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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-1716

TITLE JEAN E. WELCH, Petitioner V. STATE DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION, ET AL.

PLACE Washington, D. C.

DATE March 4, 1987

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IN THE SUPREME COURT OF THE UNITED STATES

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JEAN E. WELCH, :

Petitioner, :

v. : No. 85-1716

STATE DEPARTMENT OF HIGHWAYS AND :

PUBLIC TRANSPORTATION, ET AL. :

- -x

Washington, D.C.

Wednesday, March 4, 1987

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:50 o'clock p.m.

APPEARANCES:

MICHAEL D. CUCULLU, ESQ., Houston, Texas; on behalf of the petitioner.

F. SCOTT McCOWN, ESQ., Special Assistant Attorney General of Texas, Austin, Texas; on behalf of the respondents.

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P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will hear argument next in No. 85-1716, Jean E. Welch versus State Department of Highways and Public Transportation.

Mr. Cucullu, you may begin whenever you are ready.

ORAL ARGUMENT OF MICHAEL D. CUCULLU, ESQ.,

ON BEHALF OF THE PETITIONER

MR. CUCULLU: Mr. Chief Justice, may it please the Court, Jean Welch was crushed and injured between a mobile crane and a guard rail in 1981 while employed as a marine technician for the State Highway Department of the State of Texas.

Faced with the proposition that a line of decisions in Texas precludes her from pursuing a Jones Act case within the state court system she sued for Jones Act remedies in the Federal District Court in Houston, and was denied by virtue of a motion to dismiss founded upon Eleventh Amendment immunity.

The District Court reasoned that the Eleventh Amendment precluded her right to pursue her Jones Act claim in Federal District Court. That is the issue which comes here by way of the Fifth Circuit, which held in its en banc decision that the recent line of cases of this Court in connection with immunity requires a

statement within the Jones Act that the Jones Act is particularly, clearly, and unequivocally applicable to the states.

This is a deviation from the most closely aligned cases of Petty and Parden which held very simply the other end of the spectrum, that in the event that the government chooses or elects to enter into a federally regulated sphere of activity, that it necessarily subjects itself to the federal regulations which Congress has enacted.

In Petty, for instance, even though there is some distinguishing factors in there the Jones Act was the key issue. The individual sued a bi-state corporation and was entitled to recover with language by this Court indicating that unless the state was specifically excluded from the statutory language, then the individual who was injured had the right to proceed.

QUESTION: Mr. Cucullu, would you say that the constructive waiver theory in Parden is inconsistent with this Court's most recent statements about the need for Congress to use express language to leave no room for another construction if the state's Eleventh Amendment immunity is to be waived?

MR. CUCULLU: Yes, Your Honor, it is. I believe that the opposite ends of the spectrum are the

Parden decision and the Atascadero decision. I think on the one hand where the Court said if you choose to enter into this activity, you are going to subject yourself to our regulations, whereas on the other hand the Atascadero decision says the immunity issue is not going to be waived until and unless Congress says that it is directly and unequivocally applicable to the states as defendants under the Jones Act.

QUESTION: Is it open to us, do you think, to just overrule Parden in this case?

MR. CUCULLU: Of course it is open to you. I think that is one of the options that the Court has. I think one of the considerations that the Court has to undertake in connection with overruling Parden is whether the provisions of Article 3, Section 2 of the Constitution are sufficient to allow Congress to completely, totally, and exclusively regulate maritime and admiralty matters in this country, and that is the critical issue here, because Jean Welch, the plaintiff in this particular case, has no remedy.

If the Fifth Circuit Court of Appeals is affirmed. She has no remedy under the Jones Act in connection with her rights as a seaman, which is a federally protected employee, one of the two classes of federally protected employees.

QUESTION: Do federal courts have exclusive jurisdiction under the Jones Act?

MR. CUCULLU: No, Your Honor, they do not.

QUESTION: How about a state court suit?

MR. CUCULLU: It was an option to the plaintiff, to Ms. Welch, at the time that the suit was filed. There are state --

QUESTION: What, has the statute run now, or what?

MR. CUCULLU: Yes, Your Honor.

QUESTION: Because it didn't seem to me that the Court of Appeals foreclosed any Jones Act suit in the state court. Petty would indicate that it was open.

MR. CUCULLU: It was open, but there is language also in the state court in the concurring opinion of Judge Gee, for instance, Your Honor, which indicates that --

QUESTION: In the Court of Appeals.

MR. CUCULLU: The Court of Appeals. That the state law in Texas provides that my client, Jean Welch, has only the right to pursue an exclusive worker's compensation remedy.

QUESTION: I see.

MR. CUCULLU: That she has no right to pursue

a Jones Act claim against the state within the state court system. Therefore the election --

QUESTION: You think that the judge indicated that Texas has closed its court to Jones Act cases?

MR. CUCULLU: It was indicated first of all Your Honor, in the District Court level by the decision of Judge Sire, who was also one of the authors of one of the Texas appellate court decisions before he took the District Court bench, and that foreclosed the issue as far as the State of Texas is concerned, which allowed -- which precluded Jean Welch from filing her Jones Act suit within the state system.

It is clear and it is evident that there is nothing within the legislative history of the Jones Act which provides that Congress contemplated that the Jones Act would be applicable to the states.

However, if you look to the language of the statute itself wherein it provides that any seaman shall have the right to pursue her remedies or his remedies in connection with injuries sustained, and you look to the provision of the statute which supplies the jurisdiction in federal courts in connection with Jones Act claims. That in the petitioner's estimation is sufficient reason to allow the pursuit of Jones Act claims against state employers within the federal court system.

We have to differentiate between the substantive and the jurisdictional issues which were raised by the Fifth Circuit in connection with their affirming the dismissal of Jean Welch's complaint.

If you look first to the jurisdictional issue it can be overcome by the language in the statute notwithstanding the Eleventh Amendment, which is the balancing of the competing interests which this Court has to decide will prevail, whether the individual, Jean Welch, or whether the state's rights are going to be subjected to the fact that Congress has exclusive authority over admiralty and maritime matters.

In connection with the substantive matter, because Texas has enacted a statute which says you, even though you are a seaman, Jean Welch, even though you are doing traditional maritime duties, even though you are in the position that we know that admiralty and maritime is governed by Congress and not by us, you have no Jones Act rights in this state.

If you took that one step farther and affirmed the Fifth Circuit Court of Appeals in this particular case, would you not then have in fact deviations in connection with admiralty and maritime matters whereas the plaintiff, for instance, in the State of Texas could not pursue a Jones Act right, whereas a plaintiff in the

State of Louisiana could pursue a Jones Act right because there is a constitutional waiver of immunity in Louisiana, but can't get a jury trial in Louisiana, because there is also a constitutional amendment in Louisiana which says you can't try a jury trial against a state agency in Louisiana.

So if you cross the border you are in a position where you have no jury trial in Louisiana but you can try a Jones Act case against the state in that state. If you go west to Texas you can't try the case at all. She is limited exclusively and entirely to worker's compensation remedies.

Now, what results is a derogation of the Congressional intent, objective, and purpose to maintain complete control of admiralty and maritime matters. Any other result which could be reached in this particular case is going to result in either one of two things.

It is going to result in the limitation of Jones Act claims in federal court against state employers, that is that the court will overrule Parden and say you cannot pursue a Jones Act complaint in federal court, period, against a state employer, no ifs, ands, or buts, following Atascadero. There is no language in the statute.

Or the court will have to compel the states in

some fashion to accept the Jones Act claims against their employees.

Alternative is very simply this Court could decide that even with the Eleventh Amendment standing in the way of a Jones Act complaint in federal court, that you can compel the states, the state courts to accept the claim, hear the claims, and litigate the claims with this Court obviously having supervisory appellate jurisdiction ultimately.

In the event that any other result is reached, and what has happened is that there has been a judicially carved exception in which Jean Welch falls where she has no rights and she has no -- she has no remedies, but she has the rights provided her by Congress in connection with the Jones Act.

The respondent in this case says very simply we didn't intend, we didn't acknowledge, we didn't waive our immunities. It is the position that they have to take, because they know that first of all Jean Welch cannot pursue her claim in state court. If they were to take any other position in this case, in connection with either express or implied waiver, they would be subjecting the state and its agencies to the Jones Act.

The question arises as to whether or not the two named defendants in this case, which are the State

Highway Department and the State of Texas, can be separated. Could the court in this instance say you cannot sue the State of Texas but Jean Welch, you can pursue your case in federal court against a state agency.

That resolves in going back to the test as to whether or not ultimately the verdict for any damages would be paid out of the state treasury. This Court in the Eleventh Amendment opinions which have been rendered since the Parden and the Petty decisions has drawn lines in various forms --

QUESTION: You don't think (inaudible) do you?

MR. CUCULLU: Pardon?

QUESTION: The Court of Appeals didn't question Petty?

MR. CUCULLU: No, Your Honor.

QUESTION: So your client was a Jones Act employee.

MR. CUCULLU: Yes, Your Honor.

QUESTION: That was the holding of Petty, wasn't it?

MR. CUCULLU: No, the holding of Petty was --

QUESTION: Didn't they treat a state employee as a Jones Act seaman?

MR. CUCULLU: Yes, Your Honor.

QUESTION: Jones Act seaman?

MR. CUCULLU: As a Jones Act seaman allowing that seaman to pursue his rights in federal court for injuries. The distinction, unfortunately, in connection with Petty from our side of the case is very simply that it was a bi-state corporation which had a sue and be sued clause which was approved by Congress.

QUESTION: Exactly.

MR. CUCULLU: So if we don't -- if we take that out, and if you have a narrow reading of Petty, then the only effect of it as far as this particular case is concerned is that with that clause and with Congressional approval obviously my client should succeed.

QUESTION: We should judge this case as though this client was a Jones Act seaman?

MR. CUCULLU: Yes, Your Honor. That has not been an issue of dispute although it was assumed, I believe, by the Court, because this case was cut off very early on by virtue of the motion to dismiss for Eleventh Amendment immunity.

The delay was because there a another party in it. A request was made for a certification in order to appeal immediately, which was denied. Therefore a trial was concluded against the other party before final

judgment was rendered.

The respondent's position in connection with the Eleventh Amendment versus the Jones Act, as I indicated before, is that because there is no legislative intent and because of this Court's decisions in Atascadero and Garcia which require the clear and unequivocal language to waive the Eleventh Amendment that obviously it is a case which should be affirmed given that.

The difference between this case and the Employees case and the Edelman case and the line of cases which now are suggesting that there must be a clear statement is the fact that we clearly have a private remedy. We have an individual who is entitled to a private remedy, that is, a damage suit for injuries under the Jones Act.

We have in this case exclusive, unquestioned, never deviated from authority of Congress to regulate admiralty and maritime matters. That is not an issue in this case.

QUESTION: Do we have the first clearly, a person who clearly as a remedy under the Jones Act? That is certainly not conceded by the other side.

MR. CUCULLU: We certainly do, Your Honor, in connection with the issues --

QUESTION: Well, maybe we do, maybe we don't. You are saying we clearly do. I mean, it is not even an issue?

MR. CUCULLU: As to whether or not we have a seaman?

QUESTION: A seaman who can recover under the Jones Act. I am talking about whether the Jones Act substantively was meant to apply to --

MR. CUCULLU: I don't believe that is an issue in this case, Your Honor. In the format in which it appears before this Court by virtue of the motion to dismiss on the Eleventh Amendment there was no status question raised as obviously -- it was probably premature.

QUESTION: No, I am not talking about the status as a seaman. I am just talking about whether when the Jones Act refers to any seaman it includes a seaman who is a seaman of a state.

MR. CUCULLU: That is certainly our contention. It would certainly include the seamen which are employed by the United States government, which is an issue that has been raised by the respondent in this particular case. The question that they ask in that particular case is why can Congress, can the United States provide only a compensation, federal employees'

compensation remedy for that seaman whereas the state can't provide it for its seaman?

The answer is Pope and Talbott versus Hahn. in connection with that particular remedy. The second answer is, because of the fact that Congress, Congress alone has the exclusive admiralty and maritime right to control and regulate those matters in this country. That is Article 3, Section 2 of the Constitution.

The amicus for the respondent in this particular case suggests that this Court reach only the jurisdictional issue and not consider any merits in connection with Jean Welch's substantive Jones Act rights.

If the Court were to do that, it would leave open obviously the issues as to whether or not Jean Welch or any other state employed seaman should or could have the right to pursue his or her remedy within the state court systems, because if the Eleventh Amendment does in fact provide the state with that particular immunity in Jones Act claims, then again the result would be to carve out an exception for state seamen unless the substantive issue or the substantive portion of the Jones Act is reached by this Court in connection with this particular case.

Consequently what we propose, what the

petitioners suggest to this Court is that between the balancing or the competing interests of the Eleventh Amendment and the Jones Act is that the Court rule either that states which provide no Jones Act forum for their employees are in fact waiving their Eleventh Amendment immunity because of the substantive rights of that seaman, or vice versa, that if immunity does apply, and the plenary powers over commerce and admiralty matters of Congress shall be washed aside in this case, that in that event that the state must provide a forum for these seamen, because otherwise you have created in fact the exceptions to the rule, you have gone beyond the purpose and the scope of Article 3, Section 2 of the Constitution and said, state, you have blanket immunity, you can employ all the seamen that you care to, you cannot or you are not compelled to provide a remedy for them as Congress has, and a state such as Texas or perhaps one such as Louisiana where you couldn't get a jury trial if you were a seaman there employed by the state, the flocking would begin in terms -- in terms of the effect not necessarily of the financial positions of the state because one of the purposes of the Eleventh Amendment is to protect and preserve the financial integrity of the state.

What, then, would the effect be to allow the

seaman who is employed by the state, the very few which are employed by the states within this country to pursue their Jones Act remedies within the federal court system? Isn't it so that the effect of these few people, these lawsuits, these claims, would be much, much less significant than were a state to run afoul of federal revenue sharing?

Isn't the fiscal integrity of the state now more dependent upon the federal government than upon individual claims which may be brought against it under its Tort Claims Act or, as in this instance, under a situation where one of a few number of seamen has a substantive right granted to her by Congress which she seeks to assert.

QUESTION: In your brief you also argue that in any event the state has waived its Eleventh Amendment immunity. You didn't present that as one of the questions for us to resolve on certiorari or appeal.

MR. CUCULLU: It was not presented as one of the questions, Your Honor, and --

QUESTION: And it isn't really properly before us or open to us to decide that surely.

MR. CUCULLU: It is a collateral issue which comes with the constructive or the implied waiver argument quite frankly is why it was included in the

brief. It is not before the Court in connection with the express waiver in terms of the petition for certiorari.

In the event that the fiscal integrity of the state is attacked by Jones Act claims in this regard, the Court must be mindful of whether or not that fiscal integrity is sufficient to overcome the balancing act between the states' integrity and the individual rights, and that is essentially what we have here, is the competing interests between the individual versus the state.

The immunity issue is one where there has been no clear line drawn because even with the Employees and the Edelman and the Atascadero and the Garcia decisions, you have to look at the aberrations of the decisions, and I say that respectfully, because for instance in UTU versus Long Island Railroad anticipations were that because of the Garcia decision and the decisions of National League of Cities before it was such that the Railway Labor Act would be found not applicable to the states because there is, again, no express language within that particular statute.

And faced with an Eleventh Amendment immunity issue in that particular case the Court said, but the commerce clause, the interest of the federal government

in interstate commerce by rail is one which is unquestionably relegated to the federal government as opposed to the states.

Isn't that the same thing that we have with the Jones Act? Isn't it in fact incorporated into the FELA insofar as the remedies available to the employees are concerned?

If you take that case and you apply it to this one, then obviously the result would be that the Eleventh Amendment immunity is not going to be a bar to Jean Welch in federal court, or to mitigate that somewhat, if you take the Atascadero language and requirements of clear and unequivocal expression of waiver, you are left with the position where you have to provide a forum for this particular individual because Congress, the objective of Congress in connection with the Jones Act, the objective of Congress in connection with regulation of admiralty and maritime matters, is that it shall remain with the federal government.

The federalism issue versus the state issue is one which requires very simply the balancing to determine whether or not there is sufficient interest insofar as this statute is concerned, and Jean Welch is right, to pursue or to overcome the shield which the State of Texas has put forward by virtue of the Eleventh

Amendment.

I would like to reserve my time for rebuttal.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Cucullu.

We will hear now from you, Mr. McCown.

ORAL ARGUMENT OF F. SCOTT MC COWN, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. MC COWN: Mr. Chief Justice, and may it please the Court, I would like to divide my argument into two parts. In Part One I am going to offer the Court a very conservative way to resolve this case that turns completely on the statutory construction of the Jones Act, requires the Court to overrule no cases and decide no constitutional questions.

QUESTION: But to ignore the doctrine that you reach jurisdictional issues first.

MR. MC COWN: No, Your Honor, I think it doesn't ignore that doctrine, because I think in fact -- well, let me answer that two ways. Number One, I think it is more important to decide the statutory question to avoid the constitutional question than it is to decide the jurisdictional question first.

But Number Two, this case is just like the occasional case of jurisdiction where the merits and jurisdiction are entwined. Here, to decide the

jurisdictional question you really have to -- I think the best first step is to ask whether this statute even authorizes a suit against the state at all before then reaching the Eleventh Amendment issue that the case presents.

QUESTION: Of course, if you are correct, why would the Petty court have analyzed the thing under two distinct heads? Don't you read that decision as first saying the Eleventh Amendment immunity was waived by the sue and be sued clause, sue and be sued, and then going on to say, and the Jones Act includes states within the definition of employers?

MR. MC COWN: Yes, Your Honor, that is what the Petty court says, but I think the Petty court is wrong, and would offer the Court three proofs. Congress never intended to authorize a person employed by a state to bring a Jones Act claim against the state. The only statutory definition of seaman that you will find in the United States Code explicitly excludes persons employed by the state, and that definition in fact applies to the Jones Act.

I am referring to what was 46 USC Section 1713, which defines seaman as a person employed on board a vessel belonging to a citizen of the United States, and as the Court well knows, a state is not a citizen.

That definition excludes a person employed by the state.

The Second Circuit held in an opinion by Augustus Hand in the Gerin case in 1932 that that definition of seaman found in Section 1713 applies to the Jones Act, and Judge Hand goes though what is a complicated statutory analysis, but it is not at all a tortured or strained analysis, and I think he is absolutely correct when you go and pull out the statute books and look at them, and it is a three-step process, and I think it is worth going through.

Judge Hand reasons that the Jones Act expressly amended Section 20 of the American Seamans Act of 1915. That is Step One. Step Two is that Section 20 of the American Seamans Act expressly amended Title 53 of the revised statutes of 1878. That is Step Two. And Step Three was that Title 53 of the Revised Statutes of 1878 had at the time that it was amended a definition of seaman which Congress must have had reference to when it enacted the American Seamans Act and which then must have had reference to when the Jones Act amended the American Seamans Act, and that definition was the codified definition of seamen found in the Act of 1872 defining a seaman as a person employed on board a vessel owned by a citizen of the United States.

That is the definition that was found until 1983 in 46 USC Section 1713, and since 1983 has been found in 46 USC Section 10,101, Subdivision 3. So for 115 years the only Congressional definition of seaman expressly excluded a person employed by the states.

That leads to my second proof, that the state doesn't come within the terms of the Jones Act, and that is the legislative history of the Jones Act itself which was part of the Merchant Marine Act of 1920. It is completely inconsistent with the view that the state comes within the Jones Act.

First, as is conceded by the petitioner, not a single word in the entire history of the merchant Marine Act appears talking about the states, but secondly, regulating the states does not fit within the purpose of the Merchant Marine Act. Section One of the Merchant Marine Act expressly provides that it is being enacted to foster a merchant marine, and I quote, "to be owned and operated privately by citizens of the United States," so that the legislative purpose of the Merchant Marine Act fits with the statutory definition of seaman which would exclude seamen employed by the states.

But finally, I offer Proof Three, which is really an elementary but I think quite convincing point, that the venue provision of the Jones Act is

inconsistent with the view that the Jones Act applies to the states, and if you look at the last sentence of the Jones Act, you will see that venue is provided in the district in which the defendant employer resides, clearly implying a natural person, or in which his principal office is located, clearly implying a corporation. A state would not fit within that venue provision.

And if you compare that venue provision to the venue provision in the Federal Employers Liability Act you will find that the FELA has a quite different venue provision authorizing venue where the cause of action arose. So when the petitioner says that it is not contested that there is a Jones Act seaman, that is simply incorrect. What wasn't contested on the 12(b) motion were the facts alleged in the plaintiff's complaint, but the --

QUESTION: You don't challenge California against United States,then, holding that a state was an employer for purposes of the FELA, because you say the Jones Act is different from the FELA.

MR. MC COWN: That's right. The question here is what Congress intended, and I think this case can be bottomed completely on statutory construction. The argument that any seaman means any seaman then simply

ignores the Congressional definition of seaman.

QUESTION: (Inaudible) not follow Petty.

MR. MC COWN: I think, Your Honor, that Petty is completely dicta. Petty had two holdings.

QUESTION: Well, anyway, your answer is yes --

MR. MC COWN: Yes, the dicta --

QUESTION: -- you don't follow that part of Petty?

MR. MC COWN: The dicta should be rejected, Your Honor, and I would point out that Petty had two holdings. The primary holding was that the Jones Act applied because of the sue or be used clause that Congress imposed as a condition of allowing the interstate compact.

QUESTION: The Jones Act applies or that you can sue because of that?

MR. MC COWN: That there was waiver, yes, Your Honor, on the sue and be sued clause, but the second holding was that the Commission could be sued under the Jones Act. Now, I emphasize the reason that the -- saying the states could be sued under the Jones Act is dicta is because no state was a party to the Petty case. It was simply Petty and the Tennessee-Missouri Bridge Commission.

There is nothing that -- when you say the

Commission can be sued that doesn't compel the dicta that the state can be sued, and interestingly, Your Honor, the Court specifically referred to the Commission as a bi-state corporation, and I think that would fit then with my statutory construction.

You could argue that the Commission has citizenship just as a municipal corporation as citizenship, and that the Commission, which is a creature in essence chartered by Congress and the states, is different than a state.

And there is nothing in the dicta of Petty that compels the conclusion that the state could be sued as well, or that Congress intended the state to be sued as well.

QUESTION: Well, you may call it dicta but it was really the rationale, the rationale of finding that the bi-state commission was suable was apparently that a state is suable, and therefore a bi-state would be suable. Isn't that basically the reasoning the Court was using?

MR. MC COWN: I think that is right, Your Honor.

QUESTION: I mean, you can all it dictum, but it is a dictum that is part of the rationale. We would at least be rejecting the rationale of the case.

MR. MC COWN: Certainly. You have to reject the rationale of that alternative holding. There is no doubt about that. But the reason you don't -- that courts don't put stock in dicta as they do in holdings is because dicta is often ill-considered, and indeed in Petty you don't have the court going through and reviewing the statutory definition that Congress provided, nor do you have the court reviewing the legislative history of the Merchant Marines Act of which the Jones Act was a part.

So I think it is well -- it is dicta that is well cast aside.

QUESTION: And I suppose now you are going to say that if you don't overrule Petty you overrule Parden.

MR. MC COWN: Well, if you don't overrule Petty you don't even reach the Parden question because --

QUESTION: If you overrule it.

MR. MC COWN: Excuse me. Sure. You don't have to overrule the result. I mean, Petty would still be law. But you would have to reject the rationale.

QUESTION: Now your other argument is Parden, I guess.

MR. MC COWN: That's right. Let me make one more argument about the Jones Act before I reach

Parden. The plaintiff makes an incorporation argument about the FELA in Parden. I will use that as my introduction into Parden.

The plaintiff argues that the Jones Act incorporate the FELA and therefore, because the FELA authorizes suit against the state, then therefore the Jones Act does. But in fact the Jones Act doesn't incorporate the FELA to define who is a seaman or whom a seaman may sue.

The Jones Act provides that any seaman may maintain an action and then separately provides that in such action the FELA is incorporated but the FELA is not incorporated to define seaman nor to define whom a seaman may take an action against. And indeed the purpose behind the incorporation of the FELA, as this Court has said, was to abolish the traditional admiralty defenses favoring the employer. It was not in any sense to define who a seaman was.

Now that leads to Parden, because I think that the Plaintiff's incorporation argument really casts aside Congressional intent. The FELA was enacted in 1908.

The Jones Act incorporated the FELA in 1920, but the FELA was not applied to the states, held to apply to the states until the Parden decision in 1964.

So if the court reads Parden as saying Congress truly had an intent to apply FELA to the states, then there might be something to the incorporation argument had it been incorporated.

But in fact I think that that reading of Parden misses the mark because what this Court does require is a clear statement before finding that an Act of Congress abrogates immunity. Parden should be limited as a matter of presumptive statutory construction, but its rationale that the mere fact that you enter into a regulated sphere of activity then subjects you to any Act of Congress the general terms of which a state would come under I think has to be rejected in light of Employees, in light of Edelman, and in light of Atascadero.

And indeed, Justice Douglas, who wrote the four-person dissent for the Court in Parden, wrote the majority for the Court in the Employees decision, and I think he has the better of the argument, which is before you find that an Act of Congress applies to the state you have to find that the Act of Congress in a clear, unequivocal expression that that is what Congress intended to do.

The purpose for such a rule would be to protect the integrity of the state and to protect the

state fisk, and the source for such a rule would be the role of the states within the federal structure. I would like to give you four analogies.

Of course, in Pennhurst I, you develop a similar rule, that if Congress is going to act pursuant to its Section 5 Fourteenth Amendment power, that it have to do so clearly before the Court find that it has done so. In Pennhurst I reaffirmed the rule that if Congress is going to condition a grant of federal money that that has to be an unambiguous condition in order to provide notice to the states.

Atascdero, which is an Eleventh Amendment jurisdiction case, makes the same point, that there must be an unequivocal expression of Congressional intent before finding that the Eleventh Amendment is abrogated.

The Court's preemption cases make the same point before finding that a state is preempted it has to be clearly and manifestly the purpose of Congress in a statute to preempt the states.

And finally, my fourth analogy would be the sovereign immunity of the United States itself, and how the court treats that.

QUESTION: General McCown, can I ask you a question about the Eleventh Amendment?

MR. MC COWN: Yes, sir.

QUESTION: Which says that the judicial power of the United States doesn't extend to any suit in law or equity. It doesn't mention maritime or admiralty, whereas Article III jurisdiction has a separate provision for admiralty and maritime jurisdiction. How well settled is it that the Eleventh Amendment applies in admiralty and maritime matters?

MR. MC COWN: It is absolutely settled, and the Court took on both heads of admiralty jurisdiction in New York One and New York Two in 1921.

QUESTION: In the two New York cases.

MR. MC COWN: And it said that admiralty in rem jurisdiction against a vessel is barred by sovereign immunity doctrine under the Eleventh Amendment and admiralty in personem jurisdiction is barred by sovereign immunity under the Eleventh Amendment.

QUESTION: And Petty accepted that.

MR. MC COWN: Sir?

QUESTION: And Petty accepted that.

MR. MC COWN: And Petty accepted that as well, so the notion that admiralty somehow has an exception doesn't come into play in this case.

QUESTION: They didn't really explain it very well in the New York cases, did they? They just sort of

said it.

MR. MC COWN: Well, I think the explanation was that the Eleventh Amendment is but an exemplification of the doctrine of sovereign immunity, and the doctrine of sovereign immunity comes from the structure of the Constitution and applies to admiralty as well as it does to law or to equity. And indeed the clear statement should be required in admiralty when Congress acts every bit as much as if Congress -- I look at it the different way around.

If pursuant to Section 5 of the Fourteenth Amendment there must be a clear statement from Congress, then surely in an admiralty case there must be a clear statement from Congress before presuming that Congress intended to in any way attempt to regulate the states. I also think that the question of power, what Congress can do can be separated completely from the question of what the rule of statutory construction would be, and I use my fourth analogy to illustrate that.

Congress can waive its own sovereign immunity and Congress can authorize a citizen to bring a suit for money damages against the United States. There is no doubt about the Congressional power to do that. But before this Court reads an Act of Congress as in any way consenting to an action for money damages against the

United States, the Court requires Congress to clearly and unequivocally say in a statute that that is what it intends to do.

And that rule is designed, of course, to protect the sovereign immunity of the United States, so the rule can have a prudential basis completely separate from any constitutional basis, and indeed in this case what the anomaly is is that the Jones Act has been held by this Court not to apply to a federal seaman, so a seaman of the United States on either a public or merchant vessel has no Jones Act claim.

He is limited only to federal employers' compensation just as the State of Texas argues that Ms. Welch is limited to state workers' compensation.

So they would be in the same position as a result of Congress not expressly saying in the statute that the Jones Act applies to the Uinted States or that the Jones Act applies to the states.

The question of admiralty in this case really puts the cart before the horse, because before deciding that this is an admiralty case the Court would have to decide that the Jones Act was intended by Congress to be an exercise of its admiralty power against the states, but indeed admiralty law recognizes sovereign immunity.

The state doesn't quarrel with the holding in

Pope and Talbott that the state can supplement but not supersede admiralty law, nor with the holding in Jensen that the state can't make compensation exclusive remedy for a private employer, nor the holding in Workman that New York local law can't supersede admiralty law.

What the state contends is that Congress has not acted under admiralty law and had no intention to apply the Jones Act to the state, that there ought to be a clear rule based upon the notion of federalism in the structure of the Constitution, and that if you do reach the constitutional question that New York One and New York Two settled that sovereign immunity is recognized in admiralty as well as the other founts of jurisdiction and that the state would be protected.

One last point about the proper disposition of this case, and coming back to how we opened the argument, the state in this instance filed a motion to dismiss both based on 12(b)(1), a failure of subject matter jurisdiction under the Eleventh Amendment, and 12(b)(6), a failure to state a claim for which relief can be granted.

The District Court held quite rightly that there was no Jones Act remedy here and dismissed with prejudice as an adjudication and said there won't be any Jones Act claim for you anywhere in federal or state

court.

I think that is the proper analysis and the best first step to avoid then reaching the Eleventh Amendment questions. Should the Court, however, decide that there is a Jones Act claim against the state, then the question becomes whether it can be brought in federal court or state court.

Under Atascadero, there is no doubt that it can't be brought in federal court because the statute doesn't have an unequivocal expression of intent to abrogate immunity to suit in federal court, and in answer to Justice White's question to my colleague representing the petitioner, were the case remanded the statute under Texas law would not have run.

There is a saving statute that provides if a case is dismissed for lack of jurisdiction then the petitioner has, I believe, 60 or 90 days to refile that. That applies for federal dismissals into state court, so there would be a state claim should the Court decide that the Jones Act applies to the states.

QUESTION: What about the statement that the Jones Act cases will not be entertained in the state courts because the only thing that is left is whether the Workman's Compensation Act applies?

MR. MC COWN: Well, that's -- the Lyons

decision, which was a decision by an intermediary Court of Appeals in Texas, said that there is no Jones Act claim, but obviously were this Court to hold that there is a Jones Act claim against the state, well, then certainly the state courts of Texas would honor that. If not, it would come up the other side of the ladder back to the Court, but I am quite confident that if the Supreme Court says there is a Jones Act claim against the state, that the state district court in Houston is going to honor it.

QUESTION: Why did Judge Gee say that that case was binding as matter of state law?

MR. MC COWN: Certainly, but any state law case could be superseded by a later opinion of this Court to the contrary.

QUESTION: That wasn't a state -- we can't supersede a decision on state law.

MR. MC COWN: Certainly. The federal law would preempt -- this Court said as a matter of federal law that state could not make workers' compensation exclusive and that the state court -- that here was a Jones Act claim, then that would supersede the Lyons decision by the state court.

QUESTION: Maybe Congress can make a state entertain a suit under a federal statute, but absent

that can we order a state court to entertain a Jones Act claim?

MR. MC COWN: I think you can, Justice White, because the only reason that the state court -- the only reason the state court refused to entertain the Jones Act claim was because it believed that there wasn't a Jones Act claim.

QUESTION: You think any time there is a -- any time unless Congress makes federal court jurisdiction exclusive, any time there is a cause of action under a federal statute a state court has to entertain it?

MR. MC COWN: I don't know the answer to that question. I think it is somewhat unresolved.

QUESTION: Why must a state court entertain a Jones Act case then?

MR. MC COWN: Well, this Court has held that a state court can, that venue in a state court was proper in the Panama case. Now, whether you would take that the next step under the Testa line of cases and say that a state court had to I suppose is an open question. I think as a practical matter the courts of Texas would entertain a Jones Act claim were the Court to say that there was one.

QUESTION: What was the ground for that

intermediate appellate court decision in Texas? Did it say that we just don't entertain Jones Act cases or that in our opinion the Jones Act doesn't cover it?

MR. MC COWN: It was that the Jones Act doesn't cover it because of the state's sovereign immunity.

QUESTION: It was purporting to decide a question of federal law.

MR. MC COWN: Yes, sir, a question of federal constitutional law. Now, there were two questions there. On the one on the one hand you had a state statute which said worker's compensation is the exclusive remedy.

That state statute was upheld, but the reason that it was upheld but the reason that it was upheld by the Lyons court is because the Jones Act couldn't apply to the states because of state sovereign immunity, so were this Court to say that in fact the Jones Act does apply to the states and that Congress has abrogated the state sovereign immunity, then I think the reasoning behind the defense of the state statute would have to give way.

QUESTION: Yes, but if we adopted that reasoning we would be finding there is no Eleventh Amendment bar, either. It seems to me if we find an

Eleventh Amendment bar on the ground that Congress has not clearly spoken, we couldn't consistently say, well, they did clearly speak if a case is brought in state court.

MR. MC COWN: That would be my position, but it doesn't have to follow. I think the Court could adopt two different rules. The Court could say that for Eleventh Amendment purposes there has to be a clear statement, but that you could take your federal claim to state court, but I think you are right that that would be a ridiculous result.

QUESTION: Is seems to me there is a little tension there.

MR. MC COWN: I think that is right. I think if you are going to say that there isn't Congressional intent for the purpose of the Eleventh Amendment because it fails the clear statement test, that you shouldn't then allow it to apply to the states under a lower threshold for Congressional intent.

I think Congress either did intend or didn't intend, and there ought to be one rule of construction, and that ought to be the clear statement rule. But regardless of the clear statement rule, I mean, I am confident enough about the statutory construction in this case to say that whatever -- just the regular rules

for litigants to construe a federal statue that the state of Texas wouldn't come within the Jones Act given the Congressional definition of seamen.

QUESTION: Is it not true that if those -- and your argument is very persuasive, but if your argument is correct really Petty should have been decided the other way.

MR. MC COWN: No.

QUESTION: Wouldn't it?

MR. MC COWN: Well --

QUESTION: Most of your argument seems to me about employed by, I forget -- a citizen of the United States. You are saying the bi-state compact would have been a citizen of the United States?

MR. MC COWN: I think that that that rationale would save Petty.

QUESTION: Certainly Petty purported to construe the Jones Act.

MR. MC COWN: Yes, it did. But --

QUESTION: You say that construction was wrong.

MR. MC COWN: I think it is wrong. I think it is clearly wrong. I mean, you have a 1950 opinion by the Court where the Court did not consider any of the arguments that are being advanced today, simply looked

at the word "any seaman," said any seaman means any seaman, did not refer to the Congressional definition of seaman, did not refer to the statutory history of seaman or the purpose of the Jones Act or the Merchant Marine Act.

So I think Petty was ill-considered dicta and shouldn't be confirmed by the Court and we would ask that the Court of Appeals be affirmed.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. McCown.

Mr. Cucullu, you have five minutes remaining.

ORAL ARGUMENT OF MICHAEL D. CUCULLU, ESQ.,

ON BEHALF OF THE PETITIONER - REBUTTAL

MR. CUCULLU: May it please the Court, just a few comments in response to respondent's arguments in connection with several of the issues raised in this case.

I suggest to the Court that there can be no division between the FELA and the Jones Act in connection with the remedies provided to these federally protected employees.

I suggest that if the Court looks to U.S. versus California and Southern Pacific versus Jensen and UTU versus Long Island Railroad and Petty and Parden that they must conclude that the rights of these

employees are rights which are governed by the commerce and admiralty clauses in the United States Constitution and that sets them apart and separate from the Fair Labor Standards Act issues in some of the cases, Employees and Atascadero.

It sets it apart from the issues which are raised in attorneys' fees cases as to whether or not the private cause of action exists for the individual to pursue. It sets it apart from the cases involving the federal aid to the blind and disabled in connection with private remedies because Congress certainly and surely intended a remedy for seamen.

And that remedy was the ability to sue his or her employer for damages if injured as a result of the negligence of that employer. That is what the Jones Act is. That is what the FELA is, and the FELA is no more explicit than the Jones Act. When the Jones Act says any seaman and the FELA says any employee has the right to bring this particular action.

No other -- no other employee class in this country is federally protected as these two particular classes. There is no corollary to the admiralty and maritime jurisdiction granted to Congress in any of the cases subsequent to Parden and Petty. There is no case which falls within that particular realm of exclusive

jurisdiction granted, unquestionably granted to Congress to regulate admiralty and maritime matters.

And this alone is sufficient in petitioner's suggestion to overcome the shield of Eleventh Amendment to allow Jean Welch to pursue her case in federal court or conversely to ensure in some fashion that her substantive Jones Act remedies are provided with a forum.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Cucullu. The case is submitted.

(Whereupon, at 2:44 o'clock p.m., the case in the above-entitled matter was submitted.)

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lderson Reporting Company, Inc., hereby certifies that the ttached pages represents an accurate transcription of lectronic sound recording of the oral argument before the preme Court of The United States in the Matter of:

#85-1716 - JEAN E. WELCH, Petitioner V. STATE DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION, ET AL.

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BY Paul A. Richardson

(REPORTER)