No. 78-1779

In the Supreme Court of the United States

October Term, 1978

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.

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

PETITION FOR REHEARING

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Come now respondents and respectfully request a rehearing of this case pursuant to U.S. Sup. Ct. Rule 58.

1. Prior to the order of this court granting plaintiff's petition for writ of certiorari, the Brief For Respondents In Opposition cautioned that this action was a "maverick among liberty interest cases" (Brief In Opposition, p. 8); and, because we felt that this case involved unique facts, we feared that, if certiorari was granted, unclear law would result. We were concerned about the ramifications

of considering the questions specifically left open in *Monell v. Department of Social Services*, 436 U.S. 658 (1978) in a case which so radically differed from the facts in *Monell*. We were concerned about the absence of any identification of a policy statement, ordinance, regulation or decision pertinent to the Questions Presented as required by Supreme Court Rule 23(1)(d). We were concerned that this case, unlike other cases, did not involve rules or customs which denied expungement of stigmatizing materials from personnel records or other deprivations that were nurtured by city regulations instead of violative of them, as in this case. More than anything, however, we were concerned about a decision on the Questions Presented in this case where critical issues had been developed for a period of five years without benefit of this Court's decision in *Monell* —leaving conceptualization and development of where individual liability for constitutional *tort* ends and entity liability begins, for the waning (and non-evidentiary) stages of this litigation.

2. The majority below, in view of the unique aspects of this case, had expressly limited its decision to this particular civil rights action. Problems in application of the case at hand to other cases clearly dictated that approach—including the difficulty of discussing what exact custom, existing regulation or official policy was being challenged. No specific allegation had ever been made in this case that a regulation (analogous to that attacked in *Monell*) in the nature of a continuing official policy had deprived plaintiff of a hearing.

3. In the district court, years prior to the Eighth Circuit's second opinion, a complex tangle of issues had been dealt with including: existence of Section 1331 jurisdiction, official capacity and entity liability, the limitations of *Paul v. Davis*, 424 U.S. 693 (1976), abstention, and, to some extent, the good faith defense. However, there was

no development of issues pertaining to respondeat superior, to definition of official policy, to the nature of appropriate relief, to the impact of *Rizzo v. Goode,* 423 U.S. 362 (1976), and to various procedural issues (presumptions, burden of proof, burden of evidence, and so on). Only upon the most recent proceedings in this Court did the full complexities and importance of the issues posed by the Questions Presented surface. The various circuits in other cases were beginning to decide cases which had been fully developed at the trial stage and were defining the contours of municipal liability and answering the related questions of what defenses, if any, government can cite in a Section 1983 action. But, this was a unique case. This was a "hard case." This was an exceedingly complex case in which all of the above-mentioned issues, in various permutations and combinations, affected one another; making clear analysis difficult at this stage and enticing consideration of each issue in a vacuum.

4. For this reason, respondents offered as their primary reason for denying the writ the following point:

> "The decisions below, and 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."

In other words, we viewed the Eighth Circuit's brief and undeveloped discussion of good faith as being well within the court's discretion and more in the nature of this court's holding, in a related context, in *Los Angeles Dept. of Water & Power v. Manhart,* 435 U.S. 702 (1978) than, for

example, *Wood v. Strickland*, 420 U.S. 308 (1975). Moreover, we viewed the good faith issue as relating as much to (1) the City's *duty* to provide a name clearing hearing and (2) actual injury for breach of any duty, as we did (3) state of mind. We never saw the defense as a true "immunity" defense. (Indeed, we only pleaded the defense affirmatively when we were forced to abandon our contention that we could pursue it under a general denial. App., p. 16. Even today, no precedent from this Court indicates that this must be an affirmative defense. An otherwise valid defense, of course, is not lost merely because it is raised, unnecessarily, as an affirmative one.)

5. The questions of the Justices during oral argument in this case certainly recognized the interrelationships and complexities of these issues. The challenge was clear: to accept the duty imposed by granting certiorari in this complex case by drawing reliable distinctions between individual and entity liability, between this Section 1983 cause of action and others, and between the relative nature of the "good faith" defense to varying causes of action.

6. Mr. Justice Brennan once recognized that:

> "Section 1983 does not in general impose strict liability on all who come within its boundaries; certain broad immunities are recognized. See *Tenney v. Brandhove*, 341 U.S. 367 (1951); *Monroe v. Pape*, 365 U.S. 167, at 187-192 (1961); *Pierson v. Ray*, 386 U.S. 547, 553-555 (1967). In some types of cases where the wrong under Section 1983 is closely analogous to a wrong recognized in the law of torts, it is appropriate for the federal court to apply the relevant tort doctrines as to the bearing of particular mental elements on the existence and amount of liability. See, e.g., *Pierson v. Ray*, supra; *Whirl v. Kern*, 407 F.2d 781 (CA 5th Cir. 1969). In other types of cases, however, the

> common law of torts may be divided on important questions of defenses and relief, or it may be inadequate to carry out the purposes of the statute. Thus the common law is not an infallible guide for the development of Section 1983. In particular, denial of equal protection on the basis of race was a central evil that Section 1983 was designed to stamp out. Where that is the basis for recovery, relief should not depend on the vagaries of the general common law but should be governed by uniform and effective federal standards.
>
> The appropriateness of any particular remedy in a given case depends on the circumstances of that case, and especially of that case, and especially on the degree of culpability of the defendant * * *" *Adickes v. Kress & Company,* 398 U.S. 144, 231-232 (1970) (Brennan, concurring in part and dissenting in part.)

Clearly, the complexities of this case not only provided an opportunity to fashion "uniform and effective federal standards" but an absolute obligation to do so—since decision on the issue of the good faith defense, if analyzed without regard to the nature of plaintiff's prima facie case, would inevitably result in immediate and widespread concern by public officials everywhere as to whether they were facing strict liability in tort for their basic policy decisions. (Respondents are presently exploring the appropriate means of presenting to this Court the already visible adverse effects of the majority opinion in this regard. The innumerable phone calls received from representatives of very small cities to counsel for very large organizations such as the National Institute of Municipal Law Officers, although perhaps not rising to the level of a reliable statistical survey, bear witness to these effects. In one class action, an eastern city is facing millions of dol-

lars in damages for a "towing ordinance" passed in good faith and without any insurance to cover its losses.)

7. To respondents' way of thinking, "uniform and effective federal standards" presently exist to provide only two reliable models of Section 1983 liability: first, the model of *Monroe* as an action for damages against individual police officers for their tortious misconduct; and, second, the model of *Monell* for its clearly non-tortious cause of action challenging official policy of general applicability and future effect which had "received formal approval through the (governmental) body's official decision making channels." *Monell*, 436 U.S. at 691. Beyond doubt, various "proper proceedings for redress" (basically remedies, sometimes including restitution, for prospective declarations of invalidity) exist to challenge the *Monell* regulation in a Section 1983 action. The school board cases cited in *Monell*, and various other decisions such as *Town of Lockport v. Citizens for Community Action*, 430 U.S. 259 (1977), *clearly not involving "a species of tort liability"*, *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976), show that a potential plaintiff is *not* "remediless" if good faith is relevant in a tort context; because there are other "proper proceedings for redress" aside from the tort remedy. Just as clear is the fact that a "good faith" defense has no place in these other "proper proceedings for redress". For example, one would look foolish indeed to seriously suggest a good faith defense exists to a challenge that a regulation was void for vagueness and overbreadth (compare Appendix, p. 10, as to such a challenge by plaintiff to a policy in respondents' charter).

On the other hand, the mainstream of litigation and comment embracing Section 1983 had developed in the image of *Monroe*. *Monroe* was the type of case, decided from time to time, which is so powerful and so original as

to form a new paradigm which overshadows any other approach. *Monroe* is typical of cases which use the Ku Klux Klan Act to challenge outrageous and malicious conduct—conduct which does not involve specific intent, but clearly is in the nature of a deliberate tort.

(Cases such as *Baker v. McCollum,* 61 L.Ed.2d 433 (1974) and *Procunier v. Navarette,* 434 U.S. 555 (1978) concern whether mere negligence provides any basis of liability—however, no case has entertained the notion that the "threshold issue" of a deprivation, standing alone, could create absolute or strict liability in tort. Moreover, plaintiff's complaint alleged that the City, as an entity, "purposefully" subjected plaintiff to a deprivation (App. at 9).)

Motive, duty (compare Point Relied On I, Brief for Respondents In Opposition On Petition for Writ of Certiorari, p. 7; and, Brief for Respondents, p. 29) and state of mind in general are critically important in tort cases—either as proofs under a general denial or suggestive of affirmative defenses (since both defenses are inextricably tied to the nature of a plaintiff's prima facie tort theory). James and Hazard, Civil Procedure §§2.9, 4.6, 4.7 and 7.8 (2d ed. 1977).

In other words, an analysis of the cause of action is absolutely necessary in order to analyze applicability of a good faith defense. The question of the availability of a good faith defense should not be decided in a vacuum for all types of Section 1983 causes of action.

8. Moreover, finding the absence of such a defense by analyzing the cases referred to in Mr. Justice Brennan's majority opinion merely recognizes the obvious fact that governmental entities have never received the benefit of good faith as a defense on the merits in certain very particular types of causes of action involving street grades,

nuisances, taking, breach of contract, lateral support and other cases where state of mind had no conceivable relationship to or basis in a plaintiff's prima facie case.

By analogy, it is as if one would search federal cases involving procedural due process to determine the appropriateness of truth as a defense in a state defamation action. Compare *Carey v. Piphus,* 435 U.S. 247 (1978).

By deciding the issue of the availability of a good faith defense in a vacuum, the majority mistakenly mixed a wide variety of causes of action thereby making its analysis of this wholly different cause of action as dependent "on the vagaries of the general common law". Good faith never was and never will be a defense on the merits of a breach of contract, nuisance, inverse condemnation, or trespass case. By the same token, if you remove good faith as a defense on the merits in a tort action which involves a defendant's bad faith and duty as a part of the plaintiff's prima facie case, you are talking automatically about a species of absolute liability the likes of which jurisprudence has never seen. (The so-called rule of "absolute liability" has been seen as "not absolute at all, since both the propriety of its application in the first instance, and any defense against it, are conditioned by the limitations imposed by the fundamental standards which pervade all tort law: the conduct of the reasonably prudent man under the circumstances, and its procedural corollary that whenever there is a dispute in the evidence or uncertainty as to whether that standard is met, the question is one for the jury." 74 Am. Jur. 2d, Torts, Sec. 14, p. 632.)

9. Certainly the right to procedural due process is "absolute" in the sense that it does not depend upon the merits of a claimant's substantive assertions. *Carey v. Piphus,* 435 U.S. 247, 266 (1978). But since it does not depend upon the merits of a plaintiff's substantive asser-

tions it does not involve a "species of tort liability" concerned with outrageous conduct. A tort "is a civil wrong, other than a breach of contract, for which the court will provide a remedy in the form of an action for damages." Prosser, The Law of Torts at 2 (4th ed. 1971). With no significant exceptions, a cause of action founded in tort fails in the absence of actual loss or damages; and, nominal damages, to vindicate a technical right, cannot be recovered in tort. Of course, *outside the tort remedy* nominal damages can be allowed in the Section 1983 context. Compare, *Carey,* supra, at 266-267, and, Prosser's observation that no cause of action arises, even for mere negligence, in the absence of actual loss or damage.

10. Thus, insofar as Section 1983 operates with a "background of tort liability" to provide a species of tort remedy, a plaintiff's choice of a defendant simply should not eliminate the elements of a plaintiff's cause of action. One can search the legislative history of the statute in vain to fathom why the Reconstruction Congress would, even in its fervor, have treated a municipal defendant differently from an individual defendant regarding the burden of evidence pertaining to egregious acts of a tortious nature.

11. In *Procunier v. Navarette,* 434 U.S. 555, 572 (1978) (Stevens, J., dissenting) it was recognized that the good faith defense is not an immunity defense to suit. Instead, the "immunity" involves proofs which bear directly on plaintiff's cause of action—so much so that the burden of evidence shifts back and forth as both parties submit evidence pertaining to the prima facie constitutional tort. See also Developments In The Law—Section 1983 and Federalism, 90 Harv. L.Rev. 1133, 1209 n. 119 (1977).

12. We submit that the majority apparently views this case as a "species of tort liability" only up to the point that respondents' defenses, in a vacuum, are analyzed. At

that point the good faith, *tort* defense is sought for in vain in contract (this category being given particular emphasis by the Court), nuisance, statutory, and non-analogous tort actions.

13. One would have thought that cases such as *Scheuer v. Rhodes*, 416 U.S. 232 (1974) would have better expressed federal purposes as they pertain to the "particular circumstances of this civil rights action", since *Scheuer* involved adjudication and ad hoc conduct—as did this case.

Assume that civil disorder was rampant in the streets of the City of Independence and that the Mayor of the City declared martial law. Assume that the Mayor was alleged to have "intentionally, recklessly, willfully and wantonly" caused unnecessary deployment of police officers and ordered them to perform allegedly illegal and unconstitutional actions. Assume further that the City Manager and the entire City Council were aware of (and by official, formal action expressly ratified) the Mayor's conduct. Assume a deprivation of federal rights under color of state law.

What cries out for analysis is how the Mayor, the Council, and the City Manager under this example could have the benefit of a good faith defense on the merits of a resulting cause of action sounding in tort, while the City, as an entity, would be strictly liable for general and special damages on the same cause of action.

If adjudication is attacked as a constitutional tort, the good faith defense available to the defendants in their official capacities under *Scheuer* should also exist as a defense for the entity itself if the entity can be held liable under any circumstances on the same cause of action. *Scheuer* must be read for the proposition that the good faith defense broadens in relation to the extent of discre-

tion exercised in a particular case. Strict entity liability (which would result without the availability of a good faith defense) for the discretionary conduct of high ranking employees is a rule which would have the absurd result of directly controverting the logic of *Scheuer*. The good faith defense on the merits should not decrease in relation to the breadth of discretion, it should increase.

And, to make matters worse, *Owen* would prohibit the city from succeeding on a general denial that it could not be vicariously liable for the acts of its high ranking officials. In this regard, *Owen* contains a "catch" which neatly circumvents the *Monell* holdings concerning respondeat superior. The majority decision does not elaborate; but, seemingly, holds the City of Independence liable for the ad hoc conduct of its high ranking officers by the simple mechanism of defining certain official misconduct as official policy. Respondents have always maintained that the City of Independence is not inevitably and automatically liable for the conduct of its policy makers even when they act within the scope of their employment. By failing to distinguish *types* of official policy and varying causes of action, the *Owen* majority opinion seemingly eliminates the dual issues of official policy liability and absence of vicarious liability by absorbing the latter issue into the former.

The City can't be liable under *Monell* for the misconduct of its servants unless that misconduct is caused by official policy. If misconduct is simply defined as official policy, the City is always liable for that misconduct. This analysis has a certain elliptical precision to it which has rendered it impervious to respondents' repeated attacks. A better approach is to analyze the nature of the official policy involved, the elements of the cause of action attacking that official policy, and the defenses suggested by that cause of action.

14. If federal courts, under appropriate circumstances, are obligated to segregate a plaintiff's various civil rights claims and apply separate statutes of limitations relating to breach of contract, tort, and statutory liability to those segregated claims—then, there is seemingly no reason to ignore the duty of analyzing another defense, that of good faith, by applying it to certain civil rights claims creating a species of tort liability while not applying it where the cause of action does not sound in tort. Compare *Green v. Ten Eyck*, 572 F.2d 1233 (8th Cir. 1978).

CONCLUSION

In light of the above, we respectfully suggest that this petition for rehearing should be granted.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for the purposes of delay.

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