JANE MONELL, et al.,

Petitioners,

—vs.— No. 75-1914

DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK, et al.,

Respondents.

Washington, D.C.
Wednesday, November 2, 1977

The above-entitled matter came on for argument at 11:43 o'clock a.m., pursuant to notice,

BEFORE:

WARREN E. BURGER, *Chief Justice of the United States*
WILLIAM J. BRENNAN, JR., *Associate Justice*
POTTER STEWART, *Associate Justice*
BYRON R. WHITE, *Associate Justice*
THURGOOD MARSHALL, *Associate Justice*
HARRY A. BLACKMUN, *Associate Justice*
LEWIS F. POWELL, JR., *Associate Justice*
WILLIAM H. REHNQUIST, *Associate Justice*
JOHN PAUL STEVENS, *Associate Justice*

APPEARANCES:

OSCAR G. CHASE, ESQ., *250 Joralemon Street, Brooklyn, New York 11201; on behalf of the Petitioners.*

L. KEVIN SHERIDAN, ESQ., *Assistant Corporation Counsel of the City of New York, Municipal Building, New York, New York 10007; on behalf of Respondents.*

PROCEEDINGS

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 75-1914, *Monell* against *Department of Social Services, City of New York.*

Mr. Chase, you may proceed whenever you're ready.

ORAL ARGUMENT OF OSCAR G. CHASE, ESQ., ON BEHALF OF PETITIONERS

MR. CHASE: Mr. Chief Justice, and may it please the Court:

I am Oscar Chase. I represent the plaintiffs in this action, who consist essentially of two groups of women; one group was employed by the City of New York at the time of the events alleged in the complaint, the other group was employed by the Board of Education of the City of New York.

The two groups have in common the fact that they were all compelled to take unwanted leaves of absence from their employment as a result of a compulsory pregnancy rule, of the kind with which the Court is familiar after *Cleveland Board of Education* v. *LaFleur.* The principal relief sought was injunctive and declaratory relief as well as an award of lost wages. After the defendants changed their policies, sometime after the complaint was filed, the court below dismissed the declaratory and injunctive request as moot, and then went on to dismiss the remaining claim for back pay as wanting in subject matter jurisdiction.

The court held, and the Court of Appeals affirmed, that the Board of Education was not a "person" within the meaning of Section 1983, and then, in the second branch of the case, held that municipal officials are not "persons" when monetary relief is sought against them in their official capacity.

THE COURT: When you say "monetary relief is sought

against them in their official capacity," do you mean monetary relief to come out of the public treasury in some form?

MR. CHASE: That would be the effect of it, yes.

Turning first to the question of whether or not the Board of Education is a "person," we must note preliminarily that the question is a unitary one in terms of remedial purposes.

THE COURT: Just before you go on, in connection with brother Rehnquist's question: There's no finding here or no issue as to whether the individual members are "persons" for purposes of prospective relief?

MR. CHASE: That was not raised for—well, because that aspect of the case was moot, and no appeal was taken from that.

But as to the unitary question of the personhood of the Board of Education, the *City of Kenosha* v. *Bruno* teaches that the personhood is not determinable by reference to the relief sought. Under 1983, a person is a "person." And as to the Board's status in that regard, we would note that the Court is not here writing on a clean slate. There is a long line of precedent dealing with school segregation cases, a line of cases—lamented by some, I suppose; supported by most, but agreed by all—to have worked a fundamental change in the way this country educates its young.

The Court of Appeals rejected the importance of those cases on two grounds. One, the results reached as to jurisdiction in those cases were reached through inadvertence; and secondly, the individuals, members of the board, were named in those cases as well as board members. These reasons, we submit, are insufficient for rejecting this established line.

First, as to the fact that they were, as we concede in most of these cases, individual defendants as well as board members. We would note, though, that the Court has focused time and again on "the board," the defendant board, the respondent board. And Mr. Justice Powell, concurring in the second *Milliken* case last term, noted that in the line of questions commencing with ground, the principal defendant—I am quoting here—is usually the local board of education or school board. In—

THE COURT: Wasn't it to distinguish between a local board

and a state board?

MR. CHASE: Yes. And for purposes of that case it was relevant, but for the purpose of this case I think the important thing is that whether the state board or local board, it's the board that's the defendant; it's the entity that's doing the wrong.

THE COURT: Well, but, counsel, don't you have to take things in context when you're talking about a substantive right to relief, you may not be focusing on who are proper defendants, and vice versa? You know, I don't think you can take every word as written out of every opinion of this Court and say that it decides a question that the Court may not have been focusing on. And I thought from your earlier comment you probably agreed with that.

MR. CHASE: Oh, I do agree with it, Your Honor. And if we were talking about one or two cases or an accidental reference in an occasional case to a school board, I would not be presenting this argument. But we're dealing here with a line of cases which, as I mentioned, is fundamental in the jurisprudence and in the political history of this country. And its strange belief which this Court has imposed on itself in another context, the duty of determining whether subject matter jurisdiction exists in the lower courts, that this Court would then fail to appreciate that problem in cases of this magnitude.

Of course, it's always open to the Court to re-address a fundamental point of that nature. But we would add that Congress has additionally acted in reliance on those cases and has also spoken in terms of local educational agencies; thus Congress—and we cite the statutes in our brief and in the *amicus* brief—has allowed attorney's fees to be provided to prevailing parties where the defendant was a local educational agency. And the leading case interpreting that statute, the *Bradley* case, was a 1983 case in which the defendant was a school board.

There's also the statute providing financial assistance to "local educational agencies bearing the financial burden of a school desegregation order." So that where there is the established line and there is congressional reliance, there would appear to be really a rule that we have arrived at which remains

only to be announced.

THE COURT: Well, where a local financial—where a local board bears the burden of a school desegregation order and gets a grant from the Government, the order could be perfectly effective prospectively through individual school board members and, nonetheless, impose the burden of buying buses and that sort of thing on the school district, I would suppose. Isn't that language of Congress there perfectly reconcilable with that interpretation?

MR. CHASE: It is reconcilable, yes, but it is also reconcilable, and I think more so, given the language that Congress chose to use. They focused on the agency. It is reconcilable, I think more happily, with the point that appellants present here, Your Honor.

Of course, defendants would have this Court turn its back on that twenty years of decisional law and defendant argues principally that the logic of *Monroe* v. *Pape* requires a similar holding for these persons, these boards of education which, it says, "fulfill an important governmental role." Let us see how this would frustrate the statute, both its purposes and its language.

Nineteen-eighty-three is a statute which applies only where there is color of state law. It will almost always be the case, if not always, that a corporation or person acting under color of law is fulfilling an important governmental role. So that under defendants' view, when the statute applies, when you get into it you are also shunted out of it because you are really, by definition, fulfilling that important role.

Such a reading would, aside from being absurd and, I submit, impugning to Congress an intent to pass a meaningless statute in that context, such a reading would allow states, if they were of such a mind, to evade constitutional obligations by setting up corporations to undertake important governmental roles. And one thinks of *Smith* v. *Allwright* where, in another context, the Court said to the Democratic Party of Texas back in those days: You can't set up a jaybird society and tell us that's not the State of Texas operating the primaries. I think the case is relevant in spirit, if not in precise holding.

THE COURT: Mr. Chase.

MR. CHASE: Yes, sir?

THE COURT: To what extent is your position predicated on the view that the New York Board of Education is a separate entity from the City of New York?

MR. CHASE: Well, Your Honor, I think that that is an important ingredient about our case, because under the *Monroe* holding a city is simply not a person. And we don't think our case presents the Court with the necessity of reconsidering that holding. But we think that the record is so clear that the Board of Education is not an arm of the city, that that problem—

THE COURT: Does it have any power to levy taxes?

MR. CHASE: No, it does not.

THE COURT: Or to issue bonds?

MR. CHASE: No, it does not. But it does have the power to obtain funds from Federal, state, city and private sources.

THE COURT: They come from all three of those, don't they?

MR. CHASE: Well, four; private as well.

THE COURT: Yes.

MR. CHASE: Although the governmental are naturally the bulk of it.

But one thinks of the Court's opinion in *Mt. Health City* v. *Doyle*, where the question there was whether a school board was an arm of the state; and the fact, the mere fact that it got funds from the state there didn't make it an arm of the state any more than the fact that the Board of Education gets funds from the city makes it "an arm of the city." And we—

THE COURT: Well, is the Board of Education here what you would call a municipal corporation? Can sue, be sued; that sort of thing?

MR. CHASE: It's a corporation. And, like any corporation, can sue and be sued. It is not a municipal corporation in the sense that it (a) does not have power to administer within a geographic area and, perhaps more to the point, under New York law it is not so considered. The New York Constitution

defines very specifically "local government" as "a county, city, town or village"; it does not include it under decisional law. And there are similar provisions in the general municipal law, which are even more—

THE COURT: Well, it's not a private corporation.

MR. CHASE: It's not a private corporation.

THE COURT: It's not a municipal corporation. So what is it?

MR. CHASE: No, it isn't. Well, it's an entity that's in between. It's a—

THE COURT: What does the State of New York say it is?

MR. CHASE: A corporation chartered under the rules of the state, which is separate and distinct from the city, which has the capacity to sue and be sued, and has the responsibility to administer education—

THE COURT: And where will I find that?

MR. CHASE: —in the—excuse me, Your Honor?

THE COURT: Is that statute here some place in the record?

MR. CHASE: Well, it's both decisional law and statutory law, and it's set out in our brief.

THE COURT: I see.

MR. CHASE: Yes, Your Honor.

THE COURT: Does the Constitution of New York provide for boards of education as constitutional entities? This is true in my State of Virginia, for example.

MR. CHASE: No, the constitution provides that education is a power—that the control of education is a power reserved to the state, and excludes it, interestingly, on the constitutional point—it's excluded from the home rule provisions of the New York Constitution, which do define the sphere of influence of cities, and is a further indicia of the fact that it is not an arm of the city. But it's primarily in statutory law, Your Honor, that the Board is established as a separate entity. It's in the New

York education law.

Now, Your Honors, I had addressed the point as to how the defendants' position would frustrate the language of the statute, and let's take a look now at the purposes of the statute and how this argument fits in there. The purpose of Section 1983 is revealed in the title by which it is referred to in the statutes at large and in the debates: An act to enforce the provisions of the Fourteenth Amendment.

And I may say parenthetically that in *Monroe* the Court referred to it as the Ku Klux Act, which I think, frankly, while somewhat accurate, is a misnomer. The true purpose, the true title was an act to enforce the provisions of the Fourteenth Amendment. And it's been agreed that that purpose was its primary purpose. Even Justice Frankfurter, in his dissent in *Monroe*, said that the purpose of Section 1 of this Act of 1871 was to protect against constitutional violations through the authority enhanced by the majesty and dignity of the state. Just as here we have this corporation set up by the board, given some powers—by the state—and then it, in this case, has violated people's rights. It's the very situation in which the statute, Section 1, was intended to apply. And when the legislature, when Congress used the words "all persons are liable," it clearly intended to include such corporations.

We know this because, first, the common understanding of the term "corporation"—of "persons" in a legal sense included corporations. This Court said as much in, as early as 1838. It was just an axiom, unless someone tells us otherwise, the term "persons" in a statute means corporations. And beyond that we have the Dictionary Act, adopted by the same Congress of 1871, which said in it that: You may take it that we mean corporations as well as corporeal persons when we use the term "person."

Now, counsel is quite aware that the Dictionary Act was rejected as precedent as binding in the *Monroe* case, because in *Monroe* the Court found a special intent to treat municipalities differently from other persons; and we submit that no such finding can be made with regard to this kind of corporation. And let me explain why this is so.

First, the Sherman amendment in terms would have imposed liability on cities for acts of violence done within their

borders, in terms, excuse me, "on the county, city or parish," quote, unquote, in which the riotous acts occurred. There was no discussion of corporations such as the Board of Education which exists for a particular purpose, and such discussion would have been absurd. No one would have thought to impose liability on a board of education, if they had thought of it, because riotous acts occurred in the school district.

But I think even more important boards of education were creatures that were only barely gaining their own under American law at the time of these debates. Certainly they were never mentioned during the debates. There is no indication that they were before the Congress. We just don't know what Congress would have thought about its powers to impose liabilities on these creatures of law, even if we do know what Congress thought about its power vis-à-vis the municipalities. So that a holding which would extend the legislative history reading in *Monroe*, yet further to include these entities, would really rest, if I may say so, on the legislative history of imagination, of surmise, rather than the legislative history of scholarship.

An additional point on the relevance of the Sherman amendment is that we must recall that the Sherman amendment was an additional section to the Act of 1871. It would have been tacked on the end—

MR. CHIEF JUSTICE BURGER: We'll resume there at one o'clock, counsel.

MR. CHASE: Thank you, Your Honor.

[Whereupon, at 12:00 noon, the Court was recessed, to reconvene at 1:00 p.m., the same day.]

AFTERNOON SESSION

MR. CHIEF JUSTICE BURGER: Counsel, you may continue.

ORAL ARGUMENT OF OSCAR G. CHASE, ESQ., ON BEHALF OF PETITIONERS—Resumed

MR. CHASE: Thank you, Your Honor.

Your Honor, at this point I would like to turn, with the Court's permission, to the second aspect of our position: that the defendants can be required, under Section 1983—that is, the official defendants can be required to use their official powers to make whole the plaintiffs. That is, they can be required, in the words of this Court in *Griffin* v. *Prince Edward County*, to use the power that is theirs to remedy the wrongs that they have done.

Now, let me begin by saying that here, unlike plaintiffs' claim against the school board, it is undeniable that an order to the defendant mayor in his official capacity will have some impact on the municipality, and thus the remit in *Monroe* is, at least arguably, relevant. But we contend it is not determinative, because it is beyond dispute that the defendants are, in their official capacity, subject to 1983, for injunctive and other purposes. And it was held in *Kenosha* that the quality of personhood does not depend on the type of relief sought.

THE COURT: If there is no money available—let us assume hypothetically—for some legal reasons, could others be compelled to enact legislation or make appropriations or raise the money by borrowing it in order to pay? Or, if they have borrowing power, could they be compelled to exercise that borrowing power?

MR. CHASE: You mean the official defendants?

THE COURT: Yes.

MR. CHASE: No, Your Honor, I don't think so, because, under state law which at least might apply to that end of the case, the liability of the defendants is limited to such amounts as are in the treasury, even in their official capacities. That's in

General Municipal Law, Section 70 of the New York Code. So that I don't think—I think the situation would there be, as in any case in which the defendant turns out to be judgment-proof, the plaintiff gets a judgment but he can't enforce it. Still plaintiffs would prefer to get the judgment and worry about enforcing it later.

THE COURT: But don't you think the courts have to think about that?

MR. CHASE: No, Your Honor, I don't, because I think that a rule of subject matter jurisdiction or a rule of remedial scope should not turn on the likelihood that defendants either can or will pay the judgment. I think that those are very separate.

THE COURT: Well, that's casting it in somewhat different terms from my inquiry. If you were talking about two private parties, that certainly would be true, the courts aren't concerned with it.

MR. CHASE: Yes.

THE COURT: But we're talking about public money here now.

MR. CHASE: Yes. And I think that the general principle is the same. I don't think that the Court should erect special rules to protect public entities unless Congress has done so, where they are otherwise subject to the terms of the statute.

THE COURT: Would the individual defendants in the capacity you're talking about have the same good-faith reasonable type of defense that they would have to a damages action against them personally in this capacity?

MR. CHASE: Well, Your Honor, that—I believe not. Because of the special reasons that run, that the Court mentioned and so forth; but I think that that is a question that is not before the Court. It's a difficult question, I concede. It's one that, had the defendants properly raised—or perhaps may even have a chance to raise below if this Court reverses—we would appreciate an opportunity to convince the lower court and maybe ultimately this Court on.

MR. CHIEF JUSTICE BURGER: I should say to counsel in this case, by the way, that Mr. Justice Brennan is unavoidably absent, but has heard part of the arguments and will participate in the case on the basis of the tape recordings of the oral arguments and, of course, all the records.

MR. CHASE: We understand, Your Honor.

I was about to say that a logically consistent system of 1983 jurisprudence would require—taking into account the *Kenosha* case and the other cases that we cite in our brief, in which the Court has affirmed lower court holdings—ordering defendants in their official capacity to make restitution to plaintiffs—that those cases require a similar holding here.

And I think it's fair to say that this is an issue that cannot be decided in either direction without some infringement on *stare decisis* principles. The Court is caught between conflicting lines of cases, and I suggest that plaintiffs' position is the best way to resolve them, because it looks back to the fundamental purpose of Section 1983: the purpose of protecting constitutional rights and enforcing the Fourteenth Amendment. Anything which would be found in the legislative history that might be contrariwise, or was in the context of the Sherman amendment, which was really not terribly relevant to Section 1 at all.

And insofar as the *Monroe* case does stand against the position that plaintiffs take, we would make at least three points. In *Monroe*, the city was the defendant. So that just in the narrow *stare decisis* the case is implicable. Second and more broadly, plaintiffs do not here seek to render *Monroe* meaningless. We are not saying that the plaintiffs in *Monroe* could have sued Mayor Daley of Chicago and obtained a judgment because some police officer beat them up. Mayor Daley, in that case, did not wrongfully exercise his official powers.

The analogy is very close to *Rizzo* v. *Goode*, when then Police Commissioner Rizzo could not be held liable, the Court thought, because some of his officers had run amuck, allegedly. Nor could, under our view, the plaintiff in *Monroe* sue the police officer, because the—in his official capacity—because the police officer, in that capacity, has no authority to dispense public funds to make whole injured plaintiffs. So that the integrity of *Monroe* is not necessarily at issue here. And I would

like, with that background, to—

THE COURT: In other words, as I understand it, your argument is this phase of the case is not at all dependent upon a *respondeat superior* theory?

MR. CHASE: No, Your Honor. We believe that—

THE COURT: Not a bit?

MR. CHASE: Not at all. The defendants themselves acted wrongfully, so we allege.

THE COURT: Yes.

THE COURT: Well, what if the school board member says: I've done all I can to give you back pay, but I don't have the money; and then: I get my money from the city; then—is he then like a police officer?

MR. CHASE: Well, if the Federal district judge orders the school board or its members to make restitution and they, in the normal course of their business, as they would, issue a directive or a voucher to the holder of their funds, the city comptroller, that is all they could be reasonably expected to do, yes. And I would assume, in the normal course of events, that, as under state law, the comptroller is required to pay money on vouchers lawfully issued by the board, and he would pay it.

THE COURT: Would you have a stronger case if you came from somewhere else than New York, do you think?

MR. CHASE: If we came—oh, because of New York's financial embarrassments.

[Laughter]

MR. CHASE: Well, Your Honor, I like to think, as I said to the Chief Justice, that that will not be relevant to making a ruling that's going to be applicable for those other cities that may be better managed or luckier, possibly. I would further urge that our position—

THE COURT: Would you be here making the same claim if there had been no claim for equitable relief other than this so-

called restitutionary claim?

MR. CHASE: If there had never been an action for injunction?

THE COURT: Yes.

MR. CHASE: Well, that raises the question, really, I think, if I may, of whether or not this restitution stands in law or equity, and I'm not sure that this is the kind of issue that the difference is important. I think this is—

THE COURT: So you—why don't you just say that: I'm suing the school board or its members, I can sue them in law and get money even if the city has to pay it? To that extent, *Monroe* just doesn't reach it. That is really your position, isn't it?

MR. CHASE: That is really our position, yes, sir. I think we should state that.

In this case I should say that the case does arise in the context of an injunctive action, and that it's traditional that restitution is considered an incident of equity. But after the abolition of law and equity distinction, I'm not sure how terribly important it is.

I think the power is there in the district court, because if the power is not there, using the defendants' approach, a defendant official would be subject to Section 1983 because he has official powers. And then when the court seeks to order him to exercise those official powers, it would be the very same powers that he would use to say: Oh, no, you can't do that to me, because that would be the same as having an impact on the entity that I serve. So, here again, it would be a way of making the statute, if you will, consume itself. And I don't think that's what Congress had in mind.

Now, the lower court was impressed by this Eleventh Amendment analogy that it found, and I would like to address myself to that. The Eleventh Amendment, of course, is a prohibition. It says that there shall be no suits by a citizen against a state. And I have great difficulty in analogizing that provision, which is wholly negative, to a provision which had as its prime purpose an expansive view of Federal power to protect constitutional rights.

Secondly, I find it difficult to believe that the Congress

that enacted Section 1983 had in its mind this Eleventh Amendment construct, when *Ex Parte Young* was not even decided until about 1908; and this is a Congress that could never, I don't think, have contemplated the unusual chain of events that led to *Ex Parte Young*, which has resolved those competing considerations there relevant. If there is an intent to insulate municipalities, it can be found in only one place, and that is in the rejection of the so-called Sherman amendment that would have made cities vicariously liable for acts that it didn't commit, that were committed within its borders.

And in *Monroe*, of course, the Court read the rejection of the Sherman amendment to mean that Congress had decided it had no power to impose "liability" on cities. But, of course, that's different than saying that the Congress thought that it had to insulate the cities from even the ancillary effect of orders against those whom it—or concede it did have power to effect.

Secondly, we think that the Court in *Monroe* read the legislative history rather too broadly. In the very language that Mr. Justice Douglas quoted in *Monroe*, he quoted Representative Poland, who was a Reconstruction Republican, believed four-square in the Fourteenth Amendment, but said, in this one speech that Mr. Justice Douglas quoted, that: We don't have the power to impose, and I quote, "obligations on municipalities."

And we think that the correct reading of that legislative history was something like this. Even the Reconstruction Republicans recognized that in 1871 there was no power to say to a city: You shall have a police force, you shall police what goes on in your neighborhood, and so forth. The states decided what the obligations of the cities were. That being the case, they said: How can we in good faith, or even constitutionally, tell them you're liable for not doing that which we don't have the power to tell you to do in the first place? And I don't have the time to read from the record, or from the briefs, but I think that Your Honors will find that the key Republicans who were in support of this basic approach of Section 1983 did have difficulty, but only on that score. They believed they had the power to impose liability, but not obligations, on municipalities.

And so we find that the Eleventh Amendment analogy is simply not supported by reference to the record. Congressmen

like Congressman Kerr, who was against everything they did—he was a Democrat who thought the Fourteenth Amendment did not give the powers that the Republicans thought. I don't think the Court should look to his quotes and use them to interpret a law that he was against right from A to Z. So we think that the legislative history does not support this special intent to protect municipalities.

And I will, if Your Honor please, reserve the rest of my time.

MR. CHIEF JUSTICE BURGER: Your time has expired now, counsel.

MR. CHASE: Oh, okay.

MR. CHIEF JUSTICE BURGER: Mr. Sheridan.

ORAL ARGUMENT OF L. KEVIN SHERIDAN, ESQ., ON BEHALF OF RESPONDENTS

MR. SHERIDAN: Mr. Chief Justice, and may it please the Court:

In answer to questions concerning the status of the defendant Board of Education, the New York law indicates that this is a hybrid entity. The state constitution provides that every child shall be guaranteed a free public education. There's provision in the state constitution for a state board of regents and a commissioner of education. Certain state cases indicate that for pedagogical purposes, at the very least, boards of education are arms of the state, coming perilously close to an Eleventh Amendment defense being available, we can't urge that in light of this Court's *Mt. Health City* decision.

Other cases indicate that, based upon its city funding, its relationship under the city charter, with the city, under the education law with respect to appointment of members of boards of education, that it is a city agency. I don't think that's dispositive of a determination in this case, Your Honors; there can be absolutely no dispute. It performs a critical, expensive, important governmental function. This Court, in *National League of Cities* v. *Usery*, treated boards of education and public hospital systems as just as clearly

governmental entities as what we generally think of as municipal corporations.

To answer Mr. Justice Marshall's question, or to attempt to answer it: Is it a municipal corporation? What do you call it? I think we would fairly characterize it as a quasi-municipal corporation. I think McQuillin, on Municipal Corporations, would probably discuss it that way. There are a host of arrangements whereby local boards of education are established. Right now, the mayor of the City of New York would like to have it a clearly city agency with him appointing a local chancellor. If that would affect the outcome of this case, because we change the nature of the appointment, and what's the power—

THE COURT: Counsel—

MR. SHERIDAN: Yes, Your Honor?

THE COURT: —this morning, I don't know if you sat here during the argument on the *Memphis* case—

MR. SHERIDAN: I did, Your Honor.

THE COURT: I gather that all parties there conceded that the Memphis utility was simply a division of the city—

MR. SHERIDAN: Under the city charter, apparently it's set up that way.

THE COURT: —though the mayor ran that like he did other divisions of the city. I take it that isn't the case with the New York school board?

MR. SHERIDAN: The mayor appoints two members of the board, I believe, Your Honor, and the bar presidents, I think each appoints one member. It's in the brief. I think that's the way it is constituted. Then they have certain statutory authority under the New York State education law, that is vested with government and management of the local school districts.

THE COURT: But they do not have, themselves, have taxing authority—

MR. SHERIDAN: No, Your Honor. Many—

THE COURT: —or the authority to borrow money.

MR. SHERIDAN: Yes, Your Honor, which, in this case—

THE COURT: Issue bonds, do they?

MR. SHERIDAN: They do not issue bonds.

THE COURT: No, I didn't think so.

MR. SHERIDAN: They cannot borrow independently. They can be given funds by the state or Federal Government or from private funds, as counsel noted. I think that brings them even closer to a municipality. I frankly don't believe it should be dispositive. I don't live in the City of New York. I live in a suburb, with a local board of education that taxes and can borrow.

THE COURT: So then it varies from—

MR. SHERIDAN: It does, throughout—

THE COURT: —subdivision to subdivision within the State of New York?

MR. SHERIDAN: Within the State of New York? Surely, Your Honor. In fact, in many smaller localities, probably the most expensive governmental function is provision of education.

I am not trying to argue against myself. Those situations are mainly for certain purposes. They are more like a separate municipality; here it's mixed. One, I don't think the Court should be engaged in the type of logic shopping that—so that you're going to have to have: How many inches on the head of a pin? If you want to go case-by-case in deciding, and it will have to come to this Court for final resolution, is this Board of Education so like—

THE COURT: What do the statutes of New York say that the Board of Education of the City of New York is?

MR. SHERIDAN: It is a—

THE COURT: What do the statutes say?

MR. SHERIDAN: My recollection on it is that it's a sepa-

rate—

THE COURT: I'm always troubled with a "recollection."

MR. SHERIDAN: Okay. Then the answer to Your Honor's question—

THE COURT: I think it's very important what the state considers this to be. What kind of an animal is this?

MR. SHERIDAN: Well, looking not only to the state statutes, but the court decisions, Your Honor, the New York Court of Appeals has quite clearly said that this is an "arm of the state," not subject to municipal home rule provisions. It is a separate body politic incorporate that may sue and be sued in its own name.

THE COURT: And the statute is silent?

MR. SHERIDAN: The statute merely establishes the Board of Education, and vests in it—

THE COURT: Is it in these records, the statute?

MR. SHERIDAN: I don't know, Your Honor. If you'd wait a second—

THE COURT: That's all right, I can get it.

MR. SHERIDAN: —I will cite it to the Court.

THE COURT: Let me follow that up if I may, Mr. Sheridan. Supposing that the—this Court were to hold, in accordance with your opponents' contention, that the individual defendant could be required to pay public moneys to redress past wrongs. What would be the source of those public moneys?

MR. SHERIDAN: Your Honor, in the case of an action against the Board of Education—

THE COURT: Well, that's what we're talking about here.

MR. SHERIDAN: Well, this is mixed. The board, if sued as an entity, a party defendant. We have other defendants here who are public officials who solely, in their official capacity—they have no independent power to order the Comptroller of

the City of New York to draw a check unless there's a judgment, which they would forward to the Comptroller.

THE COURT: And then if there were—but if there were a judgment, they would forward it to the Comptroller of the City of New York?

MR. SHERIDAN: I would hope the Comptroller would pay it if that were the situation.

THE COURT: What funds would he pay it out of?

MR. SHERIDAN: General city funds. A fund actually for claims and judgments. These would be public moneys, there's no question about that, and tax moneys.

Your Honors, I'm not quite sure I understand my opponents' argument. At one point he says *Monroe* versus *Pape* is not in this case, it doesn't have to be dispositive here. The next moment he's arguing it was incorrectly decided. I'd like to speak briefly on that point.

Justice Douglas, in *Monroe* versus *Pape*, Justice Marshall in *Moor* versus *County of Alameda*, Justice Rehnquist in *City of Kenosha* and, I might add, Mr. Justice Brennan in his dissent in *Aldinger* versus *Howard*; all discussed the legislative history of what is now 1983. Uniformly, no dissent on this issue; not intended to reach local governmental subdivisions.

Congress in 1961, I believe it was, has acquiesced in this view. There is presently pending in both the Senate and the House a measure—it's Senate 35, introduced by Senator Mathias in the Senate—proposing to overrule that decision as well as *Imbler* versus *Pachtman* and various other cases. Congress has been aware of the interpretation placed upon 1983 by this Court. It has acquiesced in this interpretation, which, to most lawyers, meant you couldn't get a money judgment against a municipality. When Congress was dissatisfied with the *Aleyeska Pipeline* decision, the next year it changed the law, at least on civil rights action.

I'd suggest that these considerations indicate that this matter is appropriately to be addressed by Congress, which has acquiesced for sixteen years in this line of decisions. In a sense, Your Honors have engrafted onto the statute an important judicial gloss that takes on independent meaning. But if we're go-

ing to re-examine the intent of the Congress in 1871, I would suggest that that Congress was not only not aware of the need for devising a fiction, such as *Ex Parte Young* represents, but it never would have seen any need to. This was a statute directed at nightriders, the Ku Klux Klan and state officials who would not accord justice to people injured.

Today—and I take no issue with this—it guarantees to public employees their job security. It guarantees to welfare recipients the right to a pre-termination hearing. It may even provide for notice to cut off gas and electric companies. It's come a long, long way. And sometimes we've had boards of education or cities named defendants in a 1983 action.

THE COURT: And it remained moribund for a long time, too, didn't it?

MR. SHERIDAN: It certainly did, Your Honor, and I come from a city where the tradition of liberalism is fairly widespread, and I'm not going to take issue with the development of this law.

In one sense this has become a great charter of liberties, analogous to the Sherman Act—not the Sherman Amendment, the Sherman Act—on the economic side. I appreciate that. Nobody wants to roll the clock back. But let's look at the context in which relief has been accorded, and let's look at the relief accorded. Typically, injunctive declaratory relief. And, incidentally, maybe damages; I know that.

But before this Court in the *LaFleur* case, *City of Cleveland Board of Education*, it was primarily—primarily—should they get an order striking down mandatory maternity leave? The Court noted in the opinion that appropriate damages or injunctive relief be granted, back pay reinstated. As far as I'm aware, this is the first case that squarely poses to this Court the issue of how this statute should be construed, when what is really at issue is damages. And this is an equitable restitution, it's not some sort of equitable decree, this is just like the money judgment you get and you can sell the property on the courthouse steps.

THE COURT: And you're saying, I take it, that it wouldn't make any difference if this school board were—had its own sources of funds, had its own taxing powers?

MR. SHERIDAN: Your Honor, I can't predict the outcome of this case—

THE COURT: Well, I know, but you're making that argument, aren't you?

MR. SHERIDAN: I think to the extent we're going to engage in formalistic-type distinctions, then my case is closer to a municipality than the more independent school district. I think I've got an *a fortiori* case. I'd suggest it should be decided more broadly, and that—

THE COURT: What if it were to be held that there was jurisdiction to give a judgment against the school board member as a member, but all the judgment would require him to do is to send the voucher in to the Comptroller of the city, and that the judgment didn't require the Comptroller to pay it; would that satisfy your view?

MR. SHERIDAN: Your Honor, this is so unknown to me. I'm asked to predict what the Comptroller will do. He may send it right back to that official—

THE COURT: I'm not asking you to predict what the Comptroller would do. I'm asking, if the Court expressly said that the judgment doesn't run against the Comptroller.

MR. SHERIDAN: Okay. If it doesn't run against the corporate entity, it runs against the individual sued, solely in his official capacity.

THE COURT: Yes.

MR. SHERIDAN: I am at a loss to know the authority for the Comptroller to pay that judgment.

THE COURT: Yes.

MR. SHERIDAN: He has—

THE COURT: So my question is: Would that satisfy your worries?

MR. SHERIDAN: All it does is enhance my worries, Your Honor. I don't know what the Comptroller would do. I don't

know what the district court would say were the remedies of the plaintiffs in this context. It is so unorthodox, what these people propose. I mean, if you order the Chancellor of the Board of Education to integrate schools, to bus, and if he doesn't do it your remedy is clear: contempt. If he does certain other things, and there's no guarantee that the city is going to pay his contempt judgment; maybe there's an indemnity clause statute, there's no guarantee. If he's sued in his individual capacity because he unconstitutionally dismissed a child from school, and there's a damage aware; absent an indemnity statute which this Court has held irrelevant to the determination of this issue in the *Moor* case—

THE COURT: Well, of course, the city—neither the city nor the Comptroller is a party to this case.

MR. SHERIDAN: They are the real party in interest, Your Honor. They really are. We all know that.

THE COURT: Do you think that if the judgment wasn't paid, that if the voucher wasn't paid, that the Comptroller could be held in contempt?

MR. SHERIDAN: I don't know, Your Honor. I don't know if the Comptroller here is a defendant. They don't—they don't have the Comptroller.

THE COURT: Before you leave this hypothetical, Justice White's hypothetical—I took it that way—does that have some elements of an advisory opinion of the Court, to say this is what ought to be done, that we expressly say that the Comptroller doesn't have to pay any attention to it? And individual defendants do not have to respond in a money judgment?

MR. SHERIDAN: Your Honor, if the Court is going to advise the parties that a judgment can be entered that the parties don't have to pay any attention to, then I think that that judgment is wrong. It doesn't make any sense to—

THE COURT: Well, does it have some elements of advisory opinion of the Court? Or how would you characterize it? There's not anything wrong as you see it?

THE COURT: And as the Chief Justice sees it.

[Laughter]

MR. SHERIDAN: It might be improper as an advisory opinion. Maybe we should be ignorant as to what to do, and then litigate. That issue, frankly, I don't think is before the Court. I think it impinges upon the decisional process, how much uncertainty you want to create.

THE COURT: Well, your friend also counseled us not to be concerned about whether the Court's judgment, if it was for him, would ever be acknowledged or have any response.

MR. SHERIDAN: Your Honor, very respectfully, I disagree with my friend's advice to the Court. I think it's quite important that you think out, as I'm sure you will, the implications of what's being decided in this case. It really gets down to: Have we taken Section 1983 far, far beyond anything its draftsmen, the Congress that enacted it, ever contemplated?

THE COURT: Mr. Sheridan, may I ask a question about the significance of where the—how the judgment is paid in a case of this kind: Your opponent says we shouldn't be concerned with that, and I guess your side of the case thinks perhaps we should.

Supposing we had a case on its facts, like *Monroe* v. *Pape*, where police officers were guilty of misconduct, and the police chief and so forth, and there were a judgment for damages against the New York police officers; would that judgment be paid from municipal funds?

MR. SHERIDAN: It would, Your Honor, only pursuant to a local indemnity statute, and in not all cases. We pick and choose, frankly, the cases in which we will indemnify.

THE COURT: But in deciding whether or not to impose liability, should that fact be considered by the trial court in the 1983 action? And, if not in a police officer case, why should it be so in a school board case?

MR. SHERIDAN: Your Honor, I'm not sure I fully comprehend the point of this line of questioning, but I do recall that in Mr. Justice Marshall's *Moor* versus *County of Alameda* opinion, it was mentioned, the fact that there was a local—

state statute indemnifying the officials sued there. And it was urged there that this should affect the outcome of that case.

The Court specifically rejected that line of reasoning. But what I think is critical here is not whether there's indemnity or what local officials are going to do. I raise the question of: Do you have a judgment that makes practical sense to enter? Because I see it as a difficulty, another reason for the Court not extending 1983 in the fashion *Moor* sought to extend it.

The more fundamental question, Your Honor, is one really of both construction of the statute, which this Court, in one sense, in one line of cases, has consistently indicated should be limited in its enforcement to the way Congress enacted it and intended it to be. Let me be—

THE COURT: Mr. Sheridan, aren't you wrong about policemen suits in New York? That, as a matter of fact, they are settled out of court by your office.

MR. SHERIDAN: Not uniformly, Your Honor. Not uniformly at all.

THE COURT: But pretty uniformly.

MR. SHERIDAN: Your Honor, plaintiffs bar has as much interest in settling those cases as we do.

THE COURT: But aren't most of them settled in your office?

MR. SHERIDAN: I don't know the number that we have, Your Honor. I know some are litigated. And they get expensive, sometimes. I don't think that's really the point here.

One point I would like to make: As I understand petitioners' argument, they really want to take 1983 liability, impose it on the municipality and other governmental entities in a situation which would operate even more harshly than the aborted Sherman amendment would have acted. It's notable that there is absolutely no claim here that the official conduct complained of would be actionable as against the individuals involved in their individual capacity. This is sort of the penultimate strict liability: You were wrong when you had a mandatory maternity leave policy, for whatever good motives, concern for the mother, the child, the schoolchildren, you were wrong. We now have a class action based upon the enlightenment furnish-

ed by this Court that you shouldn't have such policies, however well intended.

It's not simply *respondeat superior* liability, you didn't pick your employees. More precisely, it's government qua government, in your legislative and executive and administrative capacity, you are wrong. So now you're going to pay damages. And let's not kid about it, you're going to pay damages. That's what they want. That's what they asked for in their amended complaint. They don't ask for equitable restitution. Now you're going to pay for that. A hundred and six years after Congress acted, without one thought in its mind that it was doing anything like this.

Undoubtedly, that Congress also did not realize that it was giving job security to tenured public employees, welfare recipients, any number of a host of other instances, where I take absolutely no issue with the actions of this Court, no—

THE COURT: Well, it's the changes in the construction of the Fourteenth Amendment, not because of changes in the construction of 1983.

MR. SHERIDAN: The basis for relief, Your Honor, is 1983. To date this Court has not said they sue directly under the Fourteenth Amendment.

THE COURT: Well, certainly if I read the cases that I think you're referring to about job security and those sort of things, they would not have been afforded by this Court in the absence of some construction of the Fourteenth Amendment. 1983 just says if you have a violation of the Fourteenth Amendment.

THE COURT: Right.

MR. SHERIDAN: I appreciate that, Your Honor. It's expanding Fourteenth Amendment notions what due process and equal protection guarantee.

THE COURT: But 1983 also says: or the violations of the laws of the United States. And there are new statutes all the time.

MR. SHERIDAN: It may have been a reference to the earlier Reconstruction Act, making it a violation, criminal violation. So now you have, in addition have a civil remedy for this type

of action.

Your Honors, the same need for a fiction—and this Court itself has characterized *Ex Parte Young* as devising a fictional remedy. The same need for a fiction is called for here. And why? I'll be blunt. When it comes to damages, and damage actions, 1983 is about as blunderbuss an instrument as there exists. It is not tailored to the situation. It's not like Title VII, where you have procedures to go through and limits the discretion of the court with respect to back pay. Here, you establish liability, and they say, *ipso facto*, we get the judgment. You show the liability and the damages, and that's it. The case is over.

In a line of cases involving officials, and whatever immunity they enjoy for their official action, this Court has placed a gloss on 1983 by reference to common law immunity. I'm not asking for a common law immunity to be found somewhere. I think my job is easy, Your Honors. I'm saying here, we know what the intent of the Congress was. No such judgments allowed against municipalities or local subdivisions of states. We don't have to look to Harper and James on the Law of Torts.

Your Honors, if the plaintiffs, petitioners here, prevail in this case, they will have opened up a major area for litigation which will be ruinously expensive for municipalities, boards of education. There is no action taken by Government officials today that probably ten, fifteen years ago or later, will not be subject to constitutional litigation. And we may lose. The best of good faith, under this theory, is irrelevant.

Now, under these circumstances, Your Honors, if these plaintiffs in their class action, certified class action—I don't know how many were involved in this case, it could conceivably be tens of millions—where they are not without remedies, they can seek a preliminary injunction in the district court, they can go to the state court and get relief. There is a balance that must be struck.

I think it's a fairly obvious balance. Without being slavish to the intent of an 1871 Congress, the Court can consider, as it has in earlier cases, what that Congress intended and give effect to it; not just because of the strictures about statutory construction in judicial legislation, that doesn't always decide cases. I'd suggest that when you study and consider balance,

the considerations, the equities here, it just doesn't make sense to allow a blunderbuss instrument such as this to be made available. We're not talking about equitable restitution; we're really talking about damages, and we're talking about damages paid to classes of people. Lord knows how large the classes will be, what the amounts in question will be. And if the deeper pocket theory of tort recovery is to operate, real politics of tort analysis, I'd add also: The pocket isn't deep, it's broad. It's not deep.

It's not irrelevant that the cities are in trouble, that they're having trouble providing essential services. It's not irrelevant that the city can practically go into bankruptcy, or that they are not judgment-proof. That's not irrelevant.

I'm saying, please think seriously about imposing additional large substantial burden on governmental entities that are already strapped, overburdened, finding it difficult to function. We laid off 5,000 policemen in New York City, 11,000 teachers. We laid off lawyers. We laid off legal secretaries, law secretaries to judges. Other cities are in the same boat. Small municipalities. Small school systems. They could be literally bankrupted.

THE COURT: Did you lay off any judges?

[Laughter]

MR. SHERIDAN: There's some complaint about the mayor not appointing some until the election was over, Your Honor. Judges enjoy a rare status in New York.

THE COURT: Good behavior.

MR. SHERIDAN: It goes beyond even good behavior.

Your Honors, I think you have my point. I thank you for your indulgence.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Sheridan.

Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:43 o'clock p.m., the case in the above-entitled matter was submitted.]