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

## Amicus Brief of James Clancy

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## Brief Amicus Curiae

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# In the
# Supreme Court of the United States

OCTOBER TERM, 1980

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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.

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

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONERS, THE CITY OF NEWPORT ET AL.

James J. Clancy, (hereafter referred to as Moving Party) respectfully moves, pursuant to Rule 36 of the Rules of the Supreme Court of the

United States, for leave to file a brief as amicus curiae in support of the Petitioners herein. The consent of the parties was requested by letter dated January 27, 1981.

Amicus Curiae has a special interest in the subject of this appeal, being special counsel for the City of Santa Ana in four (4) civil public nuisance abatement lawsuits in the California State Court, and a defendant in a Civil Rights Action against the City Council of the City of Santa Ana and others, filed in the United States District Court, Central District of California on March 12, 1980, alleging constitutional torts incident to such State Court civil abatement proceedings. A motion to dismiss for failure to state a claim on which relief could be based, F.R.C.P. 12(b), and a motion to strike the claim for punitive damages pursuant to F.R.C.P. 12(f), on the ground that the statutes of the State of California do not permit punitive damages against a public entity, see California Government Code section 818, is

presently pending in the U.S. District Court.

Moving party contends that the judgment awarding punitive damages in The City of Newport et al. v. Fact Concerts, Inc., et al., should be reversed for reasons other than those being urged in the brief of the petitioners; namely, for lack of jurisdiction in the U.S. District Court, and for failure to state a claim upon which federal relief can be granted.

In a lawsuit such as Fact Concerts, Inc. v. The City of Newport, et al., where the specific facts pleaded show: (1) the underlying claim against the municipality is in contract and the federal constitutional issue is "pendent" to the main contract claim, and (2) such federal constitutional claim may be asserted affirmatively either as a remedy in the contract action in the State Court or joined as an independent cause of action in such state court action, it would seem that the constitutional rule must evolve that the party must first assert the federal claim in the contract action

in the state court. Dismissal of such action is warranted either on the ground that a federal court does not have "jurisdiction" to hear such a separate civil rights action until such federal claim has been rejected in the state court system, Allen et al. v. McCurry, supra, or the plaintiff has failed to plead the necessary facts to state a cause of action upon which relief can be based. Martinez v. California, supra.

Unless the judgment in Fact Co. erts Inc., et al. v. The City of Newport et al., 626 F.2d 1060 (June 17, 1980) is reversed on jurisdictional grounds, any party to a contract with a municipality who "claims" a constitutional tort in the execution of the contract will be able to enter the federal system under a 42 U.S.C. section 1983 claim and litigate such contract claim in the federal system. The fact that the City of Newport did not raise the "jurisdictional" issue in the trial court should not be allowed to establish a

precedent and create federal jurisdiction where it does not properly exist.[1]

DATED: January 29, 1981

Respectfully Submitted,

James J. Clancy
Counsel for Amicus Curiae

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[1] The City of Newport did, however, move to dismiss for failure to state a claim upon which relief could be based. See Fact Concerts Inc. v. City of Newport, 626 F.2d 1060 at 1063.

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BRIEF OF AMICUS CURIAE
IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

Amicus Curiae has a special interest in the subject of this appeal, being special counsel for the City of Santa Ana in four (4) civil public nuisance abatement lawsuits in the California State Court, and a defendant in a Civil Rights Action against the City Council of the City of Santa Ana and others, filed in the United States District Court, Central District of California on March 12, 1980, alleging constitutional torts incident to such State Court civil abatement proceedings.[1] A motion to strike the claim for punitive damages pursuant to F.R.C.P. 12(f) is presently pending in the U.S. District Court on the ground that the statutes of the State of California do not

[1] The Civil Rights Action is entitled Mitchell Brothers' Santa Ana Theater; Cinema 7, Inc, a California corporation vs. City Council of the City of Santa Ana; David L. Brandt; Gordon Bricken; Vernon S. Evans; John Garthe; David F. Ortiz; James E. Ward; Harry Yamamoto; Keith L. Gow and James J. Clancy, Civil No. 80-959 FW. See, also, Amicus Curiae Brief of the City of Santa Ana, California, in Support of Petition for Rehearing in Vance et al., v. Universal Amusement Co., Inc., October Term, 1979 No. 78-1588 at page 8, footnotes 4 and page 15 footnote 6.

permit punitive damages against a public entity. See California Government Code section 818.

Amicus Curiae was also the attorney of record in the Ohio Public Nuisance Abatement case, Huffman v. Pursue, Ltd., 420 U.S. 592, 43 L.Ed.2d 482, 95 S.Ct. 1200 (March 18, 1975) in which it was argued on appeal that the U.S. District Court lacked jurisdiction and was required to dismiss the Civil Rights Action. This Court's decision in Huffman v. Pursue, Ltd., supra, remanding the case to the U.S. District Court:

> ". . . so that the District Court may consider whether irreparable injury can be shown in light of 'Without a Stitch,' and if so, whether that injury is of such a nature that the District Court may assume jurisdiction under an exception to the policy against federal judicial interference with state court proceedings of this kind." (Our emphasis)

was further applied in Judice v. Vail, 430 U.S. 327, 51 L.Ed.2d 376, 97 S.Ct. 1211 (Mar. 22, 1977). In his dissent in Judice, Justice Stewart significantly noted as to what is required under Huffman v. Pursue Ltd., supra:

> "Both types of 'abstention' of course, serve the common goal of judicial restraint as a means of avoiding undue federal interference with state goals and functions. But there is a significant difference in result between the two. Under Pullman abstention, the federal court may retain jurisdiction pending state-court interpretation of an ambiguous statute, while under Younger it may not." (Our emphasis.)

see also Trainor v. Hernandez, 431 U.S. 434, 445, 52 L.Ed.2d 486, 493, 97 S.Ct. 1911 (May 31, 1977)[2] and Moore v. Sims, 442 U.S. 415, 430, 60 L.Ed.2d 994. 1007, 99 S.Ct. 2371 (June 11, 1979), citing the Trainer v. Hernandez text

[2] In Trainor v. Hernandez, supra, this Court held that where Huffman v. Pursue Ltd. applies, the Court should dismiss the case:

> "For a federal court to proceed with its case rather than to remit appellees to their remedies in a pending state enforcement suit would confront the State with a choice of engaging in duplicative litigation, thereby risking a temporary federal injunction, or of interrupting its enforcement proceedings pending decision of the federal court at some unknown time in the future. It would also foreclose the opportunity of the state court to construe the challenged statute in the face of the actual federal constitutional challenges that would also be pending for decision before it, a privilege not wholly shared by the federal courts. Of course, in the case before us the state statute was invalidated and a federal injunction prohibited state

noted above, in holding that the principles of Younger-Huffman acted as a bar.

While the language of the U.S. Supreme Court in Huffman v. Pursue, Ltd., supra, Judice v. Vail, supra, Trainer v. Hernandez, supra, and Moore v. Sims, supra, does not specifically hold that federal "jurisdiction" is in question, that appears to be the necessary result under the rationale expressed in Allen v. McCurry, supra, where the trial court facts show that the constitutional claim can be raised and fully

footnote 2 continued:

> officers from using or enforcing the attachment statute for any purpose. The eviscerating impact on many state enforcement actions is readily apparent. This disruption of suits by the State in its sovereign capacity, when combined with the negative reflection on the State's ability to adjudicate federal claims that occurs whenever a federal court enjoins a pending state proceeding, leads us to the conclusion that the interests of comity and federalism on which Younger and Samuels v. Mackell primarily rest apply in full force here. The pendency of the state court action called for restraint by the federal court and for the dismissal of appellees' complaint unless extradordinary circumstances were present warranting federal interference or unless their state remedies were inadequate to litigate their federal due process claim." (Our emphasis.)

litigated in a Civil Action in the state court.

It would seem, therefore, that the constitutional rule must evolve that, in a lawsuit such as Fact Concerts, Inc. v. The City of Newport, et al., where the specific facts pleaded show: (1) the underlying claim against the municipality is in contract and the federal constitutional issue is "pendent" to the main contract claim, and (2) such federal constitutional claim may be asserted affirmatively either as a remedy in the contract action in the State Court or joined as an independent cause of action in such state court action, the party must first assert the federal claim in the contract action in the state court. Dismissal of such action can be justified either on the ground that a federal court does not have "jurisdiction" to hear such a separate civil rights action until such federal claim has been rejected in the state court system, Allen et al. v. McCurry, supra, or the plaintiff has failed to plead the necessary facts to state a cause of

action upon which relief can be based. Martinez v. California, supra.

Unless the judgment in Fact Concerts Inc., et al. v. The City of Newport et al., 626 F.2d 1060 (June 17, 1980) is reversed on jurisdictional grounds, any party to a contract with a municipality who "claims" a constitutional tort in the execution of the contract will be able to enter the federal system under a 42 U.S.C. section 1983 claim and litigate such contract claim in the federal system. The fact that the City of Newport did not raise the "jurisdictional" issue in the trial court should not be allowed to establish a precedent and create federal jurisdiction where it does not properly exist.[3]

More importantly to the Amicus Curiae and the City of Santa Ana (which has been in litigation in the state court system for more

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[3] The City of Newport did, however, move to dismiss for failure to state a claim upon which relief could be based. See Fact Concerts Inc. v. City of Newport, 626 F.2d 1060 at 1063.

than four years on four state civil public nuisance abatement actions in which it has expended more than $190,000.00) this Court should place both (a) jurisdictional, and (b) financial limitations on the newly created liability of Cities established by this Court in Monell v. New York City Department of Social Services, 436 U.S. at 695, 56 L.Ed.2d 611, 98 S.Ct. 2018 and Owen v. City of Independence, Mo., ___ U.S. ___, 63 L.Ed.2d 673, 100 S.Ct. ____ (April 16, 1980). Broadly speaking, this Court should require federal claims, which are "pendent" to state court matters, be raised in the civil action in the state court. Under the present state of the economy, an "average" municipality cannot afford a staff of attorneys to litigate governmental claims in the federal system at the same time they are being litigated in the state court system. In no event, should punitive damages be awarded. Amicus Curiae submits that unless remedied, the natural consequence of this extension of federal

jurisdiction will be governmental paralysis.

## STATEMENT OF THE CASE

### (A) The Execution Of The Contract.[4]

In the early summer of 1975, Plaintiff Fact Concerts, Inc. (Fact Concerts) through its President Frank Amado (Amado) and Plaintiff Marvin Lerman (Lerman) discussed holding a two-day jazz festival in the City of Newport. Amado had previously obtained a lease from the Rhode Island Department of Natural Resources to hold three concerts in Fort Adams, a large, state-owned facility located in Newport, Rhode Island and then sought licenses from the City of Newport. Amado obtained a license from the City of Newport and successfully staged a first concert featuring Arthur Fiedler. Amado had also applied for, in May, 1975, and been granted a license by the City Council for two jazz concerts to be given at Fort Adams on August 2nd and 3rd. Subsequently, the Plaintiffs

[4] See Statement of the Case in Brief in Opposition to the Petition for a Writ of Certiorari at page 2.

successfully sought a substitution of August 30 and 31 from the Council, which granted a license through a contract dated August 22, 1975 and duly authorized it by vote.

(B) The Contract Provisions In Dispute.

Plaintiff Fact Concerts contends[5] that the contract did not grant the City the right to approve performers who would appear, nor did it designate the type of music to be played, referring only to a "music concert" and acknowledges the city retained the right to cancel only "if the interests of public safety demand."

In cancelling the contract, the City of Newport contended[6] that it was justified in relying upon paragraph 2 and paragraph 7 of the contract. The contract provided in paragraph 2 that:

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[5] See Statement of the Case in Brief in Opposition to the Petition for a Writ of Certiorari at page 2.

[6] See Statement of Facts in Petition for a Writ of Certiorari at page 3.

> "It is expressly agreed by the parties hereto that the entertainment license herein granted is held solely at the discretion of the City, and if at any time in the opinion of the City the interest of the public safety demand, said entertainment license may be cancelled at any time by the City, and the City shall incur no liability to the Producer as a result of such cancellation."

In Paragraph 7 it further provided:

> "The Producer agrees to comply with all orders of the Director of Public Safety with reference to fire and police protection and safety including, but not limited to, the following:
>
> (a) Auxiliary generator for lighting;
> (b) Firefighters for fire protection and First Aid duties;
> (c) Portable firefighting equipment, state area;
> (d) Seating to be arranged so that aisles point near exits off the field as well as possible - all chairs to be wired together. Exits and entrances shall be provided as directed;
> (e) All seats to be installed and ready for occupancy no later than 3:00 P.M. on August 29, 1975."

(C) <u>The Nature Of The Dispute Which Arose In The Execution Of The Contract</u>.

Plaintiffs began in the summer of 1975 to book top jazz acts. However, one attraction, Sarah Vaughan, was unavailable, and Plaintiffs substituted an alternative group called Blood,

Sweat and Tears. This group triggered the events at the heart of the case. Plaintiffs considered Blood, Sweat and Tears a jazz group equivalent in stature to Sarah Vaughan, based upon the group's appearance in Carnegie Hall, representing the United States on State Department-sponsored jazz tours, and appearing at major jazz festivals. Plaintiffs advertised the jazz concerts, including an August 24, 1975 ad in the New York Times, announcing the addition of Blood, Sweat and Tears.[7]

On the Monday before the concerts, August 24, 1975, Amando received notice of a problem. He called Mayor Donnelly, who talked about cancellation of Blood, Sweat and Tears because he did not want any rock groups appearing in Newport. The next day Fact Concerts officials attended a special City Council meeting. The Fact Concerts group was told that Blood, Sweat and Tears would have to be removed or the

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[7] See Statement of the Case in Brief in Opposition to the Petition for writ of certiorari at page 2.

license would be revoked. The Mayor said that Blood, Sweat and Tears would bring 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.

After further meetings on August 28th and August 29th, the City Council acted on the matter. A motion was made, seconded and approved unanimously to cancel the contract. All of the councilmen who later testified, indicated that they were concerned because of earlier disturbances (in 1960, 1969 and 1971) at so-called rock concerts and that it was this concern that prompted the vote to cancel.

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[8] See Statement of the Case in Brief in Opposition to the Petition for Writ of Certiorari at page 3.

[9] See Statement of Facts in Petition For a Writ of Certiorari at page 5.

(D) The Litigation In The State Court System.[10]

The next day, Saturday, August 30th, the plaintiffs obtained a Temporary Restraining Order in the State Superior Court against the Council and the concert went on as planned including the appearance of Blood, Sweat and Tears on Sunday, August 31st. Approximately 6400 people attended the two-day event.

(E) The Litigation In The Federal Court System.[10]

Thereafter Fact Concerts, Inc. and Marvin Lerman (one of the promoters) brought a five count complaint in the United States District Court for the District of Rhode Island seeking declaratory relief, redress for a violation of their First Amendment rights, and compensatory and punitive damages for various pendent contract claims.

At trial the complaint was reduced to two

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10 The sole ground for federal jurisdiction is 42 U.S.C. Section 1983. If the plaintiffs have failed to state a claim under 42 U.S.C. § 1983, the lawsuit must be dismissed.

counts, the first a Section 1983 claim[11] and the second a claim for interference with contractual relationships.

The jury answered interrogatories finding all defendants liable on both counts and awarding $72,000.00 compensatory damages and punitive damages in the total amount of $275,000.00 of which $200,000.00 was assessed against the City of Newport.

A Motion for Judgment N.O.V. and a New Trial was filed and after hearing thereon the trial justice ordered a remittitur of $125,000.00 of the punitive damages award against Newport and sustained the verdicts in all other respects.

The United States Court of Appeals for the First Circuit affirmed.

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11 See Statement of Facts in Petition for Writ of Certiorari at page 6.

## SUMMARY OF ARGUMENT

The federal judgment against the City of Newport for punitive damages must be reversed for lack of jurisdiction in the federal district court to hear the main contract claim, and for failure of the plaintiffs to state a claim upon which federal relief can be based.

Where the specific facts pleaded show: (1) the underlying claim against the municipality is in contract and the constitutional issue is "subordinate" and "pendent" to the main contract claim, and (2) the state court appears to be ready and willing to undertake full litigation of the contract claim and the "pendent" constitutional claim, and has already granted partial relief, a cause of action under 42 U.S.C. section 1983 cannot be stated upon which federal jurisdiction can be based. Martinez v. California; Allen v. McCurry et al.

It was never intended that the federal courts should have jurisdiction where the state courts stand ready and willing and are available

"to allow full litigation of a constitutional claim" Allen et al. v. McCurry.

It can no longer be claimed that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court. It clearly was not the intention of Congress in 1871 to establish concurrent jurisdiction in the federal court over all municipal contracts wherein one of the contracting parties claims a constitutional tort in the execution of that governmental contract. Allen et al. v. McCurry.

Fact Concerts Inc. cannot rely upon Southeastern Promotion Ltd. v. Conrad, which is distinguishable. Southeastern Promotion Ltd, was a "prior restraint" case in which the plaintiffs were denied a license and the opportunity to perform. Here, "Blood Sweat and Tears" was granted the license and did perform. The only "live" dispute was as to the rights of the respective parties under the municipal contract.

The public policy expressed in Owen v. City

of Independence, Missouri precludes an award of punitive damages against local public entities under 42 U.S.C. section 1983.

A federal court may not disregard the public policy in States like California which prohibit an award of punitive damages against a public entity. Board of Regents of the University of New York v. Tomanio; Eleventh Amendment.

A federal court may not disregard the public policy of those states which generally prohibit an award of punitive damages. Eleventh Amendment; Hans v. Louisiana; Parden v. Terminal R. Co.; Employees of the Dept. of Public Health and Welfare v. Dept. of Public Health and Welfare.

Unless the judgment in Fact Concerts Inc., et al. v. The City of Newport et al., 626 F.2d 1060 (June 17, 1980) is reversed on jurisdictional grounds, any party to a contract with a municipality who "claims" a constitutional tort in the execution of the

contract will be able to enter the federal system under a 42 U.S.C. section 1983 claim and litigate such contract claim in the federal system. A federal trial court should not be allowed to "create" federal jurisdiction where it does not properly exist.

ARGUMENT

THE FEDERAL JUDGMENT AGAINST THE CITY OF NEWPORT FOR PUNITIVE DAMAGES IN THE CIVIL RIGHTS ACTION (42 U.S.C. SECTION 1983) MUST BE REVERSED FOR LACK OF JURISDICTION IN THE FEDERAL DISTRICT COURT TO HEAR THE MATTER.

(A) Fact Concerts Inc., Has Failed To State A Claim Upon Which Federal Jurisdiction Can Be Based.

Where the specific facts pleaded show: (1) the underlying claim against the municipality is in contract and the constitutional issue is "pendent" to the main contract claim, and (2) the state court appears to be ready and willing to undertake full litigation of the contract claim and the "pendent" constitutional claim, and has already granted partial relief, a cause of action under 42 U.S.C. § 1983 cannot be stated upon which federal jurisdiction can be based. Under Martinez v. California, ___ U.S. ___, 62 L.Ed.2d 481, 100 S.Ct. ____ (Jan. 15, 1980) and Allen v. McCurry et al., ___ U.S. ___, ___ L.Ed.2d ___, ___ S.Ct. ____ C.C.H., U.S. Supreme Court Bulletin at pages B 395 - B 422. (December 9, 1980), the federal complaint should

have been dismissed for failure to state a claim upon which relief can be based.

In Martinez v. California, (supra), this Court held that, under the specific facts pleaded, the survivors of a parolee's murder victim had not stated a cause of action against officials, where a state statute immunized parole officials from injuries resulting from parole decisions. Under Martinez v. California, supra, the U.S. District Court has the power and duty to decide whether or not, under the specific facts alleged, the plaintiffs have stated a cause of action under 42 U.S.C. § 1983. See Martinez v. California, supra, at 481:

> ". . . we hold that, taking these particular allegations as true, appellees did not 'deprive' appellants' decedent of life within the meaning of the Fourteenth Amendment..
>
> ". . . We need not and do not decide that a parole officer could never be deemed to 'deprive' someone of life by action taken in connection with the release of a prisoner on parole. But we do hold that at least under the particular circumstances of this parole decision, appellants' decendent's death is too remote a consequence of the parole officers' action to hold them responsible under the federal civil rights law. Although a § 1983 claim

> has been described as 'a species of tort liability,' Imbler v. Pachtman, 424 U.S. 409, 417, 47 L.Ed.2d 128, 96 S.Ct. 984, it is perfectly clear that not every injury in which a state official has played some part is actionable under that statute." (Our emphasis.)

In Allen et al. v. McCurry, supra, a majority of this Court had occasion to rethink the legislative intent and rationale which authorized federal jurisdiction in Civil Rights cases, (42 U.S.C. section 1983). In that decision, the majority made it clear that, except where the claim was made that a state statute was unconstitutional on its face, it was never intended that the federal courts should have jurisdiction where the state courts stand ready and willing and were available (as here) "to allow full litigation of the constitutional claim," See Allen et al. v. McCurry, supra, at page B406-407:

> "To the extend that it did intend to change the balance of power over federal questions between the state and federal courts, the 42d Congress was acting in a way thoroughly consistent with the doctrines of preclusion. In reviewing the legislative history of § 1983 in Monroe v. Pape, supra, the Court inferred that

> Congress had intended a federal remedy in three circumstances: where state substantive law was facially unconstitutional, where state procedural law was inadequate to allow full litigation of a constitutional claim and where state procedural law, though adequate in theory, was inadequate in practice. 365 U.S. at 173-174. In short, the federal courts could step in where the state courts were unable or unwilling to protect federal rights. Id., at 176." (Our emphasis.)

In other words, it can no longer be claimed that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, at page B409-410:

> "The actual basis of the Court of Appeals' holding appears to be a generally framed principle that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the federal claim arises. But the authority for this principle is difficult to discern. It cannot lie in the Constitution, which makes no such guarantee, but leaves the scope of the jurisdiction of the federal district courts to the wisdom of Congress. And no such authority is to be found in § 1983 itself."

Amicus contends that under the rational expressed by this Court in Allen et al. v.

McCurry, supra, it clearly was not the intention of Congress in 1871 to establish concurrent jurisdiction in the federal court over all municipal contracts wherein one of the contracting parties claims a constitutional tort in the execution of that governmental contract. Particularly is that so, in this case, where the state court has shown a willingness to protect federal rights. Fact Concert , Inc. made use of the State judicial system on Aug. 30th and obtained a Temporary Restraining Order in the State Superior Court against the Council and the concert went on as planned. There is no reason to believe the state judiciary would not give Fact Concerts, Inc. a full and fair opportunity to litigate the federal claim in a state court action regarding any breach of contract.

Fact Concerts, Inc. cannot rely upon Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, which is distinguishable. Southeastern Promotions, Ltd., supra, was a "prior restraint" case in which the plaintiffs

were denied a license and the opportunity to perform. Here, "Blood, Sweat and Tears" was granted the licence and did perform. The only "real" dispute was as to the rights of the respective parties under the municipal contract.

(B) The Public Policy Expressed In Owen v. City Of Independence, Mo., Precludes An Award Of Punitive Damages Against Local Public Entities Under 42 U.S.C. Section 1983.

The decision of this Court in Owen v. City of Independence, Mo., ___ U.S. ___, 63 L.Ed.2d 673, 100 S.Ct. ____ (April 16, 1980) which radically revised the rule of law re liability accruing as a result of governmental action, precludes the granting of an award of punitive damages against municipalities under 42 U.S.C. § 1983. In summarizing its holding in the concluding paragraph of the majority opinion in Owen, the Court noted that there are three "principals" in the scenario of the § 1983 cause of action:

(1) the victim of the constitutional deprivation;
(2) the officer whose conduct caused the injury; and
(3) the public, as represented by the municipal entity.

In considering what damages under a § 1983 cause of action may be recovered by the victim, and what damages are appropriately chargeable to the populace as a whole, as represented by the municipal entity, the court, at page 697, limited the victim's recovery to compensatory damages, and expressly stated that the public would be forced to bear only the costs of the injury inflicted:

> "We believe that today's decision, together with prior precedents in this area, properly allocates these costs among the three principals in the scenario of the § 1983 cause of action: the victim of the constitutional deprivation; the officer whose conduct caused the injury; and the public, as represented by the municipal entity. The innocent individual who is harmed by an abuse of governmental authority is assured that he will be compensated for his injury. The offending official, so long as he conducts himself in good faith, may go about his business secure in the knowledge that a qualified immunity will protect him from personal liability for damages that are more appropriately chargeable to the populace as a whole. And the public will be forced to bear only the costs of injury inflicted by the 'execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy'. Monell v. New York City Dept., of Social Services,

436 U.S., at 695, 56 L.Ed.2d 611, 98 S.Ct. 2018." (Our emphasis.)

(C) Under Board Of Regents Of The University Of New York v. Tomanio And 42 U.S.C., § 1988, This Court May Not Disregard The Law In Those States Which Prohibits An Award Of Punitive Damages Against A Public Entity.

Representative of the law in several states, California Government Code section 818 provides:

> "§ 818. Absence of liability for exemplary and punitive damages. Notwithstanding any other provision of law, a public entity is not liable for damages awarded under Section 3294 of the Civil Code or other damages imposed primarily for the sake of example and by way of punishing the defendant."

In Board of Regents of the University of the State of New York et al., v. Tomanio, ___ U.S. ___, 64 L.Ed.2d 440, 100 S.Ct. ___ (May 19, 1980) this Court construed 42 U.S.C. § 1988 as requiring the application of state law where federal law provides no rule of decision for actions brought under 42 U.S.C. § 1983, unless they are "inconsistent" with federal law; at page 447:

> "In § 1988, Congress 'quite clearly

> instructs (federal courts) to refer to state statutes' when federal law provides no rule of decision for actions brought under § 1983. Robertson v. Wegmann, 436 U.S. 584 (1978). See also Carlson v. Green, ___ U.S. ___, ___, ___, at n. 10 (1980). As we held in Robertson, by its terms, § 1988 authorizes federal courts to disregard an otherwise applicable state rule of law only if the state law is 'inconsistent with the Constitution and the laws of the United States.'" (Our emphasis.)

Policies of "federalism" are advanced when the federal government recognizes the sovereign rights of a state and a state governmental policy which denies punitive damages in such circumstances.

(C)(1) To Permit A Federal Court To Award Punitive Damages Against A Municipality In The Execution Of Its Governmental Contracts, In Those States Where State Law Specifically Prohibits Punitive Damages Generally, Would Violate The Basic Principles Of State Sovereignty Which Are Embodied In The Eleventh Amendment To The Federal Constitution.

Under the doctrine of sovereign immunity, the U.S. District Court has no jurisdiction over a suit in law or equity by a citizen against the sovereign power of an unconsenting State. Hans v. Louisiana, 134 U.S. 1, 33 L.Ed.2d 42, 10

S.Ct. 504, Parden v. Terminal, R.Co, 377 U.S. 184, 12 L.Ed.2d 233, 84 S.Ct. 1207; Employees of the Dept. of Public Health and Welfare v. Dept. of Public Health and Welfare, 411 U.S. 279, 36 L.Ed.2d 251, 93 S.Ct. 1614. For the same reason, an award of punitive damages against a governmental subdivision of the State in the execution of its governmental contracts which conflicts with the State's public policy re punitive damages would violate those same principles of state sovereignty. Compare State of Nevada v. Hall, 440 U.S. 410, 59 L.Ed.2d 416, 99 S.Ct. 1182 (March 5, 1979), where this Court held in a conflict of laws situation, that the Eleventh Amendment does not require that the sovereign immunity expressed in Nevada law be applied by the State of California in a tort action arising out of an automobile accident occuring in the State of California.

It should be noted that six states (Connecticut, Massachusetts, New Hampshire, Colorado, Louisiana, and Washington) do not

permit an award of punitive damages in civil cases. Rosener v. Sears Roebuck and Co., 110 Cal.App.3d 740, 168 Cal.Rptr. 237 at 251. See, also, the federal problem regarding punitive damages expressed in the dissent of Justice Hoffman in Snepp v. U.S., 595 F.2d 926 at 939 et seq.; reversed in Snepp v. U.S., ___ U.S. ___, 62 L.Ed.2d 704, 100 S.Ct. ____ (Feb. 19, 1980).

## CONCLUSION

Plaintiffs have failed to plead or prove a constitutional claim upon which independent federal relief can be based. The alleged constitutional deprivation was "subordinate" and "pendent" to the contract claim and should have been presented to the Rhode Island State Court, which had jurisdiction of the contract claim.

For all of the foregoing reasons, the judgment of the court below should be reversed and the cause remanded with instructions that the case be dismissed.

DATED: January 29, 1981

Respectfully Submitted,

James J. Clancy
Counsel for Amicus Curiae

Endorsement of Sponsorship

by the City Attorney

of Santa Ana, California

Pursuant to Rule 36(4) of the Rules of the Supreme Court of the United States, I adopt the within amicus curiae brief as an amicus curiae brief of the City of Santa Ana, California, and sponsor the same as the authorized law officer thereof.

DATED: January 29, 1981

Edward Cooper
Santa Ana City Attorney

CERTIFICATE OF SERVICE

I, hereby certify that on this 29th day of January 1981, the original and 40 copies of the within Amicus Curiae Brief were deposited in the United States Post Office in Sun Valley, California, with first-class postage prepaid, and properly addressed to the Clerk of the United States Supreme Court.

I further certify that three (3) copies were also mailed, postage prepaid, to the below listed parties to the proceedings and that all parties required to be served have been served.

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