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December 11, 2000

BY FEDERAL EXPRESS
Kenneth J. Murphy
Clerk of Court
United States District Court
Southern District of Ohio
85 Marconi Blvd., Second Floor
Columbus, OH 43215

Re: United States v. City of Columbus, CA No. C2-99-1097 (Judge Holschuh; Magistrate Judge King)

Dear Mr. Murphy,

Enclosed for filing in the above-captioned case are the original and a copy of the Reply brief of Amicus Curiae Members of Congress in the above captioned case. Please give Judge Holschuh the enclosed courtesy copies. Thank you for your assistance,

Samuel R. Bagenstos

cc: BY FAX AND REGULAR MAIL
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Civil No. C2-99-1097
	)	
v.	)	Judge Holschuh
	)	
CITY OF COLUMBUS, OHIO, et al..	)	Magistrate Judge King
	)	
Defendants.	)	
	)	

REPLY BRIEF OF AMICI CURIAE MEMBERS OF CONGRESS
IN SUPPORT OF UNITED STATES'S OBJECTIONS
TO THE MAGISTRATE JUDGE'S REPORT

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REPLY BRIEF OF AMICI CURIAE MEMBERS OF CONGRESS IN SUPPORT OF UNITED STATES'S OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT

INTRODUCTION

Pursuant to this Court's order of November 20, and the Magistrate Judge's orders of September 29 and November 30, amici curiae Members of Congress hereby file this reply to the responses filed by the City of Columbus (the Defendant) and the Fraternal Order of Police, Capital City Lodge No. 9 (the Defendant-Intervenor) to our brief as amici curiae.

In their responses to our opening submission, the Defendant and the Defendant-Intervenor make several core arguments: that the "policy or custom" rule represents the default standard for imposing injunctive liability on a local government entity; that Congress must accordingly expressly disavow that rule if it intends for injunctions to be issued against municipalities on a more lenient standard; and that, indeed, any attempt to make a municipality liable for the actions of its agents, as opposed to for its "own" actions, would be unconstitutional. Each of these arguments is fundamentally flawed.

Although many federal statutes regulate local government entities, the Supreme Court has held that the "policy or custom" rule governs actions for injunctive relief under only *one* of these statutes, 42 U.S.C. § 1983. See *Monell* v. *Dep't of Social Servs.*, 436 U.S. 658 (1978). When it held that the "policy or custom" rule applied in *Monell*, the Court did not rely on any immutable or even presumptive principles governing the liability of municipal corporations in general. Rather, the Court relied entirely on two considerations that relate exclusively to Section 1983: the statute's language limiting liability to a "person who . . . subjects, or causes to be subjected" any citizen to a deprivation of federal rights; and the statute's legislative history, which indicates that the Forty-Second Congress believed (in 1871) that the imposition of *any* affirmative duty on a municipal corporation—even the duty to answer for the constitutional violations of its agents—exceeded Congress's power under the Constitution. These two considerations led the Court to hold that a municipality could be liable under Section 1983 only for acts that amount to municipal "policy" or for "customs" so widespread as effectively to have the force of law.

But neither of the two reasons the Court gave for imposing a "policy or custom" rule in Section 1983 suits applies to the statute at issue in this case, 42 U.S.C. § 14141. First, Section 14141 does not include the "subjects or causes to be subjected" language that is the textual basis for Section 1983's "policy or custom" requirement. Rather, the newer statute uses the familiar phrase "pattern or practice." Under a variety of modern civil rights statutes, courts have read those words to embrace more than unlawful policies, or unlawful customs "so permanent and well settled" as to have "the force of law." *Cf. Monell*, 436 U.S. at 691. Rather, those words extend to misconduct by line-level employees clothed with authority by their employer, so long as that misconduct is

more than "isolated, peculiar, or accidental." *United States* v. *Ironworkers Local 86*, 443 F.2d 544, 552 (9th Cir.), cert. denied, 404 U.S. 984 (1971). Two other features of the statutory text confirm this vicarious liability standard: the language of agency that has elsewhere led the Supreme Court to impose vicarious liability, and the reference to liability against municipalities for "conduct *by law enforcement officers*." 42 U.S.C. § 14141(a) (emphasis added). Congress's decision to omit the limiting language of Section 1983, and instead to use expansive language drawn from other federal statutes, must be given effect in interpreting Section 14141.

The other rationale for the Section 1983 "policy or custom" standard is similarly inapplicable with respect to Section 14141. Unlike the Reconstruction Congress that enacted Section 1983, the Congress that enacted Section 14141 could not plausibly have believed—and showed no sign of believing—that the Constitution limited congressional authority to hold municipalities answerable for the unconstitutional conduct of their agents. The Supreme Court made clear in *Monell* itself that its precedents had long rejected the Forty-Second Congress's belief that congressional power was so limited.

Amazingly, the Defendant-Intervenor seeks to revive the Forty-Second Congress's defunct understanding of the scope of congressional power. Under the Defendant-Intervenor's position, Congress would be *constitutionally* barred from applying to municipalities the same vicarious liability standards that unquestionably apply to private entities "in virtually all areas of the law." *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 434 (1984). There is absolutely no legal basis for such a radical position, which would require the overruling of a two-year-old Supreme Court precedent (*Faragher* v. *City of Boca Raton*, 524 U.S. 775 (1998)).

ARGUMENT

A. The Text of Section 14141 Makes Clear that Congress Did Not Incorporate the "Policy or Custom" Limitation on Municipal Liability Under Section 1983

1. The Defendant and the Defendant-Intervenor contend, and the Magistrate Judge agreed, that the United States cannot obtain injunctive relief against a municipality under 42 U.S.C. § 14141 unless it satisfies the "policy or custom" test that limits municipal liability under 42 U.S.C. § 1983. As we explained in our principal brief (pp. 3-10), that contention ignores crucial differences in the language of the two statutes. The "policy or custom" rule is not, as the Defendant and the Defendant-Intevenor would have it, a general background limitation on municipal liability. It is a standard that the Supreme Court adopted to give meaning to the text of—and effectuate the original intent behind—Section 1983. See *Monell*, 438 U.S. at 691 ("[T]he language of § 1983, read against the background of the same legislative history, compels the conclusion that Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort.").

When it adopted the "policy or custom" test in *Monell*, the Court gave two reasons for doing so. First, the Court looked to the text of Section 1983, which imposes liability on a "person" (including a municipality, see *Monell*, 436 U.S. at 664-690) who "subjects [a citizen], or causes [that citizen] to be subjected," to the deprivation of a federal right. See 42 U.S.C. § 1983. That language, said the Court, "plainly imposes liability on a government that, under color of some official policy, 'causes' an employee to violate another's constitutional rights." *Monell*, 436 U.S. at 692. But, the Court concluded, it "cannot be easily read to impose liability vicariously on governing bodies solely on the basis of the existence of an employer-employee relationship with a

tortfeasor." *Id.*

Second, the Court looked to the intent of the Forty-Second Congress, which in 1871 enacted the statute ultimately codified as Section 1983. The Court concluded that the Forty-Second Congress, in rejecting a proposal known as the "Sherman Amendment," made clear its view—reasonable under Nineteenth Century cases like *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1861)—that Congress could not constitutionally impose on states an obligation to keep the peace. See *Monell*, 436 U.S. at 669-683. Given the Forty-Second Congress's understanding of its own constitutional power as so constrained, the Court found it implausible that the same Congress would have sought to impose respondeat superior liability on municipalities under the statute that became Section 1983. The key sentence in *Monell* is: "[C]reation of a federal law of respondeat superior would have raised all the constitutional problems associated with the obligation to keep the peace, an obligation Congress chose not to impose because it thought imposition of such an obligation unconstitutional." *Id.* at 693. But the *Monell* Court itself observed that the Forty-Second Congress's limited view of its constitutional power "has not survived." *Id.* at 676. Thus, the constitutional analysis in the *Monell* opinion was entirely directed at understanding *the Forty-Second Congress's view* of the Constitution in order to effectuate that earlier Congress's intent.

When it adopted Section 14141 as part of the 1994 Crime Bill, Congress acted over one hundred years after the demise of the unduly narrow understandings of congressional power that prevailed in 1871. See *Puerto Rico v. Branstad*, 483 U.S. 219, 230 (1987) ("*Kentucky v. Dennison* is the product of another time. The conception of the relation between the States and the Federal Government there announced is fundamentally incompatible with more than a century of constitutional development.");

Monell, 436 U.S. at 676 (citing *Ex parte Virginia*, 100 U.S. 339 (1880), as rejecting the Forty-Second Congress's understanding). And, pointedly, Section 14141 does *not* include the "subjects or causes to be subjected" language on which the Court based its adoption of a "policy or custom" requirement in *Monell*. As the Defendant itself contends, this Court must "'assume that Congress is aware of existing law when it passes legislation.'" Def't Resp. 7 (quoting *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 351 (1998)). When Congress includes particular language in one statute, and fails to do so in a closely related statute, courts should generally treat the omission as intentional.[1] In 1994, Members of Congress were clearly aware that Section 1983's "subjects or causes to be subjected" language had been interpreted to incorporate a "policy or custom" requirement. By deciding *not* to include that language in Section 14141 (or to actually refer directly to a "policy or custom"), Congress plainly expressed an intent that the "policy or custom" requirement not apply to the newer statute.

To the contrary, the plain text of Section 14141 makes clear that Congress intended to hold governmental authorities answerable for the acts of their agents, when those acts are sufficiently pervasive or systematic. Three aspects of the statutory text make this point evident. First, the statute authorizes injunctive relief against a government entity whenever the acts of subordinate law enforcement officers aggregate to a "pattern or practice." 42 U.S.C. § 14141(a). Contrary to the argument of the

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[1] See, *e.g.*, *Custis* v. *United States*, 511 U.S. 485, 492 (1994) ("The language of § 851(c) shows that when Congress intended to authorize collateral attacks on prior convictions at the time of sentencing, it knew how to do so. Congress' omission of similar language in § 924(e) indicates that it did not intend to give defendants the right to challenge the validity of prior convictions under this statute."); *cf. Bates* v. *United States*, 522 U.S. 23, 29-30 (1997) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks omitted).

Defendant and the Defendant-Intervenor, the "pattern or practice" standard is significantly less stringent than the "custom" standard applied under Section 1983..

The Supreme Court has not held (*cf.* Def't Resp. 2-4) that the "custom" test can be satisfied by a mere "pattern" of constitutional violations by low-level employees. Rather, it has limited that test to cases in which the "practices of state officials" are "so permanent and well settled" as to have "the force of law." *Monell*, 436 U.S. at 691 (quoting *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 167-168 (1970)); accord *Board of Comm'rs* v. *Brown*, 520 U.S. 397, 404 (1997). Where that stringent requirement cannot be satisfied, the Court has insisted that plaintiffs identify some culpable act or omission of the municipality "itself," *City of Canton* v. *Harris*, 489 U.S. 378, 385 (1989), which act must be proven to be a proximate cause of the constitutional violation committed by the municipality's agents. See *Board of Comm'rs*, 520 U.S. at 404.

By contrast, the "pattern or practice" test that is applied under many modern civil rights statutes does not require the plaintiff to establish a practice so permanent and well settled as to have the force of law. The Supreme Court has held that the "pattern or practice" test "was not intended as a term of art, and the words reflect only their usual meaning"—a meaning that, as we explained in our principal brief (p. 7), reflects a primary concern with the defendant's actual operations rather than its official policies. *Int'l Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 336 n.16 (1977). True, the test is not satisfied by "the mere occurrence of isolated or 'accidental' or sporadic [unlawful] acts." *Id.* at 336. Instead, unlawful acts must constitute "the regular rather than the unusual practice" among the defendants' agents. *Id.* Although that language (and the *Teamsters* Court's reference to "standard operating procedure," *id.*) might suggest a similarity to the "policy or custom" test (*cf.* Def't-Int. Resp. 6), the *Teamsters*

opinion makes clear that the "pattern or practice" test contains no requirement of a custom that amounts to law, nor does that test impose any requirement that the plaintiff identify specific culpable acts or omissions by the defendant entity "itself." Indeed, the *Teamsters* Court cited with approval the Ninth Circuit's decision in *Ironworkers Local 86*, 443 F.2d at 552, which rejected such a stringent construction of "pattern or practice." See *Teamsters*, 431 U.S. at 336 n.16. The *Ironworkers* court concluded instead "that it was the intent of Congress that a 'pattern or practice' be found where the acts of discrimination are not 'isolated, peculiar or accidental' events." 443 F.2d at 552. Quoting one of the key sponsors of the Civil Rights Act of 1964, the *Teamsters* Court endorsed this reading: "[t]he point is that single, insignificant, isolated acts of discrimination by a single business would not justify a finding of a pattern or practice." *Id.* at 336 n.16 (quoting 110 Cong. Rec. 14270 (1964) (statement of Sen. Humphrey)).[2]

Both before and after *Teamsters*, courts interpreting various civil rights statutes have read the "pattern or practice" language in a manner that is entirely incompatible with any requirement that the Attorney General either identify any specific unlawful act or culpable omission of the defendant entity "itself" or establish that actions of low-level agents are so widespread as to have the force of law (as is required under the *Monell* custom or policy test). Thus, in *United States* v. *Balistrieri*, 981 F.2d 916, 929-930 (7th Cir. 1992), the court upheld a "pattern or practice" finding against an apartment owner

[2] The Defendant-Intervenor misreads *Teamsters* when it states that "the Supreme Court indicated that in a pattern or practice case, 'proof of [the employer's] discriminatory motive is critical'" (Def't-Int. Resp. 8 (quoting *Teamsters*, 431 U.S. at 335 n.15) (alteration in Resp.)). The quoted portion of *Teamsters* simply states that in Title VII disparate treatment cases, proof of a discriminatory motive is critical. The Court did *not* state that the *employer's* discriminatory motive—as opposed to the motives of the subordinate employees whose conduct makes up the pattern or practice—is the motive that must be proven (which is why the Defendant Intervenor had to add the words "the employer's" in brackets).

where his rental agent discriminated on five occasions, even though no evidence specifically tied the building owner to the discrimination.[3] And in *United States* v. *Landsdowne Swim Club*, 713 F. Supp. 785 (E.D. Pa. 1989), the court noted the range of factors on which a "pattern or practice" finding might be based: "statistics alone . . . or . . . a cumulation of evidence, including statistics, patterns, practices, general policies, or specific instances of discrimination." *Id.* at 806 (ellipses in original; internal quotation marks omitted). As the *Landsdowne* court explained, a "pattern or practice of discrimination may be found even if a defendant does not discriminate uniformly," and "no minimum number of acts is required." *Id.* at 807. These cases illustrate that the "pattern or practice" test imposes a significantly less onerous burden on the Attorney General than the "policy or custom" test imposes on private plaintiffs.

Two other features of Section 14141's text confirm that the statute follows the typical "pattern or practice" approach, in which entities are held responsible for the acts of their agents. The statute uses the language of agency, defining the class of covered entities to include "any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority." 42 U.S.C. § 14141(a). This language echoes that of Title VII, in which the definitional section defines the term "employer" to mean "a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such a person." 42 U.S.C. § 2000e(b). In *Meritor*

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[3] The Defendant-Intervenor asserts that *Balistrieri* is irrelevant because it involved the application of the Fair Housing Act to the conduct of a private party rather than a municipality (Def't-Int. Resp. 6 n.10). But the text of the Fair Housing Act's "pattern or practice" provision draws no distinction between private and governmental patterns or practices, and the Sixth Circuit has held that the statute applies equally to public and private conduct. See *United States* v. *City of Parma*, 661 F.2d 562, 571-572 (6th Cir. 1981). Indeed, the Defendant-Intervenor itself seems tacitly to acknowledge the applicability of "pattern or practice" cases involving private defendants, given the heavy reliance it places on *Teamsters*—a private-defendant "pattern or practice" case.

Savings Bank F.S.B. v. *Vinson*, 477 U.S. 57 (1986), the Supreme Court interpreted this language as expressing Congress's intent that employers would be liable in accordance with traditional agency principles for the acts of their agents.[4] See *id.* at 70-72; see also *Burlington Indus., Inc.* v. *Ellerth*, 524 U.S. 742, 754 (1998) (reaffirming this aspect of *Meritor*'s analysis); *Faragher*, 524 U.S. at 791-792 (same); *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 283 (1998) (relying in part on absence of similar "any agent" language in Title IX of the Education Amendments of 1972 to justify refusal to make school districts liable for the acts of their agents under that statute). Informed by Title VII's reference to agency, the Court thus rejected the view, analogous to that of the Defendant here, that employers should be held liable only when they "themselves" committed the violation. When it enacted Section 14141 in the wake of *Meritor*, and used language referring to "agents" of governmental entities, Congress plainly evinced a similar intent to impose liability on government entities for the acts of their agents.[5]

Finally, unlike Section 1983, whose "subjects or causes to be subjected" language implies that a municipality cannot be liable unless the municipality *itself* is the wrongdoer, see *Board of Comm'rs*, 520 U.S. at 406-407, Section 14141 makes clear that

[4] The Supreme Court has not yet addressed the question whether the same language indicates that an agent of an employer may be individually liable under Title VII for discrimination that the agent him or herself committed.

[5] Defendant-Intervenor argues that Section 14141's use of the word "or" and its commas indicate that the statute intends for cities to be treated "as distinct from [their] employees." Def't-Int. Resp. 4. The Defendant-Intervenor's argument seems to rest on an erroneous reading of *International Primate Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72, 80 (1991), in which the Court held simply that "when construed in the relevant context" the statutory phrase "[a]ny officer of the United States or any agency thereof" referred to "only one grammatical subject, '[a]ny officer,' which is then modified by a compound prepositional phrase: 'of the United States or [of] any agency thereof.'" *Id.* (alteration in original; parsing 28 U.S.C. § 1442). That is, the Court held that one should interpret statutes in part by looking at the ordinary implications of their grammar and language. But as we develop in the text, it is the Defendant-Intervenor who ignores this instruction.

the only wrongdoing that matters is the wrongdoing of the municipality's law enforcement agents. The municipality need merely "engage" in a "pattern or practice of conduct *by law enforcement officers* . . . that deprives persons of rights." 42 U.S.C. § 14141(a) (emphasis added). The municipality need not itself "subject[]" the victims to the deprivation of rights, nor need it even "cause[]" the victims to be subjected to the deprivation. It need only participate in its officers' deprivation by, for example, clothing those officers with authority and arming them with weapons. See Websters Third New Int'l Dictionary 751 (1993) ("engage" means, *inter alia*, "to take part: PARTICIPATE"). If the statute simply made it unlawful for a municipality to "engage in a pattern or practice of conduct that deprives persons of rights," without specifying that the "conduct" at issue was "conduct by law enforcement officers," it *might* be appropriate to read that language as requiring a more active degree of involvement on the part of the municipality "itself." But Section 14141's text focuses exclusively on the conduct of such officers. By attaching liability to a "pattern or practice of conduct by law enforcement officers," and by eschewing the "subjects or causes to be subjected" language that formed the basis for imposition of the "policy or custom" requirement, Congress plainly intended to avoid the complex search for municipal culpability that is required under Section 1983.

2. The Defendant and the Defendant-Intervenor contend that the "policy or custom" rule is such a firmly established limitation that Congress must expressly disavow that rule if it intends for a statute to impose any broader form of liability on municipalities (Def't Resp. 4-7). As we have explained, however, the language of Section 14141 does makes it "unmistakably clear" (*Vermont Agency of Natural Resources* v. *United States*, 120 S. Ct. 1858, 1870 (2000)) that Congress intended to eschew the "policy or custom" limitation in that statute. Section 14141's text makes this

intent clear in four ways: (1) by omitting the "subjects or causes to be subjected" language that was the source of the "policy or custom" requirement under Section 1983; (2) by including instead the broader language of "pattern or practice"; (3) by its "any agent" language that provides the basis for a form of vicarious liability under Title VII; and (4) by expressly targeting wrongdoing "by law enforcement officers" rather than by the municipality "itself."

In any event, the Defendant and the Defendant-Intervenor are simply incorrect to assert that a congressional decision to adopt a new statute eschewing the "policy or custom" limitation "would require a radical departure from established law" (Def't Resp. 6). Of the many federal statutes that impose liability on municipalities, the Supreme Court has held that the "policy or custom" rule applies to exactly *one* of those statutes: Section 1983.[6] It has done so, as we have explained, for reasons that are entirely specific to the language and the legislative history of that statute. There is no reason why Congress should have faced any extraordinary burden to make its intentions hyper-clear when it chose to adopt a different standard of municipal liability under a *different* statute.

B. The Legislative History Confirms that Congress Did Not Intend to Impose A "Policy or Custom" Limitation on Liability Under Section 14141

As we explained in our principal brief (pp. 10-16), the legislative history confirms

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[6] In *Gebser*, 524 U.S. at 290-291, the Supreme Court adopted a similar standard to govern claims by private parties for damages under Title IX of the Education Amendments of 1972. But the issue confronted in *Gebser* is different in important ways from the issue here. First, Title IX contains no express right of action, a fact that the Court explained gave it "a measure of latitude" in defining the contours of the remedy, *id.* at 284; Section 14141 expressly provides the Attorney General a right of action. Second, *Gebser* involved a claim for damages, a fact the Court found "most critical" in its decision to adopt a narrow standard of municipal liability, *id.* at 283; Section 14141 authorizes "equitable and declaratory relief" only, 42 U.S.C. § 14141(b). Finally, Title IX is Spending Clause legislation, to which the Court has applied especially stringent rules of construction, see *Gebser*, 524 U.S. at 287-288; Section 14141 was enacted pursuant to the Fourteenth Amendment.

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what the statutory text makes clear: Congress did not intend to impose the "policy or custom" limitation on municipal liability under Section 14141. In particular, at the congressional hearing that formed the basis for the introduction of the statute that became Section 14141, a number of the participants cited the restrictive nature of the "policy or custom" rule as a crucial defect in then-existing law. Contrary to the Defendant's argument (Def't Resp. 7), the committee report to the 1991 Crime Bill (which all parties seem to agree is the most authoritative piece of legislative history on Section 14141) expressly refers to this hearing as providing the legislative record for the statute that became Section 14141. See H.R. Rep. No. 242, 102d Cong., 1st. Sess. 136 (1991). The statements of the witnesses at this hearing could not themselves make law, but they do indicate that the omission of the "subjects or causes to be subjected" language in Section 14141 was no accident; that omission reflected a deliberate decision to eschew the "policy or custom" limitation under the new statute. Instead, as we explained in our principal brief (pp. 11-12), the committee report states that the statute was drafted to grant the Attorney General the same pattern or practice authority she has in a variety of other civil rights settings. See H.R. Rep. No. 242, 102d Cong., 1st Sess. 137 (1991).

C. Congress's Decision to Dispense With the "Policy or Custom" Requirement Under Section 14141 Raises No Constitutional Problem

We explained in our opening brief (pp. 16-21) that the Magistrate Judge's invocation of the constitutional-doubt canon was incorrect on two counts. First, Section 14141's text is not "genuinely susceptible" to a construction that incorporates the "policy or custom" limitation on municipal liability (p. 17, quoting *Almendarez-Torres* v. *United States*, 523 U.S. 224, 238 (1998)). The Defendant-Intervenor attempts to concoct an

ambiguity by pointing to isolated sentences in our principal brief and in earlier submissions filed by the Department of Justice in this and another Section 14141 case. The Defendant-Intervenor asserts that these sentences reflect "at least five different standards for municipal liability under § 14141" (Def't-Int. Resp. 13-14). Although we do not agree with the Defendant-Intervenor's characterization of these sentences,[7] that is largely beside the point. For (even if there were indeed constitutional doubt here, which there is not) the Defendant-Intervenor would have to point to more than just some statutory ambiguity to invoke the constitutional doubt canon to justify adoption of a "policy or custom" rule. It must show that the statutory text, fairly read, can bear a "policy or custom" construction. See *Almendarez-Torres*, 523 U.S. at 238. As we have explained in the balance of this brief, Section 14141's text forecloses such a construction, and nothing in the portions of earlier pleadings cited by the Defendant-Intervenor so much as suggests otherwise.

Second, Congress's decision to forego the "policy or custom" standard under Section 14141 raises no serious constitutional question. Under the "pattern or practice" standard, a court cannot issue an injunction against a municipality under Section 14141 unless it finds that law enforcement officers, clothed with power by the municipality, have committed a "pattern or practice" of conduct that deprived persons of their constitutional rights. Such an injunction does nothing more than provide a remedy for a

[7] Only the first of the sentences quoted by the Defendant-Intervenor purports to set forth a standard for municipal liability. The others: identify the proper defendants in a Section 14141 suit (sentence ii, in which it should be clear that the word "involved" modifies only the word "officer"); point to the other statutes that Congress used as a model in enacting Section 14141 (sentence iii); situate Section 14141's "pattern or practice" rule along the spectrum between simple vicarious liability and the Section 1983 "policy or custom" standard (sentence iv); and describe the ultimate *purpose* of the statute, rather than the standard it sets forth (sentence v). All of these sentences are consistent with the interpretation of Section 14141 that we have defended.

set of fully proven constitutional violations. Section 14141 thus is entirely unlike the statutes in *United States* v. *Morrison*, 529 U.S. 598 (2000); *Florida Prepaid Postecondary Ed. Expense Bd.* v. *College Savings Bank*, 527 U.S. 627 (1999); and *City of Boerne* v. *Flores*, 521 U.S. 507 (1997)—all of which sought to provide a remedy in circumstances where the Court believed no constitutional violation, *by anyone*, had been proven.

As we explained in our principal brief (pp. 20-21) the Court has made clear in *City of Boerne* and subsequent cases that Congress has broad discretion to craft remedies for proven constitutional violations. The remedy authorized by Section 14141 fits well within the permissible bounds of that discretion. "[V]icarious liability is imposed in virtually all areas of the law." *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 434 (1984). It is a commonplace that the imposition of liability on a principal for the acts taken by an agent within the scope of employment serves the important remedial functions of assuring compensation and promoting deterrence. See, *e.g.*, Harper, James & Gray, 5 The Law of Torts § 26.1 at 7-8 (2d 1986); *id.* § 26.3 at 14-15; *id.* § 26.6 at 23. Where, as in Section 14141, the principal is held to answer for a "pattern or practice" of its agents' unlawful acts, the imposition of liability serves an especially important remedial function.

The Defendant-Intervenor argues that the Constitution nonetheless bars Congress from imposing liability on a municipality absent "a finding that the municipality rather than its employees violated the Constitution or federal law" (Def't-Int. Resp.16). That argument is truly radical, for it would constitutionally prohibit Congress from applying to municipal corporations the same standards of liability that apply to private corporations "in virtually all areas of the law." *Sony Corp.*, 464 U.S. at 434. Although Congress has

chosen to apply a different standard under Section 1983, it has followed a vicarious liability approach under other statutes that regulate municipalities, most notably Title VII of the Civil Rights Act of 1964. In *Faragher*, 524 U.S. at 802-809, the Supreme Court acting under Title VII imposed vicarious liability on a city for acts of sexual harassment committed by its employees. Defendant-Intervenor's argument would require the overruling of *Faragher*, and it would impose an unprecedented limitation on congressional power in a range of areas of the law.

The Defendant-Intervenor relies on *Monell*'s statement that "creation of a federal law of respondeat superior would have raised all the constitutional problems associated with the obligation to keep the peace, an obligation Congress chose not to impose because it thought imposition of such an obligation unconstitutional" (Def't-Int. Resp. 18 (quoting *Monell*, 436 U.S. at 693)). The Defendant-Intervenor's heroic effort to parse *Monell*'s text notwithstanding (see *id.*), both the quoted sentence and its context make it perfectly clear that respondeat superior liability would have raised "constitutional problems associated with the obligation to keep the peace" *in the minds of members of the Forty-Second Congress only.* See *Monell*, 436 U.S. at 693-694. The Defendant-Intervenor's claimed "serious constitutional issue" was in fact authoritatively decided against it as early as 1880. See *Monell*, 436 U.S. at 676 (citing *Ex parte Virginia*, 100 U.S. 339 (1880)).[8]

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[8] The Defendant-Intervenor also relies on *Milliken* v. *Bradley*, 418 U.S. 717 (1974), in which the Supreme Court held that a federal district court attempting to provide a remedy for racial segregation in Detroit's schools exceeded its remedial authority by merging the school districts of the city and a number of suburbs into a single "super school district." *Id.* at 743. The *Milliken* Court reasoned that "[d]isparate treatment of white and Negro students occurred within the Detroit school system, and not elsewhere, and on this record the remedy must be limited to that system." *Id.* at 746. In the Court's view of *Milliken*, neither the surrounding school districts *nor their agents* had

(continued...)

CONCLUSION

For the reasons stated, this Court should reject the Report and Recommendation of the Magistrate Judge to the extent that it restricts the scope of municipal liability under 42 U.S.C.§ 14141 to cases that satisfy a "policy or custom" test.

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any connection to the constitutional violation; the violation occurred entirely "within the Detroit school system." *Id.* The case thus has absolutely no bearing on the question whether a municipality may be held liable for the acts of its own agents; as the Court held in *Faragher*, a municipality may be held liable for such acts.

CERTIFICATE OF SERVICE

This is to certify that on this eleventh day of December, a copy of the foregoing Reply Brief of Amici Curiae Members of Congress was sent by fax and regular mail to:

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