No. 20-6455

Supreme Court of the United States

Patricia Ann Wade, Petitioner
v.
Trustees of Indiana University, et al., Respondent

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

Petition for a Writ of Certiorari

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Questions Presented

Unlike employees of local governments and private entities, employees of state entities are excluded from recovering monetary relief when injured by their employers. State employers escape accountability for their unconstitutional behavior by invoking the doctrine of state sovereign immunity.

I. Which parts of the constitution (if any) justify the doctrine of state sovereign immunity?
II. Which parts of the constitution are at odds with the doctrine of state sovereign immunity?
III. What should be the fate of state sovereign immunity?

Parties to the Proceeding

The Pro Se Petitioner is Patricia Ann Wade, who was the Plaintiff - Appellee in the court below.

The Respondent is Trustees of Indiana University, et. al., who was the Defendant - Appellant in the court below. The Respondent was represented by James R. Dawson, Attorney at Taft Stettinius & Hollister LLP, One Indiana Square, Suite 3500, Indianapolis, Indiana 46204 – 2023. www.taftlaw.com Jdawson@taftlaw.com, 317 713-3568

Statement of Related Proceedings

1. Patricia Ann Wade v. Trustees of Indiana University, et, al., No. 1:16-cv-02256-TWP-MJD in the United States District Court for the Southern District of Indiana. The case was dismissed on summary judgment.

2. Patricia Ann Wade v. Trustees of Indiana University, et, al., No. 19-2936 in the United States Court of Appeals for the Seventh Circuit. The Appeals Court affirmed the District Court's summary judgment.

Opinions

The opinion of the United States court of appeals appears as Appendix A.
The opinion of the United States district court appears as Appendix B.
Neither were published.

Jurisdiction

The Seventh Circuit Appellate Court filed their final Order on Case 19-2936 on June 10, 2020.
The filing deadline for the Petition for a Writ of Certiorati is Monday, November 9, 2020.
I mailed the Petition on November 9, 2020.

Constitutional and Statutory Provisions Involved

Doctrine of Sovereign Immunity
Preamble
Supremacy Clause
Due Process Clause
1st Amendment
11th Amendment
14th Amendment
42 U.S.C. $ 1983

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Statement of the Case

In several recent cases, the Supreme Court decided that protecting state treasuries is more important than protecting the rights of individuals, and that state immunity is entitled to greater weight under the Constitution than the rights of individuals. When reviewing *Alden v. Maine,* Professor Chemerinsky lamented:

> The Court has preferred protecting government abuses of power over the ability of individuals to gain a remedy for violations of their rights [Chemerinsky, Erwin. Hypocrisy of *Alden v. Maine*: Judicial Review, Sovereign Immunity and the Rehnquist Court. Loyola of Los Angeles Law Review, Vol 33: 1283 (2000) p. 1308.]

Why does the Court grant state governments immunity and allow them to violate citizens' rights without paying damages for the injuries they inflict? Let's consider three justifications: Judicial Tradition, Financial Drain, and State Embarrassment.

Why do the courts cling to state sovereign immunity?

1. Judicial Tradition. Sovereign immunity is based on common law doctrine borrowed from English common law. It derives not from constitutional text but rather as an inference from constitutional structure (see *Alden v. Maine* and *College Savings Board).* At one time, The Eleventh amendment immunized state agencies from private suits. Agencies exercising state power invoked the 11th Amendment to protect the state treasury from liability. But then the Supreme Court decided that state sovereign immunity doctrine is inconsistent with the language of the 11th Amendment. Justice Kennedy decided:

> Sovereign immunity derives not from the 11th Amendment but from the structure of the original Constitution itself... The States' immunity from suit is a fundamental aspect of the sovereignty which the states enjoyed before the ratification of the Constitution, and which they retain today. [*Alden v. Maine* 527 U.S. 706, 728 (1999)].

Thus, with *Alden*, the pretext for sovereign immunity changed but states could continue to violate Federal law and not be held accountable. The pretext was not without dissenters.

Justice Souter countered :

> The American Colonies did not enjoy sovereign immunity, that being a privilege understood in English law to be reserved for the Crown alone; "antecedent to the Declaration of Independence, none of the colonies were, or pretended to be, sovereign states," ... Several colonial charters, including those of Massachusetts, Connecticut, Rhode Island, and Georgia, expressly specified that the corporate body established thereunder could sue and be sued. [*Alden v. Maine*, 119 S. Ct. 2240, 2246-47 (1999)].

Justice Souter's view aligned with that of Chief Justice Marshall who declared: ...

> Kennedy's argument has a principle nowhere found in the Constitution. Sovereign Immunity means that a state cannot be sued for violating the Constitution and laws made pursuant to it. Alden means that the Constitution is subordinate to the principle of state sovereign immunity. This is inconsistent with the Constitution's declaration in Article VI that it and laws and treaties made pursuant to it, is the supreme law of the land. [U.S. CONST. Art. VI c.2; Supreme Court in *Gibbons v. Ogden,* 22 U.S. 1 (1824),]

In *Printz*, Justice Scalia reaffirmed Chief Justice Marshall's view regarding supremacy and judicial enforcement of constitutional laws;

> The Constitution was originally understood to permit imposition of an obligation on state judges to enforce federal prescriptions... appropriate for the judicial power.

The structure of the Constitution includes the principle of accountability. In *Marbury v. Madison*, Chief Justice John Marshall explained that the Constitution's main objective is to limit the actions of government and government officers. Governments must be held accountable for their actions. The *Marbury* Court declared:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection... where there is a legal right, there is a legal remedy by suit, or action at law, whenever that right is invaded. [*Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 163 (1803)].

Also, Justice Scalia wrote:

> At the time of Marbury v. Madison, there was no doctrine of domestic sovereign immunity, as there never had been in English Law (*Historical Anomalies in Administrative Law* 103, 104 1985 Yearbook 103, 104).

In *Kimel*, Justice Stevens reinforced the dissent;

> There is not a word in the text of the Constitution supporting the Court's conclusion that the judge-made doctrine of sovereign immunity limits Congress' power to authorize private parties, as well as federal agencies, to enforce federal law against the States.

Abraham Lincoln emphasized accountability, too:

> It is as much the duty of Government to render prompt justice against itself in favor of citizens as it is to administer the same between private individuals [6 James D. Richardson, A Compilation of the Messages and Papers of the Presidents, 51 (1898)].

Professor Akhil Amar argues that principle of government accountability is apparent in many parts of Constitution, including the Preamble. The phrase, 'We the People,' makes the citizens sovereign - not the state governments sovereign [Akhil Amar, *Of Sovereignty and*

Federalism, 96 Yale L.J. 1425 (1987)]. Similarly, Chief Justice John Marshall declared that:

> The government proceeds directly from the people; is 'ordained and established in the names of the people [*McCulloch v. Maryland* 17 U.S. (4 Wheat.) 316 (1819) at 403].

Thus, sovereign immunity can be justified by neither an originalist - textualist perspective nor judicial tradition, and the doctrine is not constitutionally protected.

2. Drain on the State Treasury. After the civil war, states were deeply in debt and strongly opposed to being liable for their debts – hence the creation of the Eleventh Amendment. A primary objective of the Eleventh Amendment was to protect state treasuries. At the time, the Supreme Court chose to protect state government treasuries at the expense of individuals. The Court chose immunity for state governments instead of accountability for state governments.

Courts created a myriad of rules to determine which entities are arms of the state and are eligible to enjoy immunity. For example, the fifth circuit applies a six factor test that includes the following questions: Is the entity an arm of the state; what are the entity's funding sources; and does the entity have the ability to sue or be sued apart from the state? The most import of the six factors is assessing an entity's revenue sources: Will a judgment against the entity be paid with state funds? [*Delahoussaye v. City of New Iberia*, 937 F.2d 144, 147-48 (5th Cir 1991)] If this were the only criteria, municipalities, school districts, police units and other local arms of government would enjoy state sovereign immunity, too. Collectively, municipalities spend almost as much state money as state governments and provide essential services such as education, law enforcement, and housing.

If my former employer, Indiana University School of Medicine (IUSM), were to be judged by its funding sources, then the medical school would flunk the eligibility test. IUSM would be stripped of its sovereign immunity and the courts would provide due process and remedies for IUSM employees who were harmed by their employer. Why would IUSM fail the test? As the largest medical school in the nation, IUSM has a diverse multi-billion dollar revenue stream.

> Though a public medical school, the state of Indiana funds only about 10 % of IU School of Medicine operating costs (https://mednet.iu.edu/MasterDocLibrary/102419-IUSM-AnnualReport.pdf p22).

IUSM's federal revenue stream is larger than its state revenue stream. In 2019, it received over $361 million in research funding (IUSM annual report 2018 -19, p.14). Since the medical school has educational centers in 10 counties, it received a significant amount of revenue from each county in Indiana. Philanthropic gifts and grants totaled 1.4 billion ($628.8 million in philanthropic gifts and $817.8 million in non-government grants). Since IUSM has a broad array of revenue sources, the state treasury will not be drained if IUSM is liable for injuries and its employees receive monetary compensation. So why are IUSM employees are still haunted by the sovereign immunity zombie?

3. State Embarrassment – Loss of Dignity. The third defense of sovereign immunity is that a state can't be a defendant in federal court because it would offend its dignity:
The third defense of sovereign immunity is that a state can't be a defendant in federal court because it would offend its dignity:

> The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities. (*Idaho v. Coeur d' Alene Tribe*, 1997).

Scholar Paul Gowder disagrees:

> States don't have dignity of their own, except insofar as they serve their people. Moral standing and worth is limited to humans, not the corporate entities they create [Gowder, Paul. *The Rule of Law Against Sovereign Immunity* Texas Law Review, Vol 93 247 (2015) p248].

Scholar Aman Pradhan disagrees, too:

> The term 'dignity' is a misnomer. The starting premise of popular sovereignty and limited government is that governmental actors have dignity because they are vested with power by the people and are subject to the rule of law. Thus suability does not comprise state dignity; it is its source [Pradhan, Aman. *Rethinking the Eleventh Amendment: Sovereign Immunity in the United States and the European Union.* Legislation and Public Policy, Vol. 11:215 p. 230].

In short, state sovereign immunity has no Constitutional underpinnings and no credible defense. In spite of being an Emperor with no clothes, the common law doctrine of sovereign immunity trumps even the Constitution and federal laws in today's courts. It bars suits for relief against government entities in violation of the Constitution and Federal Laws.

Why is the Doctrine of Sovereign Immunity Unconstitutional?

State sovereign immunity is inconsistent with the Constitution because it is incompatible with at least five fundamental constitutional principles: the supremacy of the Constitution and federal laws; the accountability of government; due process of law, the petition clause of the first amendment, the preamble, and entitlement to privileges or

immunities. Each of these constitutional doctrines by itself is sufficient to justify declaring the sovereign immunity doctrine unconstitutional. We will consider four of them: the Supremacy Clause, Due Process, 14th Amendment, and Preamble.

1 & 2. Supremacy Clause and Due Processes. According to Article IV of Constitution, the Constitution and laws made pursuant to them are the supreme law and should prevail over government claims of sovereign immunity. A key principle of US government is the maxim that no one, not the President and not the government agencies, are above the law. Sovereign immunity tramples this key principle. It places the government above the law and ensures that some citizens who have suffered egregious harms will be unable to receive redress for their injuries. The judicial role of enforcing and upholding the Constitution is rendered illusory when the government has complete immunity. Moreover, sovereign immunity undermines the basic principle that 'the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury' [Chemerinsky, Erwin. *Against Sovereign Immunity.* Stanford Law Review, Vol. 53:1201. p.1202; *Marbury vs. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)]."

Many times, the Supreme Court has identified a deprivation of life, liberty, or property and declared the need for a judicial forum, state or federal, to provide redress [*Oestereich v. Selective Serv. Local Bd.*, No.11, 393 U.S. 233, 243 n.6 (1968); *Richard H. Fallon, Jr Some Confusions About Due Process, Judicial Review, and the Constitutional Remedies*, 93 COLUM. L. REV. 309 (1993); *Johnson v. Robison*, 415 U.S. 361, 368-70 (1974); *Webster v. Doe,* 486 U.S. 592, 599-600 (1988); *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 491-95 (1991); *United States v. Mendoza-Lopez*, 481 U.S. 828, 835 (1987)]. Unfortunately, the Supreme Court's recent decisions involving sovereign immunity established a pattern of injury to individuals

accompanied by the deprivation of any type of judicial forum. For example, in *Kimel v. Florida Board of Regants*, the state employees had a liberty and property interest created by federal law that provides freedom from age discrimination, but they had no judicial forum and no due process.(*Maine, College Savings Bank, Kimel, Roth v. Bd of Regents,* 408 U.S. 564, 576-78 (1972) Chemerinsky, Erwin. *Against Sovereign Immunity.* Stanford Law Review, Vol. 53:1201. p.1202

3. Fourteenth Amendment . The Fourteenth Amendment single-handedly eviscerates the doctrine of sovereign immunity:

> If common law immunity is built into the very structure of the Constitution, then only a structural change can displace it. As ... *Fitzpatrick* recognized, the Fourteenth Amendment restructured the balance between federal and state power, modifying the original design of the Constitution and the original plan for state sovereign immunity. Thus, *Alden*'s dictum about tax refund litigation was wrong at the time of writing because *Fitzpatrick,* taken to its logical extension, demands that private plaintiffs can recover unlawfully exacted taxes without being barred by state sovereign immunity... As *Fitzpatrick* recognized, this represents a fundamental reshaping of the federal-state relationship - including the very structural postulates from which the Court has drawn its modern sovereign immunity doctrine. Thus, when a state deprives a person of property without just compensation or refuses to refund tax monies unlawfully exacted, due process demands a remedy - state sovereign immunity notwithstanding. Rights for which the Fourteenth Amendment itself provides a cause of action cannot be shielded from the courts." [*Reconciling State Sovereign Immunity with the Fourteenth Amendment - Notes*, Harvard Law Review Vol. 129:1068, (2016) p.1089].

4. Preamble to the Constitution. The Preamble presents our country's core values:

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United Sates of America.

Notice that the Preamble does not start with 'The federal government...' or 'Each of the states...' It deliberately and immediately makes individual U.S. citizens the featured entity. Chief Justice John Marshall re-emphasized that the citizenry is first and foremost, not secondary to governments:

> The government proceeds directly from the people; is ordained and established in the names of the people.

Sovereign immunity is at odds with the core values reflected in the Preamble because it values state governments over citizens.

Nothing Precludes the Supreme Court from Retiring the Doctrine of Sovereign Immunity

> State sovereign immunity is now detached from the Eleventh Amendment's text and appears to be a universal default absent affirmative destruction... The modern Immunity Theory now emphasizes constitutional structure and constitutional history to explore the boundaries of state sovereign immunity... And the Fourteenth Amendment's impact on sovereign immunity is unmistakable. Section I of the Fourteenth Amendment extinguished state sovereign immunity. To the extent that a State violates the substantive provisions of the Fourteenth Amendment - be it the protections found within that Amendment, or the constitutional protections incorporated against states through the Fourteenth Amendment - such violations are unprotected by state sovereign immunity. A Section 5 enactment is not required to abrogate state sovereign immunity, because Section 1 has already eviscerated state sovereign immunity with respect to its provisions.

> Congress need only to create a right of action against the states to allow citizens to vindicate their constitutional rights. Congress has created such a right of action - 42 U.S.C $ 1983. However, the Court previously ruled that States are not 'persons' for $ 1983 purposes because of state sovereign immunity concerns. In light of this Article's assessment of state sovereign immunity giving way to Section 1 of the Fourteenth Amendment, this Article concludes that 42 U.S.C $1983 is a viable right of action against infringing states. No state sovereign immunity exists against violations of the Fourteenth

Amendment, and therefore no state sovereign immunity concerns exist to validate removing States from the scope of 42 U.S.C $ 1983 constitutional tort suits (Gunn, Travis. *The Fourteenth Amendment: Structural Waiver of State Sovereign Immunity for Constitutional Tort Suits.* Northern Illinois University Law Review (2014) Vol. 35, p72-73.)

Reasons for Granting the Petition

For All State Employees

State sovereign immunity is unconstitutional. It is at odds with the Preamble, Supremacy Clause, Due Process Clause, 1st and 14th Amendments. It renders state entities above the law, without accountability and without deterrence mechanisms. It leaves injured employees with no practical recourse and deters them from filing suits. Why file a suit when the best possible outcome is to incur thousands of dollars in unreimbursed legal expenses, spend additional years reliving the traumatic ordeal, and have a judge offer you nothing but job reinstatement as compensation? When found guilty, a state entity does not provide monetary relief in the form of back pay, front pay, and compensation for pain and suffering. When found guilty, the state entity is not fined and federal funding is not withheld. And state entities are well aware that they won't be held accountable for discriminatory, retaliatory, and unconstitutional acts against employees. When the IUSM attorney offered me a severance package, he let me know that if I filed an EEOC complaint, the best possible outcome would be job reinstatement. I was incredulous. That was so unjust! IUSM elirninated 7 old-timers in my department within a five month period and later terminated me. How could IUSM be immune to disciple?

The United States Supreme Court should value 'We the people' over state institutions and discard the unjust unconstitutional doctrine of state sovereign immunity that renders state entities unaccountable and immune to discipline. By retiring the antiquated doctrine of sovereign immunity, judges will be taking a running leap closer to realizing our country's cores values and affirming their oath to 'administer justice without respect to person, and do equal right to the poor and to the rich.'

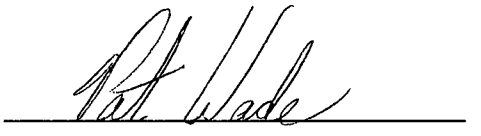
For the Petitioner

With respect to my case of age discrimination and retaliation that was dismissed on summary judgment, I ask the Supreme Court to send my case back to the District Court for reconsideration. I ask for legal counsel and additional discovery. The doctrine of sovereign immunity prevented me from retaining legal counsel on contingency. Lawyers refused to take my case on contingency because there was no prospect of a monetary award and I had to proceed without counsel.

Conclusion

The petition for a write of certiorari should be granted.

Respectfully submitted,



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