In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-.....

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.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit dated December 1, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals on Remand is reported at 589 F.2d 335 and is printed in Appendix A at pp. A1-A7. The prior opinion of the Court of Appeals is reported at 560 F.2d 925 and is printed in Appendix B at pp. A8-A45. This Court's previous memorandum order is reported at 438 U.S. 902, 98 S.Ct. 3118, 57 L.Ed.2d 611, and is printed in Appendix D at p. A79. The opinion of the District Court is reported at 421 F.Supp. 1110 and is printed in Appendix C at pp. A46-A78.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on December 1, 1978. Petition for rehearing was denied by a divided court on January 29, 1979. The time for filing a petition for writ of certiorari was extended to May 29, 1979 by order of Justice Blackmun signed April 10, 1979. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Should the qualified immunity available to local officials in their individual capacities under *Wood* v. *Strickland* be extended to local governmental bodies?

2. If qualified immunity is extended to municipalities, should it be further extended to bar declaratory and equitable relief as well as damages?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42:

§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

On and before April 18, 1972, petitioner was employed as the chief of police of Independence. Under Section 3.3(1) of the city charter, he could be removed by the city manager only "when deemed necessary for the good of the service." (App. at A32)

During a city council meeting on April 17, 1972, Paul Roberts, in his capacity as city councilman, read a written statement "impugning Owen's honesty and integrity." (App. at A31) The statement alleged that Owen had misappropriated police department property, that narcotics had "mysteriously" disappeared from his office, and that high ranking police officials had made "inappropriate" requests affecting the police court. It also alleged manipulation of traffic tickets, the "unusual release of felons" and the mysterious disappearance of money. As part of his statement, Roberts moved that certain "investigative reports" allegedly supporting the allegations be turned over to the

prosecutor for presentation to the grand jury, that they be released to the press and that the city manager take "direct and appropriate action" against those "involved in illegal, wrongful, or gross inefficient activities." The full text of the statement and motion is set forth at A54 n. 2.

The city council by official action passed the motion with one abstention and no dissents, thus lending its support to Roberts' charges. (App. at A16, A31) The following day, the city manager discharged Owen. (App. at A26) The discharge notice contained no reason for the discharge but stated simply that Owen was "[t]erminated under the provisions of Section 3.3(1) of the City Charter." (App. at A31) The city manager reinforced the council's implication that Owen was guilty of wrongdoing by publicly announcing that he was referring the reports of alleged police department inefficiency to the prosecutor for submission to the grand jury. (App. at A3-4 and A31 n. 11) He did not disavow the charges or the council's actions or take any steps to contradict reports that Owen's discharge was the direct result of the alleged misconduct.

The press and public were present at the April 17, 1972 city council meeting. (Tr. at 12, 49, 82 and 189) Copies of the statement and motion were distributed to them. The statement, motion and firing received widespread publicity. (App. at A31) The area newspapers printed the statement and motion substantially verbatim and reported the adoption of the motion. Front page articles appeared for several days under headlines such as "Lid Off Probe, Council Seeks Action" (Independence Examiner, April 18, 1972, P.Ex. 5, Tr. 25); "Independence Accusation. Police Probe Demanded" (Kansas City Times, April 18, 1972, P.Ex. 6, Tr. 25); "Probe Culminates in Chief's Dismissal" (Independence Examiner, April 19, 1972, P.Ex. 13, Tr. 27) and "Police Probe Continues; Chief Ousted". (Community Ob-

server, April 20, 1972, P.Ex. 14, Tr. 27) A copy of the statement and motion was placed in the City's permanent records. (Tr. at 81-82)

Owen's request for a hearing was denied by the City by letter dated May 3, 1972 from the city counselor's office. (App. at A4 and A17) The grand jury subsequently returned a no true bill.

Owen brought suit under 42 U.S.C. §1983, and the Fourteenth Amendment asserting jurisdiction under 28 U.S.C. §1331, 28 U.S.C. §1343(3) and 28 U.S.C. §1343(4). He sought declaratory and equitable relief, including a hearing on his discharge, back pay and attorney's fees. The District Court entered judgment for defendants. (App. C)

On appeal, the United States Court of Appeals for the Eighth Circuit reversed, ordering the entry of a declaratory judgment that Owen's discharge had deprived him of liberty without due process of law. In lieu of an award of full back pay, it ordered equitable compensation measured by the amount Owen would have earned to retirement if he had not been deprived of his good name by the actions of the City less mitigation. The Court of Appeals held that the District Court had jurisdiction under 28 U.S.C. §1331 to grant equitable relief for Owen's Fourteenth Amendment claims. The court found it unnecessary to decide whether, under 28 U.S.C. §1343 and 42 U.S.C. §1983, the District Court also had jurisdiction to grant equitable relief against the city officials in their official capacities. (App. at A22)

On June 26, 1978, this Court vacated the Court of Appeals' prior decision for reconsideration in light of *Monell* v. *Department of Social Services,* 436 U.S. 658 (1978). On remand, the Court of Appeals found that the City of Independence was subject to suit under *Monell* since the ac-

tions in question were those of the City's highest ranking officials. (App. at A3-4) It again found that petitioner had been deprived of liberty without due process. (App. at A3) However, the Court of Appeals ruled that petitioner should be denied all relief on the basis that the City was entitled to qualified "good faith" immunity.[1] The Court rejected petitioner's contentions (a) that the defense of "good faith" is limited to officeholders in their individual capacities and does not extend to governmental entities, (b) that qualified immunity does not forbid the granting of equitable relief, and (c) that qualified immunity does not justify refusal to issue a declaratory judgment. Rehearing and rehearing *en banc* were denied by a vote of five to two.

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1. Paradoxically the Court concluded that, prior to *Roth* and *Sindermann*, the City could not have known that its actions violated Owen's rights despite recognizing that:

> "Before Owen's discharge, the Supreme Court appeared to find a liberty interest '[w]here a person's good name, reputation, honor, or integrity [was] at stake because of what the government [was] doing to him,' which, when infringed, required the Government to provide the individual with notice and an opportunity to be heard. *Wisconsin* v. *Constantineau*, 400 U.S. 433, 437, 91 S.Ct. 507, 510, 27 L.Ed.2d 515 (1971). However, not until the *Roth* and *Sindermann* cases did the Court first recognize that a public employee, in the context of being terminated under circumstances imposing a stigma on his professional reputation and impairing his ability to find future employment, was entitled to notice and a name-clearing hearing."

The City Council of Independence did not need to be aware of subsequent decisions of this Court to know that its official actions would seriously damage Owen's "good name, reputation, honor and integrity."

REASONS FOR GRANTING THE WRIT

I

The Decision Below Erred in Its Resolution of an Important and Recurring Issue Significantly Affecting the Administration of Justice—Whether Qualified Immunity Should Be Extended to Local Governmental Bodies.

The question raised in the present case is whether the qualified immunity available to local officials under *Wood* v. *Strickland*, 420 U.S. 308 (1975) is to be extended to cover local governmental bodies sued directly. In *Monell*, this Court expressly deferred ruling on the issue because it had not been briefed by the parties nor discussed by the lower courts. It remains an important question which has not been, but should be, settled by this Court.

Resolution of the issue posed in this petition will significantly clarify enforcement of constitutional rights through 42 U.S.C. §1983. The substantial number of §1983 cases need hardly be emphasized.[2] Faced with this case load, the District Courts need early and definitive guidance on the difficult question left for another day in *Monell* —whether qualified immunity extends to local governmental bodies as well as to local officials. In the end, the question can be answered only by this Court. Delay in providing the answer will lead, at best, to further protraction of litigation in the already overburdened District Courts. At worst, it will lead to unjust results and unnecessary retrials.

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2. Private cases classified as "Civil Rights—Other Civil Rights" or as "Prisoner Petitions—Civil Rights" represented more that 11% of all civil filings for the year ending June 30, 1978. Administrative Office of the United States Courts, *1978 Annual Report of the Director* at A16-A17 (1978).

The importance of resolving this question is underlined by the decision below which misconstrues §1983 and *Monell*. The considerations which led this Court to grant qualified immunity to local officials have no validity if applied to suits brought directly against local governments. Public treasury liability will not deter the most capable candidates from seeking public office. *Cf., Birnbaum* v. *United States,* 588 F.2d 319 (2nd Cir. 1978). It will not cause undue timidity in decision making. *Carter* v. *Carlson,* 447 F.2d 358, 367 (D.C. Cir. 1971), *rev'd on other ground sub nom., District of Columbia* v. *Carter,* 409 U.S. 418 (1973). Rather it insures that the public as a whole, which receives the benefits of governmental policies, bears the costs of unconstitutional ones. Denying public treasury liability places the entire cost of a constitutional tort on the innocent victim. Moreover, immunity from suit for violations of all rights which have not already been recognized destroys the incentive for litigation leading to the recognition of new rights.[3]

One aspect of the Court of Appeals' opinion could, if upheld, have unfortunate consequences far beyond the area of §1983.

This Court has repeatedly exercised its salutary power to note the existence of an issue and yet to defer ruling on it. *E.g., Mt. Healthy City Board of Education* v. *Doyle,* 429 U.S. 274, 279 (1977); *In re Primus,* 436 U.S. 412, 440 (1978) (Justice Blackmun, concurring); *Robertson* v. *Wegmann,* 436 U.S. 584, 594 (1978). The Court did so in *Monell* by going out of its way to state that it expressed no view on qualified municipal immunity. 436 U.S. at 701. The power to reserve ruling on an issue permits this Court to observe

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3. This is particularly true, if, as in the present case, the immunity is extended to bar equitable relief, declaratory judgments and attorney's fee awards.

the constitutional limitation that it decide only cases and controversies presented to it and the prudential rule that it not decide issues which have not been briefed and argued by the parties or addressed by the lower courts. It can serve those functions only if the lower courts recognize that this Court's postponing ruling on an argument does not imply that the argument has merit. In the present case, the Court of Appeals failed to do so. Instead, it treated *Monell's* deferral of the qualified immunity issue as a final determination that qualified immunity was a valid defense, stating "We imply from the Court's discussion of immunity that local governing bodies may assert a limited immunity defense to actions brought against them under section 1983." (App. at A4-A5) It apparently felt that the "ruling" it inferred required it to disregard its own previous conclusion that the primary justifications for immunity did not exist in suits against public entities. (App. at A39)

II

The Decision Below Conflicts With Decisions of Other Courts of Appeal on Whether Local Governmental Bodies—As Opposed to Local Officials—May Assert a "Good Faith" Defense to Suits Under 42 U.S.C. §1983.

The decision below conflicts with decisions in three other circuits which have ruled that the good faith immunity of *Wood* v. *Strickland* does not extend to cover local governmental bodies. In *Hander* v. *San Jacinto Junior College*, 519 F.2d 273, 277 at n. 1 (5th Cir. 1975), *aff'd per curiam on rehearing*, 522 F.2d 204 (5th Cir. 1975), the defendants argued that, under *Wood*, good faith precluded any award. The Fifth Circuit rejected that argument and affirmed the award stating:

"The *Wood* rationale, however, is inapplicable to the instant case because the backpay award is entered against San Jacinto Junior College itself and not against the individual members of the Board of Regents."

Similarly, in *Hostrop* v. *Board of Junior College District No. 515,* 523 F.2d 569 (7th Cir. 1975), *cert. denied,* 425 U.S. 963 (1976), the Seventh Circuit held that the good faith immunity of a school board's members did not protect the board as an entity from liability for damages resulting from a procedurally deficient discharge.

The Fourth Circuit has taken the same position. In *Bursey* v. *Weatherford,* 528 F.2d 483, 488 at n. 8 (4th Cir. 1975), *rev'd on other grounds,* 429 U.S. 545 (1977), the Court of Appeals instructed the lower court that, in a suit against the individual defendants in their official capacities, ". . . the defense that they acted in good faith is inapplicable." Similarly, in *Thomas* v. *Ward,* 529 F.2d 916 (4th Cir. 1975), *disapproved as to measure of damages, Carey* v. *Piphus,* 435 U.S. 247 (1978), it held that back pay could be awarded against administrators and school board members in their official capacity even though their good faith barred such an award against them in their individual capacities.

The Eighth Circuit's opinion also conflicts with its own pre-*Monell* decisions. In *Wellner* v. *Junior College Board,* 487 F.2d 153 (8th Cir. 1973) and in *Cooley* v. *Board of Education of Forrest City School District,* 453 F.2d 282, 287 (8th Cir. 1972), the Court had awarded back pay against school boards without regard to good faith.

The Court of Appeals for the Tenth Circuit is presently considering the issue *en banc. Bertot* v. *School District No. 1, Albany County, Wyoming,* No. 76-1159 (Argued May 15, 1979).

III

The Decision Below Misinterprets §1983 by Denying Equitable and Declaratory Relief and by Denying Petitioner Attorneys Fees.

The Court of Appeals previously held, *inter alia*, "Owen is entitled to a declaratory judgment that his discharge from employment deprived him of constitutionally protected liberty without due process of law." (App. at A41) The present panel decision agreed that Petitioner had been deprived of liberty without due process. (App. at A3) However, without discussion, it failed to grant Petitioner a declaratory judgment to that effect and to remand for determination of attorneys fees. (App. at A7)

Since the Court of Appeals has twice held that Petitioner's rights have been violated, Petitioner knows no basis or authority for its refusal to order the entry of a declaratory judgment to that effect. *Cf. Carey* v. *Piphus*, 435 U.S. 247, 252 (1978). In a case such as this, in which Petitioner's good name, reputation and honor are at stake, a declaratory judgment is important for its own sake. Moreover, it would permit Petitioner to recover his attorneys fees under the Civil Rights Attorneys' Fees Awards Act of 1976 and this Court's decision in *Hutto* v. *Finney*, 437 U.S. 678 (1978).

The decision below also held that qualified immunity stood as a bar, not only to damages, but also to the Petitioner's claims for equitable relief. (App. at A5-A6) This holding represented a complete reversal of the Court of Appeals' previous position that "The good faith of the municipality does not constitute a defense to monetary relief as an element of equitable relief." (App. at A38-39) It was a drastic departure from previous holdings. *E.g., Strickland* v. *Inlow*, 485 F.2d 186, 190 (8th Cir. 1973) ("Good faith is

a defense in damage actions, but not in actions for equitable relief."), *position on immunity sustained sub nom., Wood* v. *Strickland,* 420 U.S. 308, 314-315 n. 6 (1975) ("immunity from damages does not ordinarily bar equitable relief as well.") On remand, the *Wood* plaintiffs were held entitled to equitable relief clearing their records regardless of any claim of good faith. Restitution in the form of back pay (or its lesser monetary equivalent) has consistently been held to be an incident to equitable relief. *N.L.R.B.* v. *Jones & Laughlin Steel Corporation,* 301 U.S. 1, 47-48 (1937).

Sustaining a holding that "good faith" bars declaratory and equitable relief as well as damages would effectively eliminate incentives to test the constitutionality of any governmental action not previously declared unconstitutional. It would reduce most pioneering constitutional litigation to a request for an advisory opinion since no relief could be granted.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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