STATEMENT OF

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BEFORE THE

CONSTITUTION, CIVIL RIGHTS,
AND CIVIL LIBERTIES SUBCOMMITTEE

COMMITTEE ON THE JUDICIARY

U.S. HOUSE OF REPRESENTATIVES

"Examining Civil Rights Litigation Reform Part 2: State and Local Government Employer Liability"

June 9, 2022

Re: Examining Civil Rights Litigation Reform, Part 2: State and Local Government Employer Liability

Dear Chair Cohen, Ranking Member Johnson and Members of the Constitution, Civil Rights, and Civil Liberties Subcommittee:

My name is Bhavani Raveendran, and I represent injured people around the United States as a partner at Romanucci Blandin LLC in Chicago. I concentrate my practice on litigating under the Civil Rights Act, specifically 42 U.S.C. § 1983, representing individuals who have experienced civil rights violations through interactions with police officers, prison officials, other governmental actors, and their municipal employers. I also bring similar claims against municipal actors under state court causes of action, pursuing *respondeat superior* claims against their employers. My specific knowledge in these areas is garnered through thousands of hours of discovery, depositions, research and writing regarding Section 1983, including individual and *Monell* claims.

I received my law degree from American University's Washington College of Law and my undergraduate degree in political science from Case Western Reserve University. During my tenure working in civil rights litigation, I have represented individuals and families in cases regarding the deprivation of a right, severe injury at the hands of state actors, or the loss of a loved one. I have been honored to represent all of my clients and to represent their interests here today, including the families of George Floyd, Botham Jean, and Byron Williams. Thank you for this opportunity to testify to the Subcommittee.

Respondeat superior and *Monell* are two sides of the same coin, providing necessary avenues for litigants who have experienced a violation of their civil rights. That is why today I will ask this Subcommittee to consider legislating to add *respondeat superior* or vicarious liability to this area of litigation, while maintaining the *Monell* doctrine. To understand why this dual approach will prove most effective for litigants and governmental employees, there are several concepts that must first be explained: 1) the tenets of *respondeat superior,* 2) the effect of its current inapplicability to actions under Section 1983 of the Civil Rights Act, 3) the elements and obstacles of *Monell* claims, and 4) the need to protect and incorporate both doctrines.

I. ***Respondeat Superior***

Vicarious liability is a form of indirect liability imposed when one party has a particular relationship with the party committing a tort or injury. In the employment context, this is referred to as *respondeat superior*.

Respondeat superior attaches when an employee, acting within the course and scope of their employment, causes harm to another person, and the employer is held liable for the employee's conduct.

Respondeat superior is considered a fundamental doctrine within the operation of the United States tort system.[1] It serves the purposes of the employee and the injured party. The reasoning is that an employee is acting at the direction of the employer and therefore, the employer should share in legal responsibility for harm caused for its benefit. Further, an employer is generally far more likely to satisfy a judgment than an individual employee and more capable of insuring against liability, including potential actions of employees.[2] Because of this accountability, employers are encouraged to implement safer procedures, enhance training and improve management practices.

A. *Respondeat Superior* and the Use of Force

Respondeat superior often applies where an employee's use of force or deadly force is an expected part of their duties or job description. This is true even where the employee's use of force was unauthorized, as long as the act was not unexpected.[3]

Usually whether or not employment involves or is likely to lead to a use of force is a question of fact and juries are given considerable discretion in finding a connection between employment and the force involved.[4] Uses of force arising from protecting an employer's property, in "excess of zeal in competition" or arising out of a work-related dispute have been considered within an employer's potential liability.[5]Examples of when an employee's position involves or is likely to lead to force, include: an employee tasked with recapturing indebted property; an employee tasked with custody and protection of property; an employee or bouncer hired to restrict the number of visitors in a venue or provide security for a venue; an employee

[1] Restatement (Third) Of Agency § 2.04 (2006).
[2] Restatement (Third) Of Agency § 2.04 (2006).
[3] Restatement (Second) of Agency § 245 ("Use of Force") (1958).
[4] Restatement (Second) of Agency § 245 ("Use of Force") (1958) (Comment a).
[5] Restatement (Second) of Agency § 245 ("Use of Force") (1958) (Comment a).

hired to protect a person; or an employee of a bar or restaurant who stops patrons from entering into a physical altercation.

B. Application by Courts

In determining whether *respondeat superior* applies, courts will consider whether the employment is one that is likely to bring an employee into conflict with others, even if the employee is instructed not to exert force.[6] In some instances, an employer can be responsible for its employee's "use of somewhat more than the appropriate amount of force"[7] or for excessive force where the use of physical force is part of the job.

This important doctrine has demonstrated that it protects individual employees, provides a remedy to subjects injured by employees, and incentivizes the employer to hire the best applicants and train thoroughly. Unfortunately, these important benefits have not been available in Section 1983 claims due to the sidelining of the *respondeat superior* doctrine.

II. ***Monell v. Department of Social Services* and its effect on *respondeat superior.***

Monell v. Department of Social Services, 436 U.S. 658 (1978) is the seminal Supreme Court case providing an avenue to litigate against a municipal entity for a constitutional violation under 42 U.S.C. §1983. *Monell* held that a governmental employer can be sued directly for unconstitutional policies, practices, or customs that were the moving force behind, or caused, a constitutional violation.

A *Monell* claim requires a litigant to demonstrate that his constitutional right has been violated and that an official custom or policy of the municipal entity caused that deprivation. [8] To show a widespread practice or custom under *Monell*, the litigant must prove and find facts "tending to show that the city policymakers were aware of the behavior of officers, or that the activity was so persistent and widespread that city policymakers should have known about the behavior."[9] In practice, this can be a difficult task for the majority of cases where a constitutional deprivation occurs.

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[6] Restatement (Second) of Agency § 245 ("Use of Force") (1958) (Comment a).
[7] Restatement (Second) of Agency § 245 ("Use of Force") (1958) (Comment a).
[8] *Bohannon v. City of Milwaukee*, 998 F. Supp. 2d 736, 743 (E.D. Wis. Feb. 11, 2014).
[9] *Id.*

Monell is, however, an invaluable tool for Section 1983 claims where some of the following scenarios are present:

(1) A municipal official with final authority to create municipal policy without action by the highest municipal legislative body, where the policy itself is unconstitutional. For example, a sheriff issues a policy that officers can discharge a firearm at an individual who is running from an officer, who is only suspected of a nonviolent misdemeanor offense and does not pose a threat of death or great bodily harm.
(2) A single determination of policy by an official with final authority, even where the decision is not a general rule. For example, a sheriff tells his deputies to break into a business and arrest an employee without probable cause.
(3) A municipality has exhibited gross disregard for the possibility that federal rights will be violated by failing to train employees adequately or perform adequate background checks on applicants for municipal employment. For example, a police department has adequate use of force training on paper, but officers testify that they have been trained in the field to shoot merely because they cannot see a person's hands.
(4) A constitutional violation closely related to a municipal policy.[10] For example, a longstanding policy that allows for neck restraints on prone subjects, that officers are using to engage in excessive deadly force.
(5) A constitutional violation that a municipality is aware of that cannot be directly connected to an individual employee's conduct. For example, overwhelming heat in a prison due to building conditions causing unconstitutional harm to inmates.

Despite the complicated language, *Monell* claims have been an unparalleled tool for litigants in certain cases. The primary downside? *Monell* determined that *respondeat superior* did not apply to claims brought under Section 1983. This determination was made despite longstanding common law recognizing *respondeat superior* and its application to municipal corporations for the wrongful acts of police officers.[11]

A. **The use of the *Monell* doctrine instead of *respondeat superior* affects litigants, officers, and governmental employers.**

[10] Jack M. Beerman, *Municipal Liability for Constitutional Torts*, 48 DPLLR 627, 653-54 (Spring 1999).
[11] *City of Okla. City v. Tuttle*, 471 U.S. 808, 835-36 (1985) (Stevens, J., dissenting).

The absence of *respondeat superior* undermines the purpose of Section 1983 which strives to provide a remedy for the violation of a constitutional right.
Claimants who cannot meet the burdens of *Monell* do not have a realistic remedy where state law or collective bargaining agreements do not provide for indemnification, as most governmental actors do not insure their own work or have sufficient assets to satisfy a judgment.

Finding representation can also be difficult for litigants, as attorneys are less likely to pursue cases against individual officers who are judgment proof. Congress passed legislation, 42 U.S.C. 1988, meant to incentivize representation in civil rights matters by providing for attorneys' fees and costs. This intent is undermined where officers are not indemnified. Failure to pursue claims for these reasons perpetuates lack of accountability and remedial action. Ultimately, this increases the likelihood of repeated constitutional deprivations that may give rise to *Monell* claims. In this way, the absence of vicarious liability fails to hold individual bad actors accountable, provide a meaningful remedy to individuals who suffer deprivations, or eliminate long-term exposure for municipalities.

Monell's stripping of *respondeat superior* has also had an unintended consequence of leaving governmental employees without guaranteed protection for claims arising from constitutional violations connected to their employment.

Another consequence of substituting *Monell* in the place of vicarious liability, is that municipal employers do not have the same incentives as private employers to avoid situations that would submit them to liability. Governmental employers have reduced incentives to hire competent and qualified individuals; to properly train new recruits and existing employees; to properly supervise employees; and to assure that employees are properly trained on the law and policies of the employer.[12] Municipal entities have also avoided liability under *Monell* by issuing policy statements that are consistent with the Constitution but then overlooking the misapplication or failure to train on the policies.

[12] https://www.nlg-npap.org/employer-liability/#:~:text=This%20legal%20doctrine%20is%20called,employers%20to%20take%20care%20to

B. *Monell* creates a barrier to a remedy for litigants, in certain claims.

The elements of *Monell* and its high standards of proof create a significant burden for injured subjects, that does not provide a realistic substitute for *respondeat superior* in many cases.

With any *Monell* claim, the difficulty begins before the initial complaint is even filed. Potential plaintiffs must seek extensive investigative materials through Freedom of Information Act (FOIA) requests, attempting to contact witnesses, and creative guesswork. Specific records that would provide critical details to a *Monell* claim could include personnel records of an involved officer, statistics of prior uses of force within a police department, details of prior similar incidents, and information regarding individuals harmed in a similar manner. Much of the required information or materials could be subject to confidentiality orders, require *in camera* inspection by a judicial officer to be released, require a subpoena to obtain, or could be received in a heavily redacted format, greatly undermining a potential plaintiff's claim at the outset.

Due to this inability to gather information pre-suit, *Monell* claims can be dismissed shortly after filing, due to "inadequate" allegations. To put it simply, plaintiffs do not have enough information at the outset to show a court they could ever prove their case, and may be denied the opportunity to even investigate claims on "proportionality" grounds. Often, courts will indicate to the filing party that *Monell* allegations are vague, conclusory, nonspecific, broad, and do not adequately plead a pattern of conduct or specific policy, as there are very specific pleading standards created by Supreme Court precedent and the Civil Rules.

If parties can get to the discovery process, the burden continues. *Monell* discovery can be significantly more extensive than an individual claim against a single municipal actor, especially when numerous prior incidents or personnel records are required to indicate a pattern in the department or the involved officers. Attorneys representing clients with *Monell* claims can face 1000s of pages and hours of attorney work time collecting, reviewing and processing these materials – limiting the types of firms and counsel that can represent clients in these claims. It is also common for counsel representing the governmental entity defending a *Monell* claim to avoid extensive production of documents or materials through tactics such as protective orders, failing to provide documents that are not specifically requested by name despite their relevance, failing to provide materials until witnesses in

depositions list them, seeking *in camera* inspection of materials before turning them over, or requiring motions to compel to provide the full set of documentation.

Taking depositions in a *Monell* case can be far more difficult than a Section 1983 matter against an individual defendant. Rule 30 of the Federal Rules of Civil Procedure limits potential depositions to 10 per party, which is only sufficient in a small number of Section 1983 claims. Counsel representing an injured party often struggle to prove a repeated practice or custom or training deficiency with this arbitrary limit to depositions in incredibly complex matters. In situations where opposing counsel objects to additional depositions or a court will not allow the depositions requested, plaintiffs will have no additional recourse to gather information that is solely in the control of the defendant municipal entities.

When proving the existence of an unconstitutional custom or policy, plaintiffs are required to show a custom "so persistent and widespread as to practically have the force of law."[13] Plaintiffs also have the additional burden of demonstrating that leaders of the police department were aware of and consciously disregarded the risk that officers would violate civil rights.[14] The burdens imposed by *Monell*'s very language require extensive discovery not always made available or that is in the control of government-controlled witnesses. These demanding discovery issues impose burdens on municipalities, individuals and greatly increase the role of the judiciary in discovery practice.

At the end of discovery, plaintiffs pursuing a *Monell* claim will likely face a motion for summary judgment. Counsel defending a *Monell* claim have the opportunity to argue that the plaintiff cannot demonstrate evidence that the required elements of *Monell* have been met. A plaintiff's ability to successfully respond sometimes hinges, often entirely, on their success at garnering the cooperation of defendants during discovery and/or the rulings of the court to ensure proper access to documentation and deposition testimony.

Even in cases where a court has found there is some evidence of an unconstitutional policy, custom or practice, a court can still find that the policy or custom was not the "moving force" that caused the injury. These issues are further exacerbated by the differing standards applied at every stage of the case in the various Federal Circuits.

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[13] *Connick v. Thompson*, 563 U.S. 51, 61 (2011).

[14] https://www.nlg-npap.org/employer-liability/#:~:text=This%20legal%20doctrine%20is%20called,employers%20to%20take%20care%20to

The numerous obstacles in the path of successfully proving a *Monell* claim become a deterrent to litigants, attorneys, and the public in holding municipal entities accountable for failing to be proactive in policy, discipline, supervision and training. *Monell* is not, therefore, an adequate substitute for *respondeat superior*. Instead, claims persist against individuals, serving only as a deterrent for quality applicants, rather than creating an incentive for municipalities to make internal improvements, reduce claims and protect their employees.

C. **Municipalities and Indemnification**

Currently, federal law does not require municipal entities to indemnify their police officers. Where it is done, it is likely compulsory through state law or collective bargaining agreements. Municipalities often find the resources to pay indemnity costs, much like other employers, through financial reserves or insurance, which is widely available. Unlike legal and medical professionals who carry malpractice insurance, officers are usually not in a position to insure themselves for actions taken on the job.

Indemnification, though common in many cases, is not a guarantee in Section 1983 litigation. There are numerous jurisdictions where state law and collective bargaining do not require indemnifying officers. In those circumstances, individual officer defendants and injured plaintiffs alike are at the mercy of municipalities deciding whether or not to cover their officers. Indemnification can be exceedingly difficult to predict in jurisdictions without laws requiring coverage, where there is no police union or fraternal order, where the municipality does not have the budget or is not adequately insured, where there is a criminal prosecution of the officer, where the municipality indemnifies for legal representation but not for potential judgments, or where a municipality determines indemnification on a case-by-case basis.

These negative consequences become cyclic, as quality employment candidates, particularly in the law enforcement arena, become more difficult to recruit due to the real or perceived personal exposure these candidates face – without indemnification by the municipal employer. *Respondeat superior* would address many of these issues by requiring municipalities to cover their employees where applicable.

III. ***Respondeat superior* and *Monell* serve different but equally essential purposes.**

At this time, *Monell* provides the only mechanism which litigants can use to include a municipal entity in a federal civil rights suit and sometimes the only vehicle to insure a viable remedy to their claims. This increases the overuse of *Monell* claims, due to litigants seeking ways to find coverage, having no access to a more logical vicarious liability doctrine. Conceptually, requiring municipal liability to be seeded entirely in *Monell* is equivalent to requiring anyone injured by a dangerous product to resort to bringing a class action, rather than an individual products liability claim. Nevertheless, due to the absence of *respondent superior* claims in the Section 1983 arena, litigants are forced to attempt to prove policy and custom claims in far too many cases – resulting in wasted judicial, municipal and individual resources.

The availability of the application of *respondeat superior* to Section1983 claims would considerably lessen the number of *Monell* claims, saving resources for all parties. Litigants would be able to choose whether vicarious liability or *Monell* was better suited for the facts of their specific case.

Each case presents the possibility that *Monell* could be an essential claim or that *respondeat superior* would be more applicable. For example, in a matter involving a prison official who sexually assaults a detainee or inmate violating their 8th Amendment rights, *respondeat superior* is unlikely to apply as it is beyond the scope of employment as a prison guard. However, if the prison had previously overlooked known repeated assaults of inmates and failed to train, discipline or terminate its employees *Monell* would be well-suited.

On the other hand, the assessment would differ in a scenario where a well-trained officer without prior complaints for excessive force discharges a firearm at an unarmed subject during a traffic stop when the subject discloses there is a legal firearm in the vehicle. If the officer acted in violation of the policies, customs and training of the police department a *Monell* claim would not be applicable but *respondeat superior* would likely apply as it was within the scope of employment.

Legislation to include *respondeat superior* in civil rights claims would have many other benefits:

- Vicarious liability would apply to all municipal actors, not just police officers, ensuring additional protection for governmental employees.
- Vicarious liability would add an additional layer of protection for officers' privacy by allowing summons for lawsuits to be served on the municipal employer instead of the personal home of an officer and would not publicize officers' personal addresses and finances.

- Vicarious liability would allow for litigants to bring claims against officers as agents of a municipal employer, sometimes avoiding the need to personally name officers as defendants, thus reducing attorney involvement and potential conflicts of interest.
- The availability of *respondeat superior* would likely lessen the number of lawsuits and allow them to resolve faster as municipalities would be immediately involved.
- Officers would potentially feel supported by their employers, decreasing understaffing, underpaying officers, burnout, and stress or anxiety related to litigation.
- Municipalities would have an added incentive to train officers, train on the meaning of policies, and root out problematic practices.
- Municipalities would have added incentive to terminate and not promote problem officers.
- *Respondeat superior* would reduce a municipality's costs because attorneys' fees and costs paid out after a plaintiff's verdict are more onerous with a *Monell* claim, as it requires more attorney hours and expert fees.
- In jurisdictions where officers are not indemnified, there would be protection for officers and an available remedy to litigants, allowing for civil rights claims to be litigated wherever they occur.

Respondeat superior and *Monell* represent two essential modes of litigation to uphold the purpose of Section 1983, with the benefit of providing a remedy to litigants facing unique circumstances and adding a level of protection to governmental employees enjoyed by employees of the private sector in virtually every context.

Conclusion

In conclusion, the Judiciary Committee and this Honorable subcommittee should consider legislation that would codify *respondeat superior* while preserving *Monell* to be utilized when the appropriate circumstances arise.