In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1779

GEORGE D. OWEN,
Petitioner,

vs.

THE CITY OF INDEPENDENCE, MISSOURI, LYLE W. ALBERG, CITY MANAGER, RICHARD A. KING, MAYOR, CHARLES E. CORNELL, DR. RAY WILLIAMSON, DR. DUANE HOLDER, RAY A. HEADY, MITZI A. OVERMAN, AND E. LEE COMER, JR., MEMBERS OF THE COUNCIL OF THE CITY OF INDEPENDENCE, MISSOURI,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION
On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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INDEX

TABLE OF CASES

OTHER AUTHORITIES

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QUESTIONS PRESENTED

Petitioner's narrow framing of the "Questions Presented" (Petition, p. 2) presents hypothetical and academic questions neither dispositive of this case nor, under the peculiar facts of this case, useful for application in other Section 1983 cases.

The factual situation giving rise to this litigation happened prior to decisions in *Board of Regents* v. *Roth,* 408 U.S. 564 (1972) and *Perry* v. *Sindermann,* 408 U.S. 593 (1972). The passage of more than seven years since petitioner's discharge from nontenured, public employment

and the passage of a similar period of time since the issues were joined in this litigation, among other factors, may have moved the court of appeals to restrict its holdings on qualified immunity to "the particular circumstances of this civil rights action" (Petition, Appendix A, at p. A4). Consequently, neither the court of appeals nor the district court explored, in depth or for precedent in other cases, "the scope of any municipal immunity" left for another day in *Monell* v. *Department of Social Services of the City of New York*, 436 U.S. 658 (1978).

Recognizing the mere existence, but not the contours, of a "good faith" defense under Section 1983, Title 42, United States Code (under three decisions of the United States Supreme Court), both the district court and the court of appeals left definition of "the boundaries" of some limited immunity for another case, whose circumstances could provide a less episodic and more current forum (App. at A4 and at A68, citing *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975); *Wood* v. *Strickland*, 420 U.S. 308 (1975); and, *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974)).[1]

STATUTORY PROVISIONS INVOLVED

In this section of his petition, Petitioner Owen does not set forth verbatim, or refer to, any policy statement, ordinance, regulation or decision officially adopted and promulgated by the officers of the City of Independence, Missouri allegedly pertinent to the questions presented as required by Supreme Court Rule 23(1)(d).

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1. The qualified immunity under *Scheuer* to defendant officials in this case, acting under color of state law sued in their *official* capacities, obviously presents an issue not stated in petitioner's "Questions Presented", where those questions limit the issues to the qualified immunity of officials in their *individual* capacities under *Wood*.

RESPONDENTS' STATEMENT OF THE CASE

As recognized by the court of appeals, the district court's findings of fact most accurately and clearly provide the background needed for understanding the issues presented in this case. These findings may be found at Appendix C, pp. A47-A60.

The Discharge

For a substantial period of time prior to March of 1972, Owen and the City Manager, defendant Alberg, had sharp disagreements over Owen's administration of the police department, including his administration of the property room (Appendix C, at A49). In early March, 1972, a handgun, which had been destroyed according to the property room records, was discovered in the hands of a felon. At that time the City Manager initiated an investigation of the property room. Statements were taken and reports made by the City Auditor and the City Counselor. The City Auditor reported that recordkeeping in the property room was too inefficient to make an adequate audit of the property therein. The City Counselor reported in writing to the City Manager that there was no evidence of any criminal acts, or violation of any state law or municipal ordinances, in the administration of the property room (App., p. A49).

On April 10, 1972, the City Manager requested Owen to resign and to accept another position in the police department. Owen was informed that the City Manager was dissatisfied with his efficiency as police chief. When Owen refused to be rehired by the City, again on April 11, the City Manager fully advised Owen that he would be discharged if he did not resign. On April 13, the City Manager obtained the consent of another police officer to serve as police chief. On April 18, the City Manager implemented

his discharge decision by completing the necessary paperwork towards discharge.

On April 15, 1972, three days prior to Alberg's implementation of his discharge decision, Owen requested that Alberg provide him with written notice of the reasons for the termination and a hearing to appeal the discharge (App., p. A54).

The request was denied, however, because, beyond present dispute, Owen had no property interest in his position.

The Roberts Statement

Contemporaneously, but without any causal or policy connection[2] whatsoever to the City Manager's acts, a lame duck City Councilman, Roberts, unilaterally (App., p. A52) decided that the investigation should be made public and secretly drafted a statement to be made by him (without prior notice to anyone) at the City Council meeting on the evening of April 17, 1972. Such "charge", though Owen opposed a hearing as to its truth or falsity, was viewed by the majority in the court of appeal's opinion as damaging to Owen's reputation and future employment prospects (App., p. A41). Finding derivative liability because of Roberts' high ranking position (App., pp. A3 and A4), the court viewed this statement as the "City's public accusation" and held it to be "of prime importance" on the liberty issue (App., p. A32). The statement appears *passim* throughout the petition and selective references from it appear in Owen's Statement of the Case (Petition, p. 3).

Predictably, both the discharge and the Roberts statement obtained considerable media coverage. Petitioner

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2. All members of the Council were prohibited by the Charter from having any voice in Owen's discharge process (App., p. A48).

(Petition at p. 4) has referred to various articles printed in area newspapers which were admitted conditionally at trial.[3]

The City Manager never made any stigmatizing allegations about Owen and no statements were placed in Owen's official record which could possibly stigmatize him. A copy of the Council motion, infra, and the vote on the motion became a part of the City's permanent records as journal entries of the Council meeting; however, a copy of the Roberts statement was not placed in the City's permanent records and, in any event, the City has had no request for records about Owen from prospective employers (Tr. at 81-82 and Tr. 229).

The City Manager did not subscribe to Roberts' accusations and publicly stated, as did the City Counselor, that there was no indication of any criminal wrongdoing or violation of law by Owen (App., pp. A14 and A51; Tr. 147; Tr. 224; Def. Ex. 11; Def. Ex. 14). Likewise, the discharge was not based upon Roberts' stigmatizing statement and nothing in the discharge process itself cast a stigma upon Owen (App., pp. A37, A44 and A56).

The Council Motion

During a regular Council meeting, the City Council for the City of Independence voted to refer "reports concerning police department inefficiencies" (App., p. A4) to the prosecuting attorney for presentation to the next grand jury. The City Manager subsequently complied with this Council motion; and, the grand jury then returned a "no true bill". Since that time, neither the City Manager nor

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3. Defendants objected to these articles because they contained hearsay and were incompetent to show any state action (Tr. 25).

the City Council made any further investigation of Owen's administration of the police department (App., p. A56).

The Aftermath

At no time did Owen or his attorneys request a name clearing hearing and only informal hearings before the City Manager were given Owen.[4] Owen brought lawsuits both in the state and federal courts for compensatory relief. Roberts has never been a party to this federal action either in his individual or official capacity. Owen's action in the Missouri courts was against both Roberts and the City Manager.[5]

On June 25, 1976, the district court entered judgment for the individual defendants sued in their official capacities and for the City (Appendix C). On appeal, the United States Court of Appeals for the Eighth Circuit modified (Appendix B), based upon certain conclusions of law alluded to in Owen's Statement of the Case (Petition, pp. 4-5). Paradoxically, the court of appeals did agree with the district court that plaintiff was discharged "for reasons which apparently did not relate to Owen's honesty or integrity" (App., p. A37). Consequently, the court refused to afford "a full back pay remedy" which "would afford Owen a windfall at the expense of the municipality and the municipal taxpayers." Notwithstanding, the court believed that "some amount of compensatory relief" was appropriate against the City as a unit of government (but not

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4. Indeed, although lack of such a hearing is apparently the constitutional tort Owen complains of here, Owen has never made a specific allegation in his complaint, or other request, for such a hearing.

5. Owen eventually dismissed the City Manager from the state case (along with allegations of a conspiracy between the City Manager and Roberts) and, subsequently, obtained a financial settlement against Roberts for the Roberts' statement on his petition for libel, slander and malicious prosecution.

against the individual officeholders) and remanded to the district court for a new trial on the issue of damages "measured by the amount of money he (Owen) likely would have received to retirement if he had not been deprived of his good name by the action of the City, subject to mitigation, including the amounts earned up to retirement age as well as the amount, if any, recovered from Councilman Roberts in the state defamation suit." (App., p. A38).

On June 26, 1978, this Court vacated (Appendix D) the court of appeals' prior decision for reconsideration in light of *Monell*, supra. On remand, the court of appeals affirmed (Appendix A) the judgment of the district court, denying Owen any relief against both the individual and corporate defendants in this case.

REASONS FOR DENYING WRIT

I

The Decisions Below, In Their Recognition Of The Existence Of Qualified Immunity To The Individual Defendants Sued In Their Official Capacity And To The City, Are Correct "In The Particular Circumstances Of This Civil Rights Action" Because Defendants Did Not Knowingly Neglect Any Duty To Plaintiff Where, In April Of 1972, Defendants Could Not Have Been Aware Of Any Affirmative Responsibility To Offer A Name Clearing Hearing To Plaintiff.

This litigation is part of the dwindling breed of Section 1983 cases predating *Roth* and *Sindermann*, supra. A few cases of similar ancestry may be pending in the lower federal courts which could ultimately involve the extremely limited type of qualified immunity applied in the

case at hand (App. p. A6 and p. A68); however, it is unlikely that even those cases bear any other significant relationship to this maverick among liberty interest cases.

Other cases, but not the case at hand, have viewed deprivation of liberty in the context of discharges which were based upon stigmatizing reasons. Other cases, but not the case at hand, have seen the existence of rules or understandings which denied expungement of stigmatizing materials from personnel records or have some other direct relationship to a constitutional tort—deprivations that were nurtured by official policy instead of violative of official policy as here. No other cases have viewed referral of investigative reports concerning departmental inefficiencies to the grand jury as a basis for liability. Other pre-*Monell* and pre-*Roth* cases involve suits against public officials in their individual capacities (to avoid the holdings of *Monroe*)—here no defendant was sued in his individual capacity (the alleged tortfeasor, Roberts, was not sued at all), leaving the issues undeveloped as to where individual liability for a constitutional tort ends and entity liability begins.

In the context of these, and other, unique aspects of this case, it is understandable why the majority limited its decision to the facts of this case. Problems in application of this case to other cases exist for various reasons—including the difficulty of discussing what exact custom, existing regulation or official policy is eligible to receive the benefit of qualified immunity. No policy involved in the City's discharge process has been identified, no policy enabling councilmen to make stigmatizing statements in speech and debate has been identified, and, in general, no policy denying name clearing hearings has ever been involved. Quite literally, plaintiff's theory is that somebody of high ranking position was guilty of an

act of omission thru their failure to offer plaintiff a name clearing hearing after the news media incorrectly linked the discharge to the Roberts' statement. Compare *Rizzo* v. *Goode*, 423 U.S. 362, 370 (1976).

No specific allegation has ever been made that any continuing official policy deprived plaintiff of a hearing. Indeed, plaintiff has never even requested a hearing. In other words, we are not dealing with a direct attack on the City's Charter, any City ordinance, written law, any practices of City officials that are so permanent and well settled as to constitute a custom or usage with the force of law, or any deeply embedded traditional ways of carrying out City policy.

Instead, when construed in the most favorable light to plaintiff, this case invovles nothing so formal as these types of official policy, but, instead, derivative liability of the City merely because the City Manager's and Roberts' isolated acts (though unconnected and non-continuing) were by high ranking officials. With the attenuated existence of official policy here, if indeed it does exist, it is within the sound exercise of judicial discretion, and equitable principles, to accord some form of qualified immunity, in a case limited to its own facts, as a defense to retroactive, compensatory relief (as opposed to prospective relief seeking to enjoin future enforcement of the policy itself).

Any other decision would have rendered the City retroactively and strictly liable as insurer for a virtually infinite number of causes of action. Without some form of immunity the net effect would have been to pull immunity out by its roots and throw away the whole. All a plaintiff would have to do is to sue the City for any one incident involving the City's high ranking officials; and, even though the official himself may have broad

immunity (historically derived, of course, from the city itself), the plaintiff's mere selection of parties would circumvent that immunity. The federal government would continue to have sovereign immunity, state government would continue to have Eleventh Amendment immunity, but local government would be fair game. Indeed, under plaintiff's theories (as to Roberts' alleged involvement in the discharge process), local government would be without a defense even if its high ranking officials acted in the face of written policy and beyond their scope of authority.

The discharge, the Roberts' statement and the council motion preceded *Roth*. The defendants were without the wherewithal to reasonably have known that the Roberts' statement could fairly be said to represent official policy. The defendants could not have known that the Roberts' statement would be connected with the discharge. The first definitive holding that the Roberts' statement required a due process hearing was with the court of appeals' reversal of the district court's holding to the contrary in August of 1977 (App., p. A26). Accordingly, the defendants did not have reason to know in April of 1972 that their actions would later be held to have violated Owen's constitutional rights.

II

The Decision Below Is Consistent With The Decisions Of The United States Supreme Court, And With Decisions Of Other Courts Of Appeal Since *Monell*, On Whether Local Government Bodies And Individuals Sued In Their Official Capacity May Assert A "Good Faith" Defense To Suits Under 42 U.S.C. Sec. 1983.

In *Scheuer* v. *Rhodes*, supra; *O'Connor* v. *Donaldson*, supra; *Wood* v. *Strickland*, supra; *Procunier* v. *Navarette*, 434 U.S. 555 (1978); *Tenney* v. *Brandhove*, 341 U.S. 367

(1951); *Barr* v. *Mateo,* 360 U.S. 564 (1959); *Imbler* v. *Pachtman,* 424 U.S. 409 (1976); *Butz* v. *Economou,* 438 U.S. 478 (1978); and, *Pierson* v. *Ray,* 386 U.S. 547 (1967); this Court has consistently recognized the existence of immunities to individuals sued in either their individual or official capacities. Little would be served by detailed discussion of each of these cases—our purpose here is to merely identify the unbroken chain of decisions accepting the need for application of some form of qualified immunity under circumstances similar to those involved here. Indeed, the court in *Monell,* at footnote 55, expressly affirms their precedential value where these cases discuss immunity to individuals sued in their official capacity (as is the case here), by holding:

> "Since official capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent—at least where eleventh amendment considerations do not control analysis—our holding today that local governments can be sued under Section 1983 necessarily decides that local government officials sued in their official capacities are 'persons' under Section 1983 in those cases in which, as here, a local government would be suable in its own name."

Taking merely one of these above-quoted decisions as an example, we suggest that the logic behind this quote forbids applying good faith immunity to an individual sued in his official capacity, but not applying the same principles to the entity itself. *Scheuer* v. *Rhodes,* supra, at 246. Qualified immunity broadens in relation to the level at which the official serves in government. However, the rule proposed by plaintiff would have the absurd result of controverting this holding in *Scheuer* in direct relation to the extent with which its test is met—qualified im-

munity would abate in relation to the level at which the official serves in government. In sum, "it would be anomalous to establish a greater degree of immunity for municipal officials than is given to the city itself." *Crowe* v. *Lucas,* 595 F.2d 985, 989 (5th Cir. 1979).

Literally every circuit decision after *Monell* has recognized the existence of some form of qualified immunity to high ranking officials. In *Bertot* v. *School District No. 1, Albany County, Wyoming,* Slip Opinion No. 76-1169 (vacated pending rehearing en banc) Chief Judge Seth held:

> "The reasons for the application of the doctrine of qualified immunity are as compelling when considering the members individually as they are to the evaluation of the members acting collectively. * * * It is apparent that conscientious board members will be just as concerned that their decisions or actions might create a liability for damages on the board or the local entity as they would on themselves. The restriction on the exercise of independent judgment is the same. The individuals are the same in whatever capacity, their good faith is the same in each capacity whether it is individual good faith, board good faith when considered collectively, or official capacity good faith."

See also *Skehan* v. *Board of Trustees of Bloomsburg State College,* 590 F.2d 470 (3rd Cir. 1978); *Princeton Community Phone Book, Inc.* v. *Bate,* 582 F.2d 706 (3rd Cir. 1978); and, *Crowe* v. *Lucas,* supra. Lest the above-cited Supreme Court decisions be drained of meaning, some form of immunity to high ranking officials, sued in their individual or official capacities, must be extended to local government bodies. Otherwise, under the holdings of the majority in

Owen, the City would be strictly liable merely because the constitutional tort was by a high ranking official. Compare *Paul* v. *Davis*, 424 U.S. 693 (1976).

III

Denying Equitable And Declaratory Relief And Denying Attorneys Fees To Petitioner Was Within The Sound Discretion Of The Court Of Appeals.

Exploring all of the issues and facts which may have moved the court of appeals to deny equitable and declaratory relief and attorneys fees to petitioner would involve a lengthy discussion of the case on its merits. Suffice it to say that the court of appeals could justifiably view this case as nothing more than a suit for money. Moreover, such denials are wholly within the discretion of the court of appeals and hardly raise special and important questions of constitutional dimensions which require review by the Supreme Court. *Hostrop* v. *Board of Junior College District No. 515*, 523 F.2d 569 (7th Cir. 1975), cert. denied, 425 U.S. 963 (1976); *Public Affairs Association, Inc.* v. *Rickover*, 369 U.S. 111 (1962); *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 540 (1945); *United Public Workers of America (CIO)* v. *Mitchell*, 330 U.S. 75 (1947); and, *Skehan*, supra.

CONCLUSION

Treating the Supreme Court's prior vacating order in this case (App., p. A79) as a decision on the merits, see *Board of Trustees of Keene State College* v. *Sweeney*, ... U.S. ....., 99 S. Ct. 295, 58 L.Ed.2d 216 (1978) (Stevens, J., dissenting), the court of appeals, under the particular circumstances of this case and in light of *Monell*, prop-

erly recognized the existence of qualified immunity to the City of Independence.

Respectfully submitted,

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