No. 21-317

ORIGINAL

IN THE

Supreme Court of the United States

DEAN A. KOCH
Petitioner,

v.

STATE OF OHIO, Department of Natural Resources, Division of Wildlife; JAMES ZEHRINGER, Director, Department of Natural Resources, Sued in both his individual and official capacities; SCOTT ZODY, Chief, Department of Natural Resources, Division of Wildlife, Sued in both his individual and official capacities; RANDALL J. MEYER, Inspector General, Sued in both his individual and official capacities; GINO BARNA, OHIO WILDLIFE OFFICER, ERIE COUNTY, OHIO, Sued in his individual and official capacities; BRIAN BURY, OHIO WILDLIFE OFFICER, ERIE COUNTY, OHIO, Sued in his individual and official capacities; GARY MANLEY, OHIO WILDLIFE OFFICER, ERIE COUNTY, OHIO, Sued in his individual and official capacities
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Decision of the Sixth Circuit herein violate the canons of statutory construction especially those enunciated in *Bostock v. Clayton County,* No. 17–1618. Argued October 8, 2019—Decided June 15, 2020, ____ U.S. ___?
2. Does the Eleventh Amendment to the U. S. Constitution prohibit suits against state entities and individuals or does it merely limit the remedies for such actions?
3. Is qualified immunity constitutional?
4. Does the judicially-created doctrine of qualified immunity run contrary to statute and the intent of the legislature under the Civil Rights Act of 1871 (The Ku Klux Klan Act), 42 U.S.C. §1983 and the XII, XIV and XV Amendments to the U.S. Constitution?

STATEMENT OF RELATED PROCEEDINGS

Dean Koch v. State of Ohio, et al. 3:18-cv-2287 (N.D. Ohio); *Dean Koch v. State of Ohio et al.*, 20-3334 (6th Cir.).

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Dean Koch v. State of Ohio et al., 20-3334 (6th Cir.). Which is included as Appendix A (App. 1). *Dean Koch v. State of Ohio, et al.* 3:18-cv-2287 (N.D. Ohio). Which is included as Appendix B (App. 16).

STATEMENT OF JURISDICTION

This matter is in response to the Sixth Circuit Court of Appeals Decision and Opinion filed June 2, 2021. This Decision and Opinion is in conflict with this Court's holding in *Bostock v. Clayton County,* No. 17–1618. Argued October 8, 2019—Decided June 15, 2020, ____ U.S. This action was brought pursuant to 42 U.S.C. §§1983, 1985 and 1988 and the First and Fourteenth Amendments to the United States Constitution, 11 U.S.C. §§362 and 1201 and, 15 U.S.C. §1692. Jurisdiction is founded on 28 U.S.C. §§1331 and 1341(3) and (4) and 1343 and the aforementioned constitutional and statutory provisions. The declaratory and injunctive relief sought is authorized by 28 U.S.C. §§ 2201 and 2202, 42 U.S.C. §1983 and Rule 57 Federal Rules of Civil Procedure. Additionally, the Plaintiffs invoked this Court's supplemental jurisdiction, pursuant to 28 U.S.C.§1367(a), of state causes of action included herein since they are involved in the facts, law and issues of this matter.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Regarding both assertions of immunity, there is no "canon of donut holes" within the canons of statutory construction. *Bostock v. Clayton County,* No. 17–1618. Argued October 8, 2019—Decided June 15, 2020,

Concerning the Eleventh Amendment, Article III, 2, of the Constitution provides that the federal judicial power extends, inter alia, to controversies "between a State and Citizens of another State."

Concerning qualified immunity, in the Civil Rights Act of 1871 (also known as the Ku Klux Klan Act), Public Law 42-22, Congress gave Americans the right to sue public officials who violate their legal rights. In Section 1983 of the U.S. Code (the modern analogue of the 1871 Civil Rights Act), Congress said that if a public official violates your rights—whether via police brutality, an illegal search, or an unlawful arrest—you can file a lawsuit to hold that public official financially accountable for his conduct. The language Congress used was unequivocal: "Every" state official who causes a "deprivation of any rights" guaranteed by the Constitution and laws "shall be liable to the party injured." The Appeal; "Qualified Immunity Explained". Amir H. Ali and Emily Clark, *infra.*

STATEMENT OF THE CASE

Petitioner filed a Complaint in the U. S. District Court Northern District of Ohio on October 2, 2018 (R.1, Complaint PAGEID# 1-15). Motions to Dismiss for Failure to State a Claim were filed on November 20, 2018 (R.10, Motion to Dismiss PAGEID# 48-143) and December 10, 2018 (R.16, Motion to Dismiss, PAGEID# 173-

209). Responses in Opposition to Motions to Dismiss were filed on December 4, 2018 (R.14, Opposition PAGEID# 151-162) and December 20, 2018 (R.18, Opposition PAGEID# 216-235). Replies to Responses in Opposition to Motion to Dismiss were filed on December 17, 2018 (R.17, Reply, PAGEID# 212-215) and December 31, 2018, (R.19, Reply PAGEID# 236-241). An Order on Motions to Dismiss was filed on March 9, 2020, dismissing the case, (R. 23, Memorandum Opinion and Order PAGEID# 250-267). Notice of Appeal was filed on March 20, 2020 (R.25, Notice of Appeal, PAGEID# 269-270). The Sixth Circuit Court of Appeals affirmed the decision of the U. S. District Court for the Northern District of Ohio on June 2, 2021.

SUMMARY OF ARGUMENT

The Respondents have engaged in a decades- long campaign of retaliation against the Petitioner for the exercise of his First Amendment right to free speech. Not only have they participated in these actions but were on explicit notice thereof. The Eleventh Amendment does not prohibit suits against these entities and individuals, but merely prohibits certain remedies. Qualified immunity is not applicable to such state actors and, in fact, is a judicially- created doctrine having no statutory basis and is contrary to the XIII, XIV and XV Amendments to the United States Constitution and the Civil Rights Act of 1871.

ARGUMENT

A. The Eleventh Amendment

1. Conflict with in *Bostock v. Clayton County,* No. 17–1618. Argued October 8, 2019—Decided June 15, 2020 and the Canons of Statutory Interpretation.

a. The Canon of Donut Holes

The Sixth Circuit accepted the Respondents' claim that the Eleventh Amendment prohibits states from being sued by their own citizens. Of course, the Eleventh Amendment itself says no such thing. This expansion of the Eleventh Amendment is a judicial creation. This fiction is necessarily limited by its conflict the Fourteenth Amendment as enunciated in *Ex Parte Young,* 209 U. S. 123 (1908).and recognized and acknowledged in *Penhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89 (1984). This approach, rejected in *Bostock,* is precisely the approach taken by the Supreme Court in expanding the unambiguous language of the Eleventh Amendment.

As recounted in *Penhurst, supra;*

A

> Article III, 2, of the Constitution provides that the federal judicial power extends, inter alia, to controversies "between a State and Citizens of another State." Relying on this language, this Court in 1793 assumed original jurisdiction over a suit brought by a citizen of South Carolina against the State of Georgia. Chisholm v. Georgia, 2 Dall. 419 (1793). The decision "created such a shock of surprise that the Eleventh Amendment was at once proposed and adopted." Monaco v. Mississippi, 292 U.S. 313, 325 (1934). The Amendment provides:
>
> "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."

> The Amendment's language overruled the particular result in Chisholm, but this Court has recognized that its greater significance lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III. Thus, in *Hans v. Louisiana*, 134 U.S. 1 (1890), the Court held that, despite the limited terms of the Eleventh Amendment, a federal court could not entertain a suit brought by a citizen against his own State. After reviewing the constitutional debates concerning the scope of Art. III, the Court determined that federal jurisdiction over suits against unconsenting States "was not contemplated by the Constitution when establishing the judicial power of the United States." Id., at 15. *See Monaco v. Mississippi,* supra, at 322-323.

Penhurst, 465 U.S. at 98 – 99.

The decision of this Court in the judicially created fiction of *Hans, supra,* that the Eleventh Amendment says more than it actually says in plain English is precisely the technique recently rejected by this Court in *Bostock v. Clayton County,* No. 17–1618. Argued October 8, 2019—Decided June 15, 2020, which states in part:

> *Syllabus,*
>
> (2) The employers contend that few in 1964 would have expected Title VII to apply to discrimination against homosexual and transgender persons. *But legislative history has no bearing here, where no ambiguity exists about how Title VII's terms apply to the facts.* See Milner v. Department of Navy, 562 U. S. 562, 574. While it is possible that a statutory term that means one thing today or in one context might have meant something else at the time of its adoption or might mean something different in another context, *the employers do not seek to use historical sources to illustrate that the meaning of any of Title VII's language has changed since 1964* ***or that the statute's terms ordinarily carried some missed message.*** Instead, they seem to say when a new application is both unexpected and important, even if it is clearly commanded by existing law, the Court should merely point out the question, refer the subject back to Congress, and decline to enforce the law's plain terms in the meantime. This Court has long rejected that sort of reasoning. And the employers' new framing may only add new problems and leave the Court with more than a little law to overturn. *Finally, the employers turn to naked policy appeals, suggesting that the Court proceed without the law's guidance to do what it thinks best. That*

is an invitation that no court should ever take up. Pp. 23–33. No. 17–1618, 723 Fed. Appx. 964, reversed and remanded; No. 17–1623, 883 F. 3d 100, and No. 18–107, 884 F. 3d 560, affirmed.

(Emphasis added).

And further:

"Nor is there any such thing as a "canon of donut holes..."

This Court has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration. See, e.g., Carcieri v. Salazar, 555 U. S. 379, 387 (2009); Connecticut Nat. Bank v. Germain, 503 U. S. 249, 253–254 (1992); Rubin v. United States, 449 U. S. 424, 430 (1981).

The employers, however, advocate nothing like that here. They do not seek to use historical sources to illustrate that the meaning of any of Title VII's language has changed since 1964 or that the statute's terms, whether viewed individually or as a whole, ordinarily carried some message we have missed. To the contrary, as we have seen, the employers agree with our understanding of all the statutory language—"discriminate against any individual . . . because of such individual's . . . sex." Nor do the competing dissents offer an alternative account about what these terms mean either when viewed individually or in the aggregate. Rather than suggesting that the statutory language bears some other meaning, the employers and dissents merely suggest that, because few in 1964 expected today's result, we should not dare to admit that it follows ineluctably from the statutory text. When a new application emerges that is both unexpected and important, they would seemingly have us merely point out the question, refer the subject back to Congress, and decline to enforce the plain terms of the law in the meantime. That is exactly the sort of reasoning this Court has long rejected.

This is not a case involving Title VII, but *Bostock* does demonstrate what *not* to do when interpreting plain language. Concerning the unauthorized expansion of the Eleventh Amendment, as stated in *Bostock*.

> The employers, however, advocate nothing like that here. They do not seek to use historical sources to illustrate that the meaning of any of Title VII's language has changed since 1964 or that the statute's terms, whether viewed individually or as a whole, ordinarily carried some message we have missed. To the contrary, as we have seen, the employers agree with our understanding of all the statutory language—"discriminate against any individual . . . because of such individual's . . . sex." Nor do the competing dissents offer an alternative account about what these terms mean either when viewed individually or in the aggregate. Rather than suggesting that the statutory language bears some other meaning, the employers and dissents merely suggest that, because few in 1964 expected today's result, we should not dare to admit that it follows ineluctably from the statutory text. When a new application emerges that is both unexpected and important, they would seemingly have us merely point out the question, refer the subject back to Congress, and decline to enforce the plain terms of the law in the meantime. That is exactly the sort of reasoning this Court has long rejected.

There was no ambiguity in the Amendment's language. There was no change to the Amendment. Instead, the Court in 1890, nearly one hundred years after the promulgation of the Eleventh Amendment, unilaterally added to the United States Constitution - a power that it does not possess and, an approach that has most recently been rejected by the Supreme Court in *Bostock*.

The reasoning in *Bostock* is not a novelty.

> Where, as here, the statutory language is unambiguous, the inquiry ceases. See, e. g., United States v. Ron Pair Enterprises, Inc., 489 U. S. 235, 240.

Barnhart v. Sigmon Coal Co., 534 U.S. 438, Syllabus.

> (a) "[I]t's a `fundamental canon of statutory construction' that words generally should be `interpreted as taking their ordinary ... meaning ... at the time Congress enacted the statute.'" *Wisconsin Central Ltd. v. United States,* 585 U.S. ___, ___, 138 S.Ct. 2067, 2074, 201 L.Ed.2d 490 (quoting *Perrin v. United States,* 444 U.S. 37, 42, 100 S.Ct. 311, 62 L.Ed.2d 199). After all, if judges could freely invest old statutory terms with new meanings, this Court would risk amending

> legislation outside the "single, finely wrought and exhaustively considered, procedure" the Constitution commands. *INS v. Chadha,* 462 U.S. 919, 951, 103 S.Ct. 2764, 77 L.Ed.2d 317.

New Prime, Inc. v. Oliveira, 139 S. Ct. 532 (2019), Syllabus.

> The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one, indeed, which would justify a court in departing from the plain meaning of words, especially, in a penal act, in search of an intention which the words themselves did not suggest.
>
> *United States v. Wiltberger,* 18 U.S. 35 (1820), 5 Wheat. 35 at 44.

The judiciary since the founding of the Republic has had a tendency to legislate. This is nowhere more evident than in its creation of immunities where none exist. These immunities are manifestly un-American and against the spirit of the law. On this basis, Petitioner would argue that all of the positions taken by the Respondents are in error and the Eleventh Amendment in its plain language does not defeat Petitioner's claims *in toto.*

2. *Limitation of Relief*

The District Court's position is that the Eleventh Amendment to the United States Constitution prohibits any suit by a citizen against a state official for monetary damages from the state treasury. However, a state official who acts unconstitutionally can be sued because he cannot be held to be performing these acts on behalf of the state, even if the official complies with the state's own laws. Nonetheless, he can still be held to be a state actor. *See, Ex Parte Young,* 209 U. S. 123 (1908). Additionally, under *Young,*

> The answer to all this is the same as made in every case where an official claims to be acting under the authority of the state. The act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional. If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States. See Re Ayers, 123 U.S. 507, 31 L. ed. 230, 8 Sup. Ct. Rep. 164.

Id. at 159-160.

Young dealt with the enforcement of an unconstitutional state law but the principle remains the same. A state officer who acts in violation of the United States Constitution, is not acting as a representative of the state (although, and importantly, *Young* also held that for purposes of a federal lawsuit he was a state actor) but is acting as an individual. The Respondents are asserted in the pleadings to have violated the Petitioner's First Amendment right to free speech, his Fourteenth Amendment right to Due Process and, to have furthered a conspiracy to do so. At the very least, under *Young,* all of these Respondents are subject to injunctive and declaratory relief as requested in the Complaint. But they (other than the Respondent State of Ohio) are also *in their individual capacity* subject to monetary damages.

The immunities of the Eleventh Amendment are,

> In *Edelman,* the Court clarified the dividing line between permissible relief and relief proscribed by the Eleventh Amendment, distinguishing

> between prospective and retroactive relief. In summary, the Eleventh Amendment bars the award of retroactive relief for violations of federal law which would require the payment of funds from a state treasury.*Id.*, at 663, 94 S. Ct. at 1355-56. "The federal court may award an injunction that governs the official's future conduct, but not one that awards retroactive monetary relief." *Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 102-03, 104 S. Ct. 900, 909-10, 79 L. Ed. 2d 67 (1984). The immunity is triggered when relief amounts to the payment of state funds as a form of compensation for past breaches of legal duties by state officials. *Edelman,* 415 U.S. at 668, 94 S. Ct. at 1358.

In the present matter, as concerns the individual named Respondents, there has been no showing that their actions in their individual capacities, capacities they are assigned not only in the Complaint, but also under *Young, supra,* requires a payment of funds of any sort from the State Treasury. To claim that it does is unsupported and, is purely speculative at the pleading stage of the proceedings. It would be appropriate, if at all, under a motion for summary judgment when exhibits could be offered, but not at the pleadings stage. The individual Respondents are sued in their individual capacities and, under *Young,* are, at this stage, acting as individuals to whom the immunities of the Eleventh Amendment do not apply. The District Court so found.

The Complaint asked that the individual. Respondents are subject to injunctive and declaratory relief in both their official and individual capacities, and, monetary relief in their individual capacities. The State of Ohio, while not subject to monetary damages, is subject to the requested injunctive and declaratory relief although such relief is prospective. The District Court found that prospective injunctive relief remained available under the Eleventh Amendment. Accordingly,

the Complaint could not have been dismissed on this basis, at least not at the pleading phase.

b. Qualified Immunity

The same principles involved in *Bostock, supra* concerning the fiction of sovereign immunity apply to the even more egregious judicially legislated doctrine of qualified immunity. The history of the development of this doctrine displayed in the light of *Bostock* is as such,

> In the Civil Rights Act of 1871 (also known as the Ku Klux Klan Act), Congress gave Americans the right to sue public officials who violate their legal rights. In Section 1983 of the U.S. Code (the modern analogue of the 1871 Civil Rights Act), Congress said that if a public official violates your rights—whether via police brutality, an illegal search, or an unlawful arrest—you can file a lawsuit to hold that public official financially accountable for his conduct. The language Congress used was unequivocal: "Every" state official who causes a "deprivation of any rights" guaranteed by the Constitution and laws "shall be liable to the party injured."
>
> Initially, the U.S. Supreme Court recognized the straightforward application of this law. In the case Monroe v. Pape, for instance, a Black family, the Monroes, sued Chicago police officers who, in the early morning, broke into their home without a warrant, rounded them up, made them stand naked in the living room, and ransacked every room, emptying drawers and ripping mattress covers. The officers then arrested James Monroe, the father, and detained and interrogated him for hours. In an opinion written by Justice William Douglas, the Supreme Court recognized that the Civil Rights Act allowed the Monroes to sue the officers for violating their constitutional rights. The very purpose of the Civil Rights Act, the Court explained, was "to give a remedy to parties deprived of constitutional rights, privileges, and immunities by an official's abuse of his position."
>
> Over recent years, however, the Supreme Court has largely gutted this promise. It has done this by creating out of whole cloth the legal defense of qualified immunity, and then vastly expanding it.

The Appeal; "Qualified Immunity Explained". Amir H. Ali and Emily Clark.

As the authors further explain, an infinitesimal number of any complainants can ever, even in the most egregious cases (As detailed by the authors) get over this judicial creation which contravenes both the clear language of all civil rights acts back to the Ku Klux Klan Act of *1871* and the clear intent of both statutes. and the U. S. Constitution, specifically the XIII, XIV and XV Amendments, Prior to *Pierson* government officials had a defense of good faith. Apparently, that was not good enough because they also needed protection for bad faith as claimed in the case herein.

The actions of Respondents that lead to the conclusion that even under this fictitious doctrine the Respondents' actions as pled demonstrate that they are not deserving of qualified immunity and, Petitioner through Counsel also asserts that qualified immunity itself is unconstitutional.

The unprofessional, and facially malicious actions of the employees of the Respondent State of Ohio, as pled, even when notice was again and again given by Barnes, by rejections in court and by Petitioner's complaints, as pled, remained unaddressed. The officials and supervisors of Respondent State of Ohio were on notice and did nothing, as their continuing actions and the continuing actions of their employees demonstrate. There was no training, remedial or otherwise and no adequate supervision. Revenge and retaliation, explicitly expressed, were the order of the day for thirty years. Accordingly, "the [Defendants'] custom was the cause of the deprivation of ... constitutional rights". *Bickerstaff, supra.*

CONCLUSION

For the foregoing reasons, this Court should accept the Petition in this matter.

Respectfully submitted,

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