county sheriff was a "policymaker" whose unlawful actions could be imputed to *some* level of government, they disagreed on which level of government: the county or the state. *Id*. at 783, 785–86. To decide the question, the Supreme Court reviewed Alabama law in order to determine how Alabama allocated the authority to control the sheriff's activities. *Id*. at 786–93. In so doing, the Court found it "[m]ost important[ ]," *id*. at 790, that the "county commission . . . has *no direct control* over how the sheriff fulfills his law enforcement dut[ies]," while "the [state officials] *do have this kind of control*." *Id*. at 791 (emphasis added); *see also id*. at 790 ("[T]he county commission cannot instruct the sheriff how to ferret out crime, how to arrest a criminal, or how to secure evidence of a crime." (citation omitted)). Thus, to determine whether the sheriff could be considered a policymaker for the county—*i.e.*, whether his actions could be attributed to the county—the Court focused on the degree of control exercised by the county with respect to the particular action at issue in the litigation. *Id*. at 790–93. And, having concluded that Alabama law did not grant counties authority to exercise such control, the

Court held that the sheriff's actions were not "fairly attributable as the acts of the [county] itself." *Id*. at 790–93; *see also Pineda*, 291 F.3d at 328.

Following *McMillian*'s approach, the courts of appeals have consistently assessed whether the actions of a government official are attributable to a particular government by focusing on the government's authority to exercise control over that official. For example, in *Carbalan v. Vaughn*, 760 F.2d 662 (5th Cir. 1985), the Fifth Circuit considered whether a municipal judge was a "policymak[er]" for the City of Buffalo, Texas, such that his allegedly unlawful actions could be imputed to the City. *Id*. at 665. In concluding that the municipal judge was not a City policymaker, the court emphasized that "Buffalo City officials exercised no control over the municipal court's operations," "gave no guidance or instructions to [the judge]," and "had no policy regarding [the judge's] judicial duties." *Id*. Because the City had no authority to control the municipal judge's allegedly unlawful actions, the plaintiff's alleged injury was not "due to a violation for which the . . . [City] itself [was] responsible." *Bennett*, 728 F.2d at 767; *see also Burns v. Mayes*, 369 F. App'x 526, 531 (5th Cir. 2010) (holding that a county could not be held liable under *Monell* for the actions of a county judge in the course of implementing state policy).

Other courts of appeals have employed the same rationale to assess whether the actions of government officials may be imputed to a local government. For example, the Eleventh Circuit in *Grech v. Clayton Cty., Ga.*, 335 F.3d 1326 (11th Cir. 2003) (en banc) considered whether a Georgia county could be held liable for a county sheriff's actions. *Id*. at 1327. Relying on *McMillian*, the Eleventh Circuit emphasized that decision's "[c]entral" requirement that "local governments such as counties *can never be liable* under § 1983 for the acts of those officials whom the local government has *no authority to control*." *Id*. at 1331 (alterations and internal quotation marks omitted) (emphasis added); *id*. ("A [local official's] policy or act cannot be said to speak for the county if

the county has no say in what policy or action the [local official] takes."). Having then reviewed Georgia law and found that "a county has no authority and control over the sheriff's law enforcement function," the court affirmed dismissal of the suit. *Id*. at 1347; *id*. ("The counties' lack of authority and control over sheriffs explains why counties have no § 1983 liability for their conduct."); *see also Turquitt v. Jefferson Cty., Ala.*, 137 F.3d 1285, 1292 (11th Cir. 1998) (holding that county could not be held liable for a policymaker's actions because "[a] local government must have power in an area in order to be held liable for an official's acts in that area") (internal quotation marks omitted); *Thompson v. Duke*, 882 F.2d 1180, 1187 (7th Cir. 1989) (dismissing suit against Illinois county for the alleged failure to train prison officials because the "County itself ha[d] no authority to train the employees involved or to set the polices under which they operate"); *Nielander v. Board of Cty. Comm'rs of Cty. of Republic, Kansas*, 582 F.3d 1155, 1170 (10th Cir. 2009) (holding that "the county attorney's actions cannot be attributable to the [county]" because the county "has no authority over how [the county attorney] exercises his law enforcement duties").

The Fifth Circuit recently looked to the degree of government control to reject *both* theories of *Monell* liability. In *Burns v. Mayes*, 369 F. App'x 526 (5th Cir. 2010), the court addressed whether a county could be held liable for the actions of a Texas judge. *Id*. at 526. The court first concluded that the judge was not a policymaker for the county because the judge had been acting to implement "a state judicial policy, not a County policy." *Id*. at 531. In other words, because the judge was acting under the authority of *state* law, the county—having no authority or control over the judge pertaining to that matter—could not be subject to § 1983 liability. *Id*. The Fifth Circuit then concluded that "[f]or identical reasons"—*i.e.*, because the judge was acting under

state, rather than county, control—the plaintiff could not show that the judge's actions were "a 'persistent widespread practice' that may properly be attributed to the County." *Id*.

Ultimately, this requirement of control is neither new nor controversial. Instead, it follows inexorably from the fundamental precept that local government liability only arises where the alleged injury is "due to a violation for which the . . . government itself is responsible." *Bennett*, 728 F.2d at 767. Indeed, a contrary rule "would impose even broader liability than the *respondeat superior* liability rejected in *Monell*," *Grech*, 335 F.3d at 1331, as "control" is one of the core requirements even of vicarious liability. *See Barbetta v. S/S Bermuda Star*, 848 F.2d 1364, 1370 (5th Cir. 1988) ("[R]espondeat superior liability is predicated upon the control inherent in a master-servant relationship."). Accordingly, Plaintiffs may not proceed unless they can adequately plead that the County possesses control of Judge Mack's practices.

II. Texas Law Does Not Grant the Commissioners Court of Montgomery County Authority over Judge Mack or His Courtroom Proceedings.

The requirement that the County *must have* control over Judge Mack's courtroom is unsatisfied as a matter of law in this case, because the County *lacks* such control. In particular, under Texas law, the Commissioners Court of Montgomery County lacks authority or control over Judge Mack's practice of opening his courtroom proceedings with prayer. *See McMillian*, 520 U.S. at 786, 789–91 (assessing state law to determine whether the defendant county had control over the county sheriff). Indeed, the County agrees that it lacks authority over Judge Mack. *See* Dkt. No. 65 at 15.

The Texas Constitution creates "Commissioners Courts" as the governing bodies for counties in Texas. *See* Tex. Const. Art. 5, § 18(b) ("The County Commissioners so chosen, with the County Judge as the presiding officer, shall compose the County Commissioners Court, which shall exercise such powers and jurisdiction over all county business . . . ."); *see also* Tex. Local

Gov. Code § 81.001 *et seq*. (describing the powers and duties of the Commissioners Court). The office of Justice of the Peace is also established by the Texas Constitution. *See* Tex. Const. Art. 5, § 18. One justice of the peace is elected by the people of each precinct within a county for a four-year period. *Id*. § 18(a). The Texas Constitution also establishes the jurisdiction of justice of the peace courts over "criminal matters of misdemeanor cases punishable by fine only" and over "civil matters where the amount in controversy is two hundred dollars or less." *Id*. § 19. The Texas Government Code, in turn, further defines the duties and powers of justices of the peace with respect to the performance of their judicial duties. *See* Tex. Gov. Code § 27.001, *et seq*.

Texas law specifically dictates who establishes the rules to govern proceedings in the justice of the peace courts. Texas Government Code § 27.061 provides that "[t]he justices of the peace in each county shall, by majority vote, adopt local rules of administration." Under this grant of authority, the justices of the peace in Montgomery County have adopted local rules to govern their courtroom proceedings. *See* Local Rules for the Justice of the Peace Courts, Montgomery County, Texas, *available at* http://www.mctx.org/document_center/1Justices/Local_rules.pdf (citing Tex. Gov. Code § 27.061 as authority for these rules). While those local rules govern issues such as justice calendars, jury selection, mediation, holiday schedules, and rules of decorum, they do not purport to regulate how each justice of the peace operates his or her courtroom. *Id*. To the contrary, the local rules expressly provide that "[a]dditional rules may be posted by each Court." *Id*. at 4.1.

Judge Mack has thus acted pursuant to the local rules by establishing various rules and practices for his courtroom, including the practice of "hav[ing] a brief opening ceremony that includes a brief invocation by one of [the] volunteer chaplains." *See* Judge Wayne L. Mack, Courtroom Rules, *at* http://www.mctx.org/document_center/1Justices/Courtroom%20Rules.pdf. Thus,

Judge Mack's authority to open his courtroom with prayer follows from an unbroken chain of authority fixed firmly in the Texas Constitution. The Commissioners Court is notably absent from this chain.

Just as the Commissioners Court does not exercise control or authority over Judge Mack or his decision to open his courtroom proceedings with prayer, so too it lacks authority to take disciplinary action against him in any respect. The Texas Constitution establishes a State Commission on Judicial Conduct. *See* Tex. Const. Art. 5, § 1-a. That Commission—whose membership may not include a commissioner, *id*. § 1-a(2)—is authorized to discipline, *inter alia*, a justice of the peace

> for willful or persistent violation of rules promulgated by the Supreme Court of Texas, incompetence in performing the duties of the office, willful violation[s] of the Code of Judicial Conduct, or willful or persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or administration of justice.

See Tex. Const. Art. 5, § 1-a(6); *see also generally* Tex. Gov. Code § 33.001, *et seq*. Moreover, review of a disciplinary measure entered by the Commission is heard by a tribunal consisting solely of state appellate judges.[1] Tex. Const. Art. 5, § 1-a(9); *see also* Tex. Gov. Code § 33.034.

By contrast, the Commissioners Court has no disciplinary role vis-à-vis the justices of the peace. It may only "fill a vacancy" when one arises, Tex. Local Gov. Code § 87.041(a)(9), and those appointments last only "until the next succeeding General Election." Tex. Const. Art. 5, § 28(b).

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[1] Texas law also authorizes district judges to remove justices of the peace, as well as other officials, from office for: (1) incompetency; (2) official misconduct; or (3) intoxication on or off duty by drinking an alcoholic beverage. *See* Tex. Local Gov. Code § 87.013; *see generally id.* § 87.011 *et seq*.

To be sure, the Commissioners Court is authorized by Texas law to determine the salaries of county and precinct officials, including justices of the peace. *See* Tex. Local Gov. Code §§ 152.011, 152.013. It is also tasked with providing for various administrative needs of county and precinct officials. *See, e.g.*, Tex. Local Gov. Code §§ 291.001, 291.004 (requiring the Commissioners Court to furnish office space and supplies to a justice of the peace). And it is authorized to "set the time and place for holding justice court," and to provide suitable accommodations for justices of the peace to hold court. *See* Tex. Gov. Code § 27.051.

These ministerial responsibilities, however, do not amount to the level of control required by *Monell*. In *McMillian*, the Supreme Court held that nearly identical authority does not demonstrate sufficient control over the government actor. There, the plaintiffs argued that a sheriff was subject to county control because, *inter alia*: (1) "the sheriff's salary [was] paid out of the county treasury," and (2) the county provided the sheriff with equipment necessary to perform his responsibilities. 520 U.S. at 791 (internal quotation marks omitted). The Court, however, rejected these forms of "control" as only "allow[ing] the commission to exert an *attenuated and indirect* influence over the sheriff's operations." *Id*. at 791–92 (emphasis added). So too here.

That the Commissioners Court (unlike the county in *McMillian*) is authorized to set the salaries of justices of the peace makes no relevant difference. *See* Tex. Local Gov. Code §§ 152.011, 152.013. Importantly, Texas law establishes a minimum salary for a justice of the peace, Tex. Local Gov. Code § 152.012, and requires the county treasurer to "disburse the money belonging to the county and [to] pay and apply the money *as required by law* and as the commissioners court may require or direct, *not inconsistent with law*." Tex. Local Gov. Code § 113.041(a) (emphasis added). Thus, Texas law significantly reduces any ability of the Commissioners Court to exercise control over Judge Mack through its salary-setting authority. When evaluating this

same kind of authority, courts have concluded that it is not sufficient for *Monell* liability. *See, e.g.*, *Grech*, 335 F.3d at 1339 (holding that authority to determine the entire sheriff's budget (including the sheriff's salary) was too "attenuated" because, *inter alia*, "the State mandate[d] the minimum salary" and required payment of the salary); *Pitts v. Cty. of Kern*, 949 P.2d 920, 934 (Cal. 1998) (holding that county did not exercise control over district attorney even while possessing authority to prescribe compensation); *Weiner v. San Diego Cty.*, 210 F.3d 1025, 1030 (9th Cir. 2000) (same); *see also Huminski v. Corsones*, 396 F.3d 53, 71 (2d Cir. 2005) ("The impact of a governmental entity's payment of an official's salary . . . is softened if that entity does not control the amount of the salary *or cannot refuse to pay the salary entirely*." (emphasis added)).

Moreover, even if one of these ministerial responsibilities could amount to "control" in a general sense, that would still not be sufficient. The Supreme Court has made clear that *Monell* only applies where the "governmental officials are final policymakers for the local government in a *particular* area, or on a *particular* issue." *See, e.g.*, *Brady v. Fort Bend Cty.*, 145 F.3d 691, 699 (5th Cir. 1998) (emphasis added) (internal quotation marks omitted). None of the Commissioners Court's various responsibilities specifically grants it control over how Judge Mack conducts his courtroom proceedings. Again, Texas law reserves that power to the justices of the peace themselves. *See* Tex. Gov. Code § 27.061.

In sum, Texas law makes it clear that the County does not exercise control or authority over Judge Mack, such that his actions may be "fairly attributable" as the actions of the County. *Pineda*, 291 F.3d at 328.

III. Because the County Lacks Authority To Control How Judge Mack Conducts His Courtroom Proceedings, It Cannot Be Held Liable for His Actions.

Based on these principles, it follows that the County cannot be held liable under *Monell* for Judge Mack's actions. As discussed, *Monell* prohibits holding counties liable "for the acts of those

officials whom the local government has no authority to control." *Grech*, 335 F.3d at 1331. As Texas law makes clear, and as the County acknowledges (Dkt. No. 65 at 13–16), the County has no control or authority over Judge Mack generally, and no control over how he opens his courtroom proceedings specifically. Its responsibilities vis-à-vis the justices of the peace are ministerial in nature, and the one possible source of control it does possess (salary-setting) has been greatly restricted by Texas law. *See supra* at 10–11. To the extent the county has any authority over Judge Mack, it is "attenuated and indirect." *McMillian*, 520 U.S. at 792. Thus, because the County has no authority or control over Judge Mack, his actions cannot be "fairly attributable as the acts of [the County] itself." *Pineda*, 291 F.3d at 328.

In addition to exceeding the limited scope of *Monell* liability, Plaintiffs' claim faces a related barrier: any judgment against the County purporting to limit Judge Mack's courtroom prayer would be unenforceable. That judgment would run against the County, as the party purportedly in control of Judge Mack's activities. But, as noted above, the County *lacks* control of Judge Mack's activities. It accordingly has no authority to dictate to him what he may do as part of the opening ceremonies in his courtroom. Plaintiffs thus are not only asking for a remedy that is legally unavailable given that the courtroom chaplain program is not a program of the County, but are asking this Court to order the County to take action—stopping the chaplains' invocations—that it lacks authority to take.

Accordingly, because the County lacks any control over Judge Mack or how he conducts his courtroom proceedings, the Court should grant Defendants' motion.

CONCLUSION

Judge Mack respectfully requests that this Court grant Defendants' Motion for Judgment on the Pleadings.

DATE: March 27, 2018

Respectfully submitted,

/s/ Ashley E. Johnson
Ashley E. Johnson
Attorney-in-Charge
Texas Bar No. 24067689
S.D. Tex. Bar No. 1154574

GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue
Suite 1100
Dallas, TX 75201-6912
ajohnson@gibsondunn.com
Telephone: 214.698.3100
Facsimile: 214.571.2900

Attorney for Amicus Curiae Judge Wayne Mack, in his individual capacity

CERTIFICATE OF SERVICE

I, Ashley E. Johnson, certify that on this 27th day of March, 2018, a true and correct copy of the foregoing document was transmitted using the CM/ECF system, which automatically sends notice and a copy of the filing to all counsel of record.

/s/ Ashley E. Johnson
Ashley E. Johnson