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IN THE SUPREME COURT OF THE UNITED STATES

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CITY OF NEWPORT ET AL.,	:	
	:	
Petitioners,	:	
	:	No. 80-396
v.	:	
	:	
FACT CONCERTS, INC. AND MARVIN	:	
LERMAN	:	
-----	:	

Washington, D. C.

Tuesday, March 31, 1981

The above-mentioned matter came on for oral argument before the Supreme Court of the United States at 1:10 o'clock p.m.

APPEARANCES:

GUY J. WELLS, ESQ., Gunning, LaFazia & Gnys, Inc., 410 Turks Head Building, Providence, Rhode Island 02903; on behalf of the Petitioners.

LEONARD DECOF, ESQ., Decof & Grimm, One Smith Hill, Providence, Rhode Island 02903; on behalf of the Respondents.

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C O N T E N T S

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GUY J. WELLS, ESQ., on behalf of the Petitioners	3
LEONARD DECOF, ESQ., on behalf of the Respondents	20

1 deterring the guilty.

2 Now, going to the historic background of 1983, it
3 is perfectly clear that punitive damage awards against municipi-
4 palities were wholly beyond the ken of the 42nd Congress.
5 Up until 1871 no court in this country, with one exception
6 -- and that exception was clearly remedied very shortly
7 thereafter -- no court of the United States had ever upheld
8 a punitive damage award against a municipality. And the
9 lawyer members of the 42nd Congress couldn't have helped but
10 know that. There was a plethora of authority on that subject
11 at that time.

12 As a matter of fact, none of the courts of England
13 had ever upheld a punitive damages award against a municipal-
14 ity. If one wants to look at legislative history as this
15 Court has done in considering the question of compensatory
16 awards against municipalities, one only has to look at the
17 remarks of Congressman Kerr, Congressman Butler, and Con-
18 gressman Poland. Now, admittedly, those remarks were directed
19 to debate on the Sherman Amendment, but we must remember that
20 the Sherman Amendment was aimed directly at municipalities,
21 the Sherman Act which passed the Senate and died in the
22 House. And each of those gentlemen speaking to the question
23 of the impact of the Sherman Act indicated that it was in-
24 tended, and they believed it was intended, to be entirely
25 remedial. I believe Representative Blair said, it is not

1 punitive or penal but remedial only. And I believe that one
2 can read that as representing the thinking of even some of the
3 most radical members of the 42nd Congress. I suggest that
4 a punitive award would have been totally abhorrent.

5 QUESTION: You wouldn't suggest that punitive damages
6 would have been improper in just the ordinary case. It's
7 just against the municipalities?

8 MR. WELLS: Well, I am limited here to talking about
9 because of the --

10 QUESTION: Well, I know, but is your argument that
11 no punitive damages against municipalities because no punitive
12 damages against anyone?

13 MR. WELLS: No, no, sir. I am suggesting here that
14 I am talking only about punitive damages against municipali-
15 ties. I recognize that this Court --

16 QUESTION: The legislative history you're citing
17 goes only to, or the case law that you're citing goes only
18 to municipalities?

19 MR. WELLS: It does, sir, yes.

20 QUESTION: And these Congressmen whose views you
21 have cited were proponents of the Sherman Amendment?

22 MR. WELLS: I believe Representative Butler was.
23 I think perhaps Representative Kerr was an opponent.
24 But it's interesting that they were in complete agreement with
25 respect to the import of that Act. And of course the Sherman

1 Act was a precursor of 1983. Now, the reasons why I think
2 that a punitive award against the city was abhorrent to
3 Congress in 1871, the reasons for that are as compelling today
4 as they were then; even perhaps more compelling. Obviously,
5 an award of punitive damages has an immeasurable impact upon
6 the financial structure of a city and today we have seen,
7 like, for instance, the examples of New York, Cleveland,
8 Boston; we know about them simply because they are matters of
9 national interest and we read about them all the time; but I
10 suggest that they are multiplied a thousandfold in smaller
11 municipalities throughout this country. And one only has to
12 read the briefs, particularly of the Attorney General and
13 the briefs of the National Institute of Municipal Law Officers,
14 to understand the real menace or the real sword of Damocles
15 that is hanging over the heads of our cities and towns.

16 QUESTION: I suppose you'd make an exception of
17 those cities and towns that happen to like rock concerts?

18 MR. WELLS: Well, you see, perhaps that is so. If
19 they like them I guess they can take their chances. In this
20 case Newport attempted not to take its chances, but beyond
21 that the scope of 1983 is so broad and I'm sure this Court is
22 aware that today 1983 cases are multiplying like rabbits.

23 QUESTION: But you say that the issue is whether
24 punitive damages would ever be allowed against a municipality?

25 MR. WELLS: That's true, sir.

1 QUESTION: And that even if there's a deliberate
2 denial of First Amendment rights or malice or what have you,
3 the normal underpinnings of punitive damages, if they're all
4 there, nevertheless, no damages like that against a munici-
5 pality?

6 MR. WELLS: Yes, I say that, sir. And I say that --

7 QUESTION: And furthermore, Mr. Wells, I gather
8 you say that -- I guess you've settled that the 1983 liability
9 of a municipality requires the plaintiff to prove that it
10 is a matter of municipal policy?

11 MR. WELLS: That's true, sir.

12 QUESTION: Not just accident, but affirmative poli-
13 cy: the municipality has violated the federal constitu-
14 tional statutory rights of the plaintiff, on purpose, done it
15 on purpose.

16 MR. WELLS: Yes, sir.

17 QUESTION: And notwithstanding all that, you say,
18 no punitive damages?

19 MR. WELLS: No punitive damages against the munici-
20 pality. And I say that because what you are doing --

21 QUESTION: Of course, the municipality has no
22 immunity defense either.

23 MR. WELLS: That's quite true.

24 QUESTION: After City of Independence.

25 MR. WELLS: That's quite true, sir.

1 QUESTION: And the holding that my brother Brennan
2 referred to means you have to prove all of that before you can
3 even get compensatory damages, doesn't it?

4 MR. WELLS: Yes, sir. But I suggest that the rea-
5 son municipalities ought to be immune from an award of punitive
6 damages is that it is clear that the function of punitive
7 damages is to punish someone, and to make an award of punitive
8 damages against a municipality does not punish anyone. The
9 burden of a punitive damages award against a municipality is
10 a burden borne solely by a taxpayer at the time the additional
11 tax is assessed or by the person whose municipal services are
12 curtailed as a result of having to take out of the budget
13 whatever the punitive damage award is. Those people are
14 clearly innocent. They are not the actors in this drama.
15 They are simply people who have to come up with the money.
16 A number of --

17 QUESTION: They are the same people that are on the
18 jury too, aren't they?

19 MR. WELLS: Not necessarily, Your Honor. Because,
20 for instance, this case was tried --

21 QUESTION: Do you mean that there are people on
22 juries in Rhode Island that are not taxpayers?

23 MR. WELLS: Oh, yes, sir; oh, absolutely.

24 QUESTION: Who are not taxpayers?

25 MR. WELLS: And there are people on juries --

1 QUESTION: In this day and age, who is not
2 a taxpayer?

3 MR. WELLS: Well, there are people who are not tax-
4 payers on juries, and --

5 QUESTION: How could they be?

6 MR. WELLS: Well, there may be --

7 QUESTION: Don't you have sales tax in Rhode Island?
8 Do you? Do you?

9 MR. WELLS: Well, but they -- they don't go to the
10 municipalities. The only tax base in Rhode Island in the
11 municipalities is property tax.

12 QUESTION: But they are taxpayers.

13 MR. WELLS: True, but you see, again, in Rhode Island,
14 we will be drawing juries, any jury in our federal court comes
15 from every city and town in the state, so in a trial against
16 the City of Newport, for instance, the plaintiff would excuse,
17 and properly so, all residents of Newport. So he might have
18 residents of Providence, Warwick, East Providence, sitting in
19 a case to assess punitive damages against the City of Newport.
20 So the jury's interests are not necessarily identical with
21 the interests of the people of Newport.

22 QUESTION: I didn't say identical. I said they were
23 of interest.

24 MR. WELLS: Yes.

25 QUESTION: That's all I said. And all you should

1 have said was "yes," and you would have saved all of this
2 trouble.

3 QUESTION: I took it that what you meant was, these
4 aren't taxpayers who are going to share in the burden of this
5 verdict?

6 MR. WELLS: True. And you see, you will have some
7 persons --

8 QUESTION: No insurance?

9 MR. WELLS: You can't buy insurance against puni-
10 tive damages, Your Honor. Or, I think you cannot buy it -- and
11 many states as a matter of public policy do not permit
12 insurance against punitive damages.

13 QUESTION: Is Rhode Island one of them?

14 MR. WELLS: I have never known of a policy issued
15 in Rhode Island that covered punitive damages.

16 QUESTION: Even in auto --

17 MR. WELLS: In automobile cases they're excluded.

18 QUESTION: You mean that you can buy it for that?

19 MR. WELLS: Well, under the statutory policy in
20 Rhode Island, that's excluded. Punitive damages are excluded.

21 QUESTION: Oh, I see. So that you don't get
22 coverage for reckless --

23 MR. WELLS: No, sir. Well, it would be an automo-
24 bile assault.

25 QUESTION: Which would be uninsurable?

1 MR. WELLS: That's right. But, you see, further,
2 a number of people who are taxpayers may not have been tax-
3 payers in the city at the time the wrong was committed but
4 who moved to the city before the assessment of taxes was made.
5 Similarly, a number of taxpayers in the city at the time the
6 wrong was committed may have moved and escaped liability alto-
7 gether. So, again, I suggest that the imposition of punitive
8 damages against a municipality serves really no deterrent
9 purpose.

10 I'd like to address myself to one of the things
11 that the trial judge said in passing on the motion for a new
12 trial and judgment N.O.V. He said, well -- and I'm para-
13 phrasing this, now -- the imposition of punitive damages on
14 the taxpayers of the city may have an influence, a beneficial
15 influence on the next election: they'll kick the rascals out.

16 Now, I think that's an interesting intrusion, if
17 that is what it is, of the federal court into local or munici-
18 pal affairs. But, secondly, it doesn't make any sense. And
19 if we take a look at this case, the wrong, such as it was
20 -- and I suppose we're now beyond the point where I can argue
21 that it wasn't -- but the wrong occurred in August of 1975.
22 Since then we've had the '76 election, we've had the '78
23 election. Then we had the trial. We've had the '80 election.
24 And, of course, the assessment of damages won't be made until
25 after a decision on the issue before us today is reached.

1 QUESTION: Mr. Wells, Judge Pettine did grant a
2 remittitur of the punitive damages, didn't he?

3 MR. WELLS: Yes, he did. Yes, what he did in that
4 case, he decided -- the original award against the city was
5 \$200,000, and against the individual councilmen in varying
6 amounts added up to \$75,000. And Judge Pettine reasoned, and
7 I think correctly, if we are to have an award of punitive
8 damages that the city could not be more guilty than the
9 councilmen who actually committed the act.

10 What will happen if we're talking about focusing
11 voter outrage on elected officials, the voter outrage won't
12 be focused, if assessment of taxes is what will do it, and I
13 suggest that that is the only thing that will do it, the voter
14 outrage won't be focused until the assessment which will be
15 by a council at least six years away from the act itself,
16 and they may not be the rascals that need to be turned out at
17 all. So I think the argument that punitive damages ought to
18 be awarded as a deterrent because they'll focus attention on
19 the malefactors just doesn't make any sense in the light of
20 practicalities.

21 QUESTION: Could I ask you, for a moment, what your
22 response is now to the argument that this issue isn't really
23 properly before us in the sense that if there's an argument
24 like this in this Court, how could it possibly have been
25 plain error? And that's what the court of appeals said;

1 it wasn't plain error, even if it was error. And you failed
2 to object to the instruction; and do we just sweep that
3 under the rug, or what?

4 MR. WELLS: No, Your Honor.

5 QUESTION: We cannot because the respondent is
6 defending the judgment below on that ground.

7 MR. WELLS: Your Honor, I understand that and I had
8 intended to address it a little later on, but --

9 QUESTION: Excuse me; you take your own time.

10 MR. WELLS: I should -- no, I'll meet the argument
11 now. I might say, I did not try that case. I wasn't re-
12 tained until after the verdict. If there was ever a case, it
13 seems to me, that cries out for the application of the plain
14 error rule or the relaxation of Rule 51, it is this one.

15 QUESTION: You mean, for relaxing the plain error
16 rule?

17 MR. WELLS: Well, yes, sir.

18 QUESTION: Well, Mr. Wells, let me ask you this, if
19 I may, along the lines of Justice White's question. On
20 page A-15 of the petition for certiorari which is the last
21 paragraph of the court of appeals' appendix, where the court
22 of appeals says, "In short, the present state of the law
23 as to municipal liability is such that we cannot with confi-
24 dence predict its future course. Where the law is in such a
25 state of flux and there is no appellate decision to the

1 contrary, we would be hard pressed to say that the trial judge's
2 punitive damages instruction was plain error. See United
3 States v. Petrozziello. Nor is this a case containing such a
4 peculiar circumstance as to warrant noticing error to prevent a
5 clear miscarriage of justice."

6 Do you read that as a flat refusal to notice the
7 error? I thought it was a little bit fuzzy myself, that the
8 court of appeals was not saying in so many words that we
9 will not notice the error.

10 MR. WELLS: Quite true. I think the court of
11 appeals was troubled, and I think it's interesting that the
12 court of appeals grappled with the problem when they could
13 have said, it's Rule 51 and we're not going to even listen to
14 you. I think, as I say, they were troubled. I believe a fair
15 reading of Judge Pettine's opinion on the motion for a new
16 trial indicates that he was somewhat troubled. And I suggest
17 again that the Court should relax the rule here for two real
18 reasons. First of all -- and again, if one looks at the
19 amici briefs, this is a problem that is floating around all
20 over the country. And sooner or later this Court is going to
21 be faced, perhaps in a better procedural context --

22 QUESTION: Of course, it may be that a good answer
23 to my question is, well, I rely on the grant of certiorari,
24 which is limited to one question.

25 MR. WELLS: Well, yes, that's correct, Your Honor.

1 This Court is going to end up here sooner or later and pro-
2 bably, considering the volume of cases, it's from the point
3 of view of judicial efficiency, and from the point of view of
4 municipal stability, it might be better to have the question
5 answered as quickly as possible.

6 QUESTION: That could be said with respect to plain
7 and flagrant violations of the rules for preserving errors
8 through the -- But we know we didn't assert it in the trial
9 court or in the court of appeals and we didn't raise it as
10 a question to be presented on this petition, but it's a ques-
11 tion that needs answering sooner or later so let's answer it
12 now.

13 MR. WELLS: Well, Mr. Justice Rehnquist, I think
14 this is a little different because of the volume of cases in
15 which the punitive damages issue is a real issue. And,
16 secondly, because I suppose with the exception of people who
17 live on Indian reservations, for instance, or federal en-
18 claves, every American lives in a city or town, and I doubt
19 that there are many cities or towns in the United States who
20 are not presently having some forms of financial problems,
21 and to settle an issue of this kind early, I think, perhaps
22 stabilizes their relationships with the Government, it gives
23 them an opportunity to assess the kinds of things that they
24 are going to do.

25 QUESTION: Well, when you say, we ought to "relax"

1 the rule as to noticing plain error, are you saying that we
2 should review the court of appeals' refusal to note plain
3 error, or that in effect the court of appeals did regard this
4 as plain error and, as you say, grappled with it in an entire
5 paragraph rather than just brushing it off and saying, it
6 wasn't raised?

7 MR. WELLS: I think the court of appeals really be-
8 lieved it was plain error, and that that's why you find that
9 language you referred to as kind of fuzzy language, in what
10 is apparently close to the last paragraph.

11 QUESTION: Of course, you could say, you could ask
12 us to waive our own rule against considering questions not
13 raised below but presented here.

14 MR. WELLS: Well, the question was raised below.

15 QUESTION: May I ask a question about the judgments
16 related to this? The trial judge reduced the punitive damage
17 award against the city from \$200,000 to \$75,000, as I remember
18 it. And was there not also a punitive damage award against
19 other defendants?

20 MR. WELLS: Yes, there were.

21 QUESTION: For how much, and is that a joint and
22 several liability, or a separate judgment?

23 MR. WELLS: No, no. There were five councilmen, and
24 a mayor. And there were varying awards of punitive damages
25 against them which totaled \$75,000. I believe there were two

of \$40,000 and a couple of ten and a couple of five, something --

QUESTION: You're way over 75 by now.

MR. WELLS: Pardon?

QUESTION: You're way over 75 with two over 40 and --

MR. WELLS: Well, I don't have the precise numbers in mind.

QUESTION: Well, now, were those -- if they collected those, that 75 from the individuals, could they get this 75 from the city in addition?

MR. WELLS: Absolutely, and that's the interesting thing about punitive damages, because, for instance, there was a \$72,000 compensatory damage award against the councilmen and against the city. Now, satisfaction by one of those of the \$72,000 satisfies the entire compensatory damage award. But the punitive damage awards are all cumulative, and again, this is one of the problems. In Owen you decide that you can collect compensatory damages. And that makes the plaintiff whole. But the punitive damages as to him represent a windfall. The only justification for them can be punishment, and against a municipality, as I suggest, you're really punishing the innocent.

QUESTION: May I ask you if the record tells us whether the city or some insurance company or who will actually pay the punitive damage award against the individuals?

1 MR. WELLS: The record does not disclose that, and
2 I don't know the answer to that. I know that it will be
3 satisfied.

4 QUESTION: Mr. Wells, as you've been talking deter-
5 rents, you've been arguing no deterrents, am I wrong? It
6 seems to me when I was in practice we used to talk about
7 punitive damages as "smart money."

8 MR. WELLS: Yes, sir, I've seen that phrase.

9 QUESTION: That's a different element from deter-
10 rents, isn't it?

11 MR. WELLS: Well, I've never been sure what
12 the adjective "smart" meant, whether it's "smarts" or --

13 QUESTION: Well, that's what I understood it to mean.

14 QUESTION: To make it hurt.

15 MR. WELLS: Yes. To make it hurt.

16 QUESTION: It smarts, and you did it to punish
17 somebody, if you please, for having done the sort of thing
18 that the jury said

19 MR. WELLS: Precisely, but --

20 QUESTION: Well, it's another form of exemplary, to
21 make an example, is it not?

22 MR. WELLS: That's true. And the problem is, or
23 it seems to me that the answer is, that -- while I know that
24 this Court has never precisely passed on punitive damages in
25 1983 cases, they're being assessed against individuals as they

1 were in this case, all the time. And so, in assessing, for
2 instance, as against the councilmen in this case, you are
3 making an example of them as actors, but in assessing it
4 against a municipality you're really not making an example of
5 anybody but the poor taxpayer. I suggest that there is
6 another reason, and perhaps it is more procedural than any-
7 thing else, that militates against this.

8 As I have always understood the law to be, the
9 wealth of the actor played a part in the assessment of puni-
10 tive damages. If you were a very wealthy man, the jury was
11 entitled to know that, assess a larger amount of damages
12 against you, because they had to do something that would hurt
13 you, that would smart.

14 QUESTION: Was there any showing here as to the
15 resources of the individual defendants?

16 MR. WELLS: Absolutely none, and there's absolutely
17 none against the municipality. And of course the municipali-
18 ty's, I suppose, power to tax is limited only by the real pro-
19 perty -- at least in Rhode Island -- within its corporate
20 bounds. But how do you measure what its wealth is? It may
21 have long-term commitments, it may be building a school, it
22 may be doing a variety of things, and it seems to me that as
23 an evidentiary point of view you would end up with weeks and
24 weeks of discussions of municipal finances before you ever
25 found out how wealthy the city really was or how poor it

COTTON CONTENT

1 really was. And I suggest that that is another reason why
2 the punitive damages scheme doesn't fit in with municipali-
3 ties. But just to conclude, again, historically --

4 QUESTION: Incidentally, I gather the punitive
5 awards against the individual councilmen have not been
6 appealed?

7 MR. WELLS: No, Your Honor, they were not. Again,
8 I say, historically, there's no reason for anyone to suspect
9 that the Congress intended punitive damages against a muni-
10 cipality; that it serves no societal purpose; and that it
11 really punishes the innocent rather than the guilty actors.
12 There are remedies against the actors that are imposing;
13 there are criminal sanctions in the appropriate case; there
14 are injunctive relief; there are punitive damages awarded
15 against an individual. And to suggest that an additional
16 award against a municipality is going to deter that individual
17 from acting just doesn't make sense. He's more worried about
18 his own pocketbook than he is about the city's pocketbook.

19 For these reasons, I think the court of appeals
20 for the 1st Circuit should be reversed.

21 MR. CHIEF JUSTICE BURGER: Mr. Decof.

22 ORAL ARGUMENT OF LEONARD DECOF, ESQ.,

23 ON BEHALF OF THE RESPONDENTS

24 MR. DECOF: Mr. Chief Justice, and may it please
25 the Court:

COTTON CONTENT

1 Mr. Wells' argument is bottomed on the allegation
2 that the innocent taxpayers would be the ones who'll bear the
3 burden of a punitive damage award. This argument could be
4 made against every provision of 1983: the innocent taxpayers
5 bearing the burden of a compensatory award, or the innocent
6 taxpayers bearing the burden of injunctive relief. And I
7 submit to Your Honors that the punitive damage award is the
8 least expensive kind of deterrent that we can buy. In any
9 given case, injunctive relief provided under 1983 will nor-
10 mally be far more expensive than a given punitive damage
11 award. Prison reform, for example, goes on for years and
12 years. It costs all kinds of money, into the millions. It's
13 far more intrusive.

14 QUESTION: How does that relate to this kind of an
15 award in this setting?

16 MR. DECOF: With reference -- Mr. Wells was making
17 the argument that the innocent taxpayer carries the burden of
18 the punitive damage award. That same argument could be made
19 with reference to injunctive relief, or reference to compensa-
20 tory damages. I submit that the punitive damage award is
21 necessary under 1983, especially since Carey v. Piphus, be-
22 cause of the reason that Mr. Wells and the City of Newport
23 tried to overlook, the deterrence which this Court has
24 acknowledged to be a primary underlying premise of 1983.

25 Since Carey v. Piphus, where the courts were

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1 struggling to find some grounds in between punitive and com-
2 pensatory for awarding a substantial sum of money for, I think,
3 what Prosser would refer to as "the petty outrages." And
4 the Court there held there could be nothing more than
5 nominal damages for violation of procedural due process or
6 whatever. There's a whole spectrum of cases which would sup-
7 port nothing more than nominal damages. How much is it worth
8 to go to an unsegregated school? How much is an individual's
9 voting rights worth? How much is it worth to deliver a
10 sermon uncontrolled by any censor? And so on down the line;
11 I don't have to belabor the obvious.

12 And I submit, Your Honors, that this leaves a big
13 hole in 1983, because these petty outrages are the easiest
14 inflicted and the most insidious and the most difficult to
15 guard against.

16 QUESTION: But by hypothesis, the least damaging?

17 MR. DECOF: Not necessarily, Your Honor, for this
18 reason. To the individual, what Your Honor has just stated
19 illustrates --

20 QUESTION: I thought that was your point, that you
21 can't compensate them in money because you can't show damages?

22 MR. DECOF: You can't show damages. But they are
23 very damaging, if the Court please, in the sense that they
24 humiliate, that they embarrass; to the individual they are
25 very damaging and they occur repeatedly.

1 The "nice" person can easily focus on and relate to
2 outrages such as whippings, lynchings, beatings, and the like,
3 but the nice person isn't so easily offended by the gentle-
4 man's agreement type of discrimination, and this is the kind
5 of thing that is the most difficult to police. The courts
6 have struggled with years over --

7 QUESTION: What is this? The right to hear the
8 music or the right to play the music?

9 MR. DECOF: This case -- and I would like to go
10 into the facts; I know the facts are not before the Court
11 but they --

12 QUESTION: Before you get to all the facts, answer
13 my question.

14 MR. DECOF: This case was a case where the City of
15 Newport wanted to dictate what kind of music would be played.

16 QUESTION: So the question was the right to hear it
17 or the right to play it?

18 MR. DECOF: It's the right to perform it. That was
19 the specific question here, but that also relates to the
20 right to hear it by the public, but what they --

21 QUESTION: And that affects a whole lot of people.

22 MR. DECOF: Yes, it does, Your Honor.

23 QUESTION: Yes, it really does.

24 QUESTION: Is there any analogy between this and
25 the sound truck cases, the right to control sound trucks

COTTON CENTER

1 going up and down the streets in a case some years ago here?

2 MR. DECOF: With reference to those cases, Your
3 Honor, we get into the question of public nuisance, public
4 safety. Public safety was raised here. The jury found it to
5 be a spurious defense. If I may, I would like to just touch
6 on the facts because this is a classic example of why nothing
7 but punitive damages will serve to answer the problem.

8 The councilmen in this case, four of the six coun-
9 cilmen and the mayor, were the very same people who had only
10 the very same year been enjoined by the very same chief judge
11 for a similar violation, for limiting the freedom of expres-
12 sion or the right of free speech. This was the "Tiger Cage"
13 case where some people wanted to place a tiger cage case in
14 a public park to demonstrate --

15 QUESTION: What's a tiger case?

16 MR. DECOF: Please, Your Honor?

17 QUESTION: You mean, a cage?

18 MR. DECOF: It was a tiger cage; yes. Yes, the pur-
19 pose of it was to protest against the Vietnam war, that we
20 were incarcerating Vietnamese prisoners in a tiger cage.
21 And the City of Newport, this very council, refused to issue
22 the license. And this very court enjoined them and said,
23 this is a violation of free speech and you must issue this
24 license. The City Solicitor --

25 QUESTION: What case was that?

1 QUESTION: Where do we find that?

2 MR. DECOF: That is cited, if the Court please, in
3 the Joint Appendix at page 41 and in the Record Appendix
4 which was filed before the Circuit Court of Appeals at
5 page 305.

6 QUESTION: What was the Joint Appendix cite?

7 MR. DECOF: Page 41, Your Honor. And that was the
8 tiger cage case.

9 QUESTION: Is the Joint Appendix the tan -- ?

10 MR. DECOF: Yes, it is, Your Honor.

11 QUESTION: Just glancing at it, page 41, I don't
12 see a case citation.

13 MR. DECOF: It isn't a case citation. What this is,
14 Your Honor, is a record of the testimony of the individual
15 who was being cross-examined about that case, having appeared
16 in that case.

17 QUESTION: Oh. What's the citation to the case in
18 which this Court enjoined it?

19 MR. DECOF: The case never went further than the
20 restraining order so there is no appellate citation of that
21 case, if the Court please.

22 QUESTION: Well, if it came here and was heard, I --

23 MR. DECOF: It did not come here, if the Court
24 please.

25 QUESTION: I thought you said it was this Court's case?

1 MR. DECOF: No, no. When I said "this court" I
2 meant --

3 QUESTION: Oh -- the district court.

4 MR. DECOF: -- the district; yes. Judge Pettine's
5 court. And that case occurred within months before this
6 incident occurred.

7 QUESTION: Was it not pursued in that court beyond
8 a temporary restraining order?

9 MR. DECOF: It was not pursued in that court, Your
10 Honor.

11 QUESTION: Well, then, how do we know whether the
12 judge was right or not?

13 MR. DECOF: The problem, whether the judge was
14 right or not, if the Court please, the question is a question
15 of knowledge, foreknowledge by this council in going
16 back in again and doing the same thing. They accepted, or
17 the City Solicitor accepted the judge's opinion, and the City
18 Solicitor in this case advised the City Council and the
19 mayor that they had no right to do what they intended to do.
20 In spite of that they went forward and did it. Because of
21 that they couched their denial and disguised it with a ruse,
22 claiming that a portion of the contract had been violated,
23 and there was a great deal of testimony about this. And so
24 they went ahead and did what they knew they shouldn't have
25 done, and then disguised it. Furthermore, these same

1 councilmen, particularly Councilman West, who was --

2 QUESTION: Now, what they did was deny a permit,
3 was that it?

4 MR. DECOF: No, Your Honor, what they did was, the
5 my clients, Facts Concerts, had a license from the City of
6 Newport to promote a musical concert at Fort Adams, and they
7 had lined up the greatest jazz stars in the country, and one
8 of them, outstanding performer Sarah Vaughn, had to cancel
9 out. And my clients engaged Blood, Sweat and Tears to take
10 her place. The City of Newport upon finding this out said,
11 if Blood, Sweat and Tears appears on this program, we would
12 cancel your license. And that's what set the facts going
13 forward.

14 QUESTION: And did they cancel the license?

15 MR. DECOF: They did cancel the license, Your Honor,
16 but on the pretext, which the jury found to be a ruse, of
17 some chairs not having been wired together. They canceled --

18 QUESTION: Is this the old Newport Jazz Festival of
19 years back or what?

20 MR. DECOF: This is -- that was -- there's a jazz
21 festival in Newport every year. This was -- the old Newport
22 Jazz Festival was run by George Wein. This was run for the
23 first time by my clients who were new promoters. By the way --

24 QUESTION: The Newport Festival is now in New York
25 City, isn't it?

1 MR. DECOF: Yes, it is, Your Honor.

2 QUESTION: It isn't even up there.

3 MR. DECOF: That's correct, Your Honor.

4 QUESTION: And it wasn't up there this time either,
5 was it?

6 MR. DECOF: No, this was -- it had a different name.

7 QUESTION: It was riding on the name, yes.

8 MR. DECOF: Yes, it was a jazz festival at Newport.

9 QUESTION: Mr. Decof, what do you make of the lan-
10 guage in Carey v. Piphus at 256 of 435, where it says that,
11 "to the extent that Congress intended that awards under Sec-
12 tion 1983 should deter the deprivation of constitutional
13 rights, there is no evidence that it meant to establish a
14 deterrent more formidable than that inherent in the award of
15 compensatory damages?"

16 MR. DECOF: What I say to that is that Carey v.
17 Piphus, Your Honor, was footnoted to the effect that -- I
18 think I paraphrase correctly -- this is not to say that we
19 indicate that punitive damages would not be properly awarded
20 in the proper case. In Carey v. Piphus there was no evidence
21 of punitive damages; there was no set of facts. In Carey v.
22 Piphus I think it was Footnote 9 stated that we don't mean to
23 indicate that punitive damages would not be recoverable in the
24 proper case; and then went on to cite a number of lower court
25 cases, circuit court holdings, where punitive damages had

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1 been awarded and cert. had been denied. And in Carlson v.
2 Green Mr. Justice Brennan indicated again in dictum that
3 punitive damages would be recoverable on the proper set of
4 facts and cited the footnote in Carey v. Piphus. So although
5 it was dictum, I would urge this Court that this Court has
6 at least edged toward --

7 QUESTION: Well, do you take issue with the sub-
8 mission that at the time 1983 was adopted the controlling
9 case law was against punitive damages against municipalities?

10 MR. DECOF: I take issue with that for this reason,
11 Your Honor. In those days, and even today, with every state
12 that has a statute that does not allow punitive damages
13 against a municipality, that state also has respondeat
14 superior, strict liability, liability without fault. And that
15 was the context in the background of the common law --

16 QUESTION: That may be, but then your answer to me
17 is, no, you do not take issue with the fact that the laws
18 as it was at the time of 1983 did not normally contemplate
19 the -- for whatever reason --

20 MR. DECOF: Yes, yes, Your Honor.

21 QUESTION: Did not contemplate the issuance, or the
22 imposing of punitive damages on municipalities.

23 MR. DECOF: Yes, Your Honor. I agree with that.
24 But I say that it was qualitatively different in the sense
25 that it was liability without fault, and I compare it, even

1 the statutes today, to the workers' compensation acts where --

2 QUESTION: So, I guess --

3 MR. DECOF: -- a state said, we will assume lia-
4 bility, but we'll put a cap on it; this is the tradeoff.

5 QUESTION: In holding that municipalities are sub-
6 ject to 1983, in Monell --

7 MR. DECOF: Yes, Your Honor?

8 QUESTION: We said, but only if it's municipal
9 policy.

10 MR. DECOF: But I think also, Your Honor --

11 QUESTION: And so we did, we apparently, according
12 to your reading of the cases, we construed 1983 not to reflect
13 the common law in that case.

14 MR. DECOF: If the Court please --

15 QUESTION: Because we didn't permit respondeat
16 superior.

17 MR. DECOF: Yes, this is -- you took away respondeat
18 superior and you established municipal liability --

19 QUESTION: And you say that's why you --

20 MR. DECOF: -- and to my way of thinking, you
21 narrowed --

22 QUESTION: -- should have punitive damages? This
23 policy?

24 MR. DECOF: Not really because of that. I say,
25 if the Court please, that this Court historically has not

1 opted for a mechanical adoption of the common law. They will
2 adopt the common law if it is not in conflict with the pur-
3 poses of 1983, and a major purpose of 1983 is deterrence and

4 QUESTION: You say that Monell and such narrowed
5 it --

6 MR. DECOF: Yes, Your Honor.

7 QUESTION: Abolishing respondeat superior, because
8 it requires now, before a municipality may be liable, proof
9 of policy.

10 MR. DECOF: Precisely, Your Honor. Precisely.

11 And when the Court came along later -- so for now there is
12 no liability without fault. Now, for us to talk about a
13 situation which would absolve municipalities of the most
14 egregious intentional malicious violations of the Civil
15 Rights Act, I think we're not talking about an extension of
16 Monell, we're talking about something that naturally comes
17 before Monell. I would think this Court would think first,
18 of course, the purposeful act should be punished. We'll
19 talk later about taking away the good faith defense, which
20 was done.

21 QUESTION: And I gather your argument also is that
22 policy necessarily means proof of intention?

23 MR. DECOF: Exactly, Your Honor.

24 QUESTION: To deny the constitutional or federal
25 statutory --

1 MR. DECOF: Exactly, Your Honor; if the taking away
2 of a good faith defense does not mean there will be liability
3 without fault. Fault must still be proven even though it may
4 be in good faith. And another corollary to this is, there is
5 a gap between absence of good faith and proof of malice. One
6 thing that would be accomplished if punitive damages were
7 allowed, not only would good faith be an allowable defense
8 to the punitive damages, but the good faith would be presumed
9 on the part of the defendant municipality because it would be
10 the affirmative burden of the plaintiff to show, to prove
11 malice.

12 QUESTION: Well, Mr. Decof, what of the situation
13 in this very case, for example? I suppose it's possible the
14 jury could have found the municipality liable as having a
15 policy, and yet -- but has no immunity defense, and yet the
16 individual councilmen would have had an immunity defense,
17 and the jury might have found them, no cause of action as
18 against them based on an immunity defense --

19 MR. DECOF: Exactly, Your Honor.

20 QUESTION: -- but a finding of liability on
21 the part of the municipality. What do you say then about puni-
22 tive damages?

23 MR. DECOF: If -- but they would have had to find
24 that the municipality acted maliciously. Your Honor points
25 up the example, for example, of the statute which is

1 wrongfully and maliciously enacted but carried out in good
2 faith by somebody else, maybe years later down the line. It's
3 one reason why we need punitive damages against a municipi-
4 pality. You may not find the person who enacted that.
5 And the good faith would be a defense.

6 Or supposing a police chief said to one of his po-
7 licemen, go out on the street every night and frisk everybody.
8 Now, that policeman, if he does it in good faith, will not be
9 held liable. So there's a tremendous gap that punitive
10 damages is the only answer to. And in this case, for example,
11 if I may continue to show how it classically demanded it,
12 the councilmen here, besides changing their stories and going
13 through the rules and having had foreknowledge, stated they
14 would do it again. Councilman West --

15 QUESTION: But they are not here.

16 MR. DECOF: But they were the city, Your Honor.

17 QUESTION: They are not here, are they?

18 MR. DECOF: If Your Honor please --

19 QUESTION: I thought you said you didn't appeal
20 that?

21 MR. DECOF: They did.

22 QUESTION: They did?

23 MR. DECOF: No, no, that's not before this Court.
24 It was appealed to the 1st Circuit.

25 QUESTION: The councilmen are not here, are they?

1 MR. DECOF: No, but if Your Honor please, the
2 councilmen were the city, because they acted by unanimous
3 vote.

4 QUESTION: About two-thirds of your time
5 you've been quoting councilmen, and they're not here.

6 MR. DECOF: Because -- that's correct, Your Honor.
7 But the point is this, if the city is the recipient, or the
8 target of award, an award for the punitive damages, then that
9 is passed on, the attention is directed to the taxpayer and
10 the taxpayer does something about removing those offending
11 councilmen. The city can only act through its officers.

12 QUESTION: Were punitive damages awarded against
13 the councilmen also?

14 MR. DECOF: Yes, they were, Your Honor.

15 QUESTION: In addition to the punitive damages
16 awarded against the city?

17 MR. DECOF: Yes, they were, Your Honor. Yes, they
18 were, Your Honor, in separate amounts.

19 QUESTION: In cumulative amounts?

20 MR. DECOF: Yes, Your Honor. They totaled \$75,000
21 against the councilmen and the mayor and they totaled \$75,000,
22 as reduced, against the city.

23 QUESTION: Now, \$75,000?

24 MR. DECOF: Yes, now, Your Honor. Sir?

25 QUESTION: Have those damages been collected from

1 the individuals?

2 MR. DECOF: No, not a penny has been collected, and
3 there's --

4 QUESTION: Is it collectible?

5 MR. DECOF: That's another question, Your Honor.
6 This is another reason for the need for the punitive damages
7 against the city. One of the purposes of 1983 is to encour-
8 age injured plaintiffs to bring their actions. If they
9 can't recover more than nominal damages, they won't bring
10 them just to recover attorneys' fees, and attorneys' fees
11 are allowable for that purpose, to give incentive. One of
12 the reasons that, again, they might not bring them is because
13 people on city councils ordinarily cannot respond to a
14 judgment.

15 QUESTION: I don't think you've answered my ques-
16 tion.

17 MR. DECOF: I don't know --

18 QUESTION: Is it collectible?

19 MR. DECOF: I don't know if it would be collectible
20 or not.

21 QUESTION: You're the attorney, you have a judgment.
22 Have you gone after it?

23 MR. DECOF: The judgments are on appeal, if the
24 Court please.

25 QUESTION: Was there supersedeas?

1 MR. DECOF: There is no supersedeas bond filed in
2 this case.

3 QUESTION: Under Rhode Island law, can't you go
4 after a judgment debtor if there is no supersedeas bond?

5 MR. DECOF: There was -- Mr. Wells, I think, inad-
6 vertently erred before the Court. Because of the problem of
7 collecting a judgment against these individuals, a stipulation
8 was filed and an agreement was reached between Mr. Wells and
9 myself that the city, the need for the city to file a super-
10 sedeas bond would be waived if the city would indemnify the
11 councilmen for the judgments against them. And that agree-
12 ment was entered, so nothing has been collected. But I
13 think the argument --

14 QUESTION: If you get the punitive damages, would
15 that be easier to collect than these? Would more damages
16 be easier to collect than less damages?

17 MR. DECOF: If the Court please, the damages would
18 be easier to collect against the municipality than the indi-
19 viduals.

20 QUESTION: So where do you want to go against
21 the municipality?

22 MR. DECOF: Yes, Your Honor. And I think that's a
23 confirmation --

24 QUESTION: And what did the municipality do?

25 MR. DECOF: The municipality, acting through all

1 its councilmen and its mayor --

2 QUESTION: I thought so. I thought so.

3 MR. DECOF: -- interfered with the right of free --

4 QUESTION: Do you want the payment -- do you want to
5 charge, to use your own words, the innocent taxpayer?

6 MR. DECOF: If the Court please --

7 QUESTION: That's who you want to collect from.

8 MR. DECOF: If the Court please --

9 QUESTION: The case that you had, you'd be bleeding
10 about this innocent taxpayer and that's who you want to pay it.

11 MR. DECOF: I don't think I referred to them, I
12 think Mr. Wells referred to them as innocent taxpayers.
13 I urge the Court that the government is of the people and
14 the government is the people, and we're not just concerned
15 with the people of the City of Newport or the State of Rhode
16 Island. We're concerned with the people of the United States
17 and it's to the interest of the people of the United States
18 that these losses be borne by the taxpayers of whatever
19 locality because this is the only way to deter this from
20 happening again in the future. This is the point I urge on
21 the Court.

22 QUESTION: Why then would you limit compensatory
23 damages to, against a municipality, to instances where it's
24 municipal policy rather than purely respondeat superior? Why
25 shouldn't the municipality, which is the government of the

1 people, be responsible for its actors, its officer actors?

2 MR. DECOF: Because we have two different concepts,
3 Your Honor. That is liability, totally without fault,
4 respondeat superior.

5 QUESTION: For punitive damages, you necessarily
6 have to rely on the mental attitude of the actor officers
7 and their conduct.

8 MR. DECOF: Yes, Your Honor.

9 QUESTION: And hence impute that kind of conduct to
10 the municipality, which is making them responsible for the
11 conduct of others.

12 MR. DECOF: Yes, Your Honor, but the municipality
13 is at fault; it can only operate through its agents in the
14 same way as a private corporation.

15 QUESTION: Well, then, how about compensatory
16 damages?

17 MR. DECOF: As far as -- but it operates through its
18 agents, but at least fault must be found. First, there
19 are these protections. Number one, it must be an act of the
20 municipality, and number two, there must be fault. With
21 respondeat superior, if an agent who drives a garbage truck
22 knocks someone down, the municipality can be held at fault,
23 even if it has no fault.

24 QUESTION: Well -- not in a 1983 action.

25 MR. DECOF: No, not now, Your Honor, but under

1 respondeat superior, although --

2 QUESTION: Yes; exactly. Even if he did it inten-
3 tionally.

4 MR. DECOF: Yes, Your Honor.

5 QUESTION: How about the concept of a non-delegable
6 duty? Can the municipality be held for that when it employs
7 an independent contractor to provide, say, policing for an
8 affair like this and the federal court says, that was a non-
9 delegable duty, you're liable?

10 MR. DECOF: In the context of the fact, if it were a
11 non-delegable duty, the municipality, in my opinion, would be
12 liable. It has its duties --

13 QUESTION: Under 1983?

14 MR. DECOF: Not under 1983, Your Honor, no. I --

15 QUESTION: Well, I thought that -- I meant under
16 1983.

17 MR. DECOF: No. I would say, no, Your Honor.

18 QUESTION: Let me go back to a reference you made to a
19 stipulation with your friend.

20 MR. DECOF: Yes, Your Honor?

21 QUESTION: Did I understand you to say that the
22 judgments which are now firm and unreviewable against the
23 individuals will be paid for by the municipality?

24 MR. DECOF: This is the agreement, that the
25 municipality, they are --

1 QUESTION: Now?

2 MR. DECOF: No, not paid for, Your Honor; indemni-
3 fication, which to my mind would mean, if the others don't
4 pay it, then the municipality will.

5 QUESTION: Yes. So that, even if you do not prevail
6 here, you are going to collect?

7 MR. DECOF: Well, not -- no. What's involved here
8 is \$75,000 and a massive principal of punitive damages. We
9 would collect the remainder of the award, the compensatory
10 and the punitive damages against the individuals. The only
11 thing before this Court is a \$75,000 award for punitive
12 damages against the City of Newport.

13 QUESTION: Mr. Decof, may I ask you a question about
14 this indemnification? In your opinion, is a city permitted,
15 does it have the authority to indemnify council members whom
16 you say maliciously violated the Constitution of the United
17 States?

18 MR. DECOF: Your Honor has raised a very good ques-
19 tion, and --

20 QUESTION: Perhaps I should ask the City Attorney.
21 But you accepted it, did you?

22 MR. DECOF: I am not the City Attorney.

23 QUESTION: I understand. So you accepted it for
24 your client?

25 MR. DECOF: Yes, Your Honor.

1 QUESTION: And you didn't consider the power and
2 authority of the city to enter into that sort of an agreement?

3 MR. DECOF: I think, in this case, it was my con-
4 sidered judgment to accept this and wrestle with that problem
5 later for this reason: it would have been extremely hard to
6 collect this judgment against the individual councilmen.

7 One was --

8 QUESTION: May I ask this, then. If cities may
9 indemnify councilmen who deliberately violate the Constitu-
10 tion for any punitive damages assessed against them, what
11 deterrence is there in granting punitive judgments even
12 against the individuals?

13 MR. DECOF: Well, you said, if cities may, but
14 cities don't always. And very frequently the individuals who
15 have committed these acts, by the time the case goes to court,
16 someone else is in office and they don't control the council
17 and maybe then the city wouldn't vote to indemnify. But,
18 from my standpoint, the most important deterrent is the
19 deterrent that goes against the city because, as I said, the
20 city is there, it's permanent, it has some control over its
21 policies, it can do something about these things. It can see
22 that these things are not done again.

23 I would like to finally touch on Rule 51. Finally,
24 these people had all, had indicated that they would do it
25 again if given the chance, and so, in this case, again, when

1 I say councilmen, the city acted through its councilmen,
2 we have a situation where an intentional act was done, it
3 was done with knowledge that it was wrong --

4 QUESTION: Well, the city -- you couldn't say
5 that's policy?

6 MR. DECOF: Policy is just one area of --

7 QUESTION: Because they couldn't bind their succes-
8 sors.

9 MR. DECOF: No, it's true; they couldn't bind their
10 successors. But, again, stopping them, an injunction hadn't
11 deterred them in the past, and the threat of compensatory
12 damages hadn't deterred them in the past, and maybe the only
13 thing that would deter them would be the threat of punitive
14 damages against the city, so that the city would say, don't
15 do this anymore.

16 Finally, on Rule 51, may it please the Court,
17 Mr. Wells' argument to this is, this is an important question,
18 so let's blink aside Rule 51. And I submit, that argument can
19 be made in many, many cases that come before this Court.
20 Rule 51 is a most important rule for the orderly processing
21 of cases and I think that for this Court to say, this is a
22 question that ought to be decided, we'll overlook Rule 51,
23 would be an invitation --

24 QUESTION: Well, there have been a good many cases
25 here, even in the few years I've been here, in which the

1 Court has dealt with cases which weren't even raised below,
2 dealt with issues from federal courts that weren't even
3 raised below, whether plain error or not.

4 MR. DECOF: I understand, but this would have to
5 fall, this issue was raised below. The attorney for the City
6 of Newport had a great deal of notice all through the trial
7 that this was an issue. Memoranda were requested by the
8 judge and filed by me and given to him. He was asked specifi-
9 cally by the judge a number of times for his memorandum on
10 punitive damages. He was asked specifically at the end of
11 the case, do you have any objection to the charge? And so
12 they can't complain that there was no notice, and I submit --

13 QUESTION: Well, Mr. Decof, why then in the court
14 of appeals opinion, in Judge Bownes' opinion, at page 815,
15 didn't they simply have a one-sentence statement saying that --

16 MR. DECOF: This is not plain error.

17 QUESTION: This is not plain error; no objection
18 to the instruction; period.

19 MR. DECOF: Well, I don't know, Your Honor, but I
20 cannot agree with Mr. Wells' interpretation that they felt it
21 was plain error because the exact language was, "where the law
22 is in such a state of flux and there is no appellate decision
23 to the contrary, we would be hard pressed to say that the
24 trial judge's punitive damage instruction was plain error."

25 QUESTION: Even if error? Even if error?

1 MR. DECOF: No, they didn't say, "even if error."

2 QUESTION: It's implicit, isn't it?

3 MR. DECOF: I think they're saying, Your Honor, that
4 erring on the side of caution they're saying there's no way
5 we can say this is plain error because there are no cases to
6 the contrary.

7 QUESTION: To say, "we're hard pressed to say it
8 was plain error," isn't the same thing as saying it's not
9 plain error.

10 MR. DECOF: Yes, Your Honor; yes.

11 QUESTION: It's weaseling a little more.

12 MR. DECOF: Yes, but I would interpret this as
13 their saying, this is not plain error. We would be hard
14 pressed to say this is plain error. Certainly, it doesn't
15 indicate the contrary to me.

16 QUESTION: Mr. Decof, I'm curious. Is this an old
17 Rhode Island word or a phrase, "travel of the case"?

18 MR. DECOF: I think that's an old Harvard Law School
19 case, Your Honor.

20 QUESTION: Oh, is it Harvard? Since when? Here's
21 a fairly young Harvard graduate. He's glad to know about
22 that.

23 MR. DECOF: On my moot court team in Harvard Law
24 School, Your Honor, we had this in our briefs, and it's been
25 used --

1 QUESTION: The travel of the case. I guess that
2 just means the procedure --

3 MR. DECOF: Yes, Your Honor.

4 QUESTION: Just how -- that's an interesting --

5 MR. DECOF: Thank you very much.

6 MR. CHIEF JUSTICE BURGER: Thank you, counsel.
7 Do you have anything further, Mr. Wells?

8 MR. WELLS: No, Your Honor.

9 MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.
10 The case is submitted.

11 (Whereupon, at 2:07 o'clock p.m., the case in the
12 above-entitled matter was submitted.)

CERTIFICATE

1
2 North American Reporting hereby certifies that the
3 attached pages represent an accurate transcript of electronic
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6 No. 80-396

7 CITY OF NEWPORT ET AL.

8 V.

9 FACT CONCERTS, INC. AND MARVIN LERMAN

10
11 and that these pages constitute the original transcript of the
12 proceedings for the records of the Court.

13 BY: Bill J. Wilson

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