No. _____

In The Supreme Court of the United States

COUNTY OF LOS ANGELES,

Petitioner,

vs.

ASSOCIATION FOR LOS ANGELES DEPUTY SHERIFFS, LISA BROWN DEBS, and SEAN O'DONOGHUE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

TIMOTHY T. COATES
Counsel of Record
LILLIE HSU
GREINES, MARTIN, STEIN & RICHLAND LLP
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
Telephone: (310) 859-7811
Facsimile: (310) 276-5261
E-Mail: tcoates@gmsr.com

ANDREA SHERIDAN ORDIN
County Counsel
LESTER J. TOLNAI
Assistant County Counsel
OFFICE OF THE COUNTY COUNSEL
500 West Temple Street, Room 653
Los Angeles, California 90012
Telephone: (213) 974-1923
Facsimile: (213) 687-7337
E-Mail: ltolnai@lacounty.gov

JEFFREY C. FREEDMAN
CONNIE C. ALMOND
LIEBERT CASSIDY WHITMORE
6033 West Century Boulevard, Suite 500
Los Angeles, California 90045
Telephone: (310) 981-2000
Facsimile: (310) 337-0837
E-Mail: jfreedman@lcwlegal.com

Counsel for Petitioner County of Los Angeles

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

In *Board of Regents v. Roth*, 408 U.S. 564, 577-78 (1972), this Court held that the scope of a public employee's constitutionally protected property interest in his or her job is defined by the terms of the employment under federal, state or local law.

In *Gilbert v. Homar*, 520 U.S. 924, 932 (1997), this Court held further that police officers who are suspended while felony charges are pending against them are not constitutionally entitled to receive pay during the suspension, because "the government does not have to give an employee charged with a felony a paid leave at taxpayer expense," and "if [the officer's] services to the government are no longer useful once the felony charge has been filed, the Constitution does not require the government to bear the added expense of hiring a replacement while still paying him."

The questions presented are:

1. Under the Constitution, does a public entity have the right to define the terms of a law enforcement officer's employment so that when the officer is charged with a felony, the entity may suspend the officer without pay pending resolution of the criminal charge?

2. If a public entity suspends a law enforcement officer based on a pending felony charge and the officer later disproves the allegations underlying the charge, does the Constitution require the public

QUESTIONS PRESENTED – Continued

entity to pay backpay for the suspension, even though terms of the officer's employment do not entitle the officer to such pay?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding in the Ninth Circuit, whose judgment is sought to be reviewed, are:

- Association for Los Angeles Deputy Sheriffs, Lisa Brown Debs, and Sean O'Donoghue, plaintiffs, appellants below, and respondents here.
- County of Los Angeles, defendant, appellee below, and petitioner here.

Darrin Wilkinson and David Sherr were plaintiffs in the underlying action and appellants below, but are not parties to this petition.

Gloria Molina, Yvonne Brathwaite Burke, Zev Yaroslavsky, Don Knabe, Michael D. Antonovich, Lynn Adkins, Vange Felton, Carol Fox, Z. Greg Kahwajian, Evelyn Martinez, and Leroy Baca were defendants in the underlying action and appellees below, but are not parties to this petition.

No corporations are involved in this proceeding.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

OPINIONS BELOW

The Ninth Circuit's opinion filed August 12, 2011, the subject of this petition, is reported at 648 F.3d 986 (9th Cir. 2011). (Appendix ["App."]1-31.) The Ninth Circuit's October 17, 2011 order denying rehearing and rehearing en banc was not published in the official reports. (App.43-45.)

The district court's July 7, 2008 order granting defendant and petitioner's motion to dismiss was not published in the official reports. (App.32-42.)

JURISDICTION

The Ninth Circuit filed its opinion on August 12, 2011. (App.1-31.) Petitioner timely petitioned for rehearing and rehearing en banc, and on October 17, 2011, the Ninth Circuit denied the petition. (App.43-45.) This Court has jurisdiction under 28 U.S.C. §1254(1) to review on writ of certiorari the Ninth Circuit's August 12, 2011 decision.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Respondents brought the underlying action under 42 U.S.C. §1983, which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of

> Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Respondents allege that petitioner violated their rights under the United States Constitution's Fourteenth Amendment, Section 1, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; 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.

STATEMENT OF THE CASE

A. Sheriff's Deputies Debs and O'Donoghue Are Suspended without Pay after Being Charged with Felonies.

Lisa Brown Debs and Sean O'Donoghue are Los Angeles County deputy sheriffs who were charged with felonies. (App.3-4.) Debs was charged on June 27, 2004, with felony drunk driving. (App.4.) O'Donoghue was charged on June 3, 2002, with seven felony counts, including two counts of falsifying a police report, three counts of accessory after the fact to possession of narcotics for sale, one count of perjury, and one count of false imprisonment. (App.4.)

The Los Angeles County Sheriff's Department (the "Sheriff's Department") served Debs and O'Donoghue with letters of intent to suspend them. (App.4.) The deputies responded in writing and denied the allegations against them, but were nonetheless suspended without pay. (App.4.) The deputies then requested post-suspension hearings before the Los Angeles County Civil Service Commission (the "Commission"). (App.4.) The requests were held in abeyance pending completion of the criminal proceedings and disciplinary action by the Sheriff's Department. (App.4.)

On August 13, 2004, the district attorney dismissed the felony charge against Debs, and Debs pleaded no contest to a misdemeanor drunk driving

charge. (App.4, 33 n.2; ER 19.)[1] A jury acquitted O'Donoghue on January 28, 2003. (App.4, 33 n.3; ER 22.) Following these events, the deputies were reinstated from their suspensions and returned to paid status. (App.4-5.) They continued to demand hearings before the Commission to contest the propriety of their suspensions after the fact. (App.5.)

After their reinstatement from suspension, and before any post-suspension hearings were held, the Sheriff's Department discharged Debs and O'Donoghue, based partly on the allegations underlying the criminal charges.[2] (App.5.) The deputies requested hearings on their discharges, and these hearings were consolidated with the pending post-suspension hearings. (App.5.)

B. After Post-Suspension Hearings, the Deputies Do Not Receive Backpay for the Suspensions.

Debs and O'Donoghue eventually received post-suspension hearings. (App.6.) The Commission's hearing officer found that Debs's suspension and discharge were improper because the allegations

---

[1] "ER" refers to the Appellants' Excerpts of Record.

[2] Debs was suspended for approximately three weeks. (App.5 n.2.) She was reinstated on August 17, 2004, and discharged on March 10, 2005. (App.5 n.3.) O'Donoghue was suspended for approximately nine months; he was reinstated on February 28, 2003 and discharged on June 9, 2005. (App.5 nn.2-3.)

underlying the felony charge against her were untrue. (App.6.) The hearing officer recommended that the Commission reinstate Debs from her discharge and restore the pay lost during her suspension. (App.6.) After hearing this recommendation, the Commission ordered Debs reinstated from her discharge, but denied Debs backpay for the time she was suspended. (App.6.) The Commission held that Debs's suspension was proper because a felony charge, whether or not supported by valid allegations, was pending against her when the Sheriff's Department imposed her suspension. (App.6.)

As to O'Donoghue, the hearing officer recommended that O'Donoghue be reinstated with backpay to the date of his discharge, and that he receive backpay and benefits for the time he was suspended. (App.6.) After hearing the recommendation, the Commission ordered O'Donoghue reinstated from his discharge. (App.6.) The Commission did not reverse the suspension, but directed the Los Angeles County Sheriff, the Sheriff's Department, and the County of Los Angeles (the "County") to reconsider the decision to suspend O'Donoghue. (App.6.) They did not do so, and O'Donoghue was not reimbursed for his lost pay and benefits for the time he was suspended. (App.6-7.)

C. Plaintiffs Sue the County, and the District Court Grants the County's Motion to Dismiss.

Debs and O'Donoghue, joined by their union, the Association of Los Angeles Deputy Sheriffs (collectively,

"plaintiffs") sued the County and numerous government officials in federal district court.[3] (App.1, 7, 34.) Plaintiffs brought claims under 42 U.S.C. §1983, alleging violations of their Fourteenth Amendment due process rights. (App.7.)

The operative complaint alleged that Debs and O'Donoghue could be suspended or discharged only for misconduct, and thus held property interests in their employment entitled to due process protection. (ER 31, 35.) They alleged that they were deprived of these interests, in that they failed to receive meaningful post-suspension hearings in which to contest the validity of the charges on which the suspensions were based and thereby recover the pay and benefits lost during the suspension. (ER 32, 36.) The complaint further alleged that the County had a policy or custom of sustaining suspensions without pay based solely on the fact that felony charges had been filed, rather than requiring proof that the charges were actually true, and that this policy caused the deprivation of the deputies' due process rights. (ER 40-41.)

The County moved to dismiss. (App.7.) The district court granted the motion, holding that

[3] Plaintiffs also sued various branches of the County, including the Commission and the Sheriff's Department, erroneously under separate names. (*See* ER 85; App.1.)

plaintiffs had failed to state a claim against the County.[4] (App.7, 36-42.) Plaintiffs appealed. (App.7.)

D. The Ninth Circuit Holds That Plaintiffs Have Sufficiently Pled a Claim against the County Based on a Violation of Their Procedural Due Process Rights.

As to the County, the Ninth Circuit reversed in a 2-1 decision.[5] The majority, Judges Pregerson and Nelson, held that plaintiffs' allegations sufficiently pleaded a claim against the County under *Monell v. Department of Social Services*, 436 U.S. 658 (1978). (App.3-16, 21.)

First, the majority noted that plaintiffs had alleged that the County's policy was to sustain suspensions, after post-suspension review, so long as there was evidence that a felony charge had been filed against the deputy, regardless of the validity of the allegations stated in the charge. (App.13.) The majority concluded that the County had actually applied this policy to Debs and O'Donoghue because, although the hearing officers recommended that these deputies receive backpay for their suspensions, the Commission nonetheless rejected the recommendation

---

[4] The district court held that the individual defendants were entitled to qualified immunity. (App.7, 39-41.)

[5] The Ninth Circuit affirmed the grant of qualified immunity to the individual defendants on Debs's and O'Donoghue's claims. (App.23-24.)

to reverse Debs's suspension, and as to O'Donoghue, although the Commission recommended reconsideration of the suspension, the County and the Sheriff failed to do so. (App.13.)

Second, the majority held that plaintiffs had thereby alleged a constitutional violation. (App.14-15.) The court reasoned that under *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538 (1985), the deputies had a constitutionally protected property interest in continued employment, of which they could not be deprived without due process of law, and that the suspensions deprived them of that interest. (App.8.) The majority then held that plaintiffs had sufficiently alleged that the post-suspension procedures provided to the deputies failed to satisfy due process:

> Making every inference in favor of Plaintiffs, as we must at the pleading stage, we conclude that Plaintiffs could conceivably prove facts to support their allegation that Defendants' policy caused a violation of Plaintiffs' right to due process. For example, Plaintiffs could show that [under the balancing test from *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976),] the limited post-suspension inquiry created too great a risk of erroneous deprivation of their protected interest in employment, or that Defendants' interest in maintaining such limited procedures does not outweigh Plaintiffs' interest in a more thorough investigation.

(App.15.)

The majority stated that it was not deciding categorically whether due process required a post-suspension hearing to look beyond whether a felony charge had been filed, but was remanding for further factual development:

> We need not and do not decide whether, in all cases, a post-suspension hearing that looks no deeper than whether felony charges were filed against an employee would or would not pass constitutional muster. Indeed, full *Mathews* analysis cannot properly be conducted at the pleading stage with an undeveloped record. . . . It is possible that Defendants' post-suspension hearings are more robust than Plaintiffs allege, or that Defendants' [*sic*] have a strong justification for their challenged policy. We leave it to the district court to make these determinations in the first instance, with *Mathews* as its guide, and therefore remand for further fact-finding and analysis.

(App.15-16.)[6]

The court also declined to decide whether Debs and O'Donoghue were entitled to backpay, but stated that should the issue arise, the district court should resolve it in the first instance. (App.19 n.10.)

---

[6] In discussing whether the individual defendants were entitled to qualified immunity, the majority noted that it was "an unresolved question whether due process is satisfied by a post-suspension hearing that sustains a suspension based solely on the fact of a pending criminal proceeding." (App.23.)

E. Judge Ikuta Dissents, Finding That under the Deputies' Employment Terms and This Court's Decisions in *Board of Regents v. Roth* and *Gilbert v. Homar*, the Deputies Could Be Suspended without Pay Based Solely on a Felony Charge.

In dissent, Judge Ikuta concluded that plaintiffs had *not* alleged a plausible violation of their due process rights. (App.25.) Rather, Debs and O'Donoghue had "received all the process that was due" by way of post-suspension hearings and reinstatement, even though the Commission denied backpay on the ground that the pending felony charges justified the suspensions. (App.25.) As Judge Ikuta explained, "a Los Angeles County deputy sheriff's property interest in continued employment does not extend to being paid while a felony charge is pending against him or her, regardless of whether the employee committed the misconduct that formed the basis of the felony charge." (App.28-29.)

First, Judge Ikuta reasoned that under *Board of Regents v. Roth*, 408 U.S. 564, 577-78 (1972), the scope of the deputies' protected property interest in their jobs depended on the terms of their employment, and those terms allowed them to be suspended without pay based solely on a felony charge. (App.27.) Specifically, Rule 18.031 of the Los Angeles County Civil Service Rules allowed the Sheriff's Department to suspend deputies based on "'any behavior or condition which impairs an employee's qualifications for his or her position or for continued county

employment,'" and "the pendency of a felony charge unquestionably 'impairs' a deputy sheriff's 'qualifications' for employment as a law enforcement officer." (App.27.)

Second, Judge Ikuta noted that in *Gilbert v. Homar*, 520 U.S. 924 (1997), this Court

> confirmed that a suspension without pay while a felony charge is pending does not deprive a law enforcement employee of any constitutionally protected property interest. [Citation.] The government is not obliged to "give an employee charged with a felony a paid leave at taxpayer expense." *See* [*Gilbert*, 520 U.S. at 932]. In other words, if a law enforcement employee's "services to the government are no longer useful once the felony charge has been filed, the Constitution does not require the government to bear the added expense of hiring a replacement while still paying him." *Id*.

(App.28.) For the same reason, Judge Ikuta reasoned, the government need not pay backpay for the suspension period after the fact. (App.28 n.2.)

Judge Ikuta commented that plaintiffs' claims did not raise a due process issue at all, because the deputies "[did] not challenge the Commission's procedures, but rather the substantive standard the Commission applied to them, that is, they object[ed] to the Commission's determination that they could be validly suspended simply because felony charges had been filed against them." (App.25, 29-30.)

The County petitioned for rehearing. (Defendants' Petition for Rehearing, 9th Cir. docket #49, filed 9/2/11.) Among other things, the County argued that the majority's decision would effectively require all public employers to provide employees with paid vacations while the employee faces criminal charges and cannot serve the public. (*Id*. at 1.)

The Ninth Circuit denied the petition for rehearing on October 17, 2011. (App.43-45.) Judge Ikuta voted to grant rehearing and rehearing en banc. (App.44.)

REASONS TO GRANT THE PETITION

The Fourteenth Amendment's Due Process Clause prohibits deprivations of property interests without due process of law. Yet, this Court has held that to have a property interest entitled to due process protection, an individual must be able to identify an independent source, such as state law or the terms of the individual's employment, that gives him or her "a legitimate claim of entitlement" to a particular benefit. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Accordingly, the scope of a public employee's constitutionally protected property interest in his or her job is defined by the terms of the employment under federal, state or local law. *See id*. at 577-78.

In *Gilbert v. Homar*, 520 U.S. 924 (1997), the Court made clear that although public employees who can be discharged only for cause have property

interests in their continued employment, those property interests do not extend to give law enforcement officers a right to be paid when they are suspended while felony charges are pending against them. In holding that a police officer suspended with felony charges pending was not entitled to pay during his suspension, the Court stated:

> [T]he government does not have to give an employee charged with a felony a paid leave at taxpayer expense. If his services to the government are no longer useful once the felony charge has been filed, the Constitution does not require the government to bear the added expense of hiring a replacement while still paying him.

Id. at 932.

Since *Roth* and *Gilbert*, it has been settled law that as far as the Constitution is concerned, public entities have an absolute right to define the terms of employment for law enforcement officers so as to suspend the officers without pay while the officers face felony charges. Similarly, it has been clear that if such an officer is suspended with felony charges pending and the officer is eventually reinstated or acquitted, or the felony charge dismissed, the public entity need not pay backpay for the suspension.

Yet the Ninth Circuit, in a 2-1 decision, has turned this expectation on its head. Here, plaintiffs, County Sheriff's deputies, alleged that they were suspended without pay while felony charges were

pending against them, and were later exonerated of the charges. They claimed that the County violated their due process rights by failing to give them a post-suspension hearing in which they could challenge the truth of the allegations underlying the felony charges and thus establish that they were entitled to backpay for the suspension period. As the dissent noted, the deputies' terms of employment provided that they could be suspended while felony charges were pending, and nothing in their employment terms or state law entitled them to be paid during the suspension or receive backpay after the fact.

Nonetheless, the Ninth Circuit majority, Judges Pregerson and Nelson, held that because the deputies were public employees who could be discharged only for cause, they had property interests in their continued employment that might entitle them to a post-suspension hearing at which they could challenge not only whether the felony charges were in fact filed, but whether the underlying allegations were true. The majority further allowed the district court to determine whether the deputies were entitled to backpay for the suspensions.

As the dissent noted, this holding was unsupported by the terms of the deputies' employment – which, under *Roth*, should have been dispositive – and flatly contravened *Gilbert*'s express statement that a law enforcement officer charged with a felony has no constitutional right to a paid leave at taxpayer expense, and the Constitution does not require the

government also to pay a replacement while the officer is suspended.

In effect, the majority created a new substantive right under the Constitution's Due Process Clause, entitling law enforcement officers to be paid while suspended for pending felony charges if they can disprove the allegations underlying the charges. The majority denied that it was creating such a right, asserting that it was not deciding whether, to satisfy due process, a post-suspension hearing must always inquire beyond whether felony charges were actually filed. The majority also remanded to the district court for factual development on issues such as whether the County's post-suspension hearings were in fact limited to determining whether felony charges were filed, or whether the County had a strong justification for such limited hearings. But by remanding for factual development on issues other than the filing of felony charges against the officers, the majority effectively determined that felony charges alone could not justify an unpaid suspension even if the terms of employment specifically provided for such a suspension.

As a result, despite this Court's clear mandate in *Roth* and *Gilbert*, it is no longer settled that the government has a right, pursuant to a law enforcement officer's terms of employment, to suspend the officer without pay while felony charges are pending against him or her.

The impact of the Ninth Circuit's decision is enormous, affecting every law enforcement agency within the Ninth Circuit, and indeed unsettling the law with respect to basic law-enforcement employment practices across the country. It is, unfortunately, not rare for police officers to be charged with felonies. As the Court recognized in *Roth* and *Gilbert*, it is essential that law enforcement agencies have the power to define the terms of employment so as to have the power to discipline such officers and take appropriate measures to preserve the integrity of the police force. It is vital that law enforcement agencies know that they can suspend officers whose services are at least temporarily unavailable due to the filing of felony charges, without being forced to give those officers "a paid leave at taxpayer expense" or to incur the substantial double expense of paying both the officer and a replacement during the suspension. *Gilbert*, 520 U.S. at 932. Absent such certainty, agencies may refrain from suspending officers charged with felonies, thus eroding public confidence in law enforcement. Alternatively, the public will be required to bear the extraordinary expense of paying officers who are not providing services. This Hobson's choice forced upon law enforcement agencies and government entities by the Ninth Circuit's decision represents a gross intrusion into the day-to-day operation of fundamental public safety services, under the guise of amorphous principles of "due process."

Moreover, the damaging impact of the Ninth Circuit's decision is not limited solely to discipline of law enforcement personnel. It impairs the ability of petitioner County to make basic managerial decisions as to its over 100,000 employees,[7] and improperly constrains the authority of government employers throughout the Ninth Circuit to deal with more than two million public employees.[8] The ability of public employers to protect governmental integrity by suspending the broad spectrum of public employees without pay, pending disposition of criminal charges that go squarely to the public's confidence in public employees' ability to perform their jobs in an honest manner, is directly compromised by the Ninth Circuit's repudiation of *Roth* and its suggestion that open-ended principles of due process may substitute for precise terms of employment conferred by the public entity. The confusion sown by the Ninth Circuit's decision with respect to both law enforcement officers in particular and public employees in general mandates review by this Court.

---

[7] *See* http://lacounty.gov/wps/portal/lac/employees/ (last visited Jan. 12, 2012).

[8] Statistics available from United States Census Bureau, http://www.census.gov/govs/apes/ (last visited Jan. 12, 2012).

I. THIS COURT HAS ESTABLISHED THAT A PROPERTY INTEREST ENTITLED TO DUE PROCESS PROTECTION MUST BE BASED ON AN INDEPENDENT SOURCE SUCH AS STATE LAW, AND THAT A POLICE OFFICER WHO CAN BE DISCHARGED ONLY FOR CAUSE DOES NOT AUTOMATICALLY HAVE A PROPERTY INTEREST IN BEING PAID FOR A SUSPENSION IMPOSED WHILE THE OFFICER FACES FELONY CHARGES.

In a series of cases, this Court has established that absent a provision of state or local law to the contrary, a public entity has an absolute right to suspend without pay a police officer who is charged with a felony, and accordingly, the public entity need not provide backpay for the suspension period if the officer is later exonerated.

In *Board of Regents v. Roth*, 408 U.S. 564 (1972), the Court made clear that to have a property interest entitled to due process protection, a plaintiff must identify a specific provision of state law or a similar source that supports such an interest. There, plaintiff was hired as an assistant professor at a state university for a one-year term, but was not rehired for the following year. *Id*. at 566. He was given no reason for the decision and no opportunity to challenge it at a hearing. *Id*. at 568. Plaintiff had no tenure rights, and under state law, a non-tenured teacher was entitled to nothing beyond his one-year appointment. *Id*. at 566. Nor were there any statutory

or administrative standards defining eligibility for reemployment; rather, state law left the decision whether to rehire a non-tenured teacher to university officials' unfettered discretion. *Id*. at 567. The university's rules also provided no protection for a non-tenured teacher who was simply not rehired for the next year. *Id*. Nevertheless, plaintiff sued, alleging that the university's failure to give him reasons for his nonretention and an opportunity for a hearing violated his right to procedural due process of law under the Fourteenth Amendment. *Id*. at 568-69.

This Court held that plaintiff had no constitutional right to a statement of reasons or a hearing. *Id*. at 569. The Court noted that "[t]he requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." *Id*. The Court found that the university's refusal to rehire plaintiff implicated no liberty or property interest entitled to due process protection. *Id*. at 573-75, 578.

In finding that plaintiff was not deprived of a property interest, the Court noted that the Fourteenth Amendment's protection of "property" safeguards "interests that a person has already acquired in specific benefits." *Id*. at 576. The Court noted that such "[p]roperty interests . . . are not created by the Constitution," but "are created and . . . defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id*. at

577. The Court emphasized that to have a property interest in a benefit, a person must not simply want or expect that benefit, but "must . . . have a legitimate claim of entitlement to it." *Id*.

The Court reasoned that any property interest in employment at the university "was created and defined by the terms of [plaintiff's] appointment," which secured his employment for one year but specifically provided for termination thereafter and did not provide for contract renewal on any terms. *Id*. at 578. Thus, plaintiff's appointment terms "supported absolutely no possible claim of entitlement to re-employment" for a second year. *Id*. Nor was there any state statute or university rule that created any legitimate claim to re-employment. *Id*. Thus, plaintiff did not have a property interest that required the university to give him a hearing when it declined to renew his employment contract. *Id*.

In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Court set forth a test for determining what procedures would satisfy the requirement of due process of law in cases where the plaintiff has established a protected property interest. The issue before the Court was whether the Fifth Amendment's due process clause required that prior to termination of Social Security disability benefit payments, the recipient have an opportunity for an evidentiary hearing. *Id*. at 323.

The Court determined that an individual's interest in continued receipt of Social Security disability

benefits was a statutorily created property interest entitled to due process protection. *Id*. at 332. The Court then considered what process was required to deprive a recipient of that interest. *Id*.

The Court noted that "due process is flexible and calls for such procedural protections as the particular situation demands." *Id*. at 334. The Court identified three factors to be used in determining what process would be required in a given situation: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id*. at 335.

Applying these factors, the Court determined that due process did not require an evidentiary hearing before terminating plaintiff's disability insurance benefits, and that the existing administrative procedures comported with due process. *Id*. at 349.

In *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), the Court considered what process must be provided to a public employee who can be discharged only for cause. *Id*. at 535. There, a public entity discharged two employees – a security guard who had falsely stated on his job application

that he had never been convicted of a felony, and a bus mechanic who failed an eye examination – without providing pre-termination hearings. *Id*. at 535-37. The Court held that plaintiffs had property interests in continued employment, because a state statute provided that the employees were entitled to retain their positions "'during good behavior and efficient service'" and could not be dismissed "'except . . . for . . . misfeasance, malfeasance, or nonfeasance in office.'" *Id*. at 538-39.[9]

The Court noted that due process generally requires that an individual be given an opportunity for a hearing before being deprived of a property interest, but that in some situations a post-deprivation hearing will satisfy due process requirements. *Id*. at 542 & n.7. The Court then applied the *Mathews* factors to determine what process was due to plaintiffs, *id*. at 543-45, and concluded that a full evidentiary hearing was not required before terminating plaintiffs; rather, a tenured public employee dismissible only for cause is entitled to a limited hearing prior to his termination, to be followed by a more comprehensive post-termination hearing. *Id*. at 545-47.

---

[9] In contrast, the Ninth Circuit has previously held that a city employee who was laid off had no constitutionally protected property interest in continued employment, where the city's municipal code provided that the city could eliminate positions for economic reasons. *Allen v. City of Beverly Hills*, 911 F.2d 367, 370-71 (9th Cir. 1990).

In *Gilbert v. Homar*, 520 U.S. 924 (1997), the Court considered what procedures would constitute due process in the context of disciplinary action short of termination – specifically, an unpaid suspension of a police officer. There, plaintiff, a police officer at a state university, was arrested in a drug raid and charged with various drug-related felonies. *Id*. at 926-27. The university suspended him without pay pending an investigation into the charges. *Id*. at 927. Although the criminal charges were eventually dismissed, plaintiff's suspension remained in effect while the university continued with its own investigation, and plaintiff was eventually demoted to the position of groundskeeper. *Id*. Plaintiff eventually had an opportunity to respond to the charges against him at a meeting with the university's president, who then sustained the demotion. *Id*. at 928. Plaintiff sued university officials, contending that they violated his procedural due process rights by failing to give him notice and an opportunity to be heard before suspending him without pay. *Id*.

The Court noted that it had not previously decided whether due process protections extend to discipline of tenured public employees short of termination, but assumed without deciding that plaintiff's suspension infringed a protected property interest. *Id*. at 929. Applying the *Mathews* factors, the Court then held that due process did not require the university to provide a pre-suspension hearing, but only a prompt post-suspension hearing. *Id*. at 932-35.

First, assessing the private interest at stake, the Court noted that unlike in the case of a termination, the income lost during a temporary suspension without pay is "relatively insubstantial" as long as the suspended employee receives a sufficiently prompt post-suspension hearing. *Id*. at 932.

Second, on the other side of the balance, the Court noted that the government "has a significant interest in immediately suspending, when felony charges are filed against them, employees who occupy positions of great public trust and high public visibility, such as police officers." *Id*. Significantly, the Court rejected the officer's argument that he was entitled to pay during the suspension. The Court explained:

> [Plaintiff] contends that [the government's] interest in maintaining public confidence could have been accommodated by suspending him *with* pay until he had a hearing. We think, however, that *the government does not have to give an employee charged with a felony a paid leave at taxpayer expense. If his services to the government are no longer useful once the felony charge has been filed, the Constitution does not require the government to bear the added expense of hiring a replacement while still paying him*.

Id. (first emphasis original; second emphasis added).

Finally, considering "the risk of erroneous deprivation and the likely value of any additional procedures," the Court determined that the government "had no constitutional obligation to provide [the

officer] with a presuspension hearing." *Id*. at 933. The Court reasoned that "the purpose of any pre-suspension hearing would be to assure that there are reasonable grounds to support the suspension without pay," but "here that has already been assured by the arrest and the filing of charges." *Id*. at 933-34 (emphasis omitted). The Court explained that "the arrest and formal charges imposed upon [plaintiff] 'by an independent body demonstrat[e] that the suspension is not arbitrary.'" *Id*. at 934. Moreover, "the imposition of felony charges 'itself is an objective fact that will in most cases raise serious public concern.'" *Id*.[10]

The Court further noted that when an employee is suspended, a short delay before a hearing on the suspension "actually benefits the employee by allowing state officials to obtain more accurate information about the arrest and charges." *Id*. at 934-35. If the government is forced to act too quickly in providing a hearing, "the decisionmaker 'may give greater weight to the public interest and leave the suspension in place.'" *Id*. at 935.

---

[10] Circuit courts have further noted that "acquittal of a criminal charge does not lead inexorably to the conclusion that an adverse personnel action was unjustified or unwarranted," given "the different standards of proof prevailing in criminal prosecutions and adverse personnel actions." *Jankowitz v. United States*, 533 F.2d 538, 542 (Ct. Cl. 1976); *Polcover v. Secretary of Treasury*, 477 F.2d 1223, 1231 (D.C. Cir. 1973) (similar reasoning).

The Court noted that once the charges against plaintiff were dropped, "the risk of erroneous deprivation increased," and "there was likely value in holding a prompt hearing." *Id*. The Court remanded the case for consideration of whether plaintiff received an adequately prompt post-suspension hearing. *Id*. at 935-36.

In short, these cases make clear that to establish a property interest entitled to due process protection, state law or some other source must specifically create an entitlement to a particular benefit – so that the scope of a public employee's protected property interest in his or her job depends on the terms of the employment. Moreover, although a tenured public employee who can be discharged only for cause has a property interest in his or her continued employment, that property interest does not extend to being paid for a period of suspension imposed when a police officer is arrested and charged with a felony.

II. THIS COURT'S PRECEDENTS ESTABLISH THAT THE OFFICERS HERE RECEIVED PROCEDURAL DUE PROCESS IN THE FORM OF A POST-SUSPENSION HEARING ON WHETHER FELONY CHARGES WERE FILED AND HAD NO RIGHT TO RECEIVE BACKPAY FOR THEIR SUSPENSIONS.

As the dissent reasoned, this Court's pronouncements make clear that Debs and O'Donoghue received adequate post-suspension hearings and were not entitled to receive backpay for their suspensions,

because under the terms of their employment and the Constitution, the County had an absolute right to suspend them without pay while they were charged with felonies.

A. The Officers' Employment Terms Allowed Them to Be Suspended without Pay Based Solely on a Felony Charge.

As discussed, this Court has held that the scope of a public employee's constitutionally protected property interest in his or her job is defined by the terms of the employment. *See Roth*, 408 U.S. at 578. In addition, the Ninth Circuit itself has explained that whether a statute or rule "is sufficient to create a property interest will depend largely upon the extent to which the statute contains mandatory language that restricts the discretion of the [decisionmaker]. If the decision to confer a benefit is unconstrained by particularized standards or criteria, no entitlement exists." *Allen v. City of Beverly Hills*, 911 F.2d 367, 370 (9th Cir. 1990) (citation and internal quotation marks omitted); *see also Richardson v. U.S. Customs Service*, 47 F.3d 415, 418-19, 420-21 (Fed. Cir. 1995) (where federal personnel statute allowing summary suspension of employees suspected of crime was silent regarding whether employees who were acquitted and reinstated were entitled to backpay for suspension period, agency was neither required to nor precluded from awarding backpay).

Thus, the Ninth Circuit held that a city employee who was discharged when his position was eliminated did not have a constitutionally protected property interest in continued employment, where no state law or city civil service rule constrained the city's discretion to terminate the employment for reasons other than performance, and to the contrary, the city's municipal code provided that the city could eliminate positions if the city council found it necessary for economic reasons. *Allen*, 911 F.2d at 370-72.

Here, Debs's and O'Donoghue's employment terms not only failed to constrain the County's discretion to suspend them without pay, but affirmatively allowed them to be suspended if they were charged with felonies, and permitted the suspension to continue until the charges were resolved.

First, Rule 18.031 of the Los Angeles County Civil Service Rules provides that the Sheriff's Department may suspend deputy sheriffs based on "any behavior or condition which impairs an employee's qualifications for his or her position or for continued County employment." L.A. County Code, tit. 5, Personnel, Appendix 1, Civil Service Rules (hereafter "Civil Service Rules"),[11] rule 18.031.[12] As the dissent

---

[11] The Civil Service Rules are available on the Internet at: http://search.municode.com/html/16274/_DATA/TITLE05/Appendix_1.html.

[12] The rule states:

"Failure of an employee to perform his or her assigned duties so as to meet fully explicitly stated or implied

(Continued on following page)

noted and plaintiffs conceded, "under this standard, a deputy sheriff may be suspended without pay while a felony charge is pending, because the pendency of a felony charge unquestionably 'impairs' a deputy Sheriff's 'qualifications' for employment as a law enforcement officer." (App.27, 39; Appellees' Supplemental Excerpts of Record 121.) Indeed, this Court recognized in *Gilbert* that the government "has a significant interest in immediately suspending, when felony charges are filed against them, employees who occupy positions of great public trust and high public visibility, such as police officers," and that – regardless of the officer's guilt or innocence – an officer's services to the government may no longer be useful once a felony charge has been filed. *Gilbert*, 520 U.S. at 932.

Second, Rule 18.01 of the Civil Service Rules very specifically provides that an employee may be suspended based on felony charges and the suspension may continue until after the charges are resolved:

---

standards of performance may constitute adequate grounds for discharge, reduction or suspension. . . . Grounds for discharge, reduction or suspension may also include . . . any behavior or pattern of behavior . . . which is unbecoming a county employee; or any behavior or condition which impairs an employee's qualifications for his or her position or for continued county employment." Civil Service Rules, rule 18.031. (*See* ER 13 [complaint, quoting rule].)

> [A]n employee may be suspended . . . for up to and including 30 days, pending investigation, filing of charges and hearing on discharge or reduction, or as a disciplinary measure. *Where the charge upon which a suspension is [sic] the subject of criminal complaint or indictment filed against such employee, the period of suspension may exceed 30 calendar days and continue until, but not after, the expiration of 30 calendar days after the judgment of conviction or the acquittal of the offense charged in the complaint or indictment has become final. . . .*

Civil Service Rules, rule 18.01(A) (emphasis added). (*See* ER 12.)

Thus, the only process that could be "due" under the officers' terms of employment is a determination of whether criminal charges were in fact filed. Moreover, nothing in the Civil Service Rules provides that the employee is entitled to be paid for the suspension period.[13] Nor did plaintiffs point to any state law or other source establishing such a right.

In short, plaintiffs identified no provision of state or local law, and nothing in the officers' terms of employment, that created "a legitimate claim of

---

[13] Civil Service Rule 18.04 provides that the Commission may instruct the appointing power to reinstate a discharged or reduced employee retroactively as of the date of the discharge or reduction, but only if the discharge or reduction is not "justif[ied]." As the dissent noted, "the Sheriff's Department was fully justified in suspending Debs and O'Donoghue under Rule 18.031." (App.29 n.3.)

entitlement" to be paid for a period of suspension imposed while the deputies were charged with felonies, regardless of whether they had actually engaged in misconduct – nor, accordingly, any right to a hearing on any issue other than whether felony charges were filed. *See Roth*, 408 U.S. at 577. Under this Court's holding in *Roth*, this should have disposed of the issue and conclusively established that the officers were not entitled to backpay for their suspensions. Nevertheless, as discussed next, the Ninth Circuit looked further, and in doing so it erred.

B. Plaintiffs Had No Substantive Constitutional Right to Be Paid for the Suspension Period.

The Ninth Circuit held that under this Court's decision in *Loudermill*, 470 U.S. at 538, Debs and O'Donoghue had "a constitutionally protected property interest in continued employment," and that their unpaid suspensions deprived them of that interest. (App.8.) The majority then found that due process might require the officers to receive post-suspension hearings in which to challenge not only whether felony charges were filed, but whether the allegations underlying those charges were true, and thereby receive backpay. (*See* App.9-10, 13-17.)

But as explained, in *Gilbert* this Court reined in its holding in *Loudermill* as applied to suspension of police officers based on felony charges. As the dissent noted, *Gilbert* made clear that although public

employees who can be discharged only for cause have property interests in their continued employment, those property interests do *not* extend to police officers' being paid for a period of suspension based on pending felony charges. (App.28-30.) In noting that the government has a strong interest in immediately suspending police officers when felony charges are filed against them, the Court explicitly rejected the plaintiff's assertion that he was entitled to be paid during his suspension. *Gilbert*, 520 U.S. at 932. The Court stated:

> [T]he government does not have to give an employee charged with a felony a paid leave at taxpayer expense. If his services to the government are no longer useful once the felony charge has been filed, the Constitution does not require the government to bear the added expense of hiring a replacement while still paying him.

Id.

The Court's statement could hardly be clearer: as far as procedural due process is concerned, when a police officer is charged with a felony, the government may suspend the officer – regardless of the officer's guilt – and does not have to pay him or her. In other words, as the dissent explained, "a suspension without pay while a felony charge is pending does not deprive a law enforcement employee of any constitutionally protected property interest." (App.28.) For the same reason, the government is not constitutionally required to pay backpay for the suspension after

the fact if the officer is reinstated – otherwise, the government would "still be in the position of paying for both the suspended employee and the employee's replacement during the suspension period, the very expense *Gilbert* said the government need not bear." (App.28 n.2.)

Plaintiffs also relied on *FDIC v. Mallen*, 486 U.S. 230 (1988), to argue that the officers were entitled to a post-suspension hearing that would allow them to contest the validity of the allegations underlying the felony charges and thus receive backpay. (*See* Appellant's Opening Brief, 9th Cir. docket #24, at 27-28, 30-31; Appellant's Reply Brief, 9th Cir. docket #35, at 13.) There, this Court addressed the constitutionality of a statute that authorized the Federal Deposit Insurance Corporation to suspend an official of a federally insured bank when the official is charged with certain crimes involving dishonesty or breach of trust and the official's continued service would threaten the bank depositors' interests or impair public confidence in the bank. *Mallen*, 486 U.S. at 231-35 & n.5, 237-38.[14] The Court found that the statutory procedures for a post-suspension hearing satisfied due process. *Id*. at 245.

In the dicta relied on by plaintiffs, the Court found it inconsequential that the suspended official's

---

[14] In *Gilbert*, the Court noted that *Mallen* assumed that the bank official's suspension would be without pay. *Gilbert*, 520 U.S. at 931 n.1.

criminal trial might conclude before the post-suspension hearing occurred. *Id*. The Court commented:

> *If* [*the official*] *had been promptly acquitted, the basis for the suspension would have disappeared and the* [*suspension*] *order would have been vacated.* On the other hand, a conviction merely strengthens the case for maintaining the suspension. . . . *The criminal trial merely constitutes a potentially intervening factor that may require that the suspension be promptly vacated.* . . .

Id. at 245-46 (emphasis added); *see also id*. at 247 ("If the official is successful in the criminal proceeding, then due process has prevailed and the order of suspension must be vacated.").

Mallen does not create a property right in being paid for a suspension based on a pending felony charge. *Mallen* merely noted that if the suspended bank official was acquitted, the suspension order could be vacated – meaning that the official could go back to work. But *Mallen* never suggested that the official was entitled to be paid for the suspension.

C. The Majority's Decision Flatly Contradicts This Court's Holdings in *Board of Regents v. Roth* and *Gilbert v. Homar*.

Even though Debs and O'Donoghue's employment terms gave them no right to be paid for a suspension based on a felony charge, and under

Loudermill and its progeny the Constitution's due process protections create no such substantive right, the Ninth Circuit created out of whole cloth a right for all police officers to receive pay for a period of suspension imposed while a felony charge is pending, if the officer later proves that the allegations underlying the charge are untrue. As explained, this holding simply cannot be squared with this Court's express directives in *Roth* and *Gilbert*.

The majority denied that it was creating any substantive right. It denied that it was determining what substantive standard should be applied at a post-suspension hearing, and asserted that it was merely holding that a post-suspension hearing that simply duplicated the pre-suspension inquiry (of whether felony charges were filed) was meaningless. (App.16-17, *see* App.9-10.) The majority also denied that it was deciding whether plaintiffs were entitled to backpay, stating that should the issue arise, the district court should resolve it in the first instance. (App.19 n.10.)

But as the dissent noted, "Debs and O'Donoghue's sole complaint [was] that the Commission denied them backpay on the ground that felony charges were (in fact) pending against them while they were suspended." (App.30.) The dissent further noted that for this to state a due process violation, the officers "must show that they have a constitutionally protected property interest specifically in *being paid while felony charges are pending against them*." (App.30

(emphasis in original).) By holding that plaintiffs had alleged a plausible due process violation, the majority effectively held that the officers *did* have a property interest that entitled them to be paid in such circumstances. Yet as shown, the officers had no such interest under either their employment terms or the Constitution.

The majority also remanded to the district court to develop the factual record and determine whether the County's post-suspension procedures (in which, plaintiffs alleged, the Commission inquired no further than to confirm that felony charges had in fact been filed (App.13)) satisfied due process under *Mathews*, 424 U.S. 319. (App.15-16.) The majority surmised that the post-suspension hearings might be "more robust than Plaintiffs allege" or the County might have "a strong justification for [its] challenged policy," thus affecting the due process calculus. (App.15.)

But no facts developed on remand could possibly be relevant to the due process inquiry. As shown, the Sheriff's Department had an absolute right under the officers' employment terms and the Constitution to suspend them without pay simply because they were charged with felonies, regardless of whether the charges were true. Accordingly, the County had an absolute right to limit the post-suspension hearing (as well as any pre-suspension hearing) to inquiring whether felony charges had actually been filed. Whether the officers in fact received additional procedures is irrelevant to whether the hearing satisfied

due process. In short, the majority remanded for what would essentially be a meaningless evidentiary hearing in the district court – and, by holding that it was an open question whether the officers were entitled to more procedures than they alleged they received, flatly contravened this Court's clear holdings in *Gilbert* and *Roth*.

The majority also attempted to distinguish *Gilbert* on the grounds that the plaintiff there eventually received backpay and complained instead that his paycheck had been interrupted during the suspension. Thus, the majority reasoned, "the issue of whether the plaintiff was entitled to backpay was not before the Court." (App.19 n.10.)

But as the dissent reasoned, *Gilbert* is directly on point. As explained,

> *Gilbert* stated that the government need not "bear the added expense of hiring a replacement while still paying" a suspended law enforcement officer, if that officer's "services to the government are no longer useful once the felony charge has been filed." *Gilbert*, 520 U.S. at 932. In short, it is constitutionally permissible not to pay a law enforcement employee who has been suspended with felony charges pending.

(App.28 n.2.) If the government nonetheless had to provide backpay for the suspension period later, as the majority held, the government would be paying

for both the suspended employee and a replacement during the suspension period. (App.28 n.2.)

Finally, the majority denied that *Gilbert* held that a police officer has no constitutionally protected property interest in being paid during a suspension with a felony charge pending. (App.18.) The majority reasoned that "[i]f the plaintiff in *Gilbert* had no protected property interest in his employment, the Court would have ended the inquiry there and concluded he was not entitled to a hearing at all"; instead, the Court "applied the *Mathews* test 'to determine what process [was] constitutionally due," indicating that "the Court considered the plaintiff's employment to be a protected property interest." (App.18.)

The majority misses the point. The Court in *Gilbert* assumed *arguendo* that plaintiff's suspension infringed a protected property interest, entitling him to due process. But in applying the *Mathews* test, the Court determined that whatever the precise scope of that property interest, it did not extend to being paid for the suspension – and whatever process was due, it did not include a substantive component of paying the employee for the suspension while awaiting a hearing.

III. REVIEW IS WARRANTED TO CLARIFY THAT LAW ENFORCEMENT AGENCIES, AS WELL AS PUBLIC EMPLOYERS GENERALLY, ARE ENTITLED, PURSUANT TO THE TERMS OF EMPLOYMENT, TO SUSPEND OFFICERS WITHOUT PAY WHILE FELONY CHARGES ARE PENDING AGAINST THEM, AND NEED NOT INCUR THE DOUBLE EXPENSE OF PAYING FOR BOTH THE EMPLOYEE AND A REPLACEMENT DURING THE SUSPENSION PERIOD.

As explained, the Ninth Circuit's holding that a police officer may have a substantive constitutional right to receive pay for a suspension imposed while a felony charge is pending, regardless of whether (as here) the terms of employment plainly so provide, cannot be squared with this Court's holdings in *Gilbert* and *Roth*.

It is vital that the Court grant review to correct the majority's error. The decision is far-reaching, directly affecting every law enforcement agency within the Ninth Circuit and unsettling the law regarding basic law-enforcement employment practices nationwide. Unfortunately, it is not rare for police officers to be charged with felonies, and as this Court recognized in *Gilbert* and *Roth*, law enforcement agencies must have the power to define the terms of employment so as to allow them to discipline their officers and take appropriate measures to preserve "public confidence in [the] police force."

Gilbert, 520 U.S. at 932. More specifically, law enforcement agencies must know that they can suspend officers whose services are unavailable while felony charges are pending, without being forced to give those officers "a paid leave at taxpayer expense" or incur the substantial double expense of paying both the officer and a replacement during the suspension. *Id*. Without such certainty, agencies may refrain from suspending officers charged with felonies, thus eroding public confidence in law enforcement. Alternatively, the public may be required to bear the costly – and unnecessary – expense of paying officers who are not providing services. By placing law enforcement agencies in such an untenable position, the Ninth Circuit's decision grossly interferes with the day-to-day operation of essential public services.

Worse yet, the Ninth Circuit's decision impacts the daily management not only of law enforcement personnel, but virtually all local, state and federal public employees. Like law enforcement agencies, public employers generally must have the power to protect governmental integrity by suspending employees without pay pending disposition of criminal charges that impact the public's confidence in the ability of public employees to perform their jobs. The Ninth Circuit's repudiation of this Court's decisions in *Roth* and *Gilbert*, and its suggestion that an open-ended "due process" inquiry may supplant the precise terms of employment defined by federal, state or local law, directly threatens that power. It is essential that this Court grant review to settle the law and protect

the ability of law enforcement agencies and all public employers to discipline their employees and preserve the integrity of government.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

TIMOTHY T. COATES
Counsel of Record
LILLIE HSU
GREINES, MARTIN, STEIN & RICHLAND LLP
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
Telephone: (310) 859-7811
Facsimile: (310) 276-5261

ANDREA SHERIDAN ORDIN
County Counsel
LESTER J. TOLNAI
Assistant County Counsel
OFFICE OF THE COUNTY COUNSEL
500 West Temple Street, Room 653
Los Angeles, California 90012
Telephone: (213) 974-1923
Facsimile: (213) 687-7337

JEFFREY C. FREEDMAN
CONNIE C. ALMOND
LIEBERT CASSIDY WHITMORE
6033 West Century Boulevard,
Suite 500
Los Angeles, California 90045
Telephone: (310) 981-2000
Facsimile: (310) 337-0837

Counsel for Petitioner
County of Los Angeles

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT.

ASSOCIATION FOR LOS ANGELES DEPUTY SHERIFFS, in Its Representational Capacity, on Behalf of Its Members; DARRIN WILKINSON; LISA BROWN DEBS; SEAN O'DONOGHUE; DAVID SHERR,

Plaintiffs-Appellants,

v.

COUNTY OF LOS ANGELES, a Municipal Corporation (also erroneously sued as the LOS ANGELES COUNTY BOARD OF SUPERVISORS, the LOS ANGELES COUNTY CIVIL SERVICE COMMISSION and the LOS ANGELES COUNTY SHERIFF'S DEPARTMENT); GLORIA MOLINA, in her capacity as a Los Angeles County Supervisor; YVONNE BRAITHWAITE BURKE, in her capacity as a Los Angeles County Supervisor; ZEV YAROSLAVSKY, in his capacity as a Los Angeles County Supervisor; DON KNABE, in his capacity as a Los Angeles County Supervisor; MICHAEL D. ANTONOVICH, in his capacity as a Los Angeles

No. 08-56283

D.C. No. 2:08-cv-00238-RGK-FFM

OPINION

County Supervisor; LYNN ADKINS, in his capacity as a Civil Service Commissioner; VANGE FELTON, in her capacity as a Civil Service Commissioner; CAROL FOX, in her capacity as a Civil Service Commissioner; Z. GREG KAHWAJIAN, in his capacity as a Civil Service Commissioner; EVELYN MARTINEZ, in her capacity as a Civil Service Commissioner; LEROY BACA, individually and as Sheriff of the County of Los Angeles,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
R. Gary Klausner, District Judge, Presiding

Argued and Submitted
October 6, 2010 – Pasadena, California

Filed August 12, 2011.

Before: Harry Pregerson, Dorothy W. Nelson,
and Sandra S. Ikuta, Circuit Judges.

Opinion by Judge Pregerson;
Partial Concurrence and Partial
Dissent by Judge Ikuta

COUNSEL

Elizabeth J. Gibbons, Green & Shinee, Encino, California, for the plaintiffs-appellants.

Connie C. Almond (argued) and Jeffrey C. Freedman, Liebert Cassidy Whitmore, Los Angeles, California, for the defendants-appellees.

OPINION

PREGERSON, Circuit Judge:

This appeal concerns the requirements of due process when law enforcement officers charged with felonies are suspended without pay. We affirm in part and reverse in part the decision of the district court.

FACTUAL AND PROCEDURAL BACKGROUND[1]

Plaintiffs Darrin Wilkinson, David Sherr, Lisa Brown Debs, and Sean O'Donoghue are four current or former Los Angeles County deputy sheriffs, joined by their union, the Association of Los Angeles Deputy Sheriffs (collectively, "Plaintiffs"). Defendants are the County of Los Angeles (the "County"), the Los Angeles

[1] The following facts come primarily from Plaintiffs' first amended complaint. Because this is an appeal from a dismissal for failure to state a claim, all facts alleged are accepted as true and interpreted in the light most favorable to Plaintiffs. *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005).

County Supervisors (the "Supervisors"), the Los Angeles County Civil Service Commissioners (the "Civil Service Commissioners"), and the Los Angeles County Sheriff (the "Sheriff") (collectively, "Defendants").

All four deputy sheriffs were charged with felonies. Plaintiff Wilkinson was charged in June 2002 with nine felony counts of falsifying police reports. Plaintiff Sherr was charged on June 11, 2003, with seven counts of workers' compensation insurance fraud, perjury, and grand theft. Plaintiff Debs was charged on June 27, 2004, with felony drunk driving. Plaintiff O'Donoghue was charged on June 3, 2002, with two counts of falsifying a police report, three counts of accessory after the fact to possession of narcotics for sale, one count of perjury, and one count of false imprisonment.

The four deputies were served by the Los Angeles County Sheriff's Department with letters of intent to suspend them. Plaintiffs responded in writing and denied the allegations against them, but were nonetheless suspended without pay. All four plaintiffs then requested post-suspension hearings before the Los Angeles County Civil Service Commission (the "Commission"). The request was held in abeyance pending completion of the criminal proceedings and disciplinary action by the Sheriff's Department.

Ultimately, the criminal charges against plaintiffs Wilkinson and Debs were dropped, and plaintiffs Sherr and O'Donoghue were acquitted by juries. All

four were reinstated from their suspensions and returned to paid status.[2] They continued to demand hearings before the Commission to contest the propriety of their suspensions after the fact.

Many months after their reinstatement from suspension, and before any post-suspension hearings were held, all four deputies were discharged from the Sheriff's Department, at least in part based on the allegations underlying the criminal charges.[3] They all requested hearings on their discharges. These hearings were consolidated with the still-pending post-suspension hearings.

While waiting for their hearings on their suspensions and discharges, Wilkinson and Sherr were both granted disability retirement by the Los Angeles County Employee Retirement System. The date of retirement was set retroactively to the day after their discharge. This effectively converted Wilkinson and Sherr from discharged employees to retired employees. The Commission subsequently issued final

---

[2] Wilkinson was suspended for approximately nine months. Sherr was suspended for approximately ten and a half months. Debs was suspended for approximately three weeks. O'Donoghue was suspended for approximately nine months.

[3] Wilkinson was reinstated from suspension on March 28, 2003; he was discharged in September 2004. Sherr was reinstated from suspension on May 18, 2004; he was discharged on January 21, 2005. Debs was reinstated from suspension on August 17, 2004; she was discharged on March 10, 2005. O'Donoghue was reinstated from suspension on February 28, 2003; he was discharged on June 9, 2005.

decisions stating that it did not have jurisdiction over the appeals of retired deputies, including Wilkinson and Sherr. Neither Wilkinson nor Sherr ever received a post-suspension hearing.

Debs and O'Donoghue received post-suspension hearings. The Commission's hearing officer found that Debs's suspension and discharge were both improper because the allegations underlying the felony charge against her were untrue. The hearing officer recommended that the Commission reinstate Debs from her discharge and also restore the pay lost during her suspension. After hearing this recommendation, the Commission ordered Debs reinstated from her discharge, but denied Debs any back pay for the time she was suspended. The Commission held that Debs's suspension was proper because a felony charge, whether supported by valid allegations or not, was pending against her at the time the Sheriff's Department imposed her suspension.

As for O'Donoghue, the hearing officer issued a report recommending O'Donoghue's full reinstatement with back pay to the date of his discharge. The hearing officer also recommended that O'Donoghue receive back pay and benefits for the time he was suspended. After hearing the recommendation, the Commission ordered O'Donoghue reinstated from his discharge. Rather than reversing the suspension, however, the Commission directed the Sheriff, the Sheriff's Department, and the County to reconsider the decision to suspend O'Donoghue. They did not do

so. O'Donoghue was not reimbursed for his lost pay and benefits for the time he was suspended.

Plaintiffs brought claims under 42 U.S.C. § 1983 in federal district court, alleging violations of their Fourteenth Amendment due process rights.[4] Defendants filed a motion to dismiss. The district court granted the motion, holding that Plaintiffs had failed to state a claim against the County of Los Angeles, and that the individual defendants were entitled to qualified immunity. Plaintiffs appeal from that decision.

STANDARD OF REVIEW

A dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is reviewed de novo. *Synagogue v. United States*, 482 F.3d 1058, 1060 (9th Cir. 2007). "When ruling on a motion to dismiss, we accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). The court draws all reasonable inferences in favor of the plaintiff. *Newcal Industries, Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1043 n.2 (9th Cir. 2008). "Dismissal

[4] Plaintiffs Wilkinson, Debs, and O'Donoghue also appealed the Commission's decisions by filing petitions for writ of mandate in Los Angeles Superior Court. The state court petitions were dismissed without prejudice after Plaintiffs filed their complaint in federal court.

is proper under Rule 12(b)(6) if it appears beyond doubt that the non-movant can prove no set of facts to support its claims." *Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir. 2004). This court also reviews de novo the district court's determination regarding qualified immunity. *Robinson v. Prunty*, 249 F.3d 862, 865-66 (9th Cir. 2001).

DISCUSSION

I. Procedural Due Process

It is not disputed by Defendants that Plaintiffs have a constitutionally protected property interest in continued employment. Plaintiffs may not be deprived of that employment without due process of law. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985). Temporary suspensions, like terminations, are deprivations of employment that can implicate the protections of due process. *See FDIC v. Mallen*, 486 U.S. 230, 240 (1988); *Finkelstein v. Bergna*, 924 F.2d 1449, 1451 (9th Cir. 1991). "'Once it is determined that due process applies, the question remains what process is due.'" *Mallen*, 486 U.S. at 240 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481, (1972)).

"[E]mployees who occupy positions of great public trust and high public visibility, such as police officers," can be temporarily suspended without any pre-suspension due process if felony charges are filed against them. *Gilbert v. Homar*, 520 U.S. 924, 932-34, (1997); *see also Mallen*, 486 U.S. at 230 (upholding

suspension of indicted bank official without pre-suspension hearing). The felony charge "serve[s] to assure that the state employer's decision to suspend the employee is not 'baseless or unwarranted,' in that an independent third party has determined that there is probable cause to believe the employee committed a serious crime." *Gilbert*, 520 U.S. at 934 (quoting *Mallen*, 486 U.S. at 240) (internal citation omitted).

However, the constitutionality of a suspension without any *pre*-suspension procedural due process depends on the availability of a *post*-suspension hearing. *See Gilbert*, 520 U.S. at 930 ("[W]here a State must act quickly, or where it would be impractical to provide predeprivation process, post-deprivation process satisfies the requirements of the Due Process Clause."); *Mallen*, 486 U.S. at 240 (holding that "in limited cases demanding prompt action," the government may be justified in "postponing the opportunity to be heard until after the initial deprivation."); *see also Loudermill*, 470 U.S. at 547 n.12 ("[T]he existence of post-termination procedures is relevant to the necessary scope of pretermination procedures.").

Even though the plaintiffs in *Gilbert* and *Mallen* received no pre-suspension process at all, unlike the plaintiffs in this case, who received notice of the impending suspension and the opportunity to submit a written statement in response, this distinction is immaterial. Plaintiffs allege – and at this stage of the proceedings we must assume the allegation is true – that the pre-suspension process provided by Defendants

consisted of nothing more than a determination that felony charges had been filed, without any inquiry into the veracity of the allegations underlying those charges. In other words, once Defendants confirmed that Plaintiffs had been charged with felonies, the pre-suspension inquiry was at an end, and Plaintiffs were suspended. This level of due process is no more substantial than what was accorded the plaintiffs in *Gilbert* and *Mallen*, in which the plaintiffs were summarily suspended as soon as it was determined that they had been charged with felonies. The fact that Plaintiffs in the instant case were given an opportunity to respond makes little difference when their response could have had no effect on their suspension. Therefore, as indicated in *Gilbert* and *Mallen*, due process requires that Plaintiffs receive post-suspension hearings in addition to the limited procedures they received before their suspensions.[5]

---

[5] Defendants argue that Plaintiffs' claims are precluded under the doctrine of res judicata because Plaintiffs failed to seek judicial review of the Commission's decisions. This argument is without merit. The case Defendants cite, *Miller v. County of Santa Cruz*, 39 F.3d 1030, 1038 (9th Cir. 1994), is inapposite for two reasons: first, it involved a challenge to a civil service commission's unreviewed factual findings, *id.* at 1038, not a constitutional challenge to the commission's procedures; second, *Miller*'s holding of preclusion relied on a finding that the commission had adequate procedural safeguards in place, *id.* at 1032-33, whereas in this case Plaintiffs allege there were insufficient safeguards.

II. *Monell* claims

To bring a § 1983 claim against a local government entity, a plaintiff must plead that a municipality's policy or custom caused a violation of the plaintiff's constitutional rights. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). The district court held that none of Plaintiffs' allegations sufficiently pleaded a *Monell* claim. We disagree.

A.

Plaintiffs allege that Defendants have adopted a policy of denying post-suspension hearings to employees who resigned after the suspension was imposed but before the hearing was completed. As discussed above, due process requires that an employee suspended solely on the basis that felony charges were filed against him must be granted a post-suspension hearing. Because plaintiffs Wilkinson and Sherr were denied any post-suspension hearing at all, pursuant to Defendants' policy, they have sufficiently stated a *Monell* claim.

The district court relied on *Zuniga v. Los Angeles County Civil Service Commission*, 40 Cal. Rptr. 3d 863 (Ct. App. 2006), a California case, to dismiss Wilkinson and Sherr's *Monell* claim. *Zuniga* held that the Commission lacks jurisdiction to hear appeals from retired employees. *Id.* at 866. The district court stated, "Because the Commission lacks jurisdiction, it cannot be simultaneously denying the individuals their constitutional right to due process."

But the fact that the Commission is precluded from hearing Wilkinson's and Sherr's appeals does not remove the County's[6] constitutional obligation to provide some form of post-suspension hearings. Summary suspensions with minimal or no pre-suspension due process are constitutional only if followed by adequate post-suspension procedures. Take away those post-suspension procedures, and the suspensions are no longer constitutional under the Due Process Clause.[7] The issue is not whether the Commission had jurisdiction, but whether Wilkinson and Sherr received sufficient post-suspension process to satisfy constitutional requirements. They did not receive such process, based on Defendants' policy to deny hearings to retired employees, and thus Wilkinson and Sherr have successfully stated a *Monell* claim.[8]

---

[6] Plaintiffs allege the challenged policy was also adopted by Los Angeles County and the Board of Supervisors. They also allege that the Sheriff ratified the conduct of the other defendants.

[7] Nor can state law supersede the federal requirements of due process. *See Loudermill*, 470 U.S. at 541.

[8] Plaintiffs also allege in their complaint that Defendants' policies unnecessarily delayed their hearings. The district court discussed the issue of delay at some length. In Plaintiffs' briefs on appeal, however, Plaintiffs have waived delay as a separate constitutional claim. *See* Appellants' Br. at 25. Plaintiffs instead assert that the delay led to an unconstitutional result when combined with Defendants' policy to deny hearings to retired employees: Wilkinson's and Sherr's hearings were delayed so long that the deputies retired before the hearings were held,

(Continued on following page)

B.

Plaintiffs Debs and O'Donoghue did receive post-suspension hearings, unlike Wilkinson and Sherr. But Debs and O'Donoghue allege that the outcomes of those hearings were predetermined. They allege that Defendants had a policy of sustaining suspensions, even after post-suspension review, so long as there was evidence that a felony charge was filed against the employee, regardless of the validity of the allegations stated in the charge. Thus, although Debs and O'Donoghue were granted post-suspension hearings, the Commission inquired no further than to confirm the pre-suspension determinations that felony charges had been filed against the two deputies. In effect, Plaintiffs allege that the post-suspension hearings merely repeated the minimal pre-suspension procedures afforded Debs and O'Donoghue.

The district court concluded that Defendants' policy, if it existed, was never applied to Debs and O'Donoghue, because the hearing officers in each of their cases recommended that Debs and O'Donoghue "receive back pay for the period of their suspensions." The district court overlooked the crucial point that the hearing officers were only making *recommendations*,

---

which denied them their right to receive full post-suspension due process. Because we conclude that Plaintiffs have sufficiently pleaded that Wilkinson's and Sherr's suspensions were unconstitutional based simply on the fact that they were denied post-suspension hearings, we do not address separately the issue of delay. As to Debs and O'Donoghue, Plaintiffs appear to have waived entirely any arguments regarding delay.

and were not the final decisionmakers. Plaintiffs allege that the Commission, following the County's policy to sustain suspensions based on the filing of felony charges, rejected the recommendation to reverse Debs's suspension. And although the Commission recommended reconsideration of O'Donoghue's suspension, the County and the Sheriff declined to do so. The district court erred in focusing on the actions of the hearing officers, and not on the actions of the final decisionmakers – in Debs's case, the Commission, and in O'Donoghue's case, the County and the Sheriff.

Because Plaintiffs allege that Defendants applied the challenged policy to them, we must decide whether Plaintiffs have thereby alleged a constitutional violation. We determine what procedures satisfy due process by applying the balancing test from *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). *See Brewster v. Bd. of Educ. of Lynwood Unified School Dist.*, 149 F.3d 971, 983 (9th Cir. 1998). *Mathews* requires courts to consider the following three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and [third], the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335.

Making every inference in favor of Plaintiffs, as we must at the pleading stage, we conclude that Plaintiffs could conceivably prove facts to support their allegation that Defendants' policy caused a violation of Plaintiffs' right to due process. For example, Plaintiffs could show that the limited post-suspension inquiry created too great a risk of erroneous deprivation of their protected interest in employment, or that Defendants' interest in maintaining such limited procedures does not outweigh Plaintiffs' interest in a more thorough investigation. Because Plaintiffs can potentially prove a "set of facts to support [their] claims," *Adams*, 355 F.3d at 1183, we hold that Debs and O'Donoghue have adequately stated a *Monell* claim.

We need not and do not decide whether, in all cases, a post-suspension hearing that looks no deeper than whether felony charges were filed against an employee would or would not pass constitutional muster. Indeed, full *Mathews* analysis cannot properly be conducted at the pleading stage with an undeveloped record. *See Brewster,* 149 F.3d at 983 ("Precisely what procedures the Due Process Clause requires in any given case is a function of context."). It is possible that Defendants' post-suspension hearings are more robust than Plaintiffs allege, or that Defendants' have a strong justification for their challenged policy. We leave it to the district court to make these determinations in the first instance, with

Mathews as its guide, and therefore remand for further fact-finding and analysis.[9]

The dissent argues that Debs and O'Donoghue are not challenging Defendants' hearing procedures, but only the substantive standard applied during those procedures, namely, Defendants' policy of upholding suspensions solely on the basis of felony charges. Dis. op. at 10768. Thus, the dissent claims, Debs and O'Donoghue are not raising a procedural due process issue at all. Dis. op. at 10769. We disagree. Debs and O'Donoghue allege that Defendants apply their policy both pre-suspension and

---

[9] The Second Circuit recently followed a similar approach in *Nnebe v. Daus*, ___ F.3d ___, No. 09-4305, 2011 WL 2149924, at *12 (2d Cir. May 31, 2011). *Nnebe* concerned New York City's policy of summarily suspending taxi drivers' licenses if the drivers were arrested on certain criminal charges. *Id.* at *1. Although the drivers were granted post-suspension hearings, the record at summary judgment suggested that the administrative law judges were "strictly prevented from considering anything other than the identity of the driver and the offense for which he was charged upon arrest." *Id.* at *12. The court declined to decide whether such a proceeding satisfied due process; more information was required as to the substance of the post-suspension hearings. *Id.* The court thus remanded the case, instructing the district court to conduct additional fact-finding. *Id.* at *13. The court further instructed the district court to evaluate the post-suspension procedure under the *Mathews* test. *Id.*

If such an approach is appropriate at the summary judgment stage in *Nnebe,* it is even more compelling in this case. At summary judgment the record is at least partially developed, whereas in this case the record has not been developed at all, given that it was dismissed at the pleading stage.

post-suspension. By doing so, Defendants render the post-suspension hearings redundant and meaningless, because the post-suspension inquiry goes no deeper than the pre-suspension inquiry. A meaningless hearing is no hearing at all, and does not satisfy the requirements of procedural due process. *See Barry v. Barchi*, 443 U.S. 55, 66 (1979) ("[T]he opportunity to be heard must be 'at a meaningful time and in a meaningful manner.'" (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965))). Thus, Defendants' policy of upholding suspensions on the sole basis of felony charges, even on post-suspension review, directly impacts the procedural due process question. Accordingly, Debs and O'Donoghue have properly and plausibly stated a procedural due process claim.

The dissent further argues that Debs and O'Donoghue cannot state a plausible due process claim because their "terms of employment allowed them to be suspended without pay on the basis of a felony charge alone." Dis. op. at 10770. In other words, the dissent claims that the felony charges were sufficient cause to justify the suspensions of Debs and O'Donoghue. The dissent supports this assertion by citing to the Supreme Court's decision in *Gilbert* and Los Angeles County Civil Service Rule 18.031. *See* Dis. op. at 10770-71. We disagree that either authority resolves this case at this stage of the proceedings.

Contrary to the dissent's assertion, *Gilbert* does not hold that felony charges alone can justify the suspension of a law enforcement officer. *Gilbert*

merely holds that felony charges can justify suspension *without pre-suspension due process. See* 520 U.S. at 932-34. *Gilbert* says nothing about whether felony charges will continue to justify a suspension under post-suspension review. *Gilbert* is a case about the timing of suspensions, not their justification.

The dissent argues that *Gilbert* stands for the proposition that "a suspension without pay while a felony charge is pending does not deprive a law enforcement employee of any constitutionally protected property interest." Dis. op. at 10770-71. But the *Gilbert* Court's analysis belies this claim. If the plaintiff in *Gilbert* had no protected property interest in his employment, the Court would have ended the inquiry there and concluded he was not entitled to a hearing at all, either pre- or post-suspension. *See Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 578 (1972) (holding that absent a protected property interest in employment, an employee is not constitutionally entitled to a hearing before his employer declines to renew his employment contract). Instead, the *Gilbert* Court applied the *Mathews* test "to determine what process is constitutionally due," *Gilbert*, 520 U.S. at 931-32, which indicates that the Court considered the plaintiff's employment to be a protected property interest. *See Roth*, 408 U.S. at 569 ("The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and

property."). Therefore, *Gilbert* does not affect Plaintiffs' protected property interest.[10]

The dissent also reads Rule 18.031 to conclusively allow for summary suspensions when a law enforcement officer is charged with a felony.[11] Dis. op. at

---

[10] Nor does *Gilbert* resolve the issue of backpay as simply as the dissent suggests. *See* Dis. op. at 10770-71. Although *Gilbert* holds that a law enforcement officer charged with a felony can be suspended without pay prior to receiving a hearing, *see* 520 U.S. at 932-33, it says nothing about backpay. In fact, the issue of whether the plaintiff was entitled to backpay was not before the Court in *Gilbert* because the plaintiff had *already* received backpay. *Id.* at 927.

Moreover, the Court in *Gilbert* minimized the plaintiff's interest in "the uninterrupted receipt of his paycheck" because "so long as the suspended employee receives a sufficiently prompt post-suspension hearing, the lost income is relatively insubstantial (compared with termination)." *Id.* at 932. Indeed, the plaintiff in *Gilbert* was suspended for only 24 days before receiving a hearing. *See id.* at 927. Plaintiff O'Donoghue, in contrast, was suspended without pay for nine months, and received his hearing almost three years after his initial suspension. It is difficult to assert that the loss of nine months' income is "relatively insubstantial," or that a hearing three years after the fact is "sufficiently prompt" – the *Gilbert* Court's *Mathews* balancing might have come out quite differently given these facts.

At this stage of the proceedings, we decline to decide whether Plaintiffs are entitled to backpay. We merely note that *Gilbert* does not resolve the question. Should the issue of backpay arise, we leave its resolution in the first instance to the district court.

[11] Rule 18.031 states, in relevant part:

> Failure of an employee to perform his or her assigned duties so as to meet fully explicitly stated or implied

(Continued on following page)

10770-71. Even assuming Rule 18.031 defines Plaintiffs' protected property interest, we disagree with the dissent's interpretation of the rule. We do not dispute that Rule 18.031 allows suspension of an employee based on a "condition which impairs an employee's qualifications for his or her position." But nowhere does the rule state that a felony charge is necessarily such a "condition" – indeed, the rule does not mention felonies or felony charges at all. The dissent makes an inferential leap to conclude that felony charges would "unquestionably" fall under 18.031, citing *Gilbert* for support. Dis. op. at 10770-71. But, as discussed earlier, *Gilbert* does not hold that felony charges justify suspension, only that felony charges justify suspension without a pre-suspension hearing. 520 U.S. at 932-34. Under *Gilbert,* a suspended deputy charged with a felony is still entitled to a post-suspension hearing, *see id.* at 530, which means his protected property interest does not end with the felony charge. Conceivably, one purpose of that post-suspension hearing would be to determine if the particular felony allegations against a suspended deputy would justify suspension under Rule 18.031. In any event, Rule 18.031 does not clearly terminate

---

> standards of performance may constitute adequate grounds for discharge, reduction or suspension. . . . Grounds for discharge, reduction or suspension may also include . . . any behavior or condition which impairs an employee's qualifications for his or her position or for continued county employment.

Civil Service Rule 18.031.

a deputy's protected property interest as soon as she is charged with a felony, and thus the rule is not determinative at this stage of the proceedings.

In sum, we hold that Debs and O'Donoghue have plausibly stated a *Monell* claim, and remand to the district court for further proceedings.

III. Qualified Immunity

In deciding whether to grant qualified immunity, a court must determine (a) whether the alleged facts make out a constitutional violation, and (b) whether the constitutional right at issue was clearly established at the time of the violation. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). A right is clearly established if it would be clear to a reasonable official that his conduct was unlawful. *Id.* at 202. A court may exercise its discretion as to the order in which it addresses each prong. *Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808, 818 (2009).

A.

Under the facts alleged, plaintiffs Wilkinson and Sherr have made out a constitutional violation. They had a right to a post-suspension hearing which Defendants denied them.

The district court held that this right was not clearly established, however. The court stated that after the California Court of Appeal's decision in *Zuniga*, a reasonable official would have believed that

denying jurisdiction over the appeals of retired deputies was lawful.

We agree with the district court as to the individually named Civil Service Commissioners, who after *Zuniga* had no authority to hear Wilkinson's and Sherr's appeals. 40 Cal. Rptr. 3d at 866. But *Zuniga* does not protect the County Supervisors and the Sheriff. *Zuniga* interpreted the County Charter and Civil Service Rules as denying the Commission jurisdiction. *See id.* Given the holdings of *Loudermill*, *Mallen*, and *Gilbert*, a reasonable official in the position of the Sheriff and the Supervisors should have concluded that, because the Commission was stripped by the state appellate court of its ability to adjudicate the suspensions of retired employees, those suspensions would be constitutionally suspect. The onus would be on County officials to address this constitutional defect, for example by providing an alternative hearing for the retired employees. *Zuniga* merely points out a jurisdictional flaw in the County's civil service procedures; *Zuniga* does not excuse the unconstitutionality of that flaw.

Thus, as to the claims brought by Wilkinson and Sherr, we hold that the district court erred in granting qualified immunity to the Sheriff and the Board of Supervisors, but did not err in granting qualified immunity to the Civil Service Commissioners.[12]

---

[12] In its qualified immunity analysis, the district court discussed Plaintiffs' claim that their hearings were delayed for

(Continued on following page)

B.

Under the facts alleged, the hearings Defendants provided for Debs and O'Donoghue may have been unconstitutional. We hold, however, that to the extent Debs and O'Donoghue were entitled to a more substantial hearing, this right was not clearly established at the time of the violation. As the Second Circuit recently noted, it is an unresolved question whether due process is satisfied by a post-suspension hearing that sustains a suspension based solely on the fact of a pending criminal proceeding. *See Nnebe v. Daus*, ___ F.3d ___, No. 09-4305, 2011 WL 2149924, at *12 (2d Cir. May 31, 2011). Although *Gilbert* and *Mallen* make clear that post-suspension procedures are constitutionally required when employees are suspended after being charged with felonies, those cases do not specifically define what must be included in those procedures. A reasonable official would not necessarily infer from existing case law that a post-suspension hearing limited to the question of whether a felony charge has been filed is unconstitutional. Thus, all individual defendants are entitled to qualified immunity from Debs's and O'Donoghue's claims.

CONCLUSION

Plaintiffs have adequately alleged that Defendants' policies caused violations of their constitutional

---

too long. We need not address this issue because Plaintiffs have waived that claim as a separate argument. *See* Appellants' Br. at 25.

rights, and therefore Plaintiffs have stated *Monell* claims against the County. All individual defendants, however, are entitled to qualified immunity from the claims of Debs and O'Donoghue, whose right to a more substantial post-suspension hearing was not clearly established at the time of the violations. The individually named Civil Service Commissioners are also entitled to qualified immunity from Wilkinson's and Sherr's claims because the Commission was stripped of jurisdiction by the California Court of Appeal in *Zuniga*. But those claims may go forward against the Sheriff and the County Supervisors, who were constitutionally required to provide post-suspension procedures for suspended deputy sheriffs who later retired. We remand for further proceedings consistent with this opinion.[13]

AFFIRMED IN PART; REVERSED AND REMANDED IN PART. The parties shall bear their own costs on appeal.

IKUTA, Circuit Judge, concurring in part and dissenting in part:

"To survive a motion to dismiss, a complaint must contain sufficient factual matter . . . to 'state a

[13] Because we hold that Plaintiffs have adequately stated their claims, we do not address their argument that the district court erred in not granting leave to amend the complaint.

claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Here, Wilkinson and Sherr alleged a plausible violation of their due process rights, namely, that they never received a hearing after being suspended without pay. Because a government employee has a constitutional right to such a post-suspension hearing, *see Gilbert v. Homar*, 520 U.S. 924, 930 (1997), I concur in sections II.A and III.A of the majority opinion.

Debs and O'Donoghue, on the other hand, did not allege a plausible violation of their due process rights. Both received all the process that was due: they had full hearings before hearing officers after they were suspended, and the Commission ordered both to be reinstated, although it denied backpay on the ground that the suspensions were justified. Debs and O'Donoghue do not challenge the Commission's procedures, but rather the substantive standard the Commission applied to them, that is, they object to the Commission's determination that they could be validly suspended simply because felony charges had been filed against them. According to Debs and O'Donoghue, their hearings were not "meaningful" because, in effect, it was too easy for the Sheriff's Department to win.

This reasoning misses the point. The scope of a public employee's constitutionally protected property interest in his or her job depends on the terms of his or her employment. *See Bd. of Regents of State*

Colleges v. Roth, 408 U.S. 564, 577-78 (1972) ("Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . . . Just as welfare recipients' 'property' interest in welfare payments was created and defined by statutory terms, so the respondent's 'property' interest in employment at Wisconsin State University-Oshkosh was created and defined by the terms of his appointment."). In other words, what constitutes adequate "cause" for suspension or termination of a particular employee will vary according to the federal, state, or local law that governs his or her employment. *See, e.g., FDIC v. Mallen*, 486 U.S. 230, 237 (1988) (holding that "cause" for suspending the indicted director or officer of a federally insured bank is defined by 12 U.S.C. § 1818(g)(1), which stated that an officer can be suspended if his continued service "[might] pose a threat to the interests of the bank's depositors or [might] threaten to impair public confidence in the bank" (alterations in original)). If (for example) state law allowed a prison guard to be terminated for drinking on the job, a guard who drank on the job could be fired so long as he received an adequate hearing; such a hearing would not be made less "meaningful" just because the state needed to prove only that the guard downed a six-pack while patrolling the yard. Thus, if Debs and O'Donoghue's terms of employment allowed them to be suspended without pay on the basis of a felony charge alone, then they cannot claim they were deprived of

adequate process simply because in the end, the Commission upheld their suspension without pay on that basis.

And that is exactly the situation here. Under Rule 18.031 of the Los Angeles County Civil Service Rules,[1] the Sheriff's Department may suspend deputy sheriffs based on "any behavior or condition which impairs an employee's qualifications for his or her position or for continued county employment." In other words, deputy sheriffs may be suspended even if they have not engaged in affirmative misconduct. Debs and O'Donoghue concede that under this standard, a deputy sheriff may be suspended without pay while a felony charge is pending, because the pendency of a felony charge unquestionably "impairs" a deputy sheriff's "qualifications" for employment as a law enforcement officer. *See Gilbert*, 520 U.S. at 932 (noting that a state has a "significant interest in immediately suspending, when felony charges are filed against them, employees who occupy positions of great public trust and high public visibility, such as

---

[1] The rule provides that:

> Failure of an employee to perform his or her assigned duties so as to meet fully explicitly stated or implied standards of performance may constitute adequate grounds for discharge, reduction or suspension. . . . Grounds for discharge, reduction or suspension may also include . . . any behavior or condition which impairs an employee's qualifications for his or her position or for continued county employment.

Civil Service Rule 18.031.

police officers"). Moreover, the Supreme Court has confirmed that a suspension without pay while a felony charge is pending does not deprive a law enforcement employee of any constitutionally protected property interest. *See id.* The government is not obliged to "give an employee charged with a felony a paid leave at taxpayer expense." *Id.* In other words, if a law enforcement employee's "services to the government are no longer useful once the felony charge has been filed, the Constitution does not require the government to bear the added expense of hiring a replacement while still paying him." *Id.*[2]

In short, a Los Angeles County deputy sheriff's property interest in continued employment does not

---

[2] The majority asserts that *Gilbert* is inapposite because its holding was about the necessity of pre-suspension process, *see* Maj. op. at 10762-63, not about backpay, *see* Maj. op. at 10764 n. 10. But the Court's reasoning in *Gilbert* is directly on point. As noted above, *Gilbert* stated that the government need not "bear the added expense of hiring a replacement while still paying" a suspended law enforcement officer, if that officer's "services to the government are no longer useful once the felony charge has been filed." *Gilbert,* 520 U.S. at 932. In short, it is constitutionally permissible not to pay a law enforcement employee who has been suspended with felony charges pending. The majority apparently interprets this statement to mean that while the government need not pay the employee during the suspension, it would have to provide backpay for the suspension period later. This interpretation makes no sense, however, because the government would then still be in the position of paying for both the suspended employee and the employee's replacement during the suspension period, the very expense *Gilbert* said the government need not bear.

extend to being paid while a felony charge is pending against him or her, regardless of whether the employee committed the misconduct that formed the basis of the felony charge.[3] Because the hearing afforded by the Commission was consistent with the Civil Service Rules and the Constitution, Debs and O'Donoghue were not deprived of anything to which they were entitled, and thus they cannot raise a plausible due process claim.[4]

---

[3] While Civil Service Rule 18.04 authorizes the Civil Service Commission to award backpay to an employee for the period of an unpaid suspension if the Commission determines that the suspension was not "justif[ied]," the Sheriff's Department was fully justified in suspending Debs and O'Donoghue under Rule 18.031.

[4] The County asserts that the district court's decision as to Debs and O'Donoghue can also be affirmed on the alternate ground of issue preclusion. The County is correct. In *Miller v. County of Santa Cruz*, 39 F.3d 1030 (9th Cir. 1994), this court held that where a plaintiff's § 1983 claim involves the same "primary right" that was at stake in a prior administrative proceeding, a federal court must give the same "full faith and credit" to the factual and legal determinations of the administrative proceeding as it would give to a state court judgment. *See id.* at 1032-34.

Debs and O'Donoghue both had administrative hearings before the Civil Service Commission, and the Commission denied them backpay. Although the plaintiffs have attempted to restate their claims in procedural terms, *see* Maj. op. at 10757-58 n.5, what they are seeking to vindicate in this § 1983 action is exactly the same "primary right" that was at stake in their administrative hearings, namely, their right to backpay. Therefore, under *Miller*, the Commission's finding that Debs and O'Donoghue's suspensions were justified should be conclusive in this case.

The majority insists that because Debs and O'Donoghue have a property interest in continued employment, they must have alleged a plausible violation of their due process rights. *See* Maj. op. at 10755-56, 10763-64. This conflates the question whether Debs and O'Donoghue were entitled to post-suspension hearings at all (they were) with what substantive standard they were entitled to at the hearings they received. Debs and O'Donoghue's sole complaint is that the Commission denied them backpay on the ground that felony charges were (in fact) pending against them while they were suspended. In order for this to state a due process violation, Debs and O'Donoghue must show that they have a constitutionally protected property interest specifically in *being paid while felony charges are pending against them.* Rule 18.031 and *Gilbert* establish that they do not have such an interest.

Nor can the majority's reasoning be saved by analogy to the Second Circuit's decision in *Nnebe v. Daus*, ___ F.3d ___, 2011 WL 2149924 (2d Cir. May 31, 2011). *See* Maj. op. at 10762 n.9. The plaintiffs in *Nnebe* stated a plausible due process violation because they alleged that the Taxi and Limousine Commission applied a standard to them that was inconsistent with state law. *See* 2011 WL 2149924, at *1, *4. In this case, by contrast, Debs and O'Donoghue have not alleged that the Civil Service Commission applied a standard inconsistent with the Civil Service Rules. Moreover, in concluding that "a hearing that does nothing more than confirm the

driver's identity and the existence of a pending criminal proceeding" might not be adequate process, the Second Circuit expressly relied on three "crucial" facts that indicated that the balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976), might tip in favor of the plaintiffs: taxi drivers are not government employees; "the misconduct that results in summary suspension" did not need to be "related to the cab driver's work"; and the "summary suspension policy is triggered even by a warrantless arrest." *Id.* at *12. None of those facts pertains here: deputy sheriffs are government employees; felony charges, by their very nature, affect the work of deputy sheriffs; and the suspension policy in this case is triggered only by the filing of criminal charges. Thus, the reasoning of *Nnebe* is inapposite.

In sum, because Debs and O'Donoghue could not allege that they had a constitutionally protected interest in being paid while felony charges were pending against them, they did not "state a claim to relief that is plausible on its face." *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 570) (internal quotation marks omitted). I therefore dissent from Section II.B of the majority opinion, and would not reach the issue of qualified immunity discussed in Section III.B.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. CV 08-00238-RGK (FFMx) Date July 7, 2008

Title ASSOCIATION FOR LOS ANGELES DEPUTY SHERIFFS, et al. v. COUNTY OF LOS ANGELES, et al.

Present: The Honorable R. GARY KLAUSNER, UNITED STATES DISTRICT JUDGE

Sharon Williams	Not Reported	N/A
Deputy Clerk	Court Reporter/ Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **(IN CHAMBERS)** Defendants' Motion to Dismiss First Amended Complaint (DE 7)

I. FACTUAL BACKGROUND

This action arises from alleged delays in holding administrative hearings on appeals of disciplinary suspensions imposed on Plaintiffs Darrin Wilkinson, Lisa Brown Debs, Sean O'Donoghue and David Sherr (collectively "Plaintiffs"). Plaintiffs are current and former Los Angeles County deputy sheriffs who were placed on unpaid suspension after being charged with

felonies.[1] They are represented by their union, Association for Los Angeles Deputy Sheriffs.

After each Plaintiff was placed on unpaid suspension, each filed appeals of their suspension with the County Civil Service Commission ("the Commission"). In response, the Commission ordered Plaintiffs' appeals held in abeyance pending completion of the criminal proceedings. The District Attorney subsequently dismissed the charges against Wilkinson and Debs.[2] O'Donoghue and Sherr were acquitted.[3]

After the dismissals and acquittals, the County discharged each of the four deputies. At least in part, the County based each discharge on allegations related to the criminal charges. Each of the Plaintiffs appealed their discharge, and these appeals were consolidated with the appeals of their suspensions.

---

[1] Plaintiff Wilkinson was charged in June 2002 with nine felony counts of falsifying police reports. Plaintiff Sherr was arrested on June 11, 2003 on seven charges of workers compensation fraud, perjury and grand theft. Plaintiff Debs was arrested on June 27, 2004 for felony drunk driving. Plaintiff O'Donoghue was indicted on June 3, 2002 on seven felony counts, including two counts of falsifying a police report and three counts of accessory after the fact to possession for sale of drugs. (First Am. Compl. ("FAC") at ¶¶ 76, 91, 103, 118.)

[2] On February 25 and 26, 2003, the District Attorney dismissed the charges against Plaintiff Wilkinson. (FAC at ¶ 80.) On August 13, 2004, the District Attorney dismissed the felony DUI charge against Plaintiff Debs; Debs pleaded no contest to a misdemeanor DUI charge. (FAC at ¶ 108.)

[3] A jury acquitted Sherr on April 18, 2004. (FAC at ¶ 95.) A jury acquitted O'Donoghue on January 28, 2003. (FAC at ¶ 121.)

On January 10, 2007 and November 14, 2007, the Commission issued findings that it no longer had jurisdiction over the appeals brought by Plaintiffs Wilkinson and Sherr, respectively, because they voluntarily retired before completion of their appeal. On August 15, 2007, the Commission issued a final decision ordering O'Donoghue reinstated with full back pay and benefits. However, instead of deciding the appeal of O'Donoghue's eight-month suspension, the Commission directed the Sheriff's Department and County to reconsider the decision to suspend him. On May 2, 2007, the Commission issued a final decision ordering Debs reinstated, but holding that her suspension was proper.

On April 10, 2007, Plaintiff Wilkinson appealed the Commission's denial of jurisdiction by filing a petition for writ of mandate in Los Angeles Superior Court pursuant to California Code of Civil Procedure § 1094.5. On July 27, 2007, and November 13, 2007, Debs and O'Donoghue, respectively, appealed the Commission's final decisions in their cases by filing their own petitions for writ of mandate pursuant to § 1094.5 in Los Angeles Superior Court. Then, on January 14, 2008, Plaintiffs sued the County of Los Angeles, the Los Angeles County Board of Supervisors, the Commission, the Los Angeles County Sheriff's Department and multiple government officers (collectively "Defendants") in federal court. The federal Complaint contained § 1094.5 petitions for writ of mandate brought by all four Plaintiffs, and claims brought under 42 U.S.C. § 1983. In essence, the

§ 1983 claims allege that Defendants violated Plaintiffs' Fourteenth Amendment due process rights by: (1) unconstitutionally delaying hearings on suspension appeals for the two Plaintiffs who were eventually reinstated following their suspensions; and (2) never holding a suspension appeal hearing for the two Plaintiffs who voluntarily accepted disability retirements. Plaintiffs seek back pay and punitive damages.

After Plaintiffs filed their Complaint in federal court, the petitions for writ of mandate that the three Plaintiffs filed in state court were dismissed without prejudice. Plaintiffs then filed their First Amended Complaint ("FAC") on February 11, 2008 in this Court. On May 1, 2008, Defendants filed the present Motion to Dismiss pursuant to Rule 12(b)(6).

For the reasons stated below, Defendants' Motion is **granted**.

II. JUDICIAL STANDARD

In deciding a 12(b)(6) motion, the court must assume the plaintiff's allegations to be true and construe the complaint in the light most favorable to the plaintiff. *United States v. City of Redwood City,* 640 F. 2d 963, 966 (9th Cir. 1981). Therefore, a motion to dismiss pursuant to F.R.C.P. 12(b)(6) will not be granted unless "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Neitzke v. Williams,* 490 U.S. 319, 327 (1989).

However, the court need not accept as true unreasonable inferences, unwarranted deductions of fact, or conclusory legal statements set forth in the complaint. *Sprewell v. Golden State Warriors,* 266 F.3d 979, 988 (9th Cir. 2001). Moreover, the court will not assume that the plaintiff can prove facts which have not been alleged in the complaint. *Associated Gen. Contractors of Cal., Inc. v. State Council of Carpenters,* 459 U.S. 519, 526 (1983).

III. DISCUSSION

A. Plaintiffs Have Failed to Sufficiently Plead a *Monell* Claim.

To bring a § 1983 claim against a local government entity, plaintiffs must plead that the alleged deprivations of constitutional rights were pursuant to a governmental custom or policy. *Monell v. Dep't of Soc. Servs. of City of N.Y.,* 436 U.S. 658, 694 (1978). "Absent a formal governmental policy, plaintiffs must show a 'longstanding practice or custom which constitutes the standard operating procedure of the local government entity.'" *Trevino v. Gates,* 99 F.3d 911, 918 (9th Cir. 1996) (quoting *Gillette v. Delmore,* 979 F.2d 1342, 1346-47 (9th Cir. 1992)). "Liability for improper custom may not be predicated on isolated or sporadic incidents; it must be founded upon practices of sufficient duration, frequency and consistency that the conduct has become a traditional method of carrying out policy." *Id.* (citing *Bennett v. City of Slidell,* 728 F.2d 762, 767 (5th Cir. 1984)).

The Court has reviewed the FAC and addresses here those allegations that might plausibly support a *Monell* claim. Specifically, Plaintiffs make the following allegations regarding *Monell*:

(1) That Defendants have adopted "a practice and unwritten rule to deny any hearing on any appeal of a disciplinary penalty other than discharge, where the employee has retired or resigned after the imposition of the penalty. . . ." (FAC at ¶ 72).[4]

(2) That Defendants have adopted a practice and unwritten rule that in post-suspension hearings, the Sherriff's [sic] Department is only required to prove that a felony charge was filed in order to permanently deprive the employee of his property interest, i.e. the back pay and/or benefits lost during an unpaid suspension. (FAC at ¶ 73.)[5]

(3) That Defendants have adopted "a practice and unwritten rule which precludes the scheduling of any hearing on an appeal from a suspension imposed in response to a criminal filing until the completion of criminal proceedings, even over the objection of the employee, resulting in the actual delay of a post-deprivation hearing

[4] Plaintiffs make a similar allegation in ¶ 210 of the FAC.

[5] Plaintiffs make a similar allegation in ¶ 211 of the FAC.

for anywhere from one to three years." (FAC at ¶ 74.)[6]

(4) " . . . it has been the Sheriff's Department's consistent practice to suspend without pay for an indeterminate time or '30 calendar days after the judgment of conviction or the acquittal of the offense charged in the complaint or indictment has become final,' only in those Department employees against whom a felony is filed." (FAC at ¶ 68.)

In essence, the first allegation amounts to a statement that the Commission is complying with *Zuniga v. L.A. County Civil Serv. Comm'n,* 137 Cal. App. 4th 1255 (2006), which held the Commission lacks jurisdiction over employees who voluntarily retire. Because the Commission lacks jurisdiction, it cannot be simultaneously denying the individuals their constitutional right to due process. Therefore, this allegation fails to state a *Monell* claim on which relief can be granted.

As to the second allegation, even assuming this policy exists, it cannot be said to have been applied to these Plaintiffs. Specifically, Plaintiffs Debs and O'Donoghue, who were both charged with felonies, received hearings that resulted in Hearing Officers recommending that both Plaintiffs receive back pay

[6] Plaintiffs make a similar allegation in ¶ 208 of the FAC.

for the period of their suspensions. Plaintiffs Wilkinson and Sherr did not receive post-suspension hearings.

As to the third allegation, in *Gilbert v. Homar,* 520 U.S. 924, 934-935 (1997), the Supreme Court held that when a public employee is charged with a felony, due process does not require that the employee receive a hearing before being placed on unpaid suspension. A post-deprivation hearing satisfies due process. *Id.* Moreover, it is not unreasonable for the Commission to wait until resolution of the criminal proceeding to schedule the post-deprivation hearing. Logically, it would be difficult to schedule such a hearing before the criminal proceedings are complete, as it would be unclear how long those proceedings would take.

As to the fourth allegation, Plaintiffs acknowledge in their Opposition that they are not asserting a right not to be suspended while felony charges are pending against them. Rather, they are challenging the delay in holding hearings. Thus, this allegation does not support the relief they seek.

B. The Individual Defendants Have Qualified Immunity.

The inquiry as to whether an official is protected by qualified immunity has two parts: (1) whether the plaintiff has alleged sufficient facts for a violation of a constitutionally protected right; and (2) whether the law regarding the official's conduct was clearly established "in light of the specific context of the case."

Saucier v. Katz, 533 U.S. 194, 201 (2001). As to the second prong, the dispositive inquiry is whether it would be clear to a reasonable officer that his conduct was unlawful. *Id.* Moreover, "because procedural due process analysis essentially boils down to an ad hoc balancing inquiry, the law regarding procedural due process claims can rarely be considered 'clearly established' at least in the absence of closely corresponding factual and legal precedent." *Id.* at 983 (internal citations omitted).

Here, Plaintiffs argue it is clearly established that the principles of due process entitle employees with a property interest in their continued employment to a "prompt" post-deprivation hearing following an unpaid suspension, *see Gilbert,* 520 U.S. at 935; *Barry v. Barchi,* 443 U.S. 55, 66 (1979). However, Plaintiffs fail to cite any authority which held that a particular delay in conducting a post-deprivation hearing following a suspension was long enough to constitute a due process violation.[7] Indeed, as to how long of a delay is justified in holding post-deprivation hearings for suspensions of government employees,

---

[7] In their Opposition, Plaintiffs cite cases including *Mallen* and *Gilbert.* However, in *Mallen,* the Court determined that a 90-day delay in hearing and deciding post-suspension claims would not have violated due process. *Mallen,* 486 U.S. at 243. In *Gilbert,* the Court remanded for consideration of whether a 16-day delay in holding a hearing after criminal charges were dismissed violated due process. 520 U.S. at 936. On remand, the district court held the delay did not violate due process. *Homar v. Gilbert,* 63 F. Supp. 2d 559, 570 (M.D. Pa. 1999).

due process is a fluid concept. *Gilbert,* 520 U.S. at 930. It is appropriate to consider "the importance of the private interest and the harm to this interest occasioned by the delay; the justification offered by the Government for delay and its relation to the underlying governmental interest; and the likelihood that the interim decision may have been mistaken." *FDIC v. Mallen,* 486 U.S. 230, 242 (1988).

Moreover, the facts alleged here – a 1-3 year delay between the end of the suspension and the hearing date – are not so extreme as to clearly constitute a due process violation. Indeed, Plaintiffs have identified no authority defining what *is* an unreasonable delay. Thus, this Court finds that a reasonable government official would not have believed the alleged delays were unlawful. Additionally, because the Commission's finding that it lacked jurisdiction over the retired Plaintiffs was consistent with the Court of Appeal's holding in *Zuniga,* a reasonable government official would not have believed that denying jurisdiction was unlawful. Thus, the individual Defendants were protected by qualified immunity.

For the foregoing reasons, the Court grants Defendants' Motion to Dismiss.[8] The Court further denies Defendants' request for a sanction against Plaintiffs.

---

[8] Because the Court dismisses the claims based on immunity, it need not reach Defendants' other asserted grounds for dismissal.

IV. CONCLUSION

For the reasons stated above, the Court **grants** Defendants' Motion to Dismiss.

IT IS SO ORDERED.

Initials of Preparer slw

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ASSOCIATION FOR LOS ANGELES DEPUTY SHERIFFS, in Its Representational Capacity, on Behalf of Its Members; DARRIN WILKINSON; LISA BROWN DEBS; SEAN O'DONOGHUE; DAVID SHERR,

Plaintiffs-Appellants,

v.

COUNTY OF LOS ANGELES, a Municipal Corporation (also erroneously sued as the LOS ANGELES COUNTY BOARD OF SUPERVISORS, the LOS ANGELES COUNTY CIVIL SERVICE COMMISSION and the LOS ANGELES COUNTY SHERIFF'S DEPARTMENT); GLORIA MOLINA, in her capacity as a Los Angeles County Supervisor; YVONNE BRAITHWAITE BURKE, in her capacity as a Los Angeles County Supervisor; ZEV YAROSLAVSKY, in his capacity as a Los Angeles County Supervisor; DON KNABE, in his capacity as a Los Angeles County Supervisor; MICHAEL D. ANTONOVICH, in his capacity as a Los Angeles County Supervisor;

No. 08-56283.

D.C. No. 2:08-cv-00238-RGK-FFM

ORDER

(Filed Oct. 17, 2011)

LYNN ADKINS, in his capacity as a Civil Service Commissioner; VANGE FELTON, in her capacity as a Civil Service Commissioner; CAROL FOX, in her capacity as a Civil Service Commissioner; Z. GREG KAHWAJIAN, in his capacity as a Civil Service Commissioner; EVELYN MARTINEZ, in her capacity as a Civil Service Commissioner; LEROY BACA, individually and as Sheriff of the County of Los Angeles,

Defendants-Appellees.

Before: PREGERSON, D.W. NELSON, and IKUTA, Circuit Judges

A majority of the panel has voted to deny the petition for rehearing and petition for rehearing en banc. Judges Pregerson and Nelson have voted to deny the petition for rehearing. Judge Pregerson voted to deny the petition for rehearing en banc, and Judge Nelson so recommends.

Judge Ikuta has voted to grant both the petition for rehearing and the petition for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petitions for panel rehearing and for rehearing en banc are DENIED.

IT IS SO ORDERED.