See my letter to SOC of 3/4

To: Justice Powell

From: Mike

Re: No. 84-1160 Pembaur v. City of Cincinnati

Date: Feb. 27, 1986

I would like to write a quick note of explanation as to what I think Justice O'Connor is asking in her letter regarding your dissent in this case. She asked about the relationship between Owen v. City of Independence and the section of the dissent about retroactivity. The question is an important one; it is likely to form a major part of the majority's response to the dissent.

As explained in the draft letter to Justice O'Connor, there is no real doctrinal connection between immunity--the subject in Owen--and retroactivity--the subject in Part I of your dissent in Pembaur. There is, however, a certain portion of cases where the practical effect of applying the retroactivity analysis suggested in the dissent will be the same as if the local government unit were given qualified immunity, even though local government immunity was expressly rejected in Owen. For that reason, it is possible that the majority may accuse the dissent of attempting to win through the back door what it lost in Owen, by giving local government units the practical effect of qualified immunity under a different name. I think that charge would be unjustified, for several reasons:

1. As explained earlier, immunity and retroactivity are separate doctrines that address different concerns. Although some of the underlying issues are similar (for example, the concept of foreseeability applies to both) there is nothing about retroactivity analysis that requires examining immunity, or vice versa.

2. The number of cases is quite small where the practical effect of your suggested retroactivity analysis will be to give the city the same protection it would get under qualified immunity. In the first place, most municipal liability cases do not involve "new law," that is, application of a case that was decided after the challenged conduct. Rather, most cases involve application of existing principles. Second, in that portion of municipal liability cases that do involve some new rule handed down after the challenged conduct, in most cases the new rule will be applied retroactively. The dissent in Pembaur is admittedly applying an exception to the general rule that cases will be applied retroactively. Owen illustrates the general rule. While it does not say a single word about retroactivity, it is clear from the opinion that it started from the assumption that the new rule was applied retroactively.[1] Given that assumption, it then

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[1]The "new rule" in Owen was the requirement of a pretermination hearing, established in Board of Regents v. Roth, 408 U.S. 564, and Perry v. Sindermann, 408 U.S. 593. Those cases were decided two months after the challenged conduct in Owen. Neither of those cases involved any discussion of immunity or retroactivity.

went on to hold that no immunity would be allowed. The point I tried to make to Justice O'Connor is that nothing in Owen foreclosed retroactively analysis; Owen simply assumed retroactivity. And on the facts of Owen, that was probably a valid assumption. The new rule in Owen was clearly foreshadowed, and there was very little support for the City's position in existing case law. The whole point of Part I of the dissent is that Steagald is an exception to the general rule favoring retroactivity--it is just the kind of case that the Court has declined to apply retroactively. In sum, retroactivity and immunity are not related, except that a court must apply retroactivity analysis in some cases in order to determine whether there even was a violation; only after establishing a violation must a court look to see if the violation was pursuant to a "policy" or if there are any applicable immunities.