City of Newport v. Fact Concerts
No. 80-396

Brief in Opposition to the Petition for Writ of Certiorari

Substitute Cover Page
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QUESTIONS PRESENTED

1. Should This Court Consider Whether a Municipality is Liable for Punitive Damages in a Section 1983 Case When Defendants Failed to Object to the Charge; There is no Conflict in the Circuits; and the Decision Below Was Clearly Right?

2. Should This Court Exercise Its Power of Supervision on a Purely Evidentiary Matter Where Defendants Objected Only Sporadically; the Testimony Was Perfectly Proper Under Rule 611(b); and Two Courts Below Carefully Considered the Questions?

3. Should This Court Exercise Its Power of Supervision Where the United States Court of Appeals for the First Circuit's Approval of the District Court's Denial of Motions for a Judgment N.O.V. was Clearly Correct in Its Interpretation of First and Fourteenth Amendment Claims Under Section 1983?

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In the
Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-396

THE CITY OF NEWPORT,
MAYOR HUMPHREY J. DONNELLY III,
Individually and in His Official Capacity
as Mayor,
THE CITY COUNCIL for the City of Newport and
LAWRENCE NEWSOME, JOHN H. WEST,
ROBERT O. BEATTIE, RAYMOND H. CARR,
EDWARD K. CORISTINE, JAMES F. RING,
All individually and in Their Official Capacity
as Members of the City Council for the
City of Newport, Rhode Island,
PETITIONERS,

v.

FACT CONCERTS, INC. AND MARVIN LERMAN,
RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

The respondents in the above-entitled matter submit that the Petition for a Writ of Certiorari (hereinafter "Petition" or "Pet.") should be denied. The respondents concur in the

petitioners' statements under the headings *Opinions Below*, *Jurisdiction*, and *Constitutional and Statutory Provisions Involved* in the Petition. The Appendices to the Petition (hereinafter "Pet. App.") are incorporated herein by reference.

Statement of the Case

The United States District Court for the District of Rhode Island had jurisdiction of this matter by virtue of 28 U.S.C. Secs. 1331 and 1343(3).

In the early summer of 1975, Plaintiff Fact Concerts, Inc. (Fact Concerts) through its President Frank Amado (Amado) and Plaintiff Marvin Lerman (Lerman) discussed holding a two-day jazz festival in the City of Newport. Amado had previously obtained a lease from the Rhode Island Department of Natural Resources to hold three concerts in Fort Adams, and he then sought licenses from the City of Newport.

Amado obtained a license from the City of Newport and successfully staged a first concert featuring Arthur Fiedler. Amado had also applied for, in May, 1975, and been granted a license by the City Council for two jazz concerts to be given at Fort Adams on August 2nd and 3rd. Subsequently, the Plaintiffs successfully sought a substitution of August 30 and 31 from the Council, which granted a license through a contract dated August 22, 1975 and duly authorized it by vote. The contract did not grant the City the right to approve performers who would appear, nor did it designate the type of music to be played, referring only to a "music concert." The city retained the right to cancel only "if the interests of public safety demand."

Plaintiffs began in the summer of 1975 to book top jazz acts. However, one attraction, Sarah Vaughan, was unavailable, and Plaintiffs substituted an alternative group called Blood, Sweat and Tears. This group triggered the events at the heart of the case. Plaintiffs considered Blood, Sweat and Tears a jazz

group equivalent in stature to Sarah Vaughan, based upon the group's appearance in Carnegie Hall, representing the United States on State Department-sponsored jazz tours, and appearing at major jazz festivals. Plaintiffs advertised the jazz concerts, including an August 24, 1975 ad in *The New York Times*, announcing the addition of Blood, Sweat and Tears.

On the Monday before the concerts, Amado received notice of a problem. He called Mayor Donnelly, who talked about cancellation of Blood, Sweat and Tears because he did not want any rock groups appearing in Newport. The next day Fact Concerts officials attended a special City Council meeting. The Fact Concerts group was told that Blood, Sweat and Tears would have to be removed or the license would be revoked. The Mayor said that Blood, Sweat and Tears would bring a long-haired element that the City did not want. A Fact Concerts spokesman explained that Blood, Sweat and Tears was a jazz group, but this information was rejected.

The official minutes of the Special Meeting of the Council held August 26, 1975, between 11:30 a.m. and 12:10 p.m. reflect "DISCUSSION RE: ENTERTAINMENT LICENSE OF FACT CONCERTS, INC." and record that:

> MAYOR DONNELLY stated that the Council had just learned of the cancellation of Sarah Vaughan as a performer and the substitution of the group, Blood, Sweat and Tears, and the city does not condone rock festivals.
>
> PHILIP WEINSTEIN [*sic*], attorney for the concert group, stated they were not considered a rock group and had performed at Carnegie Hall and they were only consisting of 10% of the program.
>
> After a long discussion, pro and con, MAYOR DONNELLY moved that unless Blood, Sweat and Tears was removed from the bill on Sunday, the license for the contract would be cancelled by the City Council. Seconded by COUNCILMAN CORISTINE and SO VOTED.

At the time of this vote, and subsequently, neither the Mayor nor any member of the City Council undertook any investigation of the type of music played by Blood, Sweat and Tears. Blood, Sweat and Tears had appeared at a 1969 Newport Jazz Festival without incident and had not even been on the program at a 1971 jazz festival in which incidents did occur! It would have been an easy matter, moreover, for such an investigation to be carried out.

After the Council meeting of the 26th, Fact Concerts decided to accept the Council decision and go forward without Blood, Sweat and Tears. Fact Concerts hired a substitute group called Weather Report. The Council's action, meanwhile, generated negative publicity and uncertainty among potential concertgoers, devastating ticket sales.

Then, on Thursday, August 28th, Amado received a call from Newport City Solicitor James O'Brien informing him that the Council had changed its mind and would let Blood, Sweat and Tears play on the bill if they did not play rock and roll. Fact Concerts then rehired Blood, Sweat and Tears and agreed to attend a meeting the next day with the City Council. This changeabout occurred because O'Brien had informed the Mayor and some or all of the councilmen that they did not have the right to approve or disapprove of who played on the program and that they were, therefore, subject to suit. Newspaper stories indicated that Blood, Sweat and Tears threatened to sue the City for large amounts for damage to their character.

The August 29th special meeting of the Council, entitled in the minutes, "ENTERTAINMENT LICENSE AND CONTRACT OF FACT CONCERTS, INC.", began at 4:28 p.m. Mayor Donnelly said the Council could either accept the City Solicitor's opinion and obtain an affidavit from Amado that no rock music would be allowed, or cancel the concert entirely. However, no affidavit was ever presented to Amado or anyone from Fact Concerts, nor were Plaintiffs ever asked to draw up any kind of affidavit.

City Manager Perry visited the site at the direction of the Council with the intent of seeing if Fact Concerts lived up to the letter of the contract. City Manager Perry stated that he had examined the concert site after 3:00 p.m., set-up time, and was unable to observe the auxiliary generator required by the contract. Perry also stated that the wiring together of the seats was in progress and not completed by the 3:00 p.m. deadline and that the chairs were being put together with tape rather than wire.

Perry reported noncompliance despite the fact that the remaining 500 of the 7,000 chairs would have been attached within fifteen minutes to half an hour of 3:00 p.m., and in the face of comments to him on the Fort Adams scene by Rhode Island Director of Natural Resources Dennis Murphy that the remaining chairs would be firmly secured within a very short period of time and that his complaint was frivolous. In addition, the chairs were not loose, but were all in banks of twelve and the professional tape being used was safer and stronger than wire. In addition, the generator required had been rented from the Newport Fire Department and was installed. Perry apparently overlooked it.

At the special meeting, Mayor Donnelly stated that if Fact Concerts was in violation of the contract, the Council should cancel it and give Mr. Amado the opportunity to enter into a new contract. After discussion, Councilman Carr moved to cancel the contract because Fact Concerts had not "lived up to all phases of the contract," which motion was adopted unanimously.

During a recess, the Fact Concerts group consulted on whether to sign an altenative contract offered to them by the Mayor and the City Council which would have allowed the concert to go on, but without Blood, Sweat and Tears. This offer was made notwithstanding anything about the chairs or generator. When the special meeting reconvened at 8:40 p.m. on August 29th, Fact Concerts' attorney informed the City Council that suit would be instituted if the concert were

stopped. Mayor Donnelly replied that the concert was cancelled because Fact Concerts did not live up to the contract.

During the special meeting, no reports by city officials relative to problems with public safety were made, according to the minutes, nor do the minutes show the presence of the Chief of Police or the Fire Chief, who might have been expected to be present if public safety was a major concern. The Mayor had no recollection of such persons being present. City Manager Perry could not produce any reports nor remember any specific content of any such reports from any such official. While the councilmen later at trial characterized themselves as concerned with public safety, the minutes of the special meeting taken at the time make absolutely no mention of any concern with public safety, nor in meeting their burden at trial of making a "good faith" defense did Appellants produce any contemporaneous documentary evidence of concern for public safety.

An announcement that the contract was cancelled and the concerts were off was made after the special meeting. The news of the concert license revocation appeared widely that night over local media. Fact Concerts appeared before Judge Orton of the Rhode Island Superior Court the next morning, and at 9:30 obtained an order restraining the City of Newport, and the concert went on. Blood, Sweat and Tears performed without incident. Over the two days of the concerts, only 6,308 of the available 14,000 tickets were sold (7,000 maximum for each day), and the event showed a loss of $72,910.00.

Fact Concerts, Inc. and Lerman brought a five count complaint in the United States District Court for the District of Rhode Island seeking declaratory relief, compensatory and punitive damages for violations of First and Fourteenth Amendment rights, and compensatory and punitive damages for three pendant state law claims. The complaint asserted that the action arose under the First and Fourteenth Amend-

ment and under 42 U.S.C. §1983, with District Court jurisdiction under 28 U.S.C. §1331 and §1343(3) over the federal claims and through pendant jurisdiction over the state claims.

The case came to trial beginning on January 16, 1979, before Chief Judge Raymond J. Pettine and a jury. After five days of trial testimony, the case was given to the jury on January 25, 1979. The trial judge sent two counts of the complaint to the jury. The civil rights violations under the First and Fourteenth Amendments and 42 U.S.C. §1983 for the revocation of the license became Count I. The action for interference with contractual relationships through announcements in public media that the events had been cancelled became Count II.

The jury returned verdicts for Plaintiffs on both counts and assessed compensatory damages against all Defendants in the amount of $72,910.00. The jury awarded punitive damages against the City of Newport in the amount of $200,000.00; $20,000.00 punitive damages against Mayor Donnelly; $20,000.00 punitive damages against Councilman West; $10,000.00 punitive damages against Councilmen Carr, Coristine, and Newsome; and $5,000.00 punitive damages against Councilmen Beattie and Ring.

In his Opinion and Order dated July 2, 1979, (Pet. App. B), Judge Pettine denied Defendants' Motion for Judgment Notwithstanding the Verdict. As to Defendants' Motion for a new trial, the court ordered a remittitur, setting $75,000.00 as the maximum permissible punitive damages awarded against the City. Plaintiffs accepted the remittitur on July 9, 1979. Defendants appealed and the Court of Appeals for the First Circuit affirmed on June 17, 1980 (Pet. App. A).

Reasons for Denying the Writ

I. PETITIONERS FAILED TO OBJECT TO THE PUNITIVE DAMAGES INSTRUCTION AND HENCE CANNOT NOW RAISE THE ISSUE; IN ADDITION THERE EXISTS NO CONFLICT IN THE CIRCUITS AND THE DECISIONS BELOW ARE CLEARLY CORRECT; THEREFORE THIS COURT SHOULD NOT ISSUE ITS WRIT ON THE ISSUE OF PUNITIVE DAMAGES AGAINST THE MUNICIPALITIES UNDER SECTION 1983.

A. *Petitioners Failed To Object*

Petitioners admit they failed to preserve their objection to the trial judge's charge on punitive damages. (Pet. at 8). Fed. R. Civ. P. 51 explicitly bars appeal on issues not objected to, and that rule is strictly adhered to because of the policies of fairness and judicial economy it incorporates. *Morris* v. *Travisano*, 528 F.2d 856, 859 (1st Cir. 1976).

Petitioners now maintain that the liability of a municipality for any damages was a new principle of law at the time of trial and that therefore their counsel's failure to object should be overlooked. (Pet. at 9). In fact, Petitioners' counsel had ample notice that punitive damages were specifically an issue in the case. Respondents' complaint (R.A. 9) and amended complaint (R.A. 23) discussed punitive damages. Respondents' pretrial memoranda discussed punitive damages as well as *Monell* v. *Department of Social Services of the City of New York*, 436 U.S. 658 (1978). During trial, the judge reminded counsel that there was a prayer for punitive damages (Transcript Vol. III, p. 115) and Respondents' counsel prepared a Memorandum on the Availability of Punitive Damages Against a Municipal Corporation, at the judge's request (made to both sides in chambers), which was hand delivered to Petitioners' counsel on the last day of the trial. The trial judge specifically invited defendants' counsel to object at the end of instructions (R.A. 591-B). It mocks the language of Fed. R. Civ. P. 51 to suggest that it should not apply in this case.

There is no miscarriage of justice here, *Fact Concerts* bears no resemblance to *Williams* v. *City of New York*, 508 F.2d 356 (2nd Cir. 1974), a pre-*Monell* case with extreme facts relied upon by Petitioners, in which the court did set aside Rule 51 and an award of punitive damages against the City of New York. In that case, an action for malicious prosecution in a murder, there was an absence of any nexus between anyone in authority in the police department and the acts complained of by the Plaintiff, *id.* at 361. Most important, because twenty-five years intervened between the tortious act and the award, and the standards for admissibility of evidence changed, there was no evidence that practices of the sort complained of continued. Without proof that the City no longer required the deterrent medicine of punitive damages, the court was reluctant to grant it.

Here petitioners acted on behalf of the City by formal vote in denying a license, despite advice that they did not have the authority to approve or disapprove content from their City Solicitor. (R.A. 270-271). In addition to this factual nexus between the City and the individual Defendants, deterrence was urgently required. This case marked the second time within a few years that a First Amendment violation had been pressed against the Newport City Council, an injunction previously having been necessary from Federal District Court to allow a peaceful demonstration in a public park. (R.A. 305-KK-LL).

Councilman West (R.A. 461), Coristine (R.A. 505-506), and Newsome (R.A. 537) were on the council and recalled the earlier so-called Tiger Cage case when asked about it at trial. Councilman Ring and Mayor Donnelly were on the council at the time the federal injunction was issued. (R.A. 525; R.A. 208). Thus, this council and these councilmen had full knowledge of the protected nature of speech and, notwithstanding that, went forward to cancel the Fact Concerts license. Clearly, on the facts, it cannot be said that the unobjected-to instructions were a miscarriage. The instruc-

tions met the purpose of punitive damages, to vindicate the public interest in deterring malicious or wanton conduct by public officials, and to do whatever is necessary to reasonably deter such conduct in the future. *Aumiller* v. *University of Delaware*, 434 F. Supp. 1273, 1312 (D.C. Del. 1977).

B. *There Is No Conflict in the Circuits*

Even if Petitioners properly preserved their objections, this Court should not grant its writ. There is no conflict among the circuits that have considered the availability of punitive damages against local governments, Supreme Court Rule 17.1(a).[1] Thus, in addition to the instant case in the First Circuit, post-*Monell* decisions have all allowed punitive damages. *Fulton Market Cold Storage* v. *Cullerton*, 582 F.2d 1071, 1073 (7th Cir. 1978), *cert. denied* 439 U.S. 1121 (1979); *Bradshaw* v. *Zoological Society of San Diego*, 569 F.2d 1066, 1068 (9th Cir. 1978); and *Simineo* v. *School Dist. No. 16, Park Cty., Wyo.*, 594 F.2d 1353, 1357 (10th Cir. 1979).

C. *The Decisions Below Are Clearly Correct*

Petitioners seek the writ, however, under Supreme Court Rule 17.1(c), maintaining that an important question of federal law has not been, but should be settled by this Court. While the Supreme Court has not addressed punitive damages against a municipality directly, it has stated that ". . . punitive damages are available in 'a proper' §1983 action." *Carlson* v. *Green*, 100 S. Ct. 1468, 1473 (1980), *citing*, *Carey* v. *Piphus*, 435 U.S. 247, 257 n.11 (1978). There is no need for this Court to go beyond that pronouncement. The

[1] Petitioners imply (Pet. at 10) that the award against the individual officials is also now challenged. But this issue is not listed in their "Questions Presented," nor briefed or argued. Hence, it is not properly before this Court.

decisions below are clearly correct, and therefore there is no need to review the issue. This is the policy followed by the Court on other constitutional issues, such as the Portal to Portal Act of 1947, 29 U.S.C. 251 *et. seq.* (1947). See: *Battaglia* v. *General Motors Corp.*, 169 F.2d 254 (2nd Cir. 1948), *cert. denied* 335 U.S. 887 (1948); *Fisch* v. *General Motors Corp.*, 169 F.2d 266 (6th Cir. 1948), *cert. denied* 335 U.S. 902 (1949); *Atallah* v. *B. H. Hubbert & Son*, 168 F.2d 993 (9th Cir. 1948), *cert. denied sub nom.*; *Ciangrigrani* v. *B. H. Hubbert & Son*, 335 U.S. 868 (1948); and *Darr* v. *Mutual Life Insurance Co.*, 169 F.2d 262 (2nd Cir. 1948), *cert. denied*, 335 U.S. 871 (1948).

The policy arguments raised by Petitioners (Pet. at 10-13) have all been recently considered and rejected by this Court in its extended discussion of the rationale for damages under Section 1983 in *Owen* v. *City of Independence, Mo.*, 100 S. Ct. 1398 (1980). The *Owen* court stated: ". . . a municipality has no 'discretion' to violate the Federal Constitution . . . [and] when a court passes judgment on the municipality's conduct in a §1983 action, it does not seek to second-guess the 'reasonableness' of the city's decision nor to interfere with the local government's resolution of competing policy considerations. Rather, it looks only to whether the municipality has conformed to the requirements of the Federal Constitution and statutes." *Id.* at 1415.

Thus, *Owen* specifically considers and rejects Petitioners' arguments that somehow the Newport government and its officials are not subject to §1983 actions, (Pet. at 12-13). Petitioners rely, incredibly, on *Luther* v. *Borden*, 7 Howard 1 (1849) and *Younger* v. *Harris*, 401 U.S. 37 (1971). Furthermore, while *Owen* does not deal with punitive damages specifically, the Court adopts the appropriate rationale behind punitive damages when it states that, "Moreover, §1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well." *Id.* at 1416.

The *Owen* reasoning applies perfectly to the public policy reasoning behind an award of punitive damages; to deter future bad conduct. And, when public officials and the local government repeatedly violate constitutional rights and a punishment to deter is needed, it is not inappropriate that taxpayers bear the burden imposed upon the government. *Owen* rejects Petitioners' argument (Pet. 10-11) to the contrary. *Owen* holds that since the public at large enjoys the benefits of government activities, it is the public at large which is ultimately responsible for its administration. *Id.* at 1417. Such burdens are part of the "inevitable costs of government borne by all the taxpayers." *Id.* at 1417.

Accordingly, because there is no conflict in the circuits and because the decisions below are clearly correct, certiorari should not be granted on the §1983 punitive damages issue.

II. Petitioners Failed To Object During Cross-examination and Closing Argument and Hence Cannot Object Now; In Addition the Testimony Was Perfectly Proper Under Fed. R. Evid. 611(b) and the Particular Sequence of This Trial; and Two Courts Below Carefully Considered All of the Questions.

A. *Petitioners Failed To Object*

Petitioners failed to preserve their objections at trial. Their assertion that testimony was admitted "over objections" (Pet. at 13) distorts the record. On Questions 141-152 (R.A. 462-463), referred to at Pet. 14, first paragraph, Petitioners objected only to Q.141 and Q.152 and to none in between. On Questions 203-208 (Pet. at 14), Petitioners only objected to Q.206. No objections were made to the closing arguments (R.A. 562-591). Fed. R. Evid. 103(a)(1) bars raising upon appeal matters not objected to at trial. The First Circuit noted that allegations now appear "in a light clouded by the defendants' failure to object at trial" (Pet. App. A-2) and that the cross-examination was "objected [to] only sporadically." (Pet. App. A-13).

B. *The Cross-examination and Closing Argument Were Perfectly Proper*

Fed. R. Evid. 611(b) permits cross-examination into matters affecting the credibility of any witness. The trial court has no obligation imposed on it to protect a witness from being discredited on cross-examination, short of an attempted invasion of his constitutional protection from self-incrimination. *Alford* v. *United States*, 282 U.S. 687, 694 (1931). Questions directed toward showing material facts bearing upon the character and credibility of the witness are admissible. *Tla-Koo-Yel-Lee* v. *United States*, 167 U.S. 275, 277 (1896). The law recognizes the force of a hostile emotion as influencing the probability of truthtelling, and a partiality of mind is therefore always relevant as discrediting the witness and affecting the weight of his testimony. *United States* v. *Kartman*, 417 F.2d 893, 897 (9th Cir. 1969).

In the instant case, cross-examination occurred only after Petitioners, using Mr. West as their key witness, began a "good faith defense," and only after Respondents' counsel put on the record that if the good faith evidence went in, this exact line of cross-examination would follow to show bad faith. Because the sequence is vital, the First Circuit reproduces at length the record surrounding the cross-examination, Pet. at A-9-13. After a close and careful review of the testimony and special circumstances, the First Circuit found West a "hostile, ascerbic witness . . . His credibility was fair game, Fed. R. Evid. 611(b) . . ." (Pet. App. A-13). West's voluntary statements were probative of whether his testimony would be of the objective nature required of experts.

Petitioners misstate the evidence as to the closing argument. In twenty of twenty-two references to West, Respondents'

counsel mentioned only some other aspect of the case and not the challenged material.[2]

None of the alleged comparisons were made. References to Hitler and the Watergate came in an analysis of how public safety rationalizations had been used by governments historically. Reference to Mr. West occurs in a completely separate paragraph. (R.A. 564). Counsel drew no connection to George Lincoln Rockwell, and mentioned Mr. West in a different paragraph entirely (R.A. 565).

No one called West a bully. Respondents' counsel said "whether he's smart, whether he's a bully . . ." in connection with how West had a lot to say. (R.A. 569). Counsel nowhere used the words "male chauvinist", but simply and accurately

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[2] R.A. 563—West exemplifies the City Council.
R.A. 564—refers to West in context of the public safety defense and as an intelligent man.
R.A. 565—West very determined but frustrated.
R.A. 569—discusses West in the context of license denial process.
R.A. 570—reviews West's statements to press and testimony as to his own deposition.
R.A. 574—discusses West's words, "I'd do it again" as bearing on good faith.
R.A. 575—mentions West in reference to the Tiger Cage case.
R.A. 577—reports that West did not volunteer in his long direct testimony that Blood, Sweat and Tears did not even appear at the 1971 festival where there was a problem.
R.A. 578—analyzes contradictions in West's testimony and deposition.
R.A. 580—West's testimony indicates how difficult it would be to reason with him.
R.A. 583—Newsome, like West, at first maintained his deposition was not correct.
R.A. 584—at trial, West offered expert opinions on music, police, law and contracts.
R.A. 588—West felt he was right in his conduct no matter what.
R.A. 590—it was marvelous that West had his full say even if what he said shocked people, because this indicates the strength of free speech in the United States.

recited what Mr. West said about Attorney Elizabeth Rode, absolutely proper evidence going to credibility. (R.A. 579).

C. *Two Courts Below Carefully Considered the Questions*

The trial court carefully considered the evidentiary issues in the context of the defense before they were asked, (R.A. 422-423), as well as when the questions were actually asked and sporadically objected to. The appellate court fully considered the challenged evidence and paid particular attention to the special circumstances of the case. (Pet. App. A. 8-13). Thus, two courts have fully considered and correctly decided these issues, in which only questions of evidence and not issues of law are involved. Therefore, these matters are not proper ones for exercise of certiorari. Just as this Court does not undertake to review findings of fact by two courts below, in the absence of a "very obvious and exceptional showing of error," it should not here review evidentiary findings by two courts below. *Graver Mfg. Co.* v. *Linde Co.*, 331 U.S. 271, 275 (1948).

III. Both Courts Below Were Clearly Correct in Their Interpretation of First and Fourteenth Amendment Claims Under Section 1983, and Therefore This Court Should Not Exercise Its Supervisory Power.

The law is quite clear as to Plaintiffs' cause of action. Both courts below fully considered and correctly decided this issue. (Pet. App. A and B). The First Amendment is incorporated into the Fourteenth Amendment. *Douglas* v. *City of Jeanette*, 319 U.S. 157 (1943). Music and musical productions are speech and are not to be subject to a standard drastically different from that applied to any other form of protected First Amendment communication. *Southeastern Promotions Ltd.* v. *Conrad*, 420 U.S. 546, 557-558 (1975) (overturning local

board's denial of a license to rock musical "Hair" to perform in municipal auditorium). Indeed, the *Southeastern Promotions* Court stated:

> The basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule. Citing: *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 503 (1952).

Id. at 558.

Petitioners' citation of *Paul* v. *Davis*, 424 U.S. 693 (1976) (Pet. at 17) is inapposite because Respondents here point to a specific constitutional guarantee safeguarding the violated interest. Respondents rely upon the specific guarantees of the First Amendment, damage to their reputation being derivative from Petitioners' violation of their basic, explicit, and clearly protected free speech rights.

Arnett v. *Kennedy*, 416 U.S. 134 (1974), oddly relied upon by Petitioners (Pet. at 17), also has no bearing upon the instant case. *Arnett* held only that in federal employment cases, where the terms were created by statute, the Constitution did not create independent and greater rights. But respondents' claims here are to protected speech, not a federal job.

Respondents' claim is that Defendants violated their protected free speech rights by cancelling the concert for no other reason than content. Respondents do not claim as Petitioners suggest that the First Amendment guarantees every commercial promoter a profit. What the First Amendment guarantees is the right, consistent with reasonable regulations reasonably applied as to public health and safety, *Stepping Stone Enterprises Ltd.* v. *Andrews*, 531 F.2d 1, 3 (1st Cir. 1976), to produce a program without interference with the content. Where the content is unconstitutionally interfered with, as here, and damages result from those intentional acts, as here, liability

results. While the concerts went on, under injunction, Defendants' intentional acts caused monetary losses. Petitioners' argument that because the event went on under court order they cannot be liable for damages amounts to asking for an open license on unconstitutional behavior whenever, in the end, the unconstitutional scheme is only partially successful.

The Court of Appeals for the First Circuit correctly rejected Petitioners' position by noting (Pet. App. A-6, 7) that their ". . . somewhat ingenious argument ignores the fact that Section 1983 provides that violators shall be liable . . . for redress and that the Supreme Court has to construe Section 1983 to comprehend, at the least, the payment of compensatory damages. *Carey* v. *Piphus*, 435 U.S. 247, 254-57 (1978)." The Circuit Court also found that this issue may be moot, because the jury's verdict does not indicate whether the compensatory damages were awarded under the §1983 count or the pendant count. (Pet. App. A-7).

Conclusion

For all of these reasons, this Court should not issue a Writ of Certiorari to review the judgment and opinion of the First Circuit.

Respectfully submitted,

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