IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-914

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,

Petitioners,

v.

GEORGE D. OWEN,

Respondent.

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioners, City of Independence *et al.*, discuss the implication for the instant case, pending certiorari, of this Court's June 6, 1978 decision in *Monell v. Department of Social Services,* No. 75-1914, 46 U.S.L.W. 4569.

Monell represents a liberation from the jurisdictional circumlocution of direct action under 28 U.S.C. §1331,

which formerly was necessary in order to avoid limitations under 42 U.S.C. §1983.[1] The Court of Appeals in this case discussed at length, 560 F.2d 925, 931-934 (8th Cir. 1977), Pet. 12a-18a, the relation of §1331 and §1983, citing *Monell,* 532 F.2d 259 (2d Cir. 1976). Were the Petition in this case solely a jurisdictional challenge under §1983 (and 42 U.S.C. §1343) or by analogy under §1331,[2] *Monell* would support denial of the Petition.

Monell, however, compels granting the writ petitioned. This case represents the impermissible application in a §1331 case of the spirit of the Sherman Amendment to the 1871 Civil Rights Act. The Sherman Amendment, which would have made municipalities insurers against torts of third parties, was rejected by the Congress and criticized by this Court, consistently from *Monroe v. Pape*[3] through *Monell,* 46 U.S.L.W., at 4572. See also 46 U.S.L.W., at 4582 (Powell, J., concurring) and 4587 (Rehnquist, J. and Burger, Ch. J., dissenting). The distinction between the permissible prohibition against municipal violation of constitutional rights, and an impermissible Federal duty in municipalities to deter other violators of rights, is apt.

In this case, the City of Independence must respond monetarily for the arguably defamatory statement of a lame duck councilman who, as a matter of law, was not acting on behalf of the municipality.[4] Nothing less than a resurrection of the Sherman Amendment can countenance such an imposition of liability for the acts of third parties.

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[1]See 46 U.S.L.W., at 4572 & n. 47.

[2]The analogy remains clouded, even after *Monell.* See 46 U.S.L.W., at 4584 (Powell, J., concurring).

[3]365 U.S. 167 (1961).

[4]See Pet. 3-5, 7, 10-12.

The gravamen of Chief Owen's suit admittedly does not "implement[] or execute [] a policy statement, ordinance, regulation, or decision officially adopted and promulgated by [the City's] officers," *Monell,* 46 U.S.L.W., at 4578. The official municipal act of firing Owen, by the City Manager, was scrupulously neutral, and followed the Manager's affirmative exculpation of Owen. See Pet. 3-4, 5 n.2. The alleged defamation of Owen was, as a matter of law, not " 'with the force of law.' " 46 U.S.L.W., at 4578.

Rather, the City was master to a frolicsome alleged defamation no more efficacious toward the firing of Owen than the defamation of any other fellow servant.[5] It is precisely this master liability which is beyond the imprimatur of the holding in *Monell,* 46 U.S.L.W., at 4578-79.[6]

The anomaly of *Monroe*'s limitation having been corrected in *Monell*, the rule of *Monell*[7] should be applied in this §1331 case. As applied, the rule wisely refuses to impose on the City liability on the facts of this case.

The questions raised in the Petition remain, after *Monell*; for the reasons set forth in the Petition, the writ should be granted.

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[5]The frolicsome councilman settled a State-Court defamation action brought by Owen prior to the instant case. 560 F.2d, at 930, Pet. 10a.

[6]The liability imposed in this case is on a more attenuated nexus than the vicarious impositions rejected in *Monroe,* and *Moor v. County of Alameda,* 411 U.S. 693 (1973), rejections unaltered by *Monell.* See 46 U.S.L.W., at 4583 (Powell, J., concurring).

[7]The rule is dictum but, in Petitioners' view, legally correct. See 46 U.S.L.W., at 4584 (Stevens, J., concurring). In the instant case, unlike *Monell*, the rule is necessary for decision.

Respectfully submitted,

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