# City of Newport v. Fact Concerts
# No. 80-396

# Brief for the Respondents

## Substitute Cover Page
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## Questions Presented

1. Should this Court reverse an award of punitive damages against a municipality in a section 1983 action when the municipality failed to object to the charge to the jury on punitive damages?

2. If the question is reached, is a municipality liable for punitive damages in a section 1983 action?

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# In the
# Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-396

THE CITY OF NEWPORT,
MAYOR HUMPHREY J. DONNELLY III,
Individually and in His Official Capacity as Mayor,
THE CITY COUNCIL for the City of Newport and
LAWRENCE NEWSOME, JOHN H. WEST,
ROBERT O. BEATTIE, RAYMOND H. CARR,
EDWARD K. CORISTINE, JAMES F. RING,
All individually and in their Official Capacity as
Members of the City Council for the
City of Newport, Rhode Island,
PETITIONERS,

*v.*

FACT CONCERTS, INC. AND MARVIN LERMAN,
RESPONDENTS.

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

## BRIEF FOR THE RESPONDENTS

The respondents in the above-entitled matter submit that the decision of the United States Court of Appeals for the First Circuit should be affirmed. The respondents concur in the petitioners' statements under the headings "Decisions Below"

and "Jurisdiction." The respondents concur in the petitioners' statement under the heading "Constitutional and Statutory Provisions Involved" except that the following should also have been included:

> 4. Federal Rule of Civil Procedure 51
>
> "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

## Statement of the Facts

In the early summer of 1975, respondent Marvin Lerman and respondent Fact Concerts, Inc., represented by its president, Frank Amado, discussed holding a two-day jazz concert in the City of Newport, Rhode Island. Amado had previously obtained a lease from the Rhode Island Department of Natural Resources for three days' use of a site in Newport known as Fort Adams. Amado obtained a license from the City Council of Newport and successfully staged a one-day concert featuring Arthur Fiedler. Amado also obtained a license from the City Council for the two-day jazz concert, to be held at Fort Adams on August 2nd and 3rd. Subsequently, the respondents successfully sought a substitution of August 30th and 31st from the City Council. The new license was granted through a contract

dated August 22, which the City Council duly authorized by vote. The contract granted the City no control over the choice of performers, nor did it designate the type of music that would be played. It referred only to a "music concert." The City retained the right to cancel only "if the interests of public safety demand."

The respondents began to book top jazz acts during the summer. Since anticipated participant Sarah Vaughan was unavailable, the respondents substituted a group called Blood, Sweat and Tears. This choice triggered the events at the heart of this case. The respondents considered Blood, Sweat and Tears a jazz act equivalent in stature to Sarah Vaughan. The group had appeared in Carnegie Hall and at major jazz festivals and had represented the United States on jazz tours sponsored by the State Department. The group had appeared at a 1969 Newport Jazz Festival without incident. The plaintiffs advertised the jazz concert, announcing the addition of Blood, Sweat and Tears. One such advertisement appeared in the *New York Times* on Sunday, August 24.

The next day Amado spoke with the Mayor of Newport, Humphrey Donnelly, who urged the cancellation of the appearance of Blood, Sweat and Tears on the ground that he did not want any rock bands appearing in Newport. On Tuesday, Fact Concerts officials attended a special meeting of the City Council. They were told that Blood, Sweat and Tears would have to be removed from the program or the license would be revoked. Mayor Donnelly said that Blood, Sweat and Tears would attract a long-haired element that the City did not want. A Fact Concerts spokesman explained that Blood, Sweat and Tears was a jazz group, but this information was rejected. The Council then voted unanimously that unless Blood, Sweat and Tears was removed from the program, the license for the concert would be revoked. Neither at the time of this decision nor subsequently did Mayor Donnelly or any member of the City Council undertake any investigation of the type of music played by Blood, Sweat and Tears. The Council's action generated

negative publicity and uncertainty among potential concert-goers, devastating ticket sales. Newspaper stories indicated that Blood, Sweat and Tears intended to sue the City for damage to their reputation.

Then, on Thursday, Amado received a call from Newport City Solicitor James O'Brien informing him that the City Council had changed its mind and would let Blood, Sweat and Tears play on the program if they did not play rock music. This change of heart occurred because City Solicitor O'Brien had informed Mayor Donnelly and some or all of the councilmen that they did not have the right to pass judgment on the list of performers and that they would be subject to suit if they did. Fact Concerts agreed to send representatives to another special meeting on Friday.

That meeting began at 4:28 p.m. on August 29. Mayor Donnelly said that the Council could either accept the City Solicitor's opinion and obtain an affidavit from Amado that rock music would not be played or cancel the concert entirely. No affidavit was ever presented to Amado or anyone else from Fact Concerts, however, nor was anyone from Fact Concerts ever asked to draw up any kind of affidavit.

City Manager William Perry reported that he had visited the concert site at the direction of the Council shortly after 3:00 p.m., the set-up deadline specified in the contract. He said that he had been unable to observe the auxiliary generator required by the contract and that the wiring together of the seats required by the contract had been in progress but had not been completed by the 3:00 deadline. He added that the chairs were being bound together with tape rather than with wire.

City Manager Perry reported noncompliance with the contract despite the fact that only 500 of the 7,000 chairs were not bound together as of 3:00 p.m., that all of the chairs were bound within fifteen minutes to half an hour after the deadline, and that Rhode Island Director of Natural Resources Dennis Murphy had told him at the site that his objections were frivolous. Also, the professional tape being used to bind the

chairs together was safer and stronger than wire. Finally, an auxiliary generator had been rented from the Newport Fire Department and installed, but the City Manager had apparently overlooked it.

After City Manager Perry's report, Mayor Donnelly stated that if Fact Concerts was in violation of the contract, the Council should cancel it and give Amado the opportunity to enter into a new contract. After discussion, a motion to cancel the contract was adopted unanimously.

The Council then offered Fact Concerts another contract which would have allowed the concert to go on, but without Blood, Sweat and Tears. This offer was made despite the supposed problems with the chairs and the generator. A recess was taken, and when the meeting reconvened at 8:40 p.m., Fact Concerts' attorney informed the Council that suit would be instituted if Fact Concerts was not allowed to put on the concert as planned. Mayor Donnelly replied that the concert was off because Fact Concert had not lived up to the contract.

According to the official minutes, no reports on public safety were made during the special meeting, nor do the minutes show the presence of the Chief of Police or the Fire Chief, who would surely have been present if public safety had been a significant concern. Years later at trial, the councilmen characterized themselves as concerned with public safety, but the minutes taken at the time of the special meeting make absolutely no mention of any such concern.

An announcement that the concert would not take place was made after the special meeting. The news spread widely that night over the local media. At 9:30 the next morning, Fact Concerts obtained an order in state court restraining the City of Newport from revoking the license. The concert went on and Blood, Sweat and Tears performed without incident. Over the two days of the concert, only 6,308 of the available 14,000 tickets (7,000 each day) were sold, and the event showed a loss of $72,910.00.

## Travel of the Case

Fact Concerts and Lerman brought a five-count complaint against the petitioners in the United States District Court for the District of Rhode Island. The plaintiffs sought declaratory relief and compensatory and punitive damages for violations of their first and fourteenth amendment rights, and compensatory and punitive damages for acts alleged in three state law claims. The complaint asserted that the federal claims arose under the first and fourteenth amendments and under 42 U.S.C. § 1983 (1976), with district court jurisdiction arising under 28 U.S.C. §§ 1331, 1343(3) (1976). The complaint also asserted that the district court should exercise pendent jurisdiction over the state law claims.

The case came to trial on January 16, 1979, before Chief Judge Raymond J. Pettine and a jury. Less than a year before the events that triggered the present litigation, this same judge had found it necessary to issue an injunction against Mayor Donnelly and these same councilmen mandating that they allow a peaceful demonstration to be held in a public park.

After five days of trial testimony, the trial judge sent two counts to the jury. The federal claims became Count I. One of the state claims became Count II. The jury returned verdicts for the plaintiffs on both counts and levied compensatory damages against all the defendants in the amount of $72,910.00. The jury also awarded punitive damages against the City of Newport in the amount of $200,000.00 and against Mayor Donnelly and the councilmen in varying amounts totalling another $75,000.00.

In his Opinion and Order dated July 2, 1979, Chief Judge Pettine denied the defendants' motion for judgment notwithstanding the verdict. As for the defendants' motion for a new trial, the court ordered a remittitur, setting $75,000.00 as the maximum permissible punitive damages award against the City. The plaintiffs accepted the remittitur on July 9, 1979. The defendants appealed, and the United States Court of Appeals for the First Circuit affirmed on June 17, 1980.

## Argument

### I. The Petitioners Failed To Object to the Charge to the Jury on Punitive Damages and Hence Cannot Now Argue that Punitive Damages Cannot Be Levied Against a Municipality in a Section 1983 Action.

The petitioners admit that they failed to preserve their objection to the trial judge's charge on punitive damages. Brief for the Petitioners at 10, 27. Federal Rule of Civil Procedure 51 explicitly bars appeal on issues not raised by objection, and that rule is strictly adhered to because it "is of considerable importance for the orderly and just functioning of the judicial system." *Morris* v. *Travisono*, 528 F.2d 856, 859 (1st Cir. 1976) (citation omitted).

The cases upon which the petitioners rely[1] in arguing that this Court should make an exception to the rule involve entirely different circumstances. Here, the trial judge's charge was in line with the relevant statements made by this court, *see Carlson* v. *Green*, 100 S. Ct. 1468, 1473 (1980) (dictum) (punitive damages available in section 1983 actions); *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978) (munici-

[1] Not surprisingly, the petitioners have abandoned their earlier argument that their counsel's failure to object is somehow excused by the fact that municipalities had only recently been deemed amenable to suit under section 1983, *see* Petition for a Writ of Certiorari at 9. In fact, the petitioners' counsel had ample notice of what was at issue. The respondents' complaint and amended complaint both asked for punitive damages. The respondents' pretrial memoranda discussed punitive damages as well as *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978) (municipalities liable under section 1983). During the trial, the judge reminded counsel that there was a prayer for punitive damages, and the respondents' counsel prepared a memorandum on the liability of a municipality for punitive damages (at the Judge's request made to both sides in chambers) which was hand delivered to the petitioners' counsel on the last day of the trial. Finally, the trial judge specifically invited the petitioners' counsel to object at the end of the instructions.

palities liable under section 1983), and was inconsistent with none of the earlier cases on point, *see* cases cited pp. 11-12 *infra*. In each of the cases relied on by the petitioner, on the other hand, the trial judge failed to instruct the jury correctly on a well established principle of law, committing an error so blatant that the appellate court could not let the jury's verdict stand while remaining faithful to the principle that litigants are governed by the rule of law. In *O'Brien* v. *Willys Motors, Inc.*, 385 F.2d 163 (6th Cir. 1967), for example, the trial judge failed to tell the jury which party bore the burden of persuasion on the issue of contributory negligence. In *Ferrara* v. *Sheraton McAlpin Corp.*, 311 F.2d 294 (2d Cir. 1962), the trial judge failed to give the jury "the minimum guidelines necessary and appropriate for responsible decision" on the issue of constructive notice, *id.* at 297, and in *McNello* v. *John B. Kelly, Inc.*, 283 F.2d 96 (3d Cir. 1960), the trial judge failed to instruct the jury on the legal standard of care to be applied.

The analogy drawn by the petitioners to the decision on which they most heavily rely, *Williams* v. *City of New York*, 508 F.2d 356 (2d Cir. 1974), is equally attenuated. The trial judge there failed to inform the jury that they need find some nexus between the illegal actions of officials and the City before finding the latter liable for punitive damages. Not only was the charge clearly erroneous, but the appellate court was faced in that case with an award of punitive damages which was particularly indefensible. The plaintiff had not even attempted to show any "nexus between the officers whose conduct [was] at issue and their superiors," and, in any event, twenty-five years had elapsed since the violation without a recurrence so that the claim for punitive damages should have failed because there was no need for deterrence. *Id.* at 381.

In the present case, on the other hand, the officials acted on behalf of the City by formal vote. In addition to this full nexus between the officials and the City, the need for deterrence is abundantly clear here. This case marked the second instance

within a year in which the Newport City Council had disregarded first amendment rights, an injunction having previously been necessary to require the City Council to allow a peaceful demonstration in a public park. With that injunction still fresh in their minds and their City Solicitor advising them that they did not have authority to pass judgment on the list of performers, the same officials went ahead anyway and repeated the unlawful act. Indeed, the officials were so aware that their act was unlawful that they attempted to disguise it with a ruse, pretending that they were acting because of a supposed breach of the contract by Fact Concerts. The jury thus had before it a compelling indication that stern measures were necessary. Clearly, the unobjected-to instruction on punitive damages was not a "miscarriage of justice," Brief for the Petitioners at 27. It was the proper response to the need to deter more wanton and malicious conduct in the future.

## II. The Trial Judge Was Correct in Instructing the Jury That Punitive Damages Could Be Levied Against a Municipality in a Section 1983 Action.

This Court has stated repeatedly that deterrence is a primary purpose of section 1983. For example, in declining to allow a good faith immunity to municipalities in section 1983 actions, the Court said: "Moreover, § 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well. *See Robertson* v. *Wegmann*, 436 U.S. 584, 590-591, 98 S. Ct. 1991, 1995, 56 L. Ed. 2d 554 (1978); *Carey* v. *Piphus*, 435 U.S. 247, 256-257, 98 S. Ct. 1042, 1048-1049, 55 L. Ed. 2d 252 (1978)." *Owen* v. *City of Independence*, 100 S. Ct. 1398, 1416 (1980). Indeed, the deterrence objective was "central to the expansion of liability in *Owen*." *The Supreme Court, 1979 Term*, 94 Harv. L. Rev. 77, 221 (1980). In an earlier case, Justice White declared that deterrence is "precisely the proposition upon

which § 1983 was enacted." *Imbler* v. *Pachtman*, 424 U.S. 409, 442 (1976) (White, J., concurring in the judgment). *See generally Monroe* v. *Pape*, 365 U.S. 167, 174-80 (1961) (extensive examination of the legislative history of section 1983); Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 Ind. L.J. 5, 32 (1974) (section 1983's purposes "while including compensation, seem in larger part designed to provide for private enforcement of [constitutional] rights *and hence to help deter their violation*") (emphasis added); Yudof, *Liability for Constitutional Torts and the Risk-Averse Public School Official*, 49 S. Cal. L. Rev. 1322, 1369 (1976) ("deterrence purposes of section 1983"); Note, *Damage Awards for Constitutional Torts: A Reconsideration After* Carey v. Piphus, 93 Harv. L. Rev. 966, 980-81 (1980) ("The legislative history of section 1983 makes clear that the statute was primarily intended to deter violations of [constitutional] rights.") (citations omitted).

Using extensive quotations from this Court's opinions, the petitioners amply demonstrate that punishment as a means to the end of deterrence has been the rationale for making punitive damages available under federal law. *See* Brief for the Petitioners at 9, 18-21. Understandably, the petitioners then do their best to ignore the crucial link between punishment and the goal of deterrence.[2] *See id.* at 9, 22-24. "Understandably," we say, because the objective of deterrence is admirably served by an assessment of punitive damages against a municipality in

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[2] Punishment for punishment's sake falls instead under the vindication-of-society rationale for punitive damages, *see* Brief for the Petitioners at 17 (distinguishing between the vindication-of-society rationale and the deterrence rationale); *cf.* Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. Pa. L. Rev. 989, 1049-50 (1978) (dividing the goals of criminal justice into punishment for punishment's sake and punishment as a means to other ends). Basically, the flaw in the petitioners' argument is that, having correctly identified punishment as a means to the end of deterrence as the rationale behind punitive damages, the petitioners proceed to analyze the question in terms of the punishment-for-punishment's-sake rationale.

a case where officials have demonstrated a continued bad faith disregard for constitutional rights. The objective was *particularly* well served by the remedy in this case because these same officials had previously failed to be deterred by a remedy that did not implicate the taxpayers' interests. As the district court pointed out in its opinion below:

> In some circumstances, however, a punitive award against a municipality may serve beneficial purposes. The payment of such an award necessarily serves to focus taxpayer and voter attention upon the malicious acts of the municipal government. This attention, in turn, may well have a beneficial effect in the next election. To characterize the municipality's voters and taxpayers as innocent victims of a punitive award does not comport with our theory of representative democracy; each voter/taxpayer is responsible, of course, for the election and formation of a government that will uphold and defend the Constitution. This responsibility is the essence of representative government. It bears repeating that the government of the United States stems from the people. The wrongs of the government, even if it betrays the electorate, are theoretically the wrongs of the people; the people may always exorcise those wrongs through the democratic process. The votes of the electorate, stirred by their pocketbooks, constitute one of the strongest corrective forces in American law. Therefore it should come as no surprise that federal courts have indicated a willingness, in other contexts, to hold cities liable for punitive damages.

*Fact Concerts, Inc.* v. *City of Newport*, No. 76-0071 (D. R.I. July 2, 1979), *reprinted in* Petition for a Writ of Certiorari at B-1, B-9 (citations omitted). Similarly, no court considering a section 1983 action against a municipality in which the plaintiff sought punitive damages has ever held such a damage award to be unavailable. *See, e.g., Simineo* v. *School District No. 16*, 594

F.2d 1353 (10th Cir. 1979); *Bradshaw* v. *Zoological Society*, 569 F.2d 1066 (9th Cir. 1978); *Ray* v. *City of Edmond*, No. 80-856-E (W.D. Okla. Nov. 26, 1980), *appeal docketed*, No. 81-1155 (10th Cir. Feb. 11, 1981); *North American Cold Storage Co.* v. *County of Cook*, 468 F. Supp. 424 (N.D. Ill. 1979); *Cook* v. *City of Miami*, 464 F. Supp. 737 (S.D. Fla. 1979); *Burnaman* v. *Bay City Independent School District*, 445 F. Supp. 927 (S.D. Tex. 1978).

None of the counterarguments advanced by the petitioners withstand examination. The statement that "no actor is deterred from a repetition of his wrong except to the extent that he is a taxpayer," Brief for the Petitioners at 24, simply ignores the indirect deterrent effect brought about by the electoral process after punitive damages are awarded against a municipality. The petitioners no doubt base this oversight on the farfetched contention that this Court would be improperly interfering with Newport's local affairs if it sought to deter the guilty officials by bringing their bad faith pointedly to the attention of the Newport electorate, *see id.* at 8-9, 15-17. The use of this argument is surprising in light of its unequivocal rejection in this Court's most recent discussion of municipal liability under section 1983:

> That common-law doctrine [of municipal immunity for "discretionary" functions] merely prevented courts from substituting their own judgment on matters within the lawful discretion of the municipality. But a municipality has no "discretion" to violate the Federal Constitution; its dictates are absolute and imperative. And when a court passes judgment on the municipality's conduct in a § 1983 action, it does not seek to second-guess the "reasonableness" of the city's decision nor to interfere with the local government's resolution of competing policy considerations. Rather, it looks only to whether the municipality has conformed to the requirements of the Federal Constitution and statutes. As was stated in *Sterling* v. *Constantin*, 287 U.S. 378, 398, 53 S. Ct. 190, 195,

> 77 L. Ed. 375 (1932), "When there is a substantial showing that the exertion of state power has overridden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression."

*Owen, supra*, 100 S. Ct. at 1415. Moreover, a deterrent remedy is actually less intrusive than the ongoing intervention to which a court might eventually have to resort if the illegal behavior continues undeterred. *See* Note, *Developments in the Law—Section 1983 and Federalism*, 90 Harv. L. Rev. 1133, 1218 n.162 (1977); *cf.* Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 Harv. L. Rev. 1 (1979) (discussing structural remedies).

The petitioners' contention that the Court's decision in *Owen* makes good faith unavailable to municipalities as a defense to a claim for *punitive* damages, Brief for the Petitioners at 24, is flatly in error. The Court in *Owen* ruled only that good faith was unavailable to municipalities as a defense to a claim for *compensatory* damages; the holding is simply inapposite to the question of punitive damages. No one contends that punitive damages should be awarded in the absence of egregious conduct on the part of the guilty officials. Indeed, a good faith defense was raised in this case and would have saved the municipality from an award of punitive damages had it succeeded. Punitive damages were levied against Newport in this case not because a good faith defense was unavailable, but because the guilty officials failed totally in making out such a defense. The respondents contend only that when officials act in bad faith and, through their malicious disregard for constitutional rights, clearly demonstrate the need for the deterrence which an award of punitive damages against the municipality would provide, such an award should be made.

In much the same way, the petitioners' reliance on the fact that *Owen* spoke only in terms of compensatory damages, Brief

for the Petitioners at 9, 22-24, is misplaced. The Court's discussion in *Owen* was limited to compensatory damages because the officials there, unlike the officials here, had acted in good faith. Punitive damages were not mentioned because the situation did not call for them. Indeed, Justice Brennan, the author of *Owen*, has elsewhere spoken for the Court in endorsing punitive damages in section 1983 cases. *See Carlson*, *supra*, 100 S. Ct. at 1473 (dictum) (explaining that punitive damages were not awarded in *Carey* v. *Piphus*, 435 U.S. 247 (1978), because the district court found that the defendants had not acted maliciously). Moreover, in the portion of the *Owen* opinion in which the Court laid out its general approach to section 1983 cases, the Court heavily emphasized the deterrent effect of municipal liability. *See* 100 S. Ct. at 1416. Far from supporting the petitioners' contention, *Owen* renders the petitioners' position untenable. *See* pp. 9-11 *supra*.

The petitioners' use of the legislative history of the Civil Rights Act of 1871, *see* Brief for the Petitioners at 8, 14-15, is hard to explain in light of the Court's decision in *Monell*, *supra*. The only excerpt from the congressional debate that the petitioners choose to quote is Representative Blair's admonition that Congress should not add to the "obligations" of municipalities, Cong. Globe, 42nd Cong., 1st Sess. 795 (1871). But the petitioners' apparent reading of Representative Blair's statement—that it indicates congressional disapproval of the imposition of liability on municipalities for constitutional violations committed by officials in the exercise of their duties—was explicitly rejected by this Court in *Monell*, 436 U.S. at 664-90. As the Court there made clear, Representative Blair's argument--and, for that matter, the opposition to the Sherman Amendment to the Civil Rights Act in general—was aimed only at the imposition of liability on municipalities for failure to perform tasks *that they were under no legal duty to perform*. Specifically, the opponents of the Sherman Amendment were opposed to the imposition of liability on municipalities for failure to prevent Ku Klux Klan violence. Municipalities were

under no legal duty to do so and, indeed, often were legally powerless to maintain police forces for any reason. The opposition simply did not extend, the Court expressly concluded, 436 U.S. at 690, to the imposition of liability on municipalities for violation of the legal duties imposed on them by the Constitution. While a municipality could not "be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality [could not] be held liable under § 1983 on a *respondeat superior* theory," *id.* at 691, the Court concluded that Congress had intended for municipalities to be liable under section 1983 as long as "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers," *id.* at 690.

Finally, the petitioners argue, based on *Owen*, 100 S. Ct. at 1408-15, that because it was established in the common law as of 1871 that punitive damages could not be awarded against municipalities, the same limitation should be incorporated into section 1983. *See* Brief for the Petitioners at 7, 10-14. *See also id.* at 10, 25-26 (noting continued disapproval in the common law since 1871 of punitive damage awards against municipalities). While this Court certainly on occasion has deemed section 1983 to incorporate common law doctrines, *see, e.g., Carey* v. *Piphus*, *supra* (measurement of compensatory damages); *Procunier* v. *Navarette*, 434 U.S. 555 (1978) (qualified immunity for state prison officials); *Imbler* v. *Pachtman*, *supra* (absolute immunity for prosecutors); *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975) (qualified immunity for state hospital superintendent); *Wood* v. *Strickland*, 420 U.S. 308 (1975) (qualified immunity for local school board members); *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974) (qualified immunity for state executive officials); *Pierson* v. *Ray*, 386 U.S. 547 (1967) (absolute immunity for judges; qualified immunity for police officers); *Monroe* v. *Pape*, *supra*, at 187 (willful intent not required for liability); *Tenney* v. *Brandhove*, 341 U.S.

367 (1951) (absolute immunity for legislators), the petitioners grossly overstate the matter when they assume that such incorporation is automatic.

It cannot be emphasized too strongly that the effectuation of the underlying goals of section 1983 takes precedence over a mechanical invocation of common law tort rules. As the Court stated in *Owen:* "Where the immunity claimed by the defendant was well-established at common law at the time § 1983 was enacted, *and where its rationale was compatible with the purposes of the Civil Rights Act*, we have construed the statute to incorporate that immunity," 100 S. Ct. at 1409 (emphasis added). In *Owen*, after giving the fact that no such immunity existed at common law in 1871 as one reason for not allowing a good faith immunity to municipalities in section 1983 actions, *see id.* at 1408-15, the Court advanced as equally dispositive the fact that the goals of section 1983 would not be achieved if such an immunity were allowed: "Our rejection of a construction of § 1983 that would accord municipalities a qualified immunity for their good-faith constitutional violations is compelled both by the legislative purpose in enacting the statute and by considerations of public policy." *Id.* at 1415. Indeed, it has been suggested that the common law as of 1871 provides no guidance on the question involved in *Owen*, so that the decision in the case necessarily hinged on the Court's effectuation of the underlying goals of section 1983. *See The Supreme Court, 1979 Term, supra*, at 219-20. The inadequacy of a mechanical approach was made especially clear when the *Owen* Court acknowledged that the common law of 1871 included an immunity for municipalities acting in their "governmental," as opposed to their "proprietary" capacity, but deemed this sovereign immunity notion to have been "obviously abrogated by the sovereign's enactment" of section 1983, 100 S. Ct. at 1412-14.

There have been numerous other indications that the achievement of the purposes behind section 1983 requires deviation from common law tort doctrines. In *Imbler* v. *Pachtman*,

*supra*, for example, the Court stated: "The common-law rule of immunity is thus well settled. *We now must determine whether the same considerations of public policy that underlie the common-law rule likewise countenance absolute immunity under § 1983.*" 424 U.S. at 424 (emphasis added) (citation omitted). In *Wood* v. *Strickland*, *supra*, the Court settled on a qualified immunity for local school board members partly because "[a]ny lesser standard would deny much of the promise of § 1983." 420 U.S. at 322. And in *Scheuer* v. *Rhodes*, *supra*, the Court cautioned: "Final resolution of this question [whether state executive officers were entitled to an absolute immunity—the Court eventually held that they were not—] must take into account the functions and responsibilities of these particular defendants in their capacities as officers of the state government, *as well as the purposes of 42 U.S.C. § 1983.*" 416 U.S. at 243 (emphasis added). In *Monell*, *supra*, in a prime example of the process at work, this Court refused to incorporate the common law doctrine allowing municipal liability on a *respondeat superior* theory because such liability would not help achieve the goals of section 1983. *Compare* 436 U.S. at 691-94 *with Carter* v. *Carlson*, 447 F.2d 358, 368-70 & n.39 (D.C. Cir. 1971) (adopting *respondeat superior* theory from common law tort doctrine for use in section 1983 action against municipality). *See* Note, *Damage Awards for Constitutional Torts*, *supra*, at 976. A mechanical incorporation of common law rules would be particularly ironic given that the entire modern interpretation of section 1983 rests on a determination that state tort law is not adequate to protect federal constitutional rights. *See Monroe* v. *Pape*, *supra*, at 172-83; *Howell* v. *Cataldi*, 464 F.2d 272, 278 (3d Cir. 1972) ("The seminal case of *Monroe* did not conceptualize the right as one that tracks exclusively the footprints of tort law."); Note, *Damage Awards for Constitutional Torts*, *supra*, at 976 ("Since *Monroe* refused to allow the *existence* of parallel state remedies to bar 1983 actions, it was ironic for [other cases] to work from the assumption that the doctrinal limits on state tort remedies should

restrict the scope of 1983 relief."). *See generally* Nahmod, *supra*, at 32-33 ("But courts in 1983 cases must be careful not to let tort law alone determine 1983 liability, for not only possibly different purposes, but different interests as well are usually at stake. A federal common law for 1983 liability should modify tort law wherever appropriate."); Yudof, *supra*, at 1369 ("Questions of interpretation about section 1983, including the proper standard of damages, should be answered so as to effectuate these purposes [of section 1983]. In general terms, this means that section 1983 will be interpreted aggressively to deter future violations of constitutional rights.") (citation omitted); Note, *Damage Awards for Constitutional Torts*, *supra*, at 976 ("At times courts have eschewed the 'background of tort liability' when it appeared to conflict with the letter and intent of the statute.") (citation omitted).

Congress' intention as regards a conflict between the need to effectuate the underlying objectives of section 1983 and the petitioners' desire to incorporate a common law rule developed in a different context would seem to have been made clear when Representative Shellabarger, the House sponsor of the bill that became the Civil Rights Act, stated:

> This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation. As has been again and again decided by your own Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people.

Cong. Globe, 42nd Cong., 1st Sess. App. 68 (1871).

As shown earlier, deterrence is a key consideration of which this Court cannot lose sight if it is to ensure that Congress' objectives in enacting section 1983 are achieved. *See* pp. 9-10 *supra*. The officials in the present case had violated first amendment rights before, but despite the injunction that had issued in the previous case they had knowingly violated first amendment rights again. With this behavior in mind, the jury decided that only a remedy implicating the taxpayers' interests would prevent more violations in the future. The officials' conduct having clearly demonstrated the need for the deterrence provided by an award of punitive damages against the municipality, the realization of Congress' intent requires that such a remedy be available.

## Conclusion

For the reasons stated above, this Court should affirm the judgment of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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