

No. 21-1324

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IN THE  
**Supreme Court of the United States**

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JOHN ZARBA AND SUSAN LEMOIE-ZARBA,  
PETITIONERS

*v.*

THE TOWN OF OAK BLUFFS ET AL.,  
RESPONDENTS

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*PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT*

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**BRIEF IN REPLY FOR PETITIONER**

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## INTRODUCTION

The respondents believe that the decision below is correct because the lower court dismissal was based solely on their 12(b)(6) motion to dismiss documents that deleted the timeline and included intentional misrepresentation of the facts.

The respondents did a masterful job convincing the lower court to wrongly conclude; 1) that this lawsuit involved other state court matters, a boundary and neighborhood dispute, App. 5 and 2) the day that the Zarbas' house was complete, fully approved and occupied, the town had a title report, the Zarbas' survey was faulty, and the Magistrate court litigation promised to resolve the property line question. App.5 There is no basis in the record factual or otherwise to support this decision. The record clearly states that the day the Zarbas' house was complete there was no conflicting survey, no title report, and the prescriptive right Magistrate legal matter did not include matters of 'ownership'. App. 74-75.

The lower court never considered the record facts that determine that the Zarbas' property interest was fully met and that Barbadoro and Rappaport lack the legal authority to revoke the Zarbas' building permit, deny the final occupancy permit and oust the Zarbas' family.

The Zarbas' never imagined when they granted the Magistrate a "restricted" easement across their property and denied commercial vehicles App. 23-24, 29 that his connections with Rappaport and the Town could set in motion 5 years of "conscious shocking" intentional actions of 15 town officials, boards and town counsel all while acting under the color of state law that

violated the Zarbas' constitutional rights. There was simply no rational basis for the town's actions.

The respondents incorrectly argue the "doctrine of collateral estoppel" precludes the petitioners from re-litigating findings in other actions. The state court actions examined strictly zoning matters. Therefore, the "doctrine of collateral estoppel" cannot preclude the Zarbas' from putting forth these unrelated issues of alleged violations of constitutional rights.

The lower court erroneously granted absolute and qualified immunity without a moment of discovery or consideration of the alleged constitutional violations.

The Zarbas' are in this court because the decision below is wrong and everyday lower courts lean to protecting towns by granting immunities. This case is no exception. This court is the only vehicle to correct this systemic issue.

In pro se civil right cases the court should apply the correct F.R.C.P. regarding 12(b)(6) motions that; considers the facts in the complaint accepted as true, state a claim plausible on its face, draw all reasonable inference in favor of the plaintiffs, and hold pro se complaints to less stringent standard than formal pleading drafted by lawyers. The facts lead to inescapable conclusion that the opinion below reflects a clear misinterpretation of 12(b)(6) motion standards in light of this courts precedent. *Gomez v. Toledo* 446 U.S. 635(1980) "pleader is entitled to relief" in a 42 U.S.C. § 1983 cause of action only from two allegations (1) that some person deprived him a federal right, and (2) that such person acted under the color of state or territorial law.

Finally, the lower court wrongly concludes; "...municipalities may not be held liable for violations of 42 U.S.C. 1983 absent allegations of an unconstitutional

policy Monell v. Dep't of Soc.Servs. 436 U.S. 658, 665 (1978)...nor may they be liable for ...intentional torts.” App. 9

This court disagrees, and holds in *Monell* that municipalities and other bodies of local government are “persons” within the meaning of this statute. Such a body may be sued directly if it caused a constitutional tort through “a policy statement, ordinance, regulation, or decision officially adopted and promulgated by the body’s officers.” This conclusion has been repeatedly reaffirmed. See; *Owen v. City of Independence*, 445 U.S. (1990), *Polk County v. Dodson*, 454 U.S. 312 (1981), *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985) , *Pembaur v. Cincinnati* 475 U.S. 469 (1986) , *Newport v. Fact Concert* 453 U.S. 247 (1981).

The *Monell* doctrine for municipality liability is properly before this court. Because, the Zarbas’ property rights were clearly met and Barbadoro the policy maker acted under the color of law who's denial of the final occupancy permit equals a policy that required the Zarbas to take action that is unconstitutional and caused extreme undo harm.

## ARGUMENT

### I. The First Circuit Decision Is Wrong

#### A. Property Interest Was Fully Met And This Is A “Policy Case”

##### Property Interest

The crux of this matter is the Massachusetts State Building Code - 780 CMR: 1) adopted by all Mass Towns, 2) requires that all plans shall be prepared by a

registered design professional, 3) does not grant anyone in any town the authority to 'pick and choose' which 'professional licensed survey' the town prefers.

Rappaport, Goldsmith and the Planning Board endorsed the 2005 Gilstad survey for the previous land owner. This survey was utilized to construct a 3 home subdivision. In 2015 the Zarbas' submitted this very same survey to Barbadoro who issued the Zarbas' a Building Permit. On June 24, 2016 the Zarbas' house was complete and fully approved. Suddenly without warning Rappaport decides that the 2005 Gilstad survey is now defective. Rappaport had no legal or line authority to intrude on the delivery of the permit or later adopt which survey he prefers. *Scott v. Carter* 273 S.C. 509 (1979) "I find no legal basis for the intrusion by County Counsel in the zoning certificate and building permit process,"

The lower court never reached the conclusion that the Zarba's demonstrated that they had a clearly established right to the issuance of the final occupancy permit. The lower court relied on the Respondent arguments that their actions do not constitute any violations and the right to the final permit is not a property interest protected by the constitution.

The Zarbas' disagree. The day that the Zarbas' were issued the building permit and began constructing the guest house is the day that the Zarbas' property interest was fully met. The Zarbas' did not have a "need" or a "desire" for this final permit, but rather a protected right guaranteed by the constitution. *Acorn Ponds at North Hill v Inc. Vill. of North Hills* 623 F. Supp. 688 (1985) "... received 41 building permits and that some of its buildings were complete..." "It had every reason to rely on the representation implicit in issuing the building permits that C of O's would be



granted if the buildings were constructed ...”  
“Accordingly, ... had a property interest in the right to the C of O’s that was protected by the Constitution.”

The Zarba relied on the town issued building permit, acted on it, then the Town changed the rules of the game after the house was completed and fully approved. *Nectow v. City of Cambridge*, 277 U.S. 183, 188, 48 S.Ct. 447, 72 L.Ed. 842 (1928), “The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, ...such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare.” “...it deprived him of his property without due process of law...”

### **Policy**

Definition “policy”: Webster’s New Twentieth Century Dictionary 1392 (2nd ed 1979) “any governing principle, plan, or course of action”, Random House Dictionary 1113 (1966) “a course of action and pursued by a government, ruler, political party, etc.”.

Massachusetts State Building Code - 780 CMR , Section 111.1 “No building or structure shall be used or occupied ...until the building official has issued a certificate of occupancy ...”

As a matter of state and local law and practice, Barbadoro possess final policymaking authority over the granting of final occupancy permits. Therefore, the lower court erroneously concludes; “The First Amended Complaint does not allege the kind of “affirmative link necessary to sufficiently plead a supervisory liability claim, and/or a policy or custom of

the [Town] which led to the alleged constitutional violation.” App.9

The complaint states; “... this decision to adopt a particular course of action, the denial of the final occupancy permit was directed by Mark Barbadoro who establishes government policy, therefore the municipality (The Town of Oak Bluffs) is equally responsible whether that action is to be taken only once or repeatedly.” App. 21“... Barbadoro decision to deny the Zarba’s Final Occupancy Permit is considered a single act that constitutes a “policy” where a “deliberate choice to follow a course of action is made from various alternatives by the official ... responsible for establishing final policy...” App. 33,34

This is a ‘policy” case. Barbadoro’s decision to deny the Final Occupancy Permit was withheld in defiance of the state and local rules (Massachusetts Declaration of Rights Article 10 (1780)). *Owen v. City of Independence* 445 U.S. 622 (1990). The official action constituted an ordinance, the implementation of an ordinance and the official action of the highest authority of the city, the city counselor and the city mayor.

## **B. Clear Conspiracy Matter**

This matter does not hinge on a single action. This is an extremely complex case to analyze because of the interplay of all the defendants across many town departments and boards taken place over 5 years all directed and orchestrated by town counsel. Town counsel stands in the middle of every illegal action against the Zarbas’. App. 38-42.

## 103 Emails

The lower court disregarded the 103 emails that allege proof of a conspiracy; "...Rappaport and ...Goldsmith acted outside the scope of their job when they conspired ...103 private emails..."App. 29, 39

## Agreement for Judgment

The Agreement for Judgment document is mentioned on 15 occasions in the complaint and is a smoking gun concrete piece of evidence of an alleged conspiracy and an illegal taking. App. 80- 84. Why did the lower court disregard this Agreement? Because the defendants misrepresented the facts surrounding this document to the lower court because they understood how problematic this Agreement for Judgment is for their case.

The lower court relied on the "Towns Memorandum of Law" filed on 02/28/21, that states; "...the Land Court Agreement for Judgment are nothing more than a collateral attack to unwind the holding and legal effect of the Agreement for Judgement entered and approved by the Land Court. This court lacks jurisdiction to rule upon such claims under the Rooker -Feldman doctrine."

However, the Chief Justice of Land Court never 'entered and approved' that Agreement. Chief Justice Order states; "That Agreement for Judgement has not been submitted to the court for its endorsement or approval ...". "Accordingly, that Agreement for Judgement does not in any manner constitute a judgment of this court..." App.30 Clearly the Town directing the lower court to exclude the Agreement for

Judgement document was based on an intentional misrepresentation of the facts.

### **Town Survey**

This matter has nothing to do with which survey is right or wrong. This matter focuses on the reason why Rappaport commissioned an unnecessary town survey and directed the surveyor to ignore his ethical duty. App.26, 40, 56

Land Court 17MISC000139 Transcript Part 3, Pg.121-123 Cross Examination of Austin:

Q. I have one final question. Did you reach out to Charles Gilstad to try to resolve this boundary dispute at any time?

A. No.

Q. Do you normally, in your course of action and in the course of your job, call up that other surveyor and try to resolve it before it goes to court?

A. Yes. And I have done that.

Q. So why did you not do that in this case?

A. We discussed it...

Q. So when you say "we discussed it." who do you mean by "we discussed it"? Who's "we"?

THE COURT: Yes. When you say "we discussed it."

A. **The lawyers.**

Q. So I have one other question. Do you regret no calling Mr. Gilstad?

A. Yes

The lower court disregarded the record evidence that the town surveyor stated under oath that Town

Counsel advised him to to ignore his ethical duty.  
App.26,40,50

### **Assessor Maps**

The complaint states on 11 occasions that the Town Principle Assessor, “moved Davis Avenue in the town assessor maps onto the Zarba’s private driveway.” App. 31,53 The lower court disregarded the fraudulent tampering of the assessor maps.

This conspiracy is best summarized by the Magistrates attorney when he states “...if we wanted our town problems to go away and water running then we needed to grant his client an unrestricted easement.” App. 24.

### **C. Inadequate Post Deprivation Remedy**

Under the due process clause is a guarantee of a fair procedure. The lower court wrongly concludes; “Plaintiffs provide no factual allegations as to how the state’s post-deprivation remedial process was inadequate...” App. 10

First, Barbadoro denial of the final occupancy permit was not based on ‘zoning grounds’ instead the decision was based on an unlawful procedure. App.43-44 Second, the local Boards pre-deprivation hearings were a sham in which Town Counsel and the Board rendered decisions that were preordained to deprive the Zarbas’ of their constitutional property rights. App. 40, 46,47 Third, Land Courts Protective Order on the Town Officials, Board, and Town Counsel prevented any and all examination to their misbehaviors or their deliberative processes. The state court de novo review

made no specific finding of facts regarding the Boards predetermined decisions. App. 85-87.

Therefore, the Zarbas' pre-deprivation and state's post-deprivation remedial process was inadequate. *Acorn Ponds at North Hill v Inc. Vill. of North Hills* 623 F. Supp. 688 (1985) "I do not understand the Court to suggest that the provisions of "post deprivation remedies" ... within a state system would cure the unconstitutional nature of a state officials intentional act that deprives a person of property."

*Euclid v. Ambler Co.*, 272 U.S. 365 (1926) "the delay in inspections requiring repeated recourse to the state courts resulted in orders that the inspections be made and a further delay in finally obtaining the C of O's; and that such post-deprivation procedures proved to be untimely and inadequate...."

*L.A. Ray v. Town Counsel of Cumberland*, 698 A.2d 202(1997)

"Because the actions of certain town officials rendered meaningless the pre-deprivation process, and because the post-deprivation remedy under state law is inadequate to compensate the plaintiffs, their procedural due process rights have been violated."

The decision below wrongly concludes; "justice of Land Court has determined that the Board.. did not act in bad faith, and that its decisions were premised on reasonable recommendations form Town officials..." App.10 There is no basis in the record to support this decision. The Zarba's were caught in a catch 22 when they sought remedy in state court for a cost and fees motion. The Land Court protective order prevented discovery, testimony and/or submissions against the Board. Without discovery, the Zarbas' were unable to prove "malice, or intentional bad behavior" of the Board. Therefore, it is illogical for the lower court to

conclude that the denial of a mere motion determined that the actions of the town officials, town counsel and boards was proper.

#### **D. Absolute and Qualified Immunities Should Be Denied**

The complaint alleges Rappaport acted outside the scope of the job by, 1) advising Austin to ignore his ethical duty. App.50, 2) conspiring with the Magistrate and shared 103 private emails App. 29, 32 and, 3) “ The defendants clearly violated the Zarbas’ property rights with lawless conduct of which a “reasonable person would have known.”” App. 33. *Leatherman v. Tarrant County Narcotics*, 507 U.S. 163, (1993) This court states the F.R.C.P. requires only “a short plain statement of the claim” and the City is liable for ‘policy’ that caused a violation of constitutional rights.

The tiny Town of Oak Bluffs with a population of approximately 6000 residents clearly has a systemic problem when 15 town officials, board members and town counsel join town counsel in this illegal concocted scheme with no benefit to the town. App. 61.

#### **II. This Case Is A Sound Vehicle For Addressing The Lower Courts Standards for pro se civil right 12(b)(6) Motions and to Deter Municipalities from Violating Property Rights .**

Rule 10 governing Certiorari review “is rarely granted” when asserted error consists of erroneous fact finding or misapplication of law. However, the overwhelming evidence in the complaint proves that this is one one of those rare cases in which the lower court erroneous decision should not be allowed to stand. The opinion below denies the Zarbras’ due process and reflects a

clear misinterpretation of 12(b)(6) motion standard in light of this court's precedent. *Tolan v. Cotton* 572 U.S. (2014)

This is one of those rare instances in which the municipality should be held liable under *Monell v. Department of Social Services*, 436 U.S. 658 (1978). This matter spans over 5 years in which the town was repeatedly put on notice for these illegal actions. These unconstitutional acts were driven by town counsel who directed 15 town officials and boards which caused a widespread pattern of abuse not for the benefit of the Town of Oak Bluffs but solely for the benefit of obtaining an easement for the Magistrate. App. 37.

The Zarbas' pray that this court vacate the lower court decision because it overlooked; 52 day ousting, denial of water, Agreement for Judgement, Zarbas' vested property interest, 4 year denial final occupancy permit, 103 private emails, Barbadoro is the 'policymaker', manipulated assessor maps, installation public street sign, predetermined board meetings, and the conspiracy, that all caused violations of the Zarbas' constitutional rights.



**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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**CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

**Civil Rights Act—42 U.S.C. § 1983:**

...Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State ...subjects, or causes to be subjected, any citizen of the United States... shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

**Civil Rights Act - 42 U.S.C. § 1985 (3)**

...in any case of conspiracy.. any act ...whereby another is injured in his person or property, or deprived may have an action for the recovery of damages ... against any one or more of the conspirators.

**United States Constitution, Amendment V:**

... nor shall private property be taken for public use without just compensation.

**United States Constitution, Amendment XIV:**

...No state shall make or enforce any law... nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**Massachusetts Tort Claim Act:**

Mass. Gen L. ch 258 § 2,4,10(c)

**Fed. R. Civ. P. 12(b)(6):**

...[T]he following defenses may at the option of the pleader be made by motion:...(6) failure to state a claim upon which relief can be granted...

**Massachusetts State Building Code - 780 CMR State Board Building Regulations and Standard Section 111.1:**

...Chapter 1 Section 101.2 “This code shall be the building code for all towns...”. Section 107.6.2.1 “All plans...shall be prepared by... a registered design

professional...” Section 107.6.5 “... building official’s authority to enforce this code with respect examination of the ...inspections. Section 111.1 “No building or structure shall be used or occupied ...until the building official has issued a certificate of occupancy ...”

**Massachusetts Declaration of Rights Article 10 (1780):**

Due Process ...Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property...And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.

**Webster’s New Twentieth Century Dictionary 1392 (2nd ed 1979) ... definition ‘policy’**

**Random House Dictionary 1113 (1966)...definition ‘policy’**