No. 78-1779

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

GEORGE D. OWEN,

Petitioner,

v.

CITY OF INDEPENDENCE, MISSOURI, *et al.*

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

BRIEF FOR THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS' PETITION FOR REHEARING

AARON A. WILSON, City Attorney
28th Floor — City Hall
Kansas City, Missouri 64106

JOHN DEKKER, Director of Law
City Hall, 13th Floor
455 North Main Street
Wichita, Kansas 67202

JAMES B. BRENNAN, City Attorney
800 City Hall
Milwaukee, Wisconsin 53202

HENRY W. UNDERHILL, JR.,
City Attorney
600 East Trade Street
Charlotte, North Carolina 28202

ROY D. BATES, City Attorney
P.O. Box 147
Columbia, South Carolina 29217

SAMUEL GORLICK, City Attorney
P.O. Box 6459, 275 E. Olive Avenue
Burbank, California 91515

(Attorneys continued on inside front cover)

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

WILLIAM R. QUINLAN, Corporation Counsel
511 City Hall
Chicago, Illinois 60602

J. LAMAR SHELLEY, City Attorney
48 North Macdonald Street
Mesa, Arizona 85201

BENJAMIN L. BROWN, City Solicitor
101 City Hall
100 N. Holiday Street
Baltimore, Maryland 21202

JOHN W. WITT, City Attorney
202 "C" Street
City Administration Building
San Diego, California 92101

GEORGE F. KNOX, JR., City Attorney
174 E. Flagler Street
Miami, Florida 33131

MAX P. ZALL, City Attorney
City & County Building
Denver, Colorado 80202

ALLEN G. SCHWARTZ,
Corporation Counsel
100 Church Street, Room 6A-11
New York, New York 10007

LEE E. HOLT, City Attorney
Dallas City Hall, 1500 Marilla
Room 7BN
Dallas, Texas 75201

BURT PINES, City Attorney
1800 City Hall East
Los Angeles, California 90012

SALVATORE PERILLO, Corporation Counsel
City Hall, 920 Broad Street
Newark, New Jersey 07102

WALTER M. POWELL, Municipal Counselor
309 Municipal Building
Oklahoma City, Oklahoma 73102

CONARD B. MATTOX, JR., City Attorney
300 City Hall
Richmond, Virginia 23219

CHARLES S. RHYNE
1000 Connecticut Avenue, N.W.
Suite 800
Washington, D.C. 20036
(202) 466-5420

Attorneys for Amicus Curiae National Institute of Municipal Law Officers

INDEX

Page

Interest of the Amicus Curiae 1

Statement of the Case 3

Issues Left Open on Rehearing 5

Conclusion 13

CITATIONS

Cases:

Agins v. *City of Tiburon,* No. 79-602 (argued April 15, 1980) 2, 12

Board of Regents v. *Roth,* 408 U.S. 564 5

Carey v. *Piphus,* 435 U.S. 247 4

City of Mobile v. *Bolden,* No. 77-1844 (April 22 1980) 9

Des Vergnes v. *Seekonk Water Dist.,* 601 F.2d 9 2

Ehlers v. *City of Decatur,* 614 F.2d 54 13

Fred F. French Inv. Co. v. *City of New York,* 39 N.Y.2d 587, 385 N.Y.S.2d 5, 350 N.E.2d 381 12

Hampton v. *City of Chicago,* 484 F.2d 602 7

Monell v. *Department of Social Services,* 436 U.S. 658 ...... 4, 5, 7

Turpin v. *Mailet,* No. 79-7562 (CA 2, April 8, 1980) 8, 9

Wisconsin v. Constantineau, 400 U.S. 433 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1779

GEORGE D. OWEN,

Petitioner,

v.

CITY OF INDEPENDENCE, MISSOURI, *et al.*

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

BRIEF FOR THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS' PETITION FOR REHEARING

INTEREST OF THE AMICUS CURIAE

The National Institute of Municipal Law Officers (NIMLO) respectfully submits this brief, pursuant to Rule 42 of the Rules of this Court. The National Institute of Municipal Law Officers is an organization of 1500 members in all states, and is composed entirely of municipalities which are political subdivisions of states. Each

member municipality participates in the work of NIMLO through its chief legal officer and his assistants.

These chief legal officers, and their municipalities, are concerned about the rule of this case as applied not only in cases such as this where, as we point out, there is no official municipal action as a matter of state law, but also in other cases, especially those where the constitutional violation alleged is not one involving procedural due process, but one involving substantive due process. In that latter case, the literal application of the rule in this case will effectively render moot the question presented this Term in *Agins* v. *City of Tiburon,* No. 79-602 (argued April 15, 1980).

Amicus stresses that these considerations — the first necessary to decision here but not raised, the second a predictable result of the decision here — had they been addressed by the Court at all, would have compelled a different judgment than the one issued April 16, 1980. It is apparent to amicus that the Court did not — because it was not called on to do so — consider the full impact of its decision in this case on municipalities governed by popularly elected officials.

Imagine the effect of a million-dollar verdict against a city of 1,000 because one councilman made a defamatory speech which, as a matter of state law, could not bind the city. To make such a speech "official" city action under federal civil rights law prevents the city from governing itself in an orderly fashion after a full and uninhibited discussion of policy alternatives. Indeed, literal application of the decision in this case would bind the city in strict liability for the statements of its electors in a referendum campaign. Cf. *Des Vergnes* v. *Seekonk Water Dist.,* 601 F.2d 9, 15 (CA 1, 1979).

Consent to the filing of this brief has been granted by counsel for both parties. Letters of consent have been lodged with the Clerk of this Court.

STATEMENT OF THE CASE

The facts relevant to the grounds advanced by amicus for rehearing begin well in advance of those necessary to support the opinion and judgment of the Court in this case (April 16, 1980).

Petitioner Owen served as chief of police for the City of Independence at the pleasure of the City Manager (City Charter §3.3(1)) who alone had the power to remove the chief "when deemed necessary for the good of the service" (City Charter §3.3(1)).

The petitioner was fired by the City Manager, who indicated only that the action was being taken "under the provisions of Section 3.3(1) of the City Charter." There is no claim that any action of the City Manager stigmatized Chief Owen or infringed any constitutional interest.[1]

The disparagement claims in this case relate to actions by a lame-duck member of the City Council. Under §2.11 of the City Charter, neither the City Council nor any member of the Council may interfere in the Manager's personnel decisions.[2]

---

[1]On the first appeal in this case, the Court of Appeals concluded:

"That notice by itself did not cast a stigma upon Owen." 560 F.2d 925, 936 (CA 8 1977).

See also slip op. 4, n.4 (April 16, 1980) ("'*In spite of* your recent investigation and your public statement given to the public press. . . .'" (emphasis added).

[2]See dissenting opinion of Mr. Justice Powell, slip op. 6, n.4 (April 16, 1980).

The Court of Appeals in the first appeal concluded nonetheless that the stigmatizing comment of the councilman about petitioner was "*connected with his discharge.*"[3]

It was on this point that the City petitioned this Court to review the Court of Appeals' first judgment, No. 77-914; certiorari was granted, the judgment vacated and the case remanded for consideration in light of *Monell* v. *Department of Social Services,* 436 U.S. 658 (1978).

This Court in *Monell* established as a predicate to municipal liability under 42 U.S.C. §1983 a showing that the act alleged to violate the Constitution "implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers" or is done "pursuant to governmental 'custom'." 436 U.S., at 690.

The Court of Appeals on remand adhered to its view that the "stigma attached to Owen in connection with his discharge was caused by the official conduct of the City's lawmakers . . . [and] may fairly be said to represent official policy." 589 F.2d 335, 337 (CA 8 1978).

Chief Owen petitioned to review the second holding of the Court of Appeals, whether the good-faith immunity of municipal officials was also available to the municipality itself.

The threshold issue whether the petitioner was stigmatized by any action which may fairly be said to represent official City action was not squarely presented.

---

[3]560 F.2d, at 936 (emphasis in original). The finding of the District Court, to the contrary, was that there was no "causal connection" between Council activity and the Manager's decision. 421 F.Supp. 1110, 1121 (WD Mo. 1976).

The City did not cross-petition for review of the first holding of the Court of Appeals, and this Court did not address the issue directly.

This Court did address the related issue — which the City also failed to cross-petition — whether the termination of Chief Owen by the City Manager without specification of reasons, stigmatizing or otherwise, under §3.3(1) of the City Charter and without a hearing "deprived [Owen] of a protected 'liberty' interest." Slip op. 10, n.13 (April 16, 1980). The opinion for the Court recognized the implication of a liberty interest from a showing of "what the government is doing to him", *ibid.*, quoting from *Wisconsin* v. *Constantineau,* 400 U.S. 433, 437 (1971), and *Board of Regents* v. *Roth,* 408 U.S. 564, 573 (1972).

ISSUES LEFT OPEN ON REHEARING

I.

We begin our analysis of the case at the next earlier stage in the inquiry occasioned by *Monell, Constantineau* and *Roth:* whether *the City* did anything stigmatizing to Chief Owen.[4] We submit that, as a matter of state law under the City Charter, there is no official City action[5] on

[4]The City obviously denied Owen a hearing; but that fact is relevant only if Owen's liberty interest has been infringed by a City-imposed stigma.

To the Court of Appeals in the first appeal the question was stated thus: "In determining whether a government employer has deprived its employee of a liberty interest *in the termination of employment,* the crucial issue is *whether the government employer,* in connection with the termination of government employment. . . *makes a charge* which might seriously damage the employee's standing and reputation in the community." 560 F.2d, at 935 (emphasis added).

[5]We find it unnecessary to draw the distinction spun by the City in brief and at oral argument between "policy" and "conduct." We focus rather on the actions of the City Manager, admitted not to have

which to base strict monetary liability for violation of procedural due process.

We submit that the conclusion of the Court of Appeals that a gratuitous comment by a lame-duck councilman who, as a matter of state law, could not bind the City to official action, was error. We support rehearing with the candid admission that neither party raised this point in brief or at oral argument.[6]

Footnote 5 continued
stigmatized Chief Owen, and the status of those actions as the only official City action resulting in Owen's discharge.

[6]At oral argument here, counsel for Chief Owen's theory of "official action" was: "It was based upon the denial of a hearing upon his termination which was a part of the charter provisions of the city. It was based on a city ordinance and the action of the highest officials, the city manager and the city counsel [sic], in proceeding under that ordinance." Tr. 8 (January 8, 1980).

Thus, counsel did not focus on the earlier question whether the stigma was official action. See also Tr. 13 ("the policy was the city ordinance which did not grant a hearing"), 20-21.

Counsel did address that threshold issue in response to a question:

> "QUESTION: What if the City of Independence simply had an individual police officer who felt that blacks should not be in the city after a certain time, the city had no ordinance, no policy, nothing like it, it never approved it. But this individual officer simply took it on himself to try to see that what he believed to be the proper policy was enforced.
>
> "Would you have anything more than respondeat superior?
>
> "MR. ACHTENBERG: No, sir."

The City attorney, for his part, focused also on the lack of a hearing as the relevant official action. Tr. 26-31. Indeed, the City attorney conceded — unwisely, in our view — the very point on which this case turns:

> "MR. CARLISLE: * * * The Court of Appeals found that the conduct which coincided in time of Paul Roberts, the city council motion and the Lyle Alberg discharge of

The dissent in this case accuses the opinion for the Court of imposing a rule of strict liability on municipalities. Slip op. 1 (April 16, 1980). Whatever the propriety of such a rule in the case where official City action has been proved in accordance with *Monell,* strict liability is entirely inappropriate here where state law[7] absolutely forecloses a conclusion of official City action.[8]

The plaint of amicus is not that municipalities under the rule of strict liability will be forced to respond in tort for the consequences of their actions. Therefore, we do not quarrel with the policy directive of the opinion for the

---

Footnote 6 continued

> the police chief, that that conduct — and I am quoting from the Court of Appeals opinion — 'could fairly be said to be official policy'.
>
> "I do not agree with that statement.
>
> "QUESTION: Well, what if you did?
>
> "MR. CARLISLE: I have not made that really an issue."

Tr. 32.

To the amicus — to municipalities nationwide — that is the whole issue in this case. And, given the concession of counsel, it is understandable why the Court bypassed it. But it illustrates the predictable, and predictably unfortunate, application of the rule of this case to other cities.

[7]It is not necessary to disagree with the conclusion of the Court that a state law immunity cannot control federal law under §1983, slip op. 24, n.30 (April 16, 1980), to conclude that state law may supply the rule in deciding whether the stigma here was attached by "conduct by persons acting under color of state law," *Hampton* v. *City of Chicago,* 484 F.2d 602, 607 (CA 7), cert. denied, 415 U.S. 917, within the perimeter of *Monell's* required policy or custom. The *Monell* rule, in this regard, is one of causation or agency, not one of immunity.

[8]The Court, of course, distinguished municipal liability and immunity from individual liability and immunity of municipal officials. Where an individual act does not bind the City, a plaintiff may still pursue a remedy against the individual, as Chief Owen did in this case against the councilman, to the Chief's monetary advantage. See slip op. 7, n.6 (April 16, 1980).

Court that "No longer is individual 'blameworthiness' the acid test of liability; the principle of equitable loss-spreading has joined fault as a factor in distributing the costs *of official misconduct.*" Slip op. 34 (April 16, 1980) (emphasis added).

Rather, we fear the application of strict liability to cases, as here, where the wrong to be remedied is, as a matter of state law, not attributable to official action.

The result, and the rule "no city action, no city liability," should be the same here as in *Turpin* v. *Mailet*, No. 79-7562 (CA 2, April 8, 1980), also a case vacated for reconsideration in light of *Monell.*

In *Turpin,* an earlier adverse excessive force and false arrest judgment under 42 U.S.C. § 1983 was criticized by the board of police commissioners in public session. The board declined to discipline the police officer against whom the judgment had been entered. A month later, a second officer arrested the same plaintiff. The subsequent § 1983 claim alleged "that the Board of [Police] Commissioners, aware that the growing animus toward [plaintiff] presented a threat to his liberties, had by failing to discipline [the first arresting officer] and indeed by promoting him knowingly encouraged the violation of his rights by the police [in the second arrest] . . ." *Turpin* v. *Mailet*, slip op. 2263, 2267 (CA 2 1980). At trial (after remand from this Court in light of *Monell*), plaintiff added to his theory that "the City's failure to discipline [the first arresting officer] in light of the publicity given to the earlier lawsuit and the animosity generated among members of the police department by that lawsuit, encouraged [the second arresting officer] to harass [plaintiff]." Slip op. 2268.

The question for the Court of Appeals on the second *Turpin* appeal was whether these facts made out the

necessary showing of "official policy" through "municipal inaction." Slip op. 2273. Reversing a judgment against the City on the second arrest, the Court held these facts, even when combined with "a few comments made by officers immediately after [the second] arrest," slip op.2277, insufficient to prove unconstitutional city action:

> "The proof here. . . that [the second officer's] arrest of [plaintiff] was caused by the inaction of the Board is simply too attenuated to support municipal liability under § 1983. To permit liability to be predicated upon such evidence would totally overextend the principles of *Monell* and *Rizzo* [v. *Goode*, 423 U.S. 362]." *Ibid.*

We submit that the facts bearing on the presence or absence of city action in *Turpin* are indistinguishable from those here.

Indeed, if this case were here on a petition for certiorari instead of on one for rehearing, the conflict between the disposition of this case and *Turpin* would counsel plenary review. We urge this plenary review to address the issue not properly presented for decision at this Term.

Municipalities have established a number of innovative forms of government to combine the features of rational management and popular accountability. The commission, combining business expertise and voter accountability in the same elected officials, is one.[9] The council-manager form at issue in this case, is another. The council members are elected, and respond to voter sentiment in the ways our political traditions are satisfied to accommodate. The appointed manager, however, is insulated from the popular politics which consumes the interest of the councilmembers. The manager is free to execute policy

[9]See *City of Mobile* v. *Bolden*, No. 77-1844 (April 22, 1980).

in an evenhanded, disinterested manner. He rolls no logs, satisfies no campaign supporters.

On the record of this case, the actions of the Manager of the City of Independence were blameless. As a matter of state law, nothing the Manager did caused any harm to petitioner. The chief was harmed, if at all, by the politically opportunistic statement of a lame-duck councilman. It would be cruel irony, indeed, if the choice of the City of Independence to provide more rational management through the council-manager form of government were nullified by this Court under the guise of the Civil Rights Act.

Indeed, on this record, the strict liability so unfairly imposed could not have been avoided. The only effective prophylaxis would be to place some restriction on the public utterances of the members of the city council. We would properly abhor the most effective means to muzzle the councilman to prevent gratuitous stigmatizing statements: secret legislative sessions, advice by a prudent city attorney to make no comment informing the citizens of the political opinions of the members of the council, sealed disciplinary proceedings against municipal employees.[10]

Amicus supports rehearing to preserve the proper balance in council-manager cities: free expression by councilmembers,[11] combined with freedom in the manager to

---

[10]Similarly, the only way the Manager could rebut an inference that comments by a councilmember influenced his decision would be to declare publicly that he (the Manager) did not respect the opinion of the councilmember, and did not intend to follow it.

[11]We advert again to the payment in state court by the councilmember involved here for his intemperate comment. Such liability is perfectly proper. So, we agree with the Court that "Elemental notions of fairness dictate that one who causes a loss should bear the loss." Slip op. 31 (April 16, 1980). We differ only with the conclusion

follow his own judgment. Where the City Charter makes only the decision by the manager the official city action, the city should not be required to pay a judgment for comments the manager cannot — and should not — influence.

II.

Moreover, nothing in the decision in this case limits its application to claims of inadequate procedural due process.

The unexpected and startling consequence of this Court's decision here is that whenever a court holds that a municipal zoning or other land use restriction is constitutionally invalid, either on its face or as applied to particular property, the municipality will be strictly liable for damages under 42 U.S.C. §1983. Thus this Court has created a cause of action for damages whenever municipal ordinances and regulations are held to be constitutionally invalid on substantive due process grounds.

The deleterious consequence for municipal government cannot be overstated. Municipalities will be increasingly reluctant to regulate the use and development of land through zoning, subdivision, and environmental ordinance if the price of invalid regulation, adopted in a good faith belief as to its reasonableness, is to be the imposition of a damage judgment on the municipality. The language employed by the Court is inexorable:

> "But a municipality has no 'discretion' to violate the Federal Constitution; its dictates are absolute and imperative."

Slip op. 26 (April 16, 1980).

Footnote 11 continued

that "it is the local government itself that is responsible for the constitutional deprivation." *Id.*, at 32, n.39.

Such considerations are bound to have a chilling effect on the willingness of elected municipal officials to deal legislatively with the increasingly complex problems of local government. Some may even conclude that the risk of substantial damage judgments and the resultant depletion of the public treasury is too great to justify continued efforts to regulate the use and development of land. In such municipalities the result may be a withdrawal from the field by repealing zoning and other land use ordinances.

The *Owen* case did not center on such questions and it was not necessary for the Court to extend the reach of its rule of strict liability under 42 U.S.C. §1983 beyond the realm of procedural due process. When a procedural due process violation is involved, damages for truly official action may provide the only effective remedy. Cf. *Carey* v. *Piphus,* 435 U.S. 247 (1978). On the other hand, when regulations contravene substantive due process requirements, invalidation of the offending regulation affords an effective and adequate remedy. See *Fred. F. French Inv. Co.* v. *City of New York,* 39 N.Y.2d 587, 385 N.Y.S.2d 5, 350 N.E.2d 381, appeal dismissed, 429 U.S. 990 (1976).

There is, therefore, a sound basis for distinguishing between the application of 42 U.S.C. §1983 in procedural as compared to substantitve due process cases.

The motivation of amicus in calling this to the attention of the Court is more than dissatisfaction with a piece of unpleasant dictum. If the Civil Rights Act dictates a judgment of damages in substantive due process cases, the states will no longer be able to establish their own prophylatic rules in this area. The issue before this Court in *Agins* v. *City of Tiburon,* No. 79-602 (argued April 15, 1980) will have effectively been mooted. It will matter not whether the California Supreme Court there was correct in

determining that a damages remedy was not needed to police local zoning decisions. The Agins will be free after *Owen* to assert a claim of absolute liability, and absolute damages, under 42 U.S.C. §1983. It will not matter that the Agins have not exhausted their administrative remedies.[12] Indeed, the prospect of the application of an *Owen* rule of absolute monetary liability would likely dictate acquiescence by the City of Tiburon in whatever rezoning the Agins propose to settle their litigation.

CONCLUSION

The amicus respectfully submits that the Court in this case has not faced up to the harmful application of the rule of this case — in both procedural and substantive due process cases — because it has not been asked properly to do so. To formulate a workable rule for council-manager cities, and for zoning decisions, this Court should grant rehearing, with oral argument, at the next Term.

Respectfully submitted,

AARON A. WILSON, City Attorney
28th Floor—City Hall
Kansas City, Missouri 64106

JOHN DEKKER, Director of Law
City Hall, 13th Floor
455 North Main Street
Wichita, Kansas 67202

JAMES B. BRENNAN, City Attorney
800 City Hall
Milwaukee, Wisconsin 53202

HENRY W. UNDERHILL, JR., City Attorney
600 East Trade Street
Charlotte, North Carolina 28202

(Attorneys continued on next page.)

---

[12]See *Ehlers* v. *City of Decatur*, 614 F.2d 54, 56 (CA 5 1980) (exhaustion not required under 42 U.S.C. §1983).

ROY D. BATES, City Attorney
P.O. Box 147
Columbia, South Carolina 29217

SAMUEL GORLICK, City Attorney
P.O. Box 6459, 2175 E. Olive Avenue
Burbank, California 91515

WILLIAM R. QUINLAN, Corporation Counsel
511 City Hall
Chicago, Illinois 60602

J. LAMAR SHELLEY, City Attorney
48 North Macdonald Street
Mesa, Arizona 85201

BENJAMIN L. BROWN, City Solicitor
101 City Hall, 100 N. Holliday Street
Baltimore, Maryland 21202

JOHN W. WITT, City Attorney
202 "C" Street
City Administration Building
San Diego, California 92101

GEORGE F. KNOX, JR., City Attorney
174 E. Flagler Street
Miami, Florida 33131

MAX P. ZALL, City Attorney
City & County Building
Denver, Colorado 80202

ALLEN G. SCHWARTZ, Corporation Counsel
100 Church Street, Room 6A-11
New York, New York 10007

LEE E. HOLT, City Attorney
Dallas City Hall, 1500 Marilla, Room 7BN
Dallas, Texas 75201

BURT PINES, City Attorney
1800 City Hall East
Los Angeles, California 90012

SALVATORE PERILLO, Corporation Counsel
City Hall, 920 Broad Street
Newark, New Jersey 07102

WALTER M. POWELL, Municipal Counselor
309 Municipal Building
Oklahoma City, Oklahoma 73102

CONARD B. MATTOX, JR., City Attorney
300 City Hall
Richmond, Virginia 23219

CHARLES S. RHYNE
1000 Connecticut Avenue, N.W., Suite 800
Washington, D.C. 20036
(202) 466-5420

Attorneys for Amicus Curiae
National Institute of Municipal Law Officers

May 1980

CERTIFICATE

The support of amicus curiae, National Institute of Municipal Law Officers, for rehearing is presented in good faith and not for the purpose of delay.

CHARLES S. RHYNE