No. 24-1509

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

AMBER LAVIGNE,

Plaintiff-Appellant,

v.

GREAT SALT BAY COMMUNITY SCHOOL BOARD, SAMUEL ROY, in his official capacity as a social worker at the Great Salt Bay Community School; KIM SCHAFF, in her official capacity as the Principal at the Great Salt Bay Community School; LYNSEY JOHNSTON, in her official capacity as the Superintendent of Schools for Central Lincoln County School System; JESSICA BERK, in her official capacity as a social worker at the Great Salt Bay Community School,

Defendants - Appellees.

On Appeal from the United States District Court
for the District of Maine
The Honorable Jon D. Levy
Case No. 2:23-cv-00158-JDL

BRIEF OF CHILD & PARENTAL RIGHTS CAMPAIGN, INC. AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae Child & Parental Rights Campaign ("CPRC") is a nonprofit organization, does not have a parent corporation, and does not issue stock. CPRC is not aware of any publicly owned corporation, not a party to the appeal, with a financial interest in the outcome of this case.

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INTEREST OF AMICUS CURIAE [1]

Child & Parental Rights Campaign (CPRC) is a nonprofit, public-interest law firm that represents parents like Plaintiff across the country in challenging school district actions that threaten parental rights, including, as is true of the district here, policies, practices, and customs that intentionally withhold from parents vital information regarding their children's well-being. In particular, CPRC represents parents challenging school districts which have concealed from parents that their children are being treated as something other than their biological sex at school, including the use of alternate names and pronouns and permitted use of opposite sex privacy facilities. *See, e.g., Blair v. Appomattox County School District,* WD of Virginia Case No.6:23-cv-00047; *Foote v. Ludlow School Committee,* First Circuit Court of Appeals Case No. 23-1069; *Landerer v. Dover Area School District,* MD of PA Case No. 1:24-cv-00566; *Littlejohn v. Leon County School Board, Eleventh Circuit Court of Appeals* Case No. 23-10385; *Perez v. Broskie,* MD FL Case No. 3:22-cv-

[1] No counsel for a party authored this brief in whole or in part; no one, other than amicus and its counsel, made a monetary contribution for its preparation or submission; and all parties have consented to its filing.

83, and *Willey v. Sweetwater County School District #1,* WY DC Case No. 23-cv-69.

In these cases, CPRC has faced challenges to pleadings nearly identical to those faced by Plaintiff here. CPRC has observed a disturbing trend in district courts applying the standards for municipal liability described in *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978), and the pleading standards of *Bell Atlantic v. Twombly,* 550 U.S. 544 (2007) and *Ashcroft v. Iqbal,* 556 U.S. 662 (2009), to create an impenetrable labyrinth for plaintiffs seeking to use 42 U.S.C. §1983 to vindicate their constitutional rights. Parents such as Plaintiff here encounter secret school district policies that deprive them of their fundamental parental rights. When they discover the secret policies and bring a Section 1983 claim for the violation of their rights, they are told that they cannot proceed because they have not provided sufficient factual details to state a plausible claim. Parents cannot provide factual details that are in the possession of Defendants without discovery and cannot engage in discovery unless they survive the motion to dismiss.

Parents are left with no remedy for the violation of their constitutional rights, undermining the *raison d'etre* for Section 1983.[2]

CPRC respectfully submits this amicus curiae brief detailing the impossible dilemma plaintiffs like Ms. Lavigne face when trying to use Section 1983 for its intended purpose. District courts have misinterpreted *Monell* to create the very *de facto* sovereign immunity for municipalities that *Monell* rejected. Courts have erected virtually unscalable obstacles in the form of plausibility standards exceeding the requirements of *Iqbal* and impermissible heightened pleading standards. Finally, district courts make it impossible for plaintiffs to remedy the purported pleading insufficiencies by refusing to grant plaintiffs the appropriate latitude to obtain the information before shutting the courthouse door in their faces.

Parents like Ms. Lavigne should not be denied their opportunity to vindicate their constitutional rights under the vehicle provided by Congress. CPRC respectfully requests that this Court reverse the district court's order.

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[2] *See* Fred Smith, *Local Sovereign Immunity,* 116 COLUMBIA L. REV. 409, 464 (2016) (citing Rep. Samuel Shellabarger, the author of Section 1983).

LEGAL ARGUMENT

I. The District Court's Decision Exemplifies How *Monell* Has Been Used To Create *De Facto* Sovereign Immunity For Municipalities.

"[A] municipality has no 'discretion' to violate the Federal Constitution." *Owen v. City of Independence*, 445 U.S. 622, 649 (1980). Those words penned by Justice Brennan in rejecting sovereign immunity for local government entities under Section 1983 ring hollow in decisions such as the district court's here, which reflect a *de facto* adoption of local sovereign immunity.[3]

In *Owen,* the Supreme Court determined that passage of Section 1983 abrogated common law immunity for municipalities. "By including municipalities within the class of 'persons' subject to liability for violations of the Federal Constitution and laws, Congress . . .abolished whatever vestige of the State's sovereign immunity the municipality possessed." 445 U.S. at 647-48. The *Owen* decision followed *Mount Healthy City School District Board of Education v. Doyle,* in which the Court said, "the record before us indicates that a local school board such as petitioner is more like a county or city than it is like an arm of the

[3] *Id.* at 416.

State. We, therefore, hold that it was not entitled to assert any Eleventh Amendment immunity from suit in the federal courts." 429 U.S. 274, 280–81 (1977). Despite the Court's rejection of municipal immunity, "cities [and school districts] are nonetheless generally protected from federal constitutional suits due to subsequent cases interpreting and applying *Monell v. Department of Social Services*."[4] "As a functional matter, the municipal causation requirement [imposed by *Monell*] and the individual immunities that local officers receive [qualified immunity] render specific classes of governmental defendants insusceptible to suit, even when there is a determination that a government's agent has violated constitutional rights."[5]

That *de* facto municipal immunity has developed as the result of *Monell*'s requirement that plaintiffs must prove that a local government's policy or custom caused a constitutional violation, 436 U.S. at 690, and subsequent cases narrowly interpreting "policy" and "policymakers."[6]

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4 *Id.* at 430.

5 *Id.* at 416.

6 *Id.* at 413-14. *See also,* David Jacks Achtenberg, *Taking History Seriously: Municipal Liability Under 42 U.S.C. § 1983 And The Debate Over Respondeat Superior,* 73 FORDHAM L.R. 2183, 2190-91 (2005), citing *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989) and *City of St. Louis v. Praprotnik*, 485 U.S. 112, 130 (1988).

The municipal causation requirement as it has evolved over time has proven costly to litigants seeking justice for civil rights violations. It has been more than 30 years since the Supreme Court found a municipal policy unconstitutional.[7] Equally restrictive rulings from lower courts, such as the ruling here, mean that local governments are often "inoculated from accountability, including for conduct that would render them liable for violations of state law."[8] When individual defendants are granted qualified immunity, the causation requirement often leaves those whose constitutional rights have been violated with "no defendant to sue at all."[9]

> Regularly leaving plaintiffs without this remedy undermines representative government. Apposite are the words of Representative Samuel Shellabarger, the author of § 1983, who shepherded the provision through the House of Representatives: "This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation." Cong. Globe, 42d Cong., 1st Sess. 68 app. (1871). The frequency with which plaintiffs are left without remedy for constitutional violations raises questions about

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7 *Smith, supra* n. 2 at 414, citing *Pembaur v. City of Cincinnati*, 475 U.S. 469, 485 (1986).

8 *Id.* at 414-15.

9 *Id.*

> whether this legislative promise is adequately fulfilled today.[10]

Congress enacted Section 1983 to, *inter alia,* provide a remedy for violations of federal law where such remedies "though adequate in theory, [were] not available in practice."[11] Inoculating municipalities from suit and leaving plaintiffs without remedy for violation of their constitutional rights, as is true here if the district court's order is not reversed, renders Section 1983 virtually meaningless as a vehicle for vindication of civil rights violations.

II. Plaintiffs' Efforts To Hold Municipalities Accountable Are Further Hampered By Lower Courts' Misapplication Of Plausibility Pleading Standards To *Monell* Claims.

As well as having to overcome *de facto* municipal immunity, Plaintiffs seeking to hold school districts liable for constitutional violations must also satisfy district courts' interpretations of the *Twombly* and *Iqbal* pleading standards. As exemplified by the district court's order here, application of those standards make it "particularly challenging for plaintiffs to survive motions to dismiss; in many cases, plaintiffs cannot find the type of evidence that would support their

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10 *Id.* at 464.

11 *Id.* at 474-75.

Monell claims without formal discovery."[12] In *Twombly*, the Supreme Court ruled that plaintiffs must allege a "plausible" entitlement to relief in their complaint to withstand a motion to dismiss. 550 U.S. at 545. Two years later in *Iqbal*, the Court clarified that a "plausible" complaint is one filled with factual allegations—legal conclusions will not suffice. 556 U.S. at 678. The circumstances in *Iqbal* foreshadowed the difficulties the ruling would create for plaintiffs like Ms. Lavigne. The Supreme Court dismissed Iqbal's claim against the attorney general and FBI director because Iqbal could not prove that the defendants had intentionally promulgated a discriminatory policy to detain Arab and/or Muslim men. *Id.* at 683. As one scholar noted, "it was near impossible for Iqbal to have evidence of Ashcroft and Mueller's intent before discovery—indeed, that is the very type of evidence that can only possibly be unearthed during discovery."[13]

Plaintiffs like Ms. Lavigne pleading a *Monell* claim after *Iqbal* often face the same Catch-22 dilemma. A plaintiff might have access to enough facts to survive *Monell* if she is challenging a policy as unconstitutional

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[12] Joanna C. Schwartz, *Municipal Immunity*, 109 VIRGINIA L. REV., 1181, 1187 (October 2023)

[13] *Id.* at 1215.

on its face or questioning obvious misconduct by a final policymaker.[14] However, if a plaintiff is alleging that there is an unwritten policy (such as Defendants' Withholding Policy), custom or failure to train, facts necessary to support the claim, *e.g.*, proof of past misconduct, training records or investigation files, may only be available through discovery.[15] In that case, unless the trial court acknowledges the problem and permits at least preliminary discovery, the plaintiff will be foreclosed from bringing her claim against the municipality. [16]

In *Haley v. City of Boston* , this Court acknowledged the challenges facing a plaintiff trying to state a claim for municipal liability under *Monell* and permitted the claim to proceed. 657 F.3d 39, 52 (1st Cir. 2011). The city argued that plaintiff's allegations of a police department policy of withholding evidence from criminal defendants and failure to train staff that the policy was unconstitutional failed to meet the plausibility standards of *Twombly* and *Iqbal*. *Id.* at 52. This Court disagreed, saying that the argument "elevates hope over reason." *Id.* Citing *Iqbal*'s statement that "evaluating the plausibility of a pleaded

14 *Id.*
15 *Id.*
16 *Id.*

scenario is a 'context-specific task that requires the reviewing court to draw on its judicial experience and common sense,'" this Court found that "the municipal liability claims pleaded by Haley step past the line of possibility into the realm of plausibility." *Id.* at 53. "Although couched in general terms, Haley's allegations contain sufficient factual content to survive a motion to dismiss and open a window for pretrial discovery." *Id.*

Some district courts have similarly recognized that the challenges facing plaintiffs trying to plead municipal liability mean that motions to dismiss are premature.

> For example, a judge in the Eastern District of Pennsylvania denied defendant's motion to dismiss plaintiff's failure-to-train claim, observing that, in order to prevail on that claim, the plaintiff would need to "prove that the Township had a pattern of engaging in constitutional violations such as those present in this case" and that the plaintiff needed "a sufficient period of discovery to adduce this evidence." The court therefore concluded that the motion to dismiss was premature.[17]

[17] *Id.* at 1215, citing *Keahey v. Bethel Township*, No. 11-cv-07210 (E.D. Pa. June 10, 2014), Memorandum at 14, Dkt. No. 7.

However, as one professor's study showed, the vast majority of motions to dismiss municipal liability claims are granted,[18] demonstrating the challenge faced by plaintiffs trying to assert a claim of municipal liability for civil rights violations.

As discussed in Part I, the difficulties of proving *Monell* claims compromise the compensation and deterrence goals of Section 1983 and mean that victims of clear constitutional abuses may be left empty-handed, unable to recover under Section 1983—even if their constitutional rights have been violated.[19] That is the situation faced by Ms. Lavigne unless this Court reverses the district court's order.

III. District Courts Impermissibly Utilize a *De Facto* Heightened Pleading Standard for *Monell* Claims.

The district court employed a *de facto* heightened pleading standard that was specifically rejected by the Supreme Court in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit,* 507 U.S. 163 (1993). In *Leatherman,* the Supreme Court overturned a Fifth Circuit decision that applied the principle that in cases against government officials plaintiffs had to state the basis for their claims with

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[18] *Id.* at 1208, describing research showing 83 percent of motions were granted in whole or in part, or were undecided.

[19] *Id.* at 1227.

factual detail and particularity. *Id.* at 167. The Court said, "it is impossible to square the 'heightened pleading standard' applied by the Fifth Circuit in this case with the liberal system of 'notice pleading' set up by the Federal Rules." *Id.* at 168.

FED R. CIV. P. 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," and the Supreme Court has interpreted it strictly. "The Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). FED. R. CIV. P. 9(b) provides a particularity pleading requirement only for "averments of fraud or mistake," in which "the circumstances constituting fraud or mistake shall be stated with particularity." Thus, the Federal Rules do not prescribe particularity in pleading for complaints alleging municipal liability under § 1983. "*Expressio unius est exclusio alterius*." *Leatherman,* 507 U.S. at 168. "Perhaps if Rules 8 and 9 were rewritten today, claims against municipalities under §1983 might be subjected to the added

specificity requirement of Rule 9(b). But that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." *Id.* "In the absence of such an amendment, federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later." *Id.* at 168-69.

Imposing a particularity pleading requirement on claims for municipal liability "wrongly equates freedom from liability with immunity from suit." *Id.* at 166. *Monell* affirmed that a municipality cannot be held liable under § 1983 on a *respondeat superior* theory. 436 U.S. at 691. However, the Court did not grant municipalities immunity. To the contrary, *Monell* overruled *Monroe v. Pape*, 365 U.S. 167 (1961), which provided that local governments were wholly immune from suit under Section 1983. In *Owen*, the Court rejected a claim that municipalities should be afforded qualified immunity, like that afforded individual officials, based on the good faith of their agents. 445 U.S. at 650. "These decisions make it quite clear that, unlike various government officials, municipalities do not enjoy immunity from suit — either absolute or qualified — under § 1983. In short, a municipality can be sued

under § 1983, but it cannot be held liable unless a municipal policy or custom caused the constitutional injury." *Leatherman,*507 U.S. at 166.

To successfully plead such a policy or custom, a plaintiff need not provide detailed factual allegations as required under Rule 9, but a "short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley,* 355 U.S. at 47. As this Court found in *Ouellette v. Beaupre,* that means something more than bare recitals that the plaintiff was hurt by an employee of the District, but something less than the kind of detailed allegations obtainable only through discovery. 977 F.3d 127, 140-41(1st Cir. 2020). As the district court here noted, Ms. Lavigne alleged much more than that she was injured by district employees. (Order on Motion to Dismiss, Dkt. 26 at 16).

> The Complaint frequently references the School Board's "widespread custom" of making decisions without informing parents, including that "[t]he Great Salt Bay Community School Board's official policy and widespread custom of making decisions for students without informing or consulting with their parents established an environment in which giving A.B. a chest binder and instructing A.B. on how to use a chest binder—without consulting Plaintiff, and afterwards withholding or concealing this information from Plaintiff—was not only allowed but considered standard practice for [the social worker who gave A.B. the chest

> binders]." ECF No. 1 at 14, ¶ 65; see also ECF No. 1 at 15-17, ¶¶ 72, 73, 75, 76, 80, 81.

(*Id.*). Labeling these allegations as "conclusory," the district court said that they could not sustain a Section 1983 claim against Defendants without additional facts showing an **unwritten** policy or custom. (*Id.*) (emphasis added). Since the alleged policy or custom is unwritten and is intended to conceal information from parents, there is no way for Ms. Lavigne to obtain the additional information requested by the district court without engaging in discovery. *See Leatherman,* 507 U.S. at 168-69. By dismissing the case, the district court foreclosed Ms. Lavigne from obtaining the information it required for her to proceed, adding another barrier to pleading a Section 1983 claim to redress the violation of her rights. Other parents challenging secretive school policies have faced similar outcomes.

IV. District Courts Deny Plaintiffs The Latitude Required To Obtain The Facts Necessary To Meet Their Heightened Plausibility And Pleading Standards.

A final barrier to pleading a Section 1983 claim erected by district courts is denying plaintiffs appropriate latitude to obtain facts necessary to state a claim when, as here, the majority of the information is in the hands of defendants and recoverable only through discovery. Such

latitude is necessary for a proper analysis of the plausibility of plaintiffs' claim in light of the *ad hoc* nature of the evaluation. As the Supreme Court observed in *Iqbal,* "[d]etermining whether a complaint states a plausible claim for relief will…be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." 556 U.S. at 672. A context-specific evaluation requires reviewing, *inter alia,* the relationship between the parties, their relative access to essential information, and the nature of the claims asserted. When, as is true here, critical information is necessarily in the hands of a corporate or institutional defendant and not accessible to an individual plaintiff without legal process, the plaintiff should have greater latitude in meeting the *Iqbal* plausibility standard. *García-Catalan v. United States*, 734 F.3d 100 (1st Cir. 2013); *Menard v. CSX Transportation, Inc.*, 698 F.3d 40 (1st Cir. 2012); *Pruell v. Caritas Christi,* 678 F.3d 10 (1st Cir. 2012); *Manning v. Bos. Med. Ctr. Corp.* 725 F.3d 34 (1st Cir. 2013).

In *Garcia-Catalan,* this Court affirmed that some latitude may be appropriate in applying the plausibility standard in "cases in which a material part of the information needed is likely to be within the defendant's control." 734 F.3d at 104. The personal injury case brought

by a prisoner was such a case. *Id.* "It cannot reasonably be expected that the appellant, without the benefit of discovery, would have any information about either how long the liquid was on the floor or whether any employees of the commissary were aware of the spill." *Id.*

This is also such a case. Ms. Lavigne cannot be expected to have information about an unwritten school district policy prescribing that parents not be informed when their children assert a discordant gender identity. Only school district staff would have information regarding the existence and nature of an unwritten policy. Being unwritten and not in the public domain, it would not be accessible to Ms. Lavigne except through discovery. Also, as was true in *Garcia-Catalan,* discovery can reasonably be expected to fill any holes in Ms. Lavigne's case. *Id.* at 104-05. "Given what the appellant has set forth in her complaint, it is reasonable to expect that 'modest discovery may provide the missing link' that will allow the appellant to go to trial on her claim." *Id.* at 105 (citing *Menard,* 698 F.3d at 45). The same is true here. As the district court said, the Complaint includes frequent references to the unwritten policy, what Ms. Lavigne understands it to include and the effects it has had on her

constitutional rights. (Order, p. 16). Discovery will provide the missing factual information to proceed with her claim.

In *Menard*, this Court noted that "in years past general statements tracking the law were often regarded as a passport to discovery or trial." 698 F.3d at 45. However, the pleading rules have tightened since *Twombly* and *Iqbal* stated that "conclusory statements must rest on pleaded facts." *Id.* "This is so not only of legal boilerplate (*e.g.*, "conspiracy," "willfully") but also of assertions nominally cast in factual terms but so general and conclusory as to amount merely to an assertion that unspecified facts exist to conform to the legal blueprint." *Id.* However, "some latitude may be appropriate where a plausible claim may be indicated based on what is known, at least where, as here, some of the information needed may be in the control of the defendants." *Id.* (internal citations omitted). In that case, a man who was badly injured by a switched railroad track, hit and dragged under a train would not be expected to have precise recollection. *Id.* "By contrast, CSX likely made its own investigation which, if not privileged, could easily reveal just what its employees saw between the switch accident and the denouement." *Id.* In such circumstances, the "interests of justice" may

warrant remand for limited discovery to fill in the informational gaps. *Id.* Here, a remand to permit the discovery denied to Ms. Lavigne would also serve the interests of justice in permitting her to fill in the informational gaps.

"The precedents on pleading specificity are in a period of transition, and precise rules will always be elusive because of the great range and variations in causes of action, fact-patterns and attendant circumstances." *Pruell,* 678 F.3d at 14. While complaints cannot be based on generalities, when some of the specifics are in the hands of the defendants, "some latitude has to be allowed where a claim looks plausible based on what is known." *Id.* at 15. No such latitude was provided for Ms. Lavigne.

This Court rejected defendants' argument that *Iqbal* requires specificity beyond what is required under Rule 8's notice pleading standards in *Manning*, 725 F.3d at 44. Defendants claimed that class action plaintiffs' allegations were insufficient because they did not identify with which managers plaintiffs interacted or the frequency and content of the purported interactions. *Id.* "Rule 8 does not demand this degree of particularity. Even where direct allegations of knowledge are

pled in a conclusory fashion, defendants' knowledge of unlawful conduct may be inferable from other allegations in the complaint." *Id.*

> To require that plaintiffs, seeking to represent a whole class of individuals, describe the specific managers they talked with, and document, by time, place, and date, the instances in which they had a relevant conversation with those managers, would exceed Rule 8's requirement of a "short and plain statement" making out a claim for relief.

Id. at 45. Plaintiffs' descriptions of several employment practices that frequently required them to work through their scheduled breaks, before and after work hours, and during training sessions were sufficient to plead that the employees were performing uncompensated work with defendants' constructive or actual knowledge. *Id.* at 44-45. Ms. Lavigne's allegations of an unwritten school policy and widespread custom of making decisions for students without informing parents and establishing an environment in which giving a child a chest binder and instructing her how to use it without parent consent is acceptable were sufficient to permit Ms. Lavigne's Section 1983 challenge to proceed to discovery. As was true of defendants' argument in *Manning,* the district court's determination that more specificity was needed exceeds the requirements of Rule 8. Ms. Lavigne was not provided the latitude

necessary to overcome the inequitable access to information and proceed with her claim.

This Court has repeatedly affirmed that detailed factual allegations are not necessary to survive a motion to dismiss. A complaint must contain more than a rote recital of the elements of a cause of action but need not state a prima facie case. *Rodríguez-Reyes v. Molina-Rodríguez,* 711 F.3d 49, 53 (1st Cir. 2013). Requiring such specificity, as the district court did here, represents "test[ing] the complaint in a crucible hotter than the plausibility standard demands." *Id.* at 53. The appropriate test is whether the facts contained in the complaint show that elements such as causation are "plausible." *Id.* at 56. When, as here, critical facts to complete the plausibility analysis are available only to the defendants and are obtainable through discovery, the interests of justice require giving plaintiffs the latitude to acquire the information. *Menard,* 698 F.3d at 45; *Pruell,* 678 F.3d at 14-15. The district court's failure to accord Ms. Lavigne that latitude was reversible error.

V. Courts' Application Of *Monell* To Deny Plaintiffs The Opportunity To Challenge Constitutional Violations Renders Section 1983 Virtually Meaningless.

Section 1983 was enacted more than 150 years ago as a means to compensate people, like Ms. Lavigne, whose constitutional rights have been violated and deter future misconduct. "*Monell* doctrine in its current form undermines both of these values."[20] Plaintiffs who seek recovery under Section 1983 from a municipal entity and individual actors face a two-pronged attack, *i.e.,* a claim of qualified immunity by the individuals and, because of the jurisprudence that has developed under *Monell, de facto* municipal immunity by the institution. A decision in defendants' favor on both issues leaves the party whose constitutional rights have been violated with no recourse. In addition, state actors which escape both individual and municipal liability are not deterred from continuing to violate constitutional rights. Other state actors are not only not deterred but are actually emboldened by the realization that a Section 1983 claim will likely be dismissed. "*Monell* doctrine is unsettled; multiple open questions lead courts to apply widely varying standards, even in the same circuit, which likely encourages defendants to file more

[20] Schwartz, *supra* n.12, at 1189.

motions and creates greater uncertainties for plaintiffs evaluating the costs and benefits of pursuing a *Monell* claim."[21]

The unsettled nature of the *Monell* doctrine is reflected in intra-Court disagreements on the Supreme Court. "On at least ten occasions during the decade after *Monell*, the Court struggled to define the kinds of circumstances, relationships, and patterns of authority determinative of whether a municipality is liable for the misconduct of its employees."[22] Emblematic of the disagreement is Justice Breyer's dissent, joined by Justices Ginsburg and Stevens, calling for a re-examination of *Monell* in *Board of the County Commissioners v. Brown*, 520 U.S. 397, 430–31 (1997). "Essentially, the history on which *Monell* relied consists almost exclusively of the fact that the Congress that enacted § 1983 rejected an amendment (called the Sherman amendment) that would have made municipalities vicariously liable for the marauding acts of *private citizens*." *Id.* at 432 (emphasis in original). That fact "does not argue against vicarious liability for the act of municipal *employees* particularly

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[21] *Id.* at 1188.

[22] *Id.* at 1193, quoting Peter H. Schuck, *Municipal Liability Under Section 1983: Some Lessons from Tort Law and Organization Theory*, 77 GEO. L.J. 1753, 1753 (1989).

since municipalities, at the time, were vicariously liable for many of the acts of their employees." *Id.* (emphasis in original). "*Monell*'s basic effort to distinguish between vicarious liability and liability derived from 'policy or custom' has produced a body of law that is neither readily understandable nor easy to apply." *Id.* at 433.[23] "Today's case provides a good example," *id.,* as does Ms. Lavigne's case.

"By imposing an 'official policy' requirement, the Court has bound itself to a doctrine whose principal consequence is to deny citizens recoveries against local governments for damage caused by officials' constitutional violations."[24] That is evident in Ms. Lavigne's case and in other cases throughout the country. It is also antithetical to the protections offered to the public against rogue state actors in Section 1983 since 1871.

CONCLUSION

This Court should not sanction the continuing misuse of *Monell* to deny plaintiffs their rights under Section 1983 as occurred in this case.

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[23] Justice Souter echoed Justice Breyer's call for re-examination in a separate dissent. 520 U.S. at 430.

[24] *Id.* at 1200, quoting Schuck, 77 GEO. L.J., at 1755.

It should overrule the lower court's decision and permit Ms. Lavigne to proceed with her claim.

Dated: July 17, 2024

/s/*Mary E. McAlister*
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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENT

This brief complies with the word-count limitation of Fed. R. App. P. 29(a)(5) because, according to the word-count feature of the program used to prepare it and excluding the items listed in Fed. R. App. P. 32(f), it contains 4,772 words.

This amicus brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14-point Century Schoolbook font.

/s/ Mary E. McAlister
MARY E. MCALISTER

CERTIFICATE OF SERVICE

I hereby certify that on July 17, 2024, I electronically filed the foregoing brief with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that counsel for all parties in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Mary E. McAlister
MARY E. MCALISTER