2020 WL 861643 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

THE CITY OF FERGUSON, MISSOURI, Petitioner,
v.
Keilee FANT, et al., Respondents.

No. 19-1025.
February 13, 2020.

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

Petition for a Writ of Certiorari

Ronald A. Norwood, Lewis Rice LLC, 600 Washington Ave., Suite 2500, St. Louis, MO 63101, (314) 444-7759, rnorwood@lewisrice.com.

John M. Reeves, Reeves Law, LLC, 3703 Watson Rd., St. Louis, MO 63109, (314) 775-6985, reeves@reeves-law.org, for petitioner, The City of Ferguson, Missouri.

***i** Questions Presented

1. An interlocutory appeal lies from a denial of sovereign immunity to protect the sovereign's dignitary interests. Under Fed.R.Civ.P. 19, a case may not proceed in the absence of a required-entity sovereign's joinder, but rather must be dismissed. Merely considering the lawsuit's merits without the required-entity sovereign is itself a violation of sovereign immunity. A named, non-sovereign defendant has standing to seek dismissal on these grounds, as a means of vicariously protecting the required-entity sovereign's dignitary interests. The federal appellate courts are divided over whether an interlocutory appeal lies from a refusal to dismiss for failure to join a required-entity sovereign.

To the extent the matter is a purely legal question, does an interlocutory appeal lie from a refusal to dismiss for failure to join a required-entity sovereign?

2. An absent, required-entity sovereign's liability cannot be litigated behind its back. In § 1983 litigation against municipalities, state law determines whether the officials in question acted on behalf of a municipality or the State, based on the functions at issue. If the officials acted on behalf of the State, then any unlawful policy or custom was one of the State, not of the municipality.

If, in a §1983 lawsuit against a municipality, state law vests final policymaking authority for the functions at issue with a non-party state entity, does that render the state entity a required-entity sovereign, thus mandating the case's dismissal under Rule 19?

***ii** Parties to the Proceeding

Petitioner is the City of Ferguson, Missouri, a municipal corporation. Petitioner is the defendant in the district court and was the appellant in the appellate court.

Respondents are individuals Keilee Fant, Roelif Carter, Allison Nelson, Herbert Nelson, Jr., Alfred Morris, Anthony Kimble, Donyale Thomas, Shameika Morris, Daniel Jenkins, and Ronnie Tucker. An additional respondent is John R. Narayan in his capacity as the personal representative of the estate of Tonya DcBerry. Respondents are the plaintiffs in the district court and were the respondents in the appellate court.

***iii Statement of Related proceedings**

Supreme Court of the United States

> *City of Ferguson, Missouri, v. Keilee Fant, et al.,* No. 19A708 (Dec. 26, 2019) (denying application for stay of proceedings in the district court) (Gorsuch, Circuit Justice)

United States Court of Appeals for the Eighth Circuit
Keilee Fant, et al. v. City of Ferguson, Missouri, No. 19-2939 (Oct. 10, 2019) ("*Fant II*") (dismissing the second interlocutory appeal without opinion)

Keilee Fant, et al. v. City of Ferguson, Missouri, No. 18-1472) (Jan. 10, 2019) ("*Fant I*") (dismissing the first interlocutory appeal with opinion)

United States District Court for the Eastern District of Missouri
Keilee Fant, et al. v. The City of Ferguson, No. 4:15-cv-00253-agf (Aug. 6, 2019) (denying Rule 19 motion to dismiss, from which the City took the second interlocutory appeal in *Fant II*)

Keilee Fant, et al. v. The City of Ferguson, No. 4:15-cv-00253-agf (Feb. 13, 2018) (denying sovereign immunity motion to dismiss, from which the City took the first interlocutory appeal in *Fant I*)

***iv** TABLE OF CONTENTS

***vii** TABLE OF AUTHORITIES

Cases

***1 Petition for a Writ of Certiorari**

The City of Ferguson ("the City") respectfully petitions this Court for a writ of certiorari to review the Eighth Circuit's judgment in *Fant II,* without opinion, dismissing the City's second interlocutory appeal in this class action lawsuit.

In this 42 U.S.C. §1983 class action lawsuit, plaintiffs Keilee Fant, et al. (collectively "Motorists"), have sued the City alleging a variety of constitutional violations relating to the resolution of traffic and ordinance violations in the state trial court division within Ferguson overseeing such matters ("Court Division"). Throughout their complaint, Motorists treat the Court Division and the City as one-and-the-same entity, when in fact the Court Division is part of the Missouri state judiciary, rendering it a sovereign entity. Consequently, and despite their protests to the contrary, Motorists are attempting to litigate an absent, required-entity sovereign's liability behind its back, through an indirect attack on its policies and procedures without its participation in the case. *See McMillian v. Monroe Cnty.,* 520 U.S. 781, 784-786 (1997); *Mine Safety App. Co. v. Forrestal,* 326 U.S. 371, 373-375 (1945); *Taylor v. Cnty. of Pima,* 913 F.3d 930, 937 (9th Cir. 2019) (Graber, J., concurring). This creates the potential for injury to the Court Division's interests, even if it would not be formally bound by a judgment, as a required-entity sovereign's policies or customs may not be scrutinized absent its participation in the litigation. *See Forrestal,* 326 U.S. at 373-375; ***2** *Two Shields v. Wilkinson,* 790 F.3d 791, 795-797 (8th Cir. 2015); *Nichols v. Rysavy,* 809 F.2d 1317, 1333 (8th Cir. 1987) (citing *Forrestal,* 326 U.S. at 375).

Where there is potential for injury to an absent, required-entity sovereign's interests, the case may not proceed in its absence, and sovereign immunity mandates the case's dismissal under Rule 19, since immunity precludes the sovereign entity's joinder. *Republic of the Philippines v. Pimentel,* 553 U.S. 851, 864, 866-867 (2008) (citing *Forrestal,* 326 U.S. at 373-375). Considering the case's merits in the sovereign's absence is itself a violation of sovereign immunity. *Id.* at 864. Accordingly, the City moved for dismissal under Rule 19, which the district court denied. The City then sought an interlocutory appeal, which the Eighth Circuit dismissed without opinion for lack of appellate jurisdiction.

It is undisputed that an interlocutory appeal lies from a refusal to dismiss on sovereign immunity grounds. *Puerto Rico Aq. and Sew. Auth. v. Metcalf & Eddy, Inc.,* 506 U.S. 139, 146 (1993). The federal appellate courts are divided over whether an interlocutory appeal lies from a refusal to dismiss for failure to join a required-entity sovereign, with the D.C. Circuit holding that such an appeal is permitted, and the Tenth, Federal, and now Eighth Circuits holding that such an appeal is not permitted. The Ninth Circuit, in turn, is internally divided on the issue. This Court should grant certiorari to resolve this conflict.

***3 Opinions below**

The Eighth Circuit's judgment without opinion dismissing the City's interlocutory appeal in *Fant II* is unreported but reproduced at App.1. The district court's order denying the City's Rule 19 motion to dismiss is unreported but available at 2019 WL 3577529

and reproduced at App.3-10. The Eighth Circuit's opinion dismissing the City's first interlocutory appeal in *Fant I* is available at 913 F.3d 757 and reproduced at App. 11-16. The district court's order denying the City's real-party-in-interest motion to dismiss on sovereign immunity grounds is unreported but available at 2018 WL 10245936 and reproduced at App. 17-22.

Jurisdiction

The Eighth Circuit issued its judgment on October 10, 2019, (App.1), and denied the City's petition for rehearing en banc and panel rehearing on November 15, 2019. (App.23-24). This Court has jurisdiction under 28 U.S.C. §1254(1).

Constitutional and Statutory Provisions Involved

The Eleventh Amendment, 42 U.S.C. §1983, and Fed.R.Civ.P. 19 are reproduced at App.25-30.

Statement of the Case

A. Legal Background

1. *Rule 19, sovereign immunity, and* Monell *litigation.* Dismissal under Rule 19 is not an adjudication on the merits, *Pimentel,* 553 U.S. at 862, ***4** but resolving the issue "may require some preliminary assessment of the merits of certain claims." *Id.* at 868. In this sense, Rule 19 is like qualified immunity: for purposes of allowing an interlocutory appeal, qualified immunity is a matter "separate from the merits … even though a reviewing court must consider the plaintiff's allegations in resolving the immunity issue." *Mitchell v. Forsyth,* 472 U.S. 511, 528-529 (1985) (footnote reference omitted). Just as one cannot determine whether an officer is entitled to qualified immunity without conducting a preliminary assessment of the merits to see if such immunity is in play, so too one cannot determine whether Rule 19 mandates dismissal for failure to join a required-entity sovereign without examining the merits to see if such immunity comes into play in the first place. *See id.* at 529 n.10; *see also Pimentel,* 553 U.S. at 868.

Rule 19 mandates joinder of absent persons under certain conditions, *see* Rule 19(a), and governs what must be done if mandatory joinder is impossible. *See* Rule 19(b). Joinder is mandatory when "in that person's absence, the court cannot accord complete relief among existing parties.…" Rule 19(a)(1)(A). Alternatively, joinder is mandatory when the absent person "claims an interest relating to the subject of the action and is so situated that disposing of the action may … as a practical matter impair or impede that person's ability to protect the interest," or "leave an existing party subject to a substantial risk of incurring double, multiple, or inconsistent obligations because of the interest." Rule 19(a)(1)(B). In either case, the person's joinder must not destroy the court's subject matter jurisdiction. Rule 19(a).

***5** If mandatory joinder is impossible, the court must proceed to Rule 19(b) to "determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed," considering four factors:

(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

(2) the extent to which any prejudice could be lessened or avoided by:

(A) protective provisions in the judgment;

(B) shaping the relief: or

(C) other measures;

(3) whether a judgment rendered in the person's absence would be adequate; and

(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Rule 19(b). These factors are non-exclusive. *Pimentel,* 553 U.S. at 862.

Potential dismissal under Rule 19 arises in a variety of contexts, including where mandatory joinder would destroy complete diversity jurisdiction. *E.g. Provident Trades. Bank & Trust Co. v. Patterson,* 390 U.S. 102 (1968). But it takes on a particularly heightened importance in the context of required, absent-entity sovereign whose immunity renders mandatory joinder impossible. "A case may not proceed where a required-entity sovereign is not amenable to suit," *Pimentel,* 553 U.S. at 867, as "any consideration of the merits in the sovereign's absence is 'itself an infringement on … sovereign immunity.' " ***6** *Fla. Wildlife Fed. Inc. v. U.S. Army Corps. of Eng.,* 859 F.3d 1306, 1318 (11th Cir. 2017) (quoting *Pimentel,* 553 U.S. at 864). As a result, "when a necessary party is immune from suit, there is very little room for balancing of other factors, since [immunity] may be viewed as one of those interests compelling by themselves." *See Wichita and Aff. Tribes of Ok. v. Model,* 788 F.2d 765, 777 n.13 (D.C. Cir. 1986) (joined by Scalia, Circuit Judge) (internal quotation marks omitted).

A non-sovereign entity already a party to the lawsuit may move for dismissal under Rule 19; it is not necessary that the absent sovereign itself intervene or file an amicus brief to raise the matter. "Rule 19 does not say that the absent party must claim an interest in the action itself; it describes the required party as one who claims an interest *relating to the subject of* the action.'" *Fagioli v. Gen. Electric Co.,* 2015 WL 3540848 at *6 (S.D N.Y. June 5, 2015) (quoting Rule 19(a)(1)(B), emphasis in court opinion). Generally, "any party may move to dismiss an action under Rule 19(b)." *Pimentel,* 553 U.S. at 861. This includes private, non-sovereign parties already part of the lawsuit. *See id.* at 857-862; Br. for United States as *amicus curiae* at 17-18, *Pimentel,* No. 06-1204 (U.S. filed Jan. 24, 2008). Indeed, Rule 19's advisory committee foresaw that a named party will seek dismissal under the rule in order "vicariously to protect the absent person against a prejudicial judgment…." Fed.R.Civ.P. 19 advisory committee notes (1966); *see also Patterson,* 390 U.S. at 110 n.4 (1968) (quoting the same). "A court with proper jurisdiction may also consider *sua sponte* the absence of a required person and dismiss for failure to join." *Pimentel,* 553 U.S. at 861.

***7** Enabling the court itself or a non-sovereign party to raise the issue, without the absent sovereign's intervention, upholds the principle that sovereign immunity is the presumption, not the exception, and that its waiver may not be implied. *See Sossamon v. Texas,* 563 U.S. 277, 284 (2011); *Model,* 788 F.2d at 774-776. Mandating an absent-entity sovereign's intervention as a prerequisite to raising the issue would present the sovereign with a "Hobson's choice between waiving its immunity or waiving its right not to have a case proceed without it." *Hodel,* 788 F.2d at 776. So long as the moving, non-sovereign party demonstrates that the absent sovereign entity has an interest in the subject matter at issue in the litigation, and that the absent entity is, in fact, a sovereign, the matter is properly before the court. *See* 7 Wright & Miller, *Fed. Practice & Procedure* §1609 (3d ed. 2019) ("Wright & Miller") ("The burden is on the party raising the defense to show that the absentee is required to be joined under Rule 19.").

An absent-entity sovereign has an interest, even as a non-party, in litigation that indirectly attacks its policies or customs. See *Wilkinson,* 790 F.3d at 796; *Nichols,* 809 F.2d at 1333; *Fla. Wildlife,* 859 F.3d at 1316-1320; *E.E.O.C. v. Peabody West. Coal Co.,* 610 F.3d 1070, 1081-1082 (9th Cir. 2010); *Davis v. U.S.,* 192 F.3d 951, 959 (10th Cir. 1999); *Ricci v. State Bd. of Law Examiners,* 569 F.2d 782, 784 (3d Cir. 1978); *Boles v. Greeneville Hous. Auth.,* 468 F.2d 476, 479 (6th Cir. 1972). This is so even if "any potential determination about the legality of [the absent sovereign's] actions would not … be binding [on the sovereign as a nonparty]," *see Wilkinson,* 790 F.3d at 796, due to Rule 19's ***8** emphasis on whether the litigation will, as *a practical*

matter, impede the absent party's interests. *See* Rule 19(a)(1)(B)(i). "In short the government's liability can not be tried 'behind its back.'" *Forrestal,* 326 U.S. at 375 (quoting *Louisiana v. Garfield,* 211 U.S. 70, 78 (1908)) (cited in *Pimentel,* 553 U.S. at 866-867). Indeed, the Eighth Circuit itself has relied upon *Forrestal's* holding that a sovereign's liability cannot be litigated behind its back as partial justification for its conclusion that an absent-entity sovereign has a dignitary interest in not having its policies or customs indirectly attacked without its participation, even if it would not be formally bound by a judgment. *See Wilkinson,* 790 F.3d at 796 (quoting *Nichols,* 809 F.2d at 1333); *Nichols,* 809 F.2d at 1333 (quoting *Forrestal,* 326 U.S. at 375). This Court, in turn, relied upon *Forrestal* to support its conclusion in *Pimentel* that where "the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign." *Pimentel,* 553 U.S. at 866-867, 867.

A §1983 lawsuit against a municipality or county may amount to an unlawful attempt to litigate an absent-entity sovereign's liability behind its back via an indirect attack on the sovereign's policies or customs. While municipalities and counties, as political subdivisions, are not entitled to sovereign immunity, *Monell v. Dept. of Soc. Serv. of City of N.Y.,* 436 U.S. 658, 662-663 (1978), they "cannot be held liable under §1983 on a *respondeat superior* theory." *Id.* at 691. "Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts may fairly be said to represent official ***9** policy, inflicts the injury that the government as an entity is responsible under §1983." *Id.* at 694. The policy or custom must have arisen in a particular area of the local government's business. *See Jett v. Dallas Ind. School Dist.,* 491 U.S. 701. 737 (1989); *City of St. Louis v. Praprotnik,* 485 U.S. 112, 123 (1988) (plurality opinion). "[W]hether a particular official has final policymaking authority is a question of state law." *Jett,* 491 U.S. at 737 (emphasis and internal quotation marks omitted). This is a purely legal question for the judge to determine, *id.,* and federal courts are "not justified in assuming that … policymaking authority lies somewhere other than where the applicable law puts it." *Praprotnik,* 485 U.S. at 126.

For purposes of final policymaking authority under §1983, an official may act on behalf of a political subdivision in performing one function and on behalf of the State in performing another function. See *McMillian,* 520 U.S. at 784-786; *Eggar v. City of Livingston,* 40 F.3d 312, 315 (9th Cir. 1994) ("Officials can act on behalf of more than one government entity."). Courts may not take a "categorical, 'all or nothing'" approach in determining the entity on whose behalf the official acts. *McMillian,* 520 U.S. at 785. Rather, they must determine which entity - the political subdivision or the State - has policymaking authority "in a particular area, or on a particular issue." See *id. A* federal court's "understanding of the actual function of a governmental official, in a particular area, will necessarily be dependent on the definition of the official's functions under relevant state law." *Id.* at 786. In other words, "[i]f the relevant officials were working on behalf of the State, then any ***10** practice or custom was a *State* practice or custom, not a *municipal* [or county] practice or custom." *Taylor,* 913 F.3d at 937 (Graber, J., concurring) (citing *McMillian,* 520 U.S. 781, emphasis in original).

A situation like *McMillian* is one in which the absent-entity sovereign "claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may … as a practical matter impair or impede the person's ability to protect the interest…." *See* Rule 19(a)(1)(B)(i). As the absent state entity has a right both (1) not to have its policies and customs indirectly attacked absent its participation, and (2) to be free from waiving its immunity and needing to join the suit to defend those policies and customs, allowing the lawsuit to proceed in its absence will, as a practical matter, impede or impair its ability to protect that interest. *See* Rule 19(a)(1)(B)(i). This renders it a required-entity sovereign, mandating dismissal of the entire lawsuit under Rule 19. Merely allowing the case to proceed in its absence violates its sovereign immunity. *See Pimentel,* 553 U.S. at 864, 866-867; *Model,* 788 F.2d at 776 (joined by Scalia, Circuit Judge).

2. Sovereign immunity, dignitary interests, and interlocutory appeals. Federal appellate courts are vested with jurisdiction to review "final decisions of the district courts." 28 U.S.C. §1291. An order refusing to dismiss on sovereign immunity grounds falls within a small class of interlocutory orders that, while not final in the traditional sense, still satisfy §1291's finality requirement and are thus immediately appealable under the "collateral order doctrine." *See* ***11** *Metcalf & Eddy,* 506 U.S. at 143; *Cohen v. Beneficial Ind. Loan Corp.,* 337 U.S. 541, 546 (1949). It is an order "that [is] conclusive, that resolve[s] important issues

completely separate from the merits, and that [is] effectively unreviewable on appeal from a final judgment." *See Microsoft v. Baker,* 137 S.Ct. 1702, 1708 n.3 (2017), (internal quotation marks omitted); *Metcalf & Eddy,* 506 U.S. at 143-145.

Sovereign immunity is a right "too important to be denied review [until final judgment]," *see Metcalf & Eddy,* 506 U.S. at 143, as after final judgment such immunity " '… will have been lost.' " *See id.* (quoting *Cohen,* 506 U.S. at 546). In *Metcalf & Eddy,* this Court held that an interlocutory appeal lies from a refusal to dismiss on sovereign immunity grounds because the Constitution guarantees to the States "an immunity from suit," and "[a]bsent waiver, neither a State nor agencies acting under its control may 'be subject to suit in federal court.'" *Id.* at 144 (quoting *Welch v. Tex. Dept. of Hwy. and Public Trans.,* 483 U.S. 468, 480 (1987) (plurality opinion)). This Court took pains to emphasize that a State's immunity from the burdens of litigation was *not* the primary reason why an interlocutory appeal needed to be available, as this would "misunderstand [ ] the role of the [Eleventh] Amendment in our system of federalism…." *Metcalf & Eddy,* 506 U.S. at 146. The Eleventh "Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity. It thus accords the States the respect owed them as members of the federation." *Id.* (internal citation omitted). Consequently, "[w]hile application of the collateral ***12** order doctrine [in the context of sovereign immunity] is justified *in part* by a concern that States not be unduly burdened by litigation, its *ultimate justification* is the importance of ensuring that the States' *dignitary interests* can be fully vindicated." *Id.* (emphasis added, footnote reference omitted.).

In other words, sovereign immunity's ultimate purpose is to guarantee the Constitution's reservation to the States of "a substantial portion of the Nation's primary sovereignty, together with the *dignity* and essential attributes inhering in that status." *See Alden v. Maine,* 527 U.S. 706, 714 (1999) (emphasis added). In the years following *Metcalf & Eddy,* this Court has consistently reiterated the need for lower courts to ensure the vindication of such dignitary interests. *See, e.g., Franchise Tax Bd. of Cal. v. Hyatt,* 139 S.Ct. 1485, 1497 (2019) ("Each State's equal *dignity* and sovereignty under the Constitution implies certain constitutional limitations on the sovereignty of all its sister States.") (emphasis added, internal quotation marks and brackets omitted); *Fed. Maritime Comm. v. S.C. Ports Auth.,* 535 U.S. 743, 760 (2002) ("The affront to a State's *dignity* does not lessen when an adjudication takes place in an administrative tribunal as opposed to an Article III court.") (emphasis added); *Alden,* 527 U.S. at 714. Indeed, the States' dignitary interests go beyond the literal text of the Eleventh Amendment. *Id.* at 713-714.

By holding that "[a] case may not proceed when a required-entity sovereign is not amenable to suit. [due to] a potential for injury to the interests of the absent sovereign," *Pimentel,* 553 U.S. at 867, this ***13** Court has made clear that the dignitary interests inherent in sovereign immunity reach far beyond a right "not [to] be unduly burdened by litigation…." *Metcalf & Eddy,* 506 U.S. at 146. A sovereign also has a dignitary interest in not having its policies, procedures, or decisions indirectly attacked without its participation, *see ForrestaL* 326 U.S. at 373-375, and the right not to have its liability "tried behind its back." *See id.* at 375 (internal quotation marks omitted); see *also Pimentel,* 553 U.S. at 866-867 (citing *Forrestal,* 326 U.S. at 373-375). In such a situation, the mere "consideration of the merits [is] itself an infringement on … sovereign immunity…." *See Pimentel,* 553 U.S. at 864.

A required-entity sovereign's dignitary interest in not having its liability tried behind its back through an indirect attack on its policies and procedures "is for the most part lost as litigation proceeds past motion practice, such that the denial order will be effectively unreviewable on appeal from a final judgment." *See Metcalf & Eddy,* 506 U.S. at 139. Reversal on appeal from a final judgment cannot effectively vindicate such dignitary interests. On the contrary, such a reversal simply brings to light how, during the entire time the case was before the district court, the required-entity sovereign's policies and customs had been subjected to an unlawful examination for potential liability. The required-entity sovereign had the right to be free from its policies and customs being scrutinized in the first place, regardless of any ruling as to liability on the merits, and yet the district court violated these rights by allowing the case to proceed on the merits. *See Pimentel,* 553 U.S. at 864, 866-867. There is no way for ***14** a reversal of a final judgment to remedy such a violation of its dignitary interests, as by then there would be no way to turn back the clock and bar the district court from even scrutinizing the required-entity sovereign's policies and customs in the first place.

B. Factual and Procedural Background

1. *Motorists' allegations.* Motorists assert seven distinct *Monell* theories against the City under §1983, six of which are at issue here. The allegations "stem from the City's alleged detention of plaintiffs for their inability to pay traffic fines." (App. 12). Their complaint defines the "City of Ferguson" to include the Court Division. (Doc.53, ¶¶ 19, 165). [1] Motorists allege that the City, as a matter of policy or custom, refused to appoint them counsel before the Court Division, wrongly issued and executed bench warrants against them once they failed either to appear for court hearings or to pay fines, and wrongly jailed them after either failing to post bond on such warrants or failing to pay the fines. (App.12-13; Doc.53, ¶166). They allege this despite Missouri law vesting all final policymaking authority for such actions with the Missouri state judiciary, and not with the City.

Throughout their complaint, Motorists treat the Court Division and the City as one-and-the-same entity. They seek monetary damages along with ***15** declaratory and injunctive relief reforming the above alleged practices of the Court Division. (Doc.53, 57-58).

2. *The Court Division.* Under Missouri law, state trial court divisions that oversee the adjudication of municipal ordinance violations - such as the Court Division - are state entities forming part of the Missouri state judiciary. The Court Division is not a part of a city's municipal government. The Eighth Circuit itself has recognized this well-established legal principle, holding that "'[t]he municipal court is a division of the state circuit court [in Missouri]….'" *King v. City of Crestwood, Mo.,* 899 F.3d 643, 649 (8th Cir. 2018) (quoting *Granda v. City of St. Louis,* 472 F.3d 565, 569 (8th Cir. 2007)).

Missouri state law does not vest municipalities with any control over the Court Divisions' judicial and quasi-judicial functions. *See King,* 899 F.3d at 649. Rather, ultimate control over all of such functions rests solely with the Missouri Supreme Court. *See* Mo.S.Ct.R. 37. This control includes the issuance of bench warrants, the setting and revocation of bonds, the imposition of fines following the conviction on an ordinance violation, the imposition of payment plans on such fines, the appointment of counsel, and the timeframe for releasing individuals arrested without a warrant - the very actions challenged by Motorists. *See id.* To that end, the Missouri Supreme Court has issued rules governing the powers of the Court Division and the duties of those officials who execute their orders. *See* Mo.S.Ct.R. 37.

Missouri courts have unequivocally held that municipalities have no authority to alter these rules or ***16** interfere with their administration, and that any attempt to do so is void. *E.g., Gooch v. Spradling,* 523 S.W.2d 861, 865 (Mo. App. K.C.D. 1975) ("[T]he rule [providing for contact with counsel] is not meaningless and cannot be disregarded nor its clear import vitiated by a policy of the Independence, Missouri police department to deny contact with counsel…."). Indeed, while municipalities "may legislate for themselves … 'that does not mean that suits by such cities in the courts of this state are not subject to the rules of practice and procedure promulgated by the Supreme Court under the rule making power conferred on it by Article V, Section 5 [of the] Constitution of Missouri.'" *Smith v. City of St. Louis,* 409 S.W.3d 404, 416 (Mo. App. E.D. 2013) (quoting *Bueche v. Kansas City,* 492 S.W.2d 835, 842 (Mo. 1973)).

Missouri law vests the City with the discretion to decide, via ordinance, how to select a judge for the Court Division, but it may not impose upon the judge a term of less than two years. Mo.Rev.Stat. §479.020.1. The city council elects the judge upon the city manager's nomination for a two-year term. Ferguson, MO, Municipal Code §2-217. But the City has no authority to remove the judge prior to the two-year term's expiration. Rather, such authority rests with a state commission on retirement, removal, and discipline of judges. The City lacks any control over, or say in, the state commission's membership selection. Mo.Const.Art. V, §24; Mo.S.Ct.R. 12. The Missouri Supreme Court, in turn, has final authority over the state commission's rulings. Mo.Const.Art. V, §24; Mo.S.Ct.R. 12.

***17** While the City is charged with funding the Court Division and paying the salary of its personnel, including its judge, Mo.Rev.Stat. §479.060.1, Missouri Supreme Court Operating Rules and Missouri state law provide that in the event of a budget disagreement between the Court Division and the City, the Missouri Supreme Court will have the final say in the matter. Mo.S.Ct.Op.R. 13.01, 13.02; Mo.Rev.Stat. §477.600. Consequently, there is no question that under this Court's well-established precedents the Court Division is a state entity. *See McMillian,* 520 U.S. at 791 ("While the county commission … has no direct control over how the sheriff fulfills his law enforcement duty, the Governor and the attorney general do have this kind of control [under the relevant state law].… The county's payment of the sheriff's salary does not translate into control over him.…").

3. *The City's first interlocutory appeal in Fant I.* The City moved to dismiss on the basis of sovereign immunity. (Doc.150). This motion did not seek dismissal under Rule 19. Rather, it sought dismissal on the ground that because Motorists were seeking relief only the Court Division could provide, the Court Division was the real-party-in-interest, despite not being a formal party to the case, and consequently sovereign immunity barred the lawsuit. (Doc.150, ¶2); *see Lewis v. Clarke,* 137 S.Ct. 1285, 1290 (2017). The City argued that, under the function-based test of *McMillian,* Missouri state law placed final policymaking authority for all of the relevant actions at issue with the Court Division as part of the Missouri state judiciary. Consequently, all of the relevant officials, in carrying out the functions in question, acted ***18** as agents of the State, since the Court Division is a sovereign entity. As the Court Division was the real-party-in-interest, sovereign immunity mandated dismissal. *See Lewis,* 137 S.Ct. at 1290 (ruling that to determine whether the State is the real party in interests, "courts may not simply rely on the characterization of the parties in the complaint, but rather must determine in the first instance whether the remedy sought is truly against the sovereign.").

The district court denied motion. (App.17-22). The City took an interlocutory appeal in *Fant I,* invoking *Metcalf & Eddy* as grounds for doing so. After the completion of briefing, but before oral argument, the City filed with the Eighth Circuit a conditional motion to remand with directions to dismiss under Rule 19, should the Eighth Circuit reject the City's "real-party-in-interest" arguments. (App.31-44). The Eighth Circuit took the conditional motion with the case. (App.45-46).

Following oral argument, the Eighth Circuit published an opinion dismissing the interlocutory appeal for lack of appellate jurisdiction. (App. 11-16). In doing so, it clarified that the Court Division "is not a party to the action," but ruled the Court "lacked jurisdiction on this appeal to address any potential claim of immunity by the municipal court that may arise in future litigation." (App. 13). While recognizing that, under *Metcalf & Eddy,* "[s]overeign immunity protects certain entities against the indignity of suit and the burdens of litigation," the Eighth Circuit nevertheless concluded that "this justification for an exception to the final order rule is inapplicable where the claimed sovereign is not a party to the action." ***19** (App. 13). The court also denied, without comment, the City's conditional motion to remand with instructions to dismiss under Rule 19 (App. 14), and the opinion did not reference either Rule 19 or *Pimentel.*

4. *The City's second interlocutory appeal in Fant II.* Upon remand to the district court, the City filed a motion to dismiss for failure to join the Court Division as a required-entity sovereign under Rule 19. (Doc.223). It did so via a motion for judgment on the pleadings under Fed.R.Civ.P. 12(c). (Doc.223). The City argued that, under both *McMillian* and *Pimentel,* the Court Division was a required-entity sovereign because Motorists were mounting an indirect attack on its policies and procedures in its absence, and it was a violation of its dignitary interests for the litigation to proceed without its participation. Motorists' lawsuit, the City continued, amounted to an attempt to litigate the Court Division's liability behind its back.

The district court denied the motion, holding that the litigation did not potentially implicate the Court Division's policies or customs, and that, consequently, it was not a required party. (App.3-10). The City took a second interlocutory appeal. Prior to briefing, the Eighth Circuit dismissed the appeal without opinion for lack of appellate jurisdiction. (App. 1-2). The panel that dismissed the second interlocutory appeal was the same panel that had previously dismissed the City's appeal in *Fant I.* (App.1-2, 11-12). The Eighth Circuit subsequently denied the City's petition for rehearing en banc or panel rehearing. (App.23-24).

***20** Both the district court and the Eighth Circuit had previously denied the City's motion to stay proceedings pending the appeal in *Fant II.* (Doc.283; App.1). After the Eighth Circuit denied the City's petition for rehearing, the City applied for a stay of proceedings in the district court pending the filing and disposition of this petition for a writ of certiorari with Justice Gorsuch, who denied the application on December 26, 2019. *See No.* 19A708.

Discovery is presently ongoing in the district court, and is set to close on July 31, 2020. (Doc. 290, ¶ 4). The district court has not set a trial date.

Reasons for Granting the Petition

I. The federal appellate courts are divided over whether an interlocutory appeal lies from a refusal to dismiss for failure to join a required-entity sovereign under Rule 19.

In dismissing *Fant II,* the Eighth Circuit has deepened a circuit split and added to the confusion on this critical issue of sovereign immunity, an issue that implicates the fundamental structure of the U.S. Constitution. *See Alden,* 527 U.S. at 728-729. On the one hand, the D.C Circuit holds that an interlocutory appeal is available in such a situation. On the other hand, the Tenth and Federal Circuits hold that no such interlocutory appeal is available. Even worse, the Ninth Circuit is divided with itself on this matter, with one opinion holding an interlocutory appeal is available, and a subsequent opinion holding that no such appeal is available. The split between the different circuits, along with the split within the Ninth ***21** Circuit, warrants this Court's review to bring clarity to the issue. *See Metcalf & Eddy,* 506 U.S. at 142, 142 n.2 (granting certiorari to resolve the circuit split over whether an interlocutory appeal lies from a refusal to dismiss a party on sovereign immunity grounds); *see also Dickinson v. Petroleum Conversion Corp.,* 338 U.S. 507, 508 (1950) (granting certiorari "[b]ecause of [the] intracircuit conflict….").

A. *Circuits holding an interlocutory appeal is available.* While *Pimentel* was an appeal from a final judgment, this Court noted, with apparent approval, that earlier in the litigation the Ninth Circuit had entertained an interlocutory appeal over the district court's refusal to dismiss under Rule 19. *See Pimentel,* 553 U.S. at 859-861; *In re Republic of the Philippines,* 309 F.3d 1143, 1148-1149, 1152-1153 (9th Cir. 2002). Both the named sovereign defendants and the named non-sovereign defendants had sought dismissal under Rule 19 before the district court. *Pimentel,* 553 U.S. at 859. Upon its denial, both the sovereign and nonsovereign defendants took an interlocutory appeal. *See In re Republic,* 309 F.3d at 1148, 1152. The Ninth Circuit concluded it had appellate jurisdiction over the Rule 19 issue, on the basis that the "denial of a motion to dismiss on grounds of … sovereign immunity may result in the parties having to litigate claims over which the court lacks jurisdiction…." *See id.* at 1148. The Ninth Circuit thus characterized a refusal to dismiss for failure to join a required-entity sovereign as a denial of sovereign immunity. *See id.* In doing so, it made no distinction between the sovereign and nonsovereign defendants. *See id.* at 1148, 1152. Examining the Rule 19 issue, the Ninth Circuit reversed and ***22** remanded with instructions that the district court stay further proceedings pending resolution of related litigation in the Philippines, after which it was to examine the issue anew and decide whether the case could proceed in the absence of the sovereign entities. *Id.* at 1152-1153.

Less than two months after this Court issued *Pimentel,* the D.C. Circuit exercised appellate jurisdiction over an interlocutory appeal from a refusal to dismiss for failure to join a required-entity sovereign. *Vann v. Kempthorne,* 534 F.3d 741, 745. (D.C. Cir. 2008). There, the Cherokee Nation, as a nonparty, made a limited intervention into the lawsuit for the sole purpose of seeking the entire case's dismissal under Rule 19. The district court denied the motion, and the Cherokee Nation took an interlocutory appeal. *Id.* The D.C. Circuit concluded it had appellate jurisdiction over the matter, holding, "[t]he Cherokee National appeals the denial of its motion to dismiss on sovereign immunity grounds. Under 28 U.S.C. §1291 and the collateral order doctrine, we may hear an interlocutory appeal from the denial of such a motion." *Id.* It reversed in part and remanded for further proceedings. *Id.* at 756. While the Cherokee Nation was a required-entity sovereign whose immunity barred its joinder, this did not necessarily mandate dismissal under Rule 19. *See id.* Because the plaintiffs sought only declarative and injunctive relief, and no damages,

id. at 744-745, the case could possibly proceed under Rule 19 through the joinder of the relevant tribal officials in their official capacity under the ***23** *Ex parte Young* [2] doctrine without running afoul of sovereign immunity. *Vann,* 534 F.3d at 749-756. Accordingly, the court reversed in part the district court's denial of dismissal under Rule 19 and remanded for further proceedings to "determine whether 'in equity and good conscience' the suit [could] proceed with the Cherokee Nation's officers but without the Cherokee Nation itself," *id.* at 756 (quoting Fed.R.Civ.P. 19(b)), or whether Rule 19 still mandated dismissal of the entire matter. *See id.*

B. *Circuits holding an interlocutory appeal is* ***not*** *available.* Three years after this Court held that a case may not proceed in the absence of a required-entity sovereign, as merely considering the case's merits in such a situation is itself a violation of sovereign immunity, *see Pimentel,* 553 U.S. at 864, 866-867, the Tenth Circuit ruled that an order refusing to dismiss for failure to join a required-entity sovereign does not satisfy the collateral order doctrine, and, consequently, is ineligible for an interlocutory appeal. *Crowe & Dunlevy, P.C. v. Stidham,* 640 F.3d 1141, 1147, 1148-1149 (10th Cir. 2011). Incoming to this conclusion, the Tenth Circuit did not cite, much less reference, *Pimentel.* Rather, it relied on a Second Circuit case holding that no interlocutory appeal lies from a refusal to dismiss for failure to join a *private, non-sovereign entity,* whose joinder would destroy complete diversity ***24** jurisdiction. *Id.* at 1148 (citing *MasterCard Int., Inc. v. Visa Int. Serv. Assoc.,* 471 F.3d 377, 381, 383-384 (2d Cir. 2006)).

The Tenth Circuit also relied upon this Court's opinion in *Patterson,* 390 U.S. 102, but gave no explanation for doing so other than observing how *Patterson* "consider[ed] [a] Rule 19 determination on appeal from [a] final judgment." *Stidham,* 640 F.3d at 1148. Even more troubling, *Patterson,* like *Stidham,* involved an absent *private, non-sovereign* entity whose joinder would have destroyed complete diversity jurisdiction. *Patterson,* 390 U.S. at 108-109. At no time did the Tenth Circuit take into account how, under this Court's precedents, a sovereign entity's dignitary interests must be vindicated at the earliest time possible, and are of such a nature that they are effectively lost if the case proceeds to trial. *See Metcalf & Eddy,* 506 U.S. at 143-146. These interests include the right to have a lawsuit to which it is not a party dismissed as early as possible if the litigation carries with it the potential for harm to its interests. See *Pimentel,* 553 U.S. at 864, 866-867. *Forrestal,* 326 U.S. at 373-375. By contrast, a private, non-sovereign defendant whose joinder would destroy complete diversity jurisdiction has no such dignitary interests.

Two years later, the Ninth Circuit, relying on *Stidham, Mastercard,* and *Patterson* contradicted its earlier opinion of *In re Republic* and held that no interlocutory appeal lies from a refusal to dismiss for failure to join a required-entity sovereign. *Alto v. Black,* 738 F.3d 1111, 1119, 1129-1130 (9th Cir. 2013). Like the Tenth Circuit, the Ninth Circuit made no reference ***25** to *Pimentel,* and failed to consider how a required-entity sovereign's dignitary interests are effectively lost if the case proceeds to trial and those issues are tried behind the sovereign entity's back. Even worse, the Ninth Circuit made no mention of *In re Republic,* apparently overlooking that case's holding that an interlocutory appeal is available from a refusal to dismiss for failure to join a required-entity sovereign, and that a non-sovereign defendant may take such an appeal. *See In re Republic,* 309 F.3d at 1148-1149, 1152.

The same year the Ninth Circuit handed down *Alto,* the Federal Circuit likewise concluded that no interlocutory appeal lies from a refusal to dismiss for failure to join for a required-entity sovereign, although it exercised pendent appellate jurisdiction over the matter in the context of a traditional sovereign immunity interlocutory appeal by a named party. *See Univ. of Utah v. Max-Planck,* 734 F.3d 1315, 1319-1320, 1325-1326 (Fed. Cir. 2013). But like the Ninth and Tenth Circuits before it, the Federal Circuit made no reference to *Pimentel,* and failed to take into account how a required-entity sovereign's dignitary interests are effectively lost if the case proceeds to trial.

C. *This Court should definitively resolve this conflict.* Put simply, had this case arisen in the D.C. Circuit, that court would have concluded it had jurisdiction under the collateral order doctrine over the City's interlocutory appeal of the Rule 19 issue, and would have proceeded to address that issue head-on. Even though the Court Division has not sought limited intervention in this

lawsuit, unlike in *Vann,* this is ***26** irrelevant. While a required-entity sovereign *may* make a limited intervention and seek dismissal of the entire lawsuit under Rule 19 to protect its dignitary interests, its intervention is not *necessary* for purposes of resolving whether the lawsuit can proceed without violating such dignitary interests and accompanying sovereign immunity. Otherwise, there would be no way for a court to address *sua sponte* the matter, as this Court itself has recognized. *See Pimentel,* 553 U.S. at 861. Indeed, *Pimentel* resolved any lingering dispute on this matter by ruling that "[a]s a general matter any party may move to dismiss an action" for failure to join a required-entity sovereign. *See Pimentel,* 553 U.S. at 861. A ruling to the contrary would amount to holding that by failing to intervene in the lawsuit to seek dismissal under Rule 19, the required-entity sovereign had constructively waived its sovereign immunity. But this Court strictly construes sovereign immunity waivers, and such waivers "may not be implied." *Sossamon,* 563 U.S. at 284.

If anything, the potential for impact to the required-entity sovereign's dignitary interests is even greater here than it was in *Vann.* There, the D.C. Circuit agreed that the Cherokee Nation was a required-entity sovereign, but also noted that this did not necessarily mandate the lawsuit's dismissal, as the plaintiffs could still join the Cherokee Nation's officers in their official capacity to the lawsuit as a means of obtaining prospective injunctive relief via the *Ex parte Young* doctrine. *See Vann,* 534 F.3d at 749-756. Here, by contrast. Motorists are seeking prospective injunctive relief for judicial actions, and §1983's plain language forecloses injunctive relief against judicial officers for ***27** actions taken in a judicial capacity, rendering *Ex parte Young* inapplicable. This renders it all the more necessary for an interlocutory appeal to be available in a situation like this, as a means of vindicating the required-entity sovereign's dignitary interest in not having its liability tried behind its back. *See Forrestal,* 326 U.S. at 375.

One would likewise hope that if this had arisen in the Ninth Circuit, that court would have concluded an interlocutory appeal was permissible in light of *In re Republic.* But the Ninth Circuit's subsequent ruling to the contrary on the same issue in *Alto* throws this matter into doubt. Given this intracircuit conflict, along with the clear split between the D.C. Circuit on one side and the Tenth, Federal, and now Eighth Circuits on the other, this Court's intervention is justified to bring order to this confusion and resolve the conflict.

II. The Eighth Circuit's judgment is wrong and contrary to this Court's precedents.

A. *The Eighth Circuit's dismissal contradicts* Pimentel, Metcalf & Eddy, *and* Forrestal. The Eighth Circuit provided no justification for concluding that it lacked appellate jurisdiction in *Fant II.* (App. 1-2). But given the context of how the panel that dismissed *Fant II* was the same panel that had previously dismissed *Fant I* (App.1-2, 11-12), it appears that its judgment dismissing *Fant II* without opinion relied on *Fant I*'s published opinion as a rationale for doing so. While *Fant I* makes no reference to either Rule 19 or *Pimentel,* the City had brought these matters to the panel's attention via its conditional motion to remand with instructions to dismiss under Rule 19. (App.31- ***28** 46). In *Fant I,* the panel denied the City's conditional motion with no explanation. (App. 14). It did, however, note that since the Court Division was not a party to the lawsuit, it lacked appellate jurisdiction "to consider any potential claim of immunity that might arise in future litigation." (App. 13). Consequently, the panel wrote its opinion dismissing *Fant I* with both Rule 19 and *Pimentel* in mind.

In dismissing *Fant I,* the Eighth Circuit characterized *Metcalf & Eddy* as holding that an interlocutory appeal lies under the collateral order doctrine from an order denying sovereign because "[s]overeign immunity protects certain entities from the indignity of suit…." (App. 13 (citing *Metcalf & Eddy,* 506 U.S. at 143-144, 146)). Consequently, according to the Eighth Circuit, "this justification for an exception to the final order rule is inapplicable where the claimed sovereign is not a party to the action." (App. 13).

This contradicts both *Metcalf & Eddy* and *Pimentel,* along with Rule 19 itself. *Metcalf & Eddy* did *not,* as the Eighth Circuit would have it, limit itself to holding that sovereign immunity protects state entities from the "indignity of suit." Rather, this Court

concluded that while allowing an interlocutory appeal was "justified *in part* by a concern that States not be unduly burdened by litigation, its *ultimate justification* is the importance of *ensuring that the States' dignitary interests can be full vindicated.*" *Metcalf & Eddy,* 506 U.S. at 146 (emphasis added, footnote reference omitted). A State's dignitary interests extend far beyond being immune from the burdens of litigation - they also include the right not to have its ***29** liability litigated behind its back through an indirect attack on its policies and customs without its participation in the lawsuit. *See Forrestal,* 326 U.S. at 373-375 (cited favorably in *Pimentel,* 553 U.S. at 866-867); *Wilkinson,* 790 F.3d at 796; *Boles,* 468 F.2d at 479; *Fla. Wildlife,* 859 F.3d at 1316-1320; *Peabody,* 610 F.3d at 1081-1082; *Davis,* 192 F.3d at 959; *Ricci,* 569 F.2d at 784.

The Eighth Circuit's ruling effectively places the above dignitary interests on a lesser level of importance than a sovereign's interest in not having to incur the expense of litigation. This is contrary to *Pimentel,* in which this Court used the strongest language possible to emphasize how important it is for courts to ensure the vindication of an absent, required-entity sovereign's dignitary interests as early in the litigation as possible. "A case may not proceed when a required-entity sovereign is not amenable to suit." *Pimentel,* 553 U.S. at 867. Indeed, "[w]here sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action *must* be ordered where there is a *potential* for injury to the interests of the absent sovereign." *Id.* (emphasis added). This Court relied on *Forrestal's* conclusion that a required-entity sovereign's liability may not be litigated behind its back in coming to this conclusion. *Pimentel,* 553 U.S. at 866-867 (citing *Forrestal,* 326 U.S. at 373-375).

Under the Eighth Circuit's rationale, no interlocutory appeal could be taken from a refusal to dismiss for failure to join a required-entity sovereign even if the sovereign made a limited intervention and ***30** unsuccessfully moved to dismiss the entire case under Rule 19. Having made only a limited intervention, it would still not be subject to the burdens of discovery and litigation as a full party to the lawsuit. According to the Eighth Circuit, a non-party sovereign's dignitary interests would not come into play unless and until it became a full party to the lawsuit. Consequently, it could not take an interlocutory appeal of a refusal to dismiss the lawsuit for failure to join a required-entity sovereign. This would place the non-party sovereign in a Catch-22 situation, forcing it to confront the very "Hobson's choice" the D.C. Circuit foresaw in *Hodel*: The required-entity sovereign would have to choose between either (1) defending its policies or customs from an indirect attack on the merits by fully intervening in the lawsuit, and thereby waiving its sovereign immunity, or (2) sitting powerless on the sidelines as a non-party and watching the case proceed on the merits in its absence, with its policies or customs being attacked without its participation in the case, and thus waiving its right not to have the case proceed in its absence. *See Hodel,* 788 F.2d at 776 (joined by Scalia, Circuit Judge). Even if a non-party sovereign ultimately obtained reversal on appeal from a final judgment based on Rule 19, this result would not change how the district court had violated its sovereign immunity by merely considering the lawsuit's merits in its absence. *See Pimentel,* 553 U.S. at 864. This is to say nothing of the confusion that would have arisen prior to reversal over the extent to which the litigation had impacted its policies or customs, given its status as a non-party in the litigation.

***31** In any event, the required-entity sovereign need not make a limited intervention to put its interests, including its sovereign immunity, into play. A court may either *sua sponte* raise the matter, or a named, non-sovereign defendant may raise the issue as a means of vicariously protecting those interests. See *Pimentel,* 553 U.S. at 861; Fed.R.Civ.P. 19 advisory committee notes (1966). In short, if a district court refuses to dismiss a lawsuit for failure to join a required-entity sovereign, the only way to avoid placing the absent sovereign in the above Catch-22 situation is via an interlocutory appeal of the issue. No other procedural mechanism exists as a means of vindicating an absent-entity sovereign's right not to have its liability tried behind its back.

B. *Under* McMillian, *a sovereign entity's dignitary interests are potentially implicated if it has final policymaking authority in a §1983 suit against a municipality.* It is difficult to imagine a more clear instance of an indirect attack being mounted on an absent-entity sovereign's policies or customs than a §1983 lawsuit against a municipality for actions in which a sovereign entity is vested, as a matter of law, with final policymaking authority. "If the relevant officials were working on behalf of the State, then any practice or custom was a *State* practice or custom, not a *municipal* [or county] practice or custom." *Taylor,* 913 F.3d at 937 (Graber, J., concurring) (citing *McMillian,* 520 U.S. 781, emphasis in original). In *McMillian,* the plaintiff brought suit against a county, arguing that it had violated his constitutional rights pursuant to an unlawful policy or custom through

the execution of the sheriff's law enforcement functions. ***32** *McMillian,* 553 U.S. at 783-785. At the start of the litigation, before discovery commenced, the county moved for dismissal for failure to state a claim, which the district court granted and the Eleventh Circuit affirmed. *McMillian v. Johnson,* 1994 WL 904652 at *5 (M.D. Ala. Feb. 18, 1994); *McMillian,* 520 U.S. at 784. This Court affirmed, holding that while the plaintiff's complaint insisted that the sheriff acted on behalf of the county for purposes of final policymaking authority in carrying out his law enforcement functions, the relevant state law plainly made the sheriff an agent of the State for purposes of final policymaking authority. *McMillian,* 520 U.S. at 784-796. Notably, this Court rejected the plaintiff's legal conclusions that the sheriff acted on behalf of the county under the now-defunct, liberal pleading standard of *Conley v. Gibson,* 355 U.S. 41 (1957), and not the current, more stringent pleading requirements of *Ashcroft v. Iqbal,* 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly,* 550 U.S. 554 (2007).

Had the district court denied the county's motion to dismiss, and wrongly concluded that the sheriff acted on behalf of the county and not the State through a misinterpretation of the relevant state law, the case would have proceeded with discovery and possibly trial. The sheriff's actions as a state agent, along with the State's policies or customs, would have been subject to an indirect attack without the State's participation, in blatant violation of its sovereign immunity under *Pimentel.* The district court's erroneous conclusion that the sheriff acted on behalf of the county, and not the State, would have served as a cover for litigating the State's liability behind its back. A reversal on appeal ***33** from a final judgment would have done nothing more than pull the curtain back and reveal the truth of the matter. But since by then the State's liability would have already been litigated behind its back via an indirect attack on its policies or customs, a reversal could not remedy this violation of its sovereign immunity and dignitary interests. An interlocutory appeal would have to lie from such a refusal to dismiss, on Rule 19 grounds in order to vindicate such interests.

III. This case is the ideal vehicle to resolve these issues.

There is no factual dispute here, as the City sought Rule 19 dismissal via a motion for judgment on the pleadings, accepting as true all of the class action complaint's factual allegations but discarding its legal conclusions. An interlocutory appeal is not available on an otherwise-eligible issue to the extent the issue turns on the resolution of disputed material facts; it only applies to purely legal issues of undisputed allegations. *See Johnson v. Jones,* 515 U.S. 304 (1995). The issues here are purely legal. *See Jett,* 491 U.S. at 737. Missouri state law plainly vests final policymaking authority on all the matters at issue here with the Court Division as part of the Missouri state judiciary, rendering Motorists' lawsuit an attempt to litigate its liability behind its back.

What's more, the City's "real-party-in-interest" argument in *Fant I* has its origins in the very joinder context that resulted in Rule 19 and *Pimentel. See Pimentel,* 553 U.S. at 866-867; *Lewis,* 137 S.Ct. at 1290-1291; *Forrestal,* 326 U.S. at 373-375; *Cunningham v. Macon,* 109 U.S. 446, 456-457 (1883); ***34** *Muirhead v. Mecham,* 427 F.3d 14, 18-19 (1st Cir. 2005); *New Mexico v. Regan,* 745 F.2d 1318, 1320-1321 (10th Cir. 1984). The procedural history of this litigation illustrates how the dignitary interests inherent in sovereign immunity are just as strong under Rule 19 as they are under the "real-party-in-interest" doctrine.

IV. Alternatively this Court should grant certiorari, summarily reverse, and remand to the Eighth Circuit for further proceedings.

As demonstrated above, this case strongly warrants this Court granting certiorari and resolving the questions presented following briefing and oral argument. Nevertheless, should this Court disagree, the City respectfully asks that this Court grant certiorari, summarily vacate *Fant II*'s dismissal without opinion, and remand with instructions to order briefing and further consideration of the issues in light of *Pimentel* and *McMillian.* Such relief is appropriate in light of how neither the Eighth Circuit nor any other case declining to recognize an interlocutory appeal have explained how such a holding can stand in light of *Pimentel.*

***35 Conclusion**

This Court should grant the City's petition for a writ of certiorari.

Respectfully submitted,

John M. Reeves

Counsel of Record

REEVES LAW, LLC

3703 Watson Rd.

St. Louis, MO 63109

(314) 775-6985

reeves@reeves-law.org

Ronald A. Norwood

LEWIS RICE LLC

600 Washington Ave., Suite 2500

St. Louis, MO 63101

(314) 444-7759

rnorwood@lewisrice.com

Counsel for Petitioner The City of Ferguson, Missouri

Footnotes

1 The Eighth Circuit dismissed the *Fant II* interlocutory appeal before either party could file an appendix, and consequently all record citations are to the record in the district court. The term "Doc." refers to the PACER-generated document number, followed by the relevant paragraph or page number.

2 *Ex parte Young,* 209 U.S. 123 (1908). Under this doctrine, a court may grant prospective injunctive relief against a state official sued in an official capacity without violating sovereign immunity. *Virginia Office for Prot. and Advocacy v. Stewart,* 563 U.S. 247, 253-255 (2011).

End of Document