

No. 21-_____

In The
Supreme Court of the United States

JANA GARCIA,

Petitioner,

v.

WYOMING DEPARTMENT OF
HEALTH AND SOCIAL SERVICES,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Pertinent to this petition, the petitioner's complaint against the Wyoming State Department of Health alleged as follows:

This is a civil action arising under the laws of the United States and is brought pursuant to the *Rehabilitation Act of 1973*, 29 U.S.C. §793 and 29 U.S.C. §794, the *Americans with Disabilities Act of 1990* (ADA) (42 U.S.C. §§12101 et seq.), the *Civil Rights Act of 1964* codified at 42 U.S.C. §§2000e et seq. This court has jurisdiction of the claims pursuant to 28 U.S.C. §§1331 and 1343.

The defendant answered the complaint by asserting Eleventh Amendment Immunity as an *affirmative defense* under Rule 8 of the *F.R.Civ.P.* but offered no evidence that it was not a recipient of Federal Funds. The District Court Ruled that the State was immune which was affirmed by the Tenth Circuit Court of Appeals.

The questions presented are:

1. In an action against a State under the *Rehabilitation Act of 1973 as amended*, is the State immune from suit under the Eleventh Amendment when the cause of action is couched under the "standards" of the *Americans with Disabilities Act* pursuant to 29 U.S.C. §794(d)?
2. Did the defendant State of Wyoming waive its immunity defense by litigating the merits of the matter while failing to present evidence that it did not receive federal funds?

QUESTIONS PRESENTED – Continued

3. Is Eleventh Amendment Immunity a question of subject matter jurisdiction or is it an affirmative defense which may be waived?

STATEMENT OF RELATED CASES

The related cases in this matter are:

JANA GARCIA, Plaintiff v. WYOMING DEPARTMENT OF HEALTH AND SOCIAL SERVICES, Defendant; Case No. 2:19-CV-159 SWS, United States District Court for the District of Wyoming.

JANA GARCIA, Plaintiff v. WYOMING DEPARTMENT OF HEALTH AND SOCIAL SERVICES, Defendant; Case No. 20-8052, United States Court of Appeals for the Tenth Circuit (D.C. No. 2:19-CV-000159 SWS (D. Wyo.).

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Jana Garcia, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on October 18, 2021.

OPINIONS BELOW

The opinion of the Court of Appeals appears in the Appendix hereto. The District Court opinion also appears in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on the 19th of October, 2021. The court granted an extension of time to file the Petition for Certiorari to February 6, 2022. This Petition for Certiorari is filed prior to that date and is therefore timely. This court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

United States Code,

29 U.S.C. §794(a):

No otherwise qualified individual with a disability in the United States, as defined in section 7(20) [29 U.S.C. §705(20)], shall, solely

by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

(b) “Program or activity” defined. For the purposes of this section, the term “program or activity” means all of the operations of—(1)

(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

* * * *

(d) **Standards used in determining violation of section.** The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. §§12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C.

§§12201–12204 and 12210), as such sections relate to employment.

United States Code,

42 U.S.C. §2000d-7(a)(1):

A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973.

Wyoming Statutes at WYO. STAT. §§9-2-101 et seq., provide that the State of Wyoming has established the Division of Vocational Rehabilitation, Wyoming's program to provide vocational rehabilitation services to those who qualify.

Wyoming Statutes at WYO. STAT. §9-2-112, provides that the State of Wyoming will cooperate with the Federal Government in providing services to individuals with disabilities.

Wyoming Statutes at WYO. STAT. §9-2-113 provides that the State Treasurer is the custodian of all funds received from the federal government for vocational rehabilitation.

STATEMENT OF THE CASE

A public health nurse employed by the Wyoming Department of Health alleged in her Federal action that she was terminated from her position solely by reason of her disability. She stated her cause of action

under the *Rehabilitation Act of 1973* using the standards of the *Americans With Disabilities Act* which are incorporated in the *Rehabilitation Act* by statute. 29 U.S.C. §794(d). The State of Wyoming alleged as an *affirmative defense* sovereign immunity under the Eleventh Amendment.

Without filing a motion to dismiss on jurisdictional grounds under Rule 12(b)(1) F.R.Civ.P. the State moved for summary judgment on the merits and contended that it was entitled to Eleventh Amendment Immunity as a defense under Rule 8 F.R.Civ.P., but offered no evidence that the State did not receive federal funds under the *Rehabilitation Act*. 29 U.S.C. §§794(a) and (b).

The District Court granted summary judgment based on sovereign immunity under the *Americans With Disabilities Act* disregarding that the claimant invoked the *Rehabilitation Act of 1973* which sovereign immunity is waived for states that receive federal funds. 42 U.S.C. §2000d-7. It held that the because the State of Wyoming was immune under the *Americans With Disabilities Act*, it was immune under the *Rehabilitation Act* as well if the claimant stated that the allegations were made pursuant to the standards set forth in the ADA, citing *inter alia*, *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001), and *Levy v. Kansas Department of Social and Rehabilitation Services*, 789 F.3d 1164, 1170-71 (See App. pp. 32-36).¹

¹ Despite granting summary judgment on sovereign immunity grounds, the District Court also granted summary judgment

The Tenth Circuit affirmed, citing *Levy, supra*, which upheld Eleventh Amendment immunity in an *ADA* case where the state statute of limitation had expired on the *Rehabilitation* case. In this case, where the statute had not expired on the *Rehabilitation* case, the court nevertheless affirmed summary judgment on Eleventh Amendment jurisdictional grounds by labeling it an *ADA* case where sovereign immunity applies.² *Garcia v. Wyoming*. (App. 5).

REASON FOR GRANTING THE WRIT

A.

There is a conflict among the Circuits regarding whether a person can allege discrimination under the *Rehabilitation Act* by couching her claim under the standards of the *Americans With Disabilities Act*.

By reason of the statutory incorporation of the “standards” of the *Americans With Disabilities Act* (*ADA*) into the *Rehabilitation Act of 1973*, there is a close relationship between these two statutes. A state is immune under the Eleventh Amendment under the *Americans With Disabilities Act* since Congress’ abrogation of sovereign immunity under the Section

on the merits. (App. 32-36). The Tenth Circuit did not consider the merits of the disability claim. (App. 6-7).

² There was no evidence that the state had refused federal funds under the *Rehabilitation Act of 1973* even though the state had adopted statutes enabling it to receive and administer such funds. WYO. STAT. §§9-2-101 et seq.

5 of the Fourteenth Amendment has been deemed unconstitutional. *Bd. of Trs. v. Garrett*, 531 U.S. 356, 121 S. Ct. 955 (2001). However, under Section 794(d) of the *Rehabilitation Act* one must apply the standards of the *ADA* when stating a claim for disability discrimination since the *ADA* standards for determining liability are incorporated into the *Rehabilitation Act*. 29 U.S.C. §794(d). The Tenth Circuit in this matter determined that the state is immune from suit under the Eleventh Amendment if the claimant utilized the *ADA* standards to state a cause of action under the *Rehabilitation Act*. This holding is in conflict with other cases decided by other circuits and will serve to cause confusion similar cases

It is clear that under Section 504 of the *Rehabilitation Act of 1973* (29 U.S.C. §794 and 42 U.S.C. §2000d-7) Congress unambiguously abrogated state sovereign immunity in cases against the state for discrimination on the basis of disability which accept federal assistance. *Clark v. California Dep't of Corrections*, 123 F.3d 1267, (9th Cir. 1997), cert. denied, 524 U.S. 937, 118 S. Ct. 2340, 141 L. Ed. 2d 711; *Garrett v. University of Ala. Bd. of Trustees*, 193 F.3d 1214, rev'd, 531 U.S. 356, 121 S. Ct. 955, 148 L. Ed. 2d 866. It is also clear that the State is immune from suit under the *Americans With Disability Act*. *Board of Trustees v. Garrett* 531 U.S. 356, 121 S. Ct. 955, 148 L.Ed. 866, *supra*. However, since the *Rehabilitation Act of 1973* incorporates the "standards" of the *Americans With Disabilities Act* the Tenth Circuit has ruled in this matter that reference to the standards of the *ADA* results in Eleventh Amendment Immunity being grafted on to

the *Rehabilitation Act* as either a jurisdictional prerequisite or as a defense to the state even when statutorily immunity has been abrogated by virtue of waiver under the *Rehabilitation Act of 1973*.

Since the enactment of the *Civil Rights Equalization Act*,³ 42 U.S.C. §2000d-7, it's been clear that by accepting federal financial assistance, states waive sovereign immunity from suit under the *Rehabilitation Act*. This has been true for all the circuits except, at this time, the Tenth Circuit. *See, e.g., Clark v. Cal. Dep't of Corr.*, 123 F.3d 1267 (9th Cir. 1997); *Vinson v. Thomas*, 288 F.3d 1145 (9th Cir. 2002); *Garrett v. Univ. of Ala. at Birmingham Bd. of Trs.*, 344 F.3d 1288 (11th Cir. 2003); *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272 (5th Cir. 2005); *Bowers v. NCAA*, 475 F.3d 524 (3d Cir. 2007); *Duncan v. Univ. of Tex. Health Sci. Ctr.*, 469 F. App'x 364 (5th Cir. 2012); *Patrick W. v. Lemahieu*, 165 F. Supp. 2d 1144 (D. Haw. 2001); *Degrafainreid v. Ricks*, 417 F. Supp. 2d 403 (S.D.N.Y. 2006); *Hayes v. Williams-ville Cent. Sch. Dist.*, 506 F. Supp. 2d 165 (W.D.N.Y. 2007); *Miller v. Johnson*, 541 F. Supp. 2d 799 (E.D. Va. 2008); *Everybody Counts, Inc. v. N. Ind. Reg'l Planning Comm'n*, No. 2:98 CV 97, 2006 U.S. Dist. LEXIS 39607 (N.D. Ind. Mar. 30, 2006).

This Tenth Circuit position is contrary to all other Circuits that have considered Eleventh Amendment Immunity as such applies to the *Rehabilitation Act of 1973* after the *Act* was amended in 1992 to incorporate

³ Oct. 21, 1986, P. L. 99-506, Title X, §1003, 100 Stat. 1845 codified at 42 U.S.C. §2000d.

the “Standards” of the *ADA*. Oct. 29, 1992, P. L. 102-569, Title I, Subtitle A, §102(p)(32), Title V, §506, 106 Stat. 4360, 4428, 29 U.S.C. §794.)⁴

This matter is not a claim under the *Americans With Disabilities Act* but a claim under the *Rehabilitation Act of 1973* in which the cause of action was couched in terms found in the *Americans With Disabilities Act* because its “standards” were incorporated into the *Rehabilitation Act* by Congress in 1992 and is codified at 29 U.S.C. §794(d).⁵ To date this Court has not resolved the dilemma of ambiguity faced by courts and litigants caused by incorporation of the standards of the *ADA*, a statute which does not constitutionally abrogate Eleventh Amendment Immunity, into a related statute which unambiguously does require states to waive immunity if they accept federal funds.

⁴ The Circuit Court’s ruling that the state was immune under the Eleventh Amendment in an action under the *Rehabilitation Act* is not ameliorated by reliance on *Levy v. Kan. Dep’t of Soc. & Rehab. Servs.*, 789 F.3d 1164 (10th Cir. 2015). In *Levy* the complainant’s claim under the *Rehabilitation Act of 1973* was barred by the state’s two year statute of limitation leaving only a possible claim under the *Americans With Disabilities Act* and its’ language abrogating the Eleventh Amendment Immunity. The Tenth Circuit, therefore, held that *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001) clothed the state with Eleventh Amendment Immunity with respect to Levy’s ADA claim since the *Rehabilitation Act* claim was precluded by the Kansas Statute of Limitation. *Levy, supra*, p. 1174.

⁵ Oct. 29, 1992, P. L. 102-569, Title I, Subtitle A, §102(p)(32), Title V, §506, 106 Stat. 4360, 4428, 29 U.S.C. §794.

B.

There is a conflict among the Circuits concerning whether a state's Eleventh Amendment immunity deprives a federal court of subject matter jurisdiction or whether it merely acts as an affirmative defense which may be waived.

The State asserted Eleventh Amendment Immunity as an affirmative defense to the *Rehabilitation Act* cause of action, but offered no evidence that it was not a recipient of federal funds and therefore had not waived immunity. However, Summary Judgment was granted by the District Court on the merits *and* on the basis of Eleventh Amendment Immunity, without delineating whether such immunity was jurisdictional or a defense which may be waived. (App. 32-62). The Tenth Circuit, however, did not fully consider the merits of the claim under the *Rehabilitation Act*, but granted Eleventh Amendment Immunity as if it was a matter of subject matter jurisdiction and not an affirmative defense. (App. 6-7).

Plaintiff petitioner contends that the defendant State waived its affirmative defense by failing to present evidence that the state had not waived immunity. However, this court has not decided whether Eleventh Amendment Immunity is jurisdictional, or a defense that must be proved, making it unclear whether Eleventh Amendment Immunity is an affirmative defense or a jurisdictional bar, which nonetheless can be waived. *Archuleta v. Lacuesta*, 131 F.3d 1359, 1362 (10th Cir. 1997). In *Wis. Dep't of Corr. v. Schacht*, 524 U.S. 381,

391, 141 L. Ed. 2d 364, 118 S. Ct. 2047 (1998), this court assumed that “ . . . that Eleventh Amendment immunity is a matter of subject matter jurisdiction,” but noted that this was “a question we have not decided.” The court, in *Schacht*, noted that unlike subject matter jurisdiction, Eleventh Amendment immunity may be waived and courts may choose not to raise it *sua sponte*. *Schacht, supra*, 524 U.S. at 389. However, some courts have held that the State’s assertion of Eleventh Amendment immunity challenges the subject matter jurisdiction of the district court, and hence the issue must be resolved before a court may address the merits. *Martin v. Kansas*, 190 F.3d 1120, 1126 (10th Cir. 1999) (emphasis added); accord *Seaborn v. Fla., Dep’t of Corr.*, 143 F.3d 1405, 1407 (11th Cir. 1998). Others have ruled otherwise. *Parella v. Ret. Bd. of R.I. Employees’ Ret. Sys.*, 173 F.3d 46, 55-57 (1st Cir. 1999). Courts indicated that, in substance, the Eleventh Amendment constitutes a bar to federal subject matter jurisdiction which should be tested under Rule 12 Fed Rules of Civil Procedure. See, e.g., *Elephant Butte Irrig. Dist. v. Dep’t of the Interior*, 160 F.3d 602, 607 (10th Cir. 1998); *ANR Pipeline Co. v. Lafaver*, 150 F.3d 1178, 1182, 1186 (10th Cir. 1998). Accord *United States v. Tex. Tech. Univ.*, 171 F.3d 279, 285 n.9 (5th Cir. 1999) (citing similar decisions from several circuits), cert. denied, 120 S. Ct. 2194 (2000); *Fent v. Okla. Water Res. Bd.*, 235 F.3d 553, 558 (10th Cir. 2000); *Stewart v. Mountainland Tech. Coll.*, No. 20-cv-00086-JNP, 2021 U.S. Dist. LEXIS 39343, at 14 (D. Utah Mar. 2, 2021).

However, in this matter the state did not object to subject matter jurisdiction and presented no evidence of absence of waiver to support its affirmative defense – yet the district court and the court of appeals ruled that Eleventh Amendment Immunity applied. (App. 6-7; App. 32-36). This result, being internally inconsistent, should be resolved by this court by determining whether assertion of Eleventh Amendment immunity is a jurisdictional issue, or a question of whether the defense of immunity has been waived.

CONCLUSION

To resolve the conflict among the circuits and clarify existing law regarding Eleventh Amendment Immunity with respect to *Rehabilitation Act* claims, this Court should issue Writ of Certiorari to the Tenth Circuit Court of Appeals.

For the reasons stated, the court should grant a Writ of Certiorari.

Respectfully submitted,

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