ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

# THE SUPREME COURT

# OF THE

# UNITED STATES

CAPTION: KENNETH HILTON, Petitioner, V. SOUTH CAROLINA PUBLIC RAILWAYS COMMISSION

CASE NO: 90-848

PLACE: Washington, D.C.

DATE: October 8, 1991

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IN THE SUPREME COURT OF THE UNITED STATES

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KENNETH HILTON :

Petitioner :

v. : No. 90-848

SOUTH CAROLINA PUBLIC RAILWAYS :

COMMISSION :

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Washington, D.C.

Tuesday, October 8, 1991

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:40 p.m.

APPEARANCES:

ROBERT J. BECKHAM, ESQ., Jacksonville, Florida; on behalf of the Petitioner.

KEATING L. SIMONS, III, ESQ., Charleston, South Carolina; on behalf of the Respondent.



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P R O C E E D I N G S

(1:40 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 90-848, Kenneth Hilton v. South Carolina Public Railways Commission.

Mr. Beckham.

ORAL ARGUMENT OF ROBERT J. BECKHAM

ON BEHALF OF THE PETITIONER

MR. BECKHAM: Mr. Chief Justice, and may it please the Court:

This case presents another opportunity for the court to rule upon the question of the Eleventh Amendment or the -- that is the presence or the absence of the real Eleventh Amendment, or the presence or the absence of the judicial gloss Eleventh Amendment.

We submit, first of all, that the case below is clearly in conflict with the decisions of this court in the Parden case, in the Petty case before that, and indeed, in the Welch case, where five members of this Court reaffirmed the validity of the existence and the viability of the existence of the cause of action under the FELA or the Jones Act against State-owned entities.

In addition to those specific authorities, dealing with the FELA-Jones Act, we have cited three other cases, the United States v. California, California v.



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Taylor, and the United Transportation Union case, all consistently holding that the pervasive effect of the preemptive power of Congress in dealing with this Nation's railroads, mandate that there is a uniform system that applies to each and every railroad in America.

We still believe that this Court's decision recently in the Port Authority case between -- dealing with the entity between New York and New Jersey, implicitly reaffirms the existence of this cause of action. In the PATH case, the Court determined that there was expressed statutory waiver of immunity from Federal court jurisdiction, the classic Eleventh Amendment bar. The Court held that that jurisdiction had been waived -- the bar had been waived. And it would be, it seems to us, entirely fruitless for this Court to have decided that case if in any event the statute didn't apply to State-owned railroads.

The Court determined, though, that the waiver was adequate and that jurisdiction did exist in the Federal courts for a cause of action under the Jones Act-FELA to be brought against the State-owned entity.

We contend that if there is any further doubt or dispute that the railroad in this case, by a series of methods has -- South Carolina has consented or surrendered -- whatever phraseology that may be in current vogue -- to



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the mandate of the Federal law. This is not consent to where they may be sued. This is not consent to be sued in the Federal court. It is, however, consent to be covered by the cause of action created by the FELA or the Jones Act.

We recall that in the past case we just discussed, consent was found to overcome the express constitutional bar of jurisdiction. We recall in the case of Clark v. Barnard that the filing of a piece of paper by a State in a Federal court can submit to jurisdiction. This is not a waiver or a consent or a surrender to anything expressly granted to the States in the Constitution.

This is a consent, however, we contend, to the reach of Congress under the commerce clause.

We feel that here are two or three types of express consent, depending upon the cases that one looks to from this Court. The cases that talk about the commerce clause and its effect under the plan of the convention certainly would authorize a finding that any State that engages in interstate commerce does so with the firm understanding that at the time the State came into the Union, it surrendered its authority over interstate commerce to the express clause of the commerce clause in the Constitution.

We, in this case, however, have more. We have specific statutory acknowledgment by the South Carolina legislature that recognizes its obedience and obeisance, if you will, to Federal law. We point out in our brief that at the time the defendant entity was created, the South Carolina legislature directed that they comply with the provisions of the Railway Labor Act. The South Carolina legislature acknowledged that they were operating under certificates issued by the Interstate Commerce Commission. And the South Carolina legislature acknowledged that they were to be governed by the rules and regulations of the Interstate Commerce Commission. This is clear, statutory surrender,if you will, clear statutory acknowledgement of the overwhelming authority of the Federal plan governing railroads in this country.

QUESTION: (Inaudible) suit would not lie in the Federal court.

MR. BECKHAM: Your Honor, that's true. Mr. Justice, what happened, we filed this case in the Federal court in Charleston. And the Welch case was decided, and very clearly the Welch case said there's no Federal court jurisdiction under FELA.

QUESTION: So this statute wasn't specific enough to do away with the Eleventh Amendment, but --

MR. BECKHAM: That was the holding in the Welch

decision.

QUESTION: But you think it's specific enough to overcome the usual rule that you -- Federal statute that if it's going to bind, the State ought to be pretty specific.

MR. BECKHAM: I think it's specific enough. But I say that even if it weren't specific enough, the voluntary act of the State of South Carolina has surrendered to that.

We point out that this -- the whole reason for the concept of specificity is for clarity. How much more clarity could exist? When South Carolina in 1969 made the decision to create the defendant agency, this Court by that time had decided five cases. Maybe they were all wrong, but the Court was very clear in telling everybody in America that railroad legislation by Congress applied to State-owned railroads.

A statute as interpreted by this Court, a Federal scheme of regulations as interpreted by this Court, certainly gives sufficient clarity and advanced knowledge. There was no sandbagging of South Carolina here. This statute was created in 1908, I believe. The decisions of this Court started in the thirties. By the time 1969 came along and South Carolina submitted this plan through its legislature, it was very clear. No



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statute could have given them any more notice that they were walking into Federal regulation. The whole purpose, indeed this --

QUESTION: You say it's not a waiver you're relying on, Mr. Beckham.

MR. BECKHAM: I have a hard time, Mr. Chief Justice --

QUESTION: I know --

MR. BECKHAM: -- understanding whether its a waiver or a surrender. The Court, frankly, in various opinions kind of bounces back and forth.

QUESTION: A waiver, we have talked about in other cases, being a conscious surrender of a knowing right or something. You're not talking about that sort of thing, are you?

MR. BECKHAM: Yes, Mr. Chief Justice, I am.

QUESTION: You are?

MR. BECKHAM: In the statutory enactments that I referred to, the South Carolina court -- excuse me -- legislature -- the South Carolina legislature, expressly acknowledges the existence of Federal regulatory bodies to which its railroad will be subservient.

QUESTION: But not FELA.

MR. BECKHAM: They didn't specify FELA. That's correct.

QUESTION: Well, does that show that they knew of the right, that is that they knew that they weren't subject to it unless they said they were?

MR. BECKHAM: I don't think so at all.

QUESTION: So that it's not a waiver in the classic sense you're talking about.

MR. BECKHAM: Regrettably, in this case, we were pretermitted at the lower level before getting a lot of discovery. In the Parden case, they showed, I believe, that the railroad employees were given rule books that talked about FELA, et cetera, et cetera. This case, we were cut off at the pass and we were not -- we don't have a record that would explain precisely what they --

QUESTION: What theory did Parden proceed on? Was it the every common carrier by railroad is specific enough to include a State? Is that what the Court said?

MR. BECKHAM: Mr. Justice, first of all, the Court did say that when the Congress said every, it meant every. You couldn't get any more all inclusive than that.

QUESTION: And there's no question that there was a common carrier involved.

MR. BECKHAM: No question.

QUESTION: The only question was that the State owned it.

MR. BECKHAM: That is exactly --

QUESTION: Is that the theory the Court proceeded on?

MR. BECKHAM: That's one. It also -- the Court also said that by engaging in interstate commerce by rail, that they had either surrendered or consented -- the Alabama Railroad had either surrendered or consented. As you read through the decision subsequently, you'll find that sometimes Parden is referred to as an authorization case, that is the Congress authorized it by virtue of saying every. Sometimes it's referred to as a waiver case. Sometimes it's referred to as a surrender case. So that's why I say we have some difficulty in knowing exactly which hat to put on it.

But it did cover both theories. It did say that the statute was broad enough and there was no question, as you said, that literally it did apply, and that Mr. Chief Justice has written several opinions, Edelman and Quern, I believe, specifically talking about the fact that there was no question in Petty and in Parden that the State was literally an entity that was within the description.

So that is --

QUESTION: So what happens to your argument as a result of the treatment of Parden in our Welch decision -- or decisions?

MR. BECKHAM: In your Welch decision, Mr. Chief

Justice, five members of the Court said FELA survives. The plurality opinion for the Court by Justice Powell carried the day in saying Federal court jurisdiction, that explicit constitutional language had not been overcome. The Court expressly refrained in the plurality opinion from addressing whether the FELA survived against State entity.

QUESTION: Well, just assume that the FELA applied -- would apply to the States, I guess. Because otherwise there's no Eleventh Amendment problem.

MR. BECKHAM: Well, there's no Eleventh Amendment problem in State court until you get to the gloss on the Eleventh Amendment. A State being sued in a State court presents no open and obvious Eleventh Amendment problem. And of course this was highlighted most recently on the opinion in the Will case.

QUESTION: But there is a certain irony, and maybe it's self-engendered as a result of our opinions, that Congress would pass a statute regulating a liability of railroads to their employees. And it is not applicable to State railroads in Federal court, but it is applicable to State railroads in State court.

MR. BECKHAM: This irony only arises because of the Welch decision.

QUESTION: Well, you have to deal with the

Welch decision.

MR. BECKHAM: No question about it. But --

QUESTION: Or because of Parden. I mean --

MR. BECKHAM: The irony was not created by Parden. But you also have this to consider, that in the concept of trying to deal with it, the employees -- the Missouri case -- employees -- Justice Marshall's concurring opinion very definitely touched upon the concept that it is indeed possible for Federal rights to be enforced in the State courts.

You know, one of the things in the Maine v. Thiboutot case, the Court talked about in a footnote. For instance, if a jurisdictional amount -- we now have increased the jurisdictional amount in the Federal court to much more than the $10,000 it used to be. There are many cases that where Federal rights may not be able to be enforced in Federal courts because of an insufficient amount of money to get in the door. And those rights are going to be enforceable in State courts. There's nothing magic.

And of course, all the supremacy cases tell us that the States have to adjudicate Federal rights in their courts.

QUESTION: Well, how do you distinguish Will against Michigan, then, where the Court did say that to



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abrogate State sovereign immunity, at least a clear statement by Congress is required.

MR. BECKHAM: I think that it is difficult -- if you look to the history, it is difficult to say that this case, and this is what the South Carolina Supreme Court said, of course. They said they found the Will case dispositive here. We think that that is giving it more breadth and more scope than it needed.

First of all, it wasn't a commerce clause case. I'm not sure that is of major significance, but when you read Union Gas, it came out the very same day out of this same Court. You get a different reading from Union Gas as to the scope.

QUESTION: At least Will just said a State wasn't a person at all.

MR. BECKHAM: That was an easy distinction, right. In reading the statute --

QUESTION: But the question -- there's no question here of what there is a common carrier by railroad involved.

MR. BECKHAM: That's right. And every such common carrier is covered by the FELA.

We point out that by opening its own courts to State tort claim --

QUESTION: I suppose the statute at least means

that every owner of a railroad engaged in interstate commerce is covered by the FELA.

MR. BECKHAM: It certainly seems so to us.

As we point out in the Urie decision, the Urie case talked about the scope of it in terms of injury. But the same language goes for the -- this Court said it not only in Parden, the Court said it in Petty. The Court said it Petty, that the broadest possible language that was utilized left the Court no way out but to say that States were included.

Here's what we say, however. You know, just like the Hans case, supposedly now has added, and we know what the Eleventh Amendment means, not because of what it says, but because of what this Court says it says. Now, once this Court has said what Title 45, Section 51 means, then that's it. This Court has said it means every, and that every includes States. And you've said it time and time and time again, and you had said it numerous times before South Carolina created this entity in 1969.

All this business about needing advance notice about having an opportunity to debate it in Congress before the law was passed, all this need for clarity, was given them on a platter. They have absolutely no basis to allege that this catches them by surprise, that they had no idea when they went into railroading that they were

going to be subject to FELA. They had been told time and time and time again by this Court.

And just as the Eleventh Amendment loss under the decision in Hans and the succeeding opinions of this Court give meaning to what the Eleventh Amendment says and what it means certainly the decisions of this Court stating, restating, and reaffirming what every railroad means, has to mean what it says.

So we think that the necessity for the clear statement in legislation has been supplanted and replaced in this case by authoritative and definitive judicial interpretation.

Thank you. I'd like to save the rest of my time

QUESTION: Very well, Mr. Beckham.

Mr. Simons, we'll hear from you.

ORAL ARGUMENT OF KEATING L. SIMONS, III

ON BEHALF OF THE RESPONDENT

MR. SIMONS: Mr. Chief Justice, and may it please the Court:

As the questions asked of Mr. Beckham by this Court vividly illustrate, this is not simply a case about railroads. Nor is it simply a case about Federal regulation of States. There are two essential features to this case. One is the traditional well and clearly regarded sovereign immunity of the States in their own



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courts, and the other is the clear statement rule.

Counsel argues that FELA permits his client to sue the State of South Carolina in our own courts for money damages for personal injuries as a result of alleged negligence on the part of the State of South Carolina. That is an extraordinary result of a Federal statute.

QUESTION: Are you questioning the power of Congress to subject a State-owned railroad to the FELA if it said so expressly?

MR. SIMONS: We have not found occasion in this case to directly challenge the power of Congress to create a personal injury liability.

QUESTION: So as the case comes to use we assume that that --

MR. SIMONS: Absolutely. I think that a number of justices of this Court have raised questions about the existence of closely related powers.

QUESTION: Well, so far, Parden hasn't been overruled in that respect.

MR. SIMONS: That's correct, sir.

We do not directly challenge the power issue here today.

QUESTION: Well, do you take the position that in the absence of a clear statement we have to assume that FELA does not apply at all to State-owned railroads?



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MR. SIMONS: Absolutely. It's not a matter of --

QUESTION: How do you reconcile Feeney and the Port Authority case?

MR. SIMONS: The issues just simply weren't directly raised in the way that the issue has come before the Court today. In Feeney and Petty, those were bi-state compact cases which are slightly different from a case against a State directly. Furthermore, the issues were directly Eleventh Amendment issues. And the pure waiver of Eleventh Amendment or consent to Federal adjudication. Those were the issues in those cases.

Insofar as we know, this case is only the second case, Will being the other, in which a clear statement type of analysis has been applied to the statutory interpretation issue, and how it impacts upon --

THE WITNESS: Well, there was certainly an assumption in Feeney that the statute covered all railroads, and the States could waive any sovereign immunity.

MR. SIMONS: The difficulty I have with the waiver analysis that counsel has argued is that -- I believe it was in Howlett v. Rose, and perhaps other cases as well -- in which the comment was made that one cannot consent to the applicability of a cause of action that



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doesn't apply to them. What we have here is one could consent to having their liability adjudicated in Federal Court, if the liability otherwise attached. But to say that South Carolina could consent to FELA means to say that the State of North Carolina could decline to consent. And that would fly in the face of the supremacy clause. It would also fly in the case of the uniformity interests that petitioner would argue underlay FELA and all the other Federal regulation of railroads.

So I submit that consent has got simply no place in this case at all. What we're searching for is did Congress intend FELA to reach railroads owned and operated by States. And the answer to that question may be found in the clear statement rule.

QUESTION: May I ask about the statutory construction? Are you in effect saying that the statute should have said every common carrier by railroad, including those owned by the States, shall blah, blah, blah?

MR. SIMONS: That certainly would have sufficed for our purposes.

QUESTION: And so -- without that language, you're saying it isn't clear Congress intended to subject States to this statute. Does that mean that the statutes like the Federal Safety Appliance Act and the Interstate

Commerce Act and all other Federal statutes regulating railroads are inapplicable to the States unless Congress amends them in the manner I've just suggested?

MR. SIMONS: Those statutes are very different from the FELA in that they are regulatory statutes. They say --

QUESTION: But don't you need a clear statement of relief there?

MR. SIMONS: Well --

QUESTION: The Federal Safety Appliance Act provides for a cause of action. In the California case they sued for $100.

MR. SIMONS: It's my understanding that the Safety Appliance Act does not directly create a cause of action and that the practice is that a violation of the Safety Appliance Act is used almost as negligence, per se, in FELA action. The primary thrust of the Safety Appliance Act is regulation.

QUESTION: Really I'm asking do you think those statutes apply to State-owned railroads?

MR. SIMONS: I think that Congress has the power to --

QUESTION: I understand that. But I'm asking you do you think those statutes -- you surely have thought about that because is a rather far-reaching position



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you're taking here. Do you think those statutes apply to State-owned railroads? The four or five statutes, the Federal statutes, that govern the operation of railroads generally?

MR. SIMONS: I do not believe they should. I believe that Congress should be required to clearly state its intention before telling a State how to conduct its business. That's what I believe. Now, that is --

QUESTION: And you don't think the words "every common carrier by railroad" would let a State know that their railroads were also intended to be covered.

MR. SIMONS: The decisions of this Court have repeatedly said that States are different; they are entitled to be treated with greater deference and greater respect than any other employer.

QUESTION: Had any case said that at the time that you entered into the railroad business?

MR. SIMONS: Even Parden referred to the special status of States. The Parden court opted to --

QUESTION: You surely wouldn't win under Parden.

MR. SIMONS: Absolutely not. I recognize that.

QUESTION: Is there any case that supports your position that was decided before you went into the railroad business?

MR. SIMONS: Not directly, no, sir.



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QUESTION: How do you suppose Congress was supposed to know they needed a clear statement of the kind you describe?

MR. SIMONS: The simple answer to that is that at the time the FELA was passed, I don't believe it ever occurred to Congress that they had the power to subject the State of South Carolina to a damages liability in its own courts. That the doctrine of sovereign immunity was so well entrenched in the common law of this country in 1908, it never would have occurred to Congress they could do that.

So they wouldn't have taken the next step and said well, what do we need to say to abrogate that immunity. I don't believe they thought they had the power to do so.

No matter how you parse the issues in this case, the State of South Carolina enjoyed sovereign immunity in its own courts and at the time that Mr. Hilton was injured, and abrogation of that immunity by Congress is what is fundamentally at stake here. In the most general language imaginable, every common carrier, with no other reference to the States, petitioner have you hold that the State's sovereign immunity has been abrogated.

In Welch --

QUESTION: Parden held, isn't it?

MR. SIMONS: Yes, sir. Parden --

QUESTION: That hasn't been overruled that the --

MR. SIMONS: No, sir. And I believe that Parden needs to be overruled today.

QUESTION: Yeah, that's -- you're certainly asking us at least that much.

MR. SIMONS: Absolutely. Parden was a consent case in response to the question I believe you asked Mr. Beckham. It was internally inconsistent in that when Parden said that the States had surrendered all immunity, and then to go on and to hold that they had surrendered that immunity, that I don't believe bears analytical scrutiny. So I think that in the final analysis, Parden has to be regarded as a consent case.

And the federalism decisions since that time issued by this Court have demonstrated that before Congress can put the States to the choice, they have to do so clearly. And that has not been done in this instance.

QUESTION: If we rule in your favor, are there any actions under State law that the employee can bring their injuries in the course of employment? Is there a workman's comp scheme that's in place for this railroad?

MR. SIMONS: The petitioner filed, after the trial judge's order dismissing the FELA claim, an amended

complaint that asserted remedies in negligence, asserted remedies in under the Tort Claims Act, asserted remedies under the -- what we call the little FELA, which is the South Carolina version of FELA. Furthermore --

QUESTION: Do you concede that all of those statutes are applicable and all of those theories are applicable to the railroad?

MR. SIMONS: The fourth one, that I was about to mention, Your Honor, is where I believe petitioner has his avenue. Petitioner's also filed a workers' compensation claim that has been stayed pending the outcome of these proceedings. So petitioner clearly believes that there are other avenues for redress for his injury.

QUESTION: And your position is that only the workman's comp statute is applicable?

MR. SIMONS: I believe that at the end of the day, that is what the South Carolina Supreme Court will hold. Like many workers' compensation --

QUESTION: Well, what is your -- do you have a position that it's applicable or not?

MR. SIMONS: I don't have a position today. I can illustrate the difficulty with the South Carolina Workers' Compensation Act, and that is like so many others it includes and exclusion for railroad workers.

QUESTION: So it is possible, at least, that you

could take the position that the worker is not entitled to any recovery until the South Carolina legislature acts?

MR. SIMONS: That is conceivable that the commission could take that position. It has not taken any position on those issues as of yet. The South Carolina Workers' Compensation Act expressly covers employees of the State of South Carolina. Mr. Hilton is an employee of the State of South Carolina. So there is an ambiguity in the Workers' Compensation Act that I think is easily resolvable to construe the railroad worker exclusion is to be one who works for the railroad companies as opposed to a State employee who works on railroad tracks.

QUESTION: Can you tell us or does the record show how many employees there are of the State-owned railroad?

MR. SIMONS: Throughout the country or ours?

QUESTION: In yours.

MR. SIMONS: In the order of a couple of dozen. It's a very small railroad. There are only approximately 1,000 employees nationwide of State-owned railroads. I mean, it's a fairly minuscule problem in the overall scheme of things.

QUESTION: Don't you think that the -- whether or not the FELA covers the -- includes a State, really doesn't have much to do with the State's sovereign

immunity. I mean, let's assume that we're absolutely clear that the FELA just didn't reach a State. What if the FELA said except for railroads owned by a State. And then the -- somebody doesn't read the statute and he sues under the FELA -- sues the State-owned railroad under the FELA in State court.

MR. SIMONS: FELA wouldn't apply.

QUESTION: Of course. And it isn't going to do any good to say that, well, the State has waived it's sovereign immunity, would it?

MR. SIMONS: No, sir. I believe that's my point on the consent argument -- that you can't consent to a statute that doesn't apply to you.

QUESTION: That's right.

MR. SIMONS: So I don't see this as a consent case at all. What we're dealing with is whether, as in Will, this Court is going to be guided by the existence of an Eleventh Amendment principals in determining the meaning of the words "every common carrier by railroad." That is the issue here.

If the clear statement rule that was elaborated in a number of cases from Atascadero right up to Will and Dellmuth and a number of other cases, if that rule applies, FELA does not. And if the clear statement rule doesn't apply, then one would have to explain why the



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State's sovereign immunity, in its own courts --

QUESTION: Yeah, but what if we say that every railroad, every common carrier by railroad means what it says. It includes a railroad owned by a State. Then this case is over, isn't it? We just say that the clear statement rule satisfied.

MR. SIMONS: I believe that that would be very difficult to do and reconcile with recent cases as to what it takes --

QUESTION: I didn't ask you that. I just asked you wouldn't the case be over if we misguidedly did that?

MR. SIMONS: Yes, sir. If the Court determined that the words included States, I lose. I grant you that. But then the difficult task of opinion writing begins in explaining that result in comparison to Will --

QUESTION: To what, for example? The difference between the word "person" and "every common carrier by railroad"?

MR. SIMONS: I think that I've not seen a case yet that found an abrogation of Eleventh Amendment immunity that did not expressly refer to States or governmental units or public funded or some words that showed Congress actually considered the point.

QUESTION: Can you say the same about -- can you say the same in a non-Eleventh Amendment case as to -- do



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you think that a State has never been held liable under a statute that doesn't expressly -- a Federal statute that doesn't expressly refer to a State? Well, you know that's not so. How about in the Maritime?

MR. SIMONS: That was a regulatory statute to the best of my recollection.

QUESTION: Well, what's that got to do with it?

MR. SIMONS: Because I think there's a very grave difference between regulating a State's conduct of its activities in the equivalent of a prospective fashion.

QUESTION: How about the Jones Act?

MR. SIMONS: I think the Jones Act and FELA stand in the same -- stand in the same shoes.

QUESTION: Well, so we have to overrule the Jones Act cases, too.

MR. SIMONS: Yes, sir. I mean, I believe that the logic of it reaches the same conclusion. If "every common carrier" is not enough to clearly include States, then "every seaman" is not clear enough either.

QUESTION: Well, but if, I suppose the FELA argument for coverage would be stronger than the Jones Act because it says "every common carrier."

MR. SIMONS: I think I'd probably agree with you. I had not analyzed it from a comparison of the two statutes, but on first glance, I think you're probably



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right.

QUESTION: Well, what language does the Jones Act use, if you happen to know, about the defendant? How does it describe potential defendants?

MR. SIMONS: I don't believe that potential defendants are described at all. I believe it's every seaman who's injured in the course of his employment or words to that effect. But I --

QUESTION: It doesn't say (inaudible) may sue?

MR. SIMONS: I don't know.

QUESTION: It's not directly involved in it.

MR. SIMONS: There are essentially why the South Carolina Public Railways Commission believes that the clear statement rule applies to the statutory interpretation issue at hand. One is the Eleventh Amendment cases that we've touched upon. Another is Will that we've also touched upon. Another is the requirement in a number of other contexts -- granted, unrelated contexts -- for a similarly clear expression of congressional intent. And lastly is this Court's opinion in Garcia dealing with processed-based, or suggesting the need for processed-based protections for encroachment into the State's sovereignty under the commerce clause.

We've already discussed the Eleventh Amendment in some detail, but one point I think bears making. And



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that is that it's the very same interest at stake. I grant you that in the Eleventh Amendment context we're talking about immunity from suit in Federal court. And in the context we're here today on, we're talking about immunity in State court. But it's the very same State interest that is at stake.

The clear statement rule grew out of a need to protect the State's sovereignty. The sovereignty didn't exist only as a limitation on Article III judicial power. The limitation on Article III judicial power existed because of the pre-existing existence of the sovereign interests of the State, the very same interests that are at stake at applying general language to abrogate a State's immunity in its own courts.

And I would suggest on that ground alone, that it is very difficult to distinguish the Eleventh Amendment line of cases and the requirement for a clear statement from the Will approach and the statutory interpretation question that we have before us here today. Now, in fact, the logic of that carried the day with the trial judge in this particular case, and it was on that basis that he dismissed the petitioner's original complaint.

While the case was on appeal, this Court --

QUESTION: At least there's this difference, and that is that sovereign immunity insofar as -- granted that

the background of it existed both with respect to suit in the State's own courts and with respect to suit in the Federal courts, the background existed for both, but that background was codified in the Eleventh Amendment as to one and was not codified in the Eleventh Amendment as to the other, I suppose.

MR. SIMONS: That's absolutely correct.

QUESTION: Isn't that a significant difference?

MR. SIMONS: No, sir. Because what Mr. Beckham likes to call the judicial gloss on the Eleventh Amendment. The Eleventh Amendment by it's terms didn't apply to what are now all of the Eleventh Amendment contexts. To the extent that the literal language of the Eleventh Amendment didn't provide the source of the immunity, that immunity was previously existing. And that is the very same immunity that we're talking about here today.

QUESTION: Well, there's a gloss and there is a total repainting. I mean, you're really stretching it well beyond the gloss.

MR. SIMONS: I respectfully disagree. I don't believe that we're stretching anything. The same immunity interest is what formed the basis for the Eleventh Amendment, the Eleventh Amendment gloss, and the clear statement rule. It's the very same immunity interest. To



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me --

QUESTION: Well, there is an additional State interest in not having to subject itself to the jurisdiction of another sovereign and having to try cases in a Federal court. I think, generally speaking, the State would rather try cases in its own judicial system.

MR. SIMONS: Well, I don't know that that's necessarily -- I'm sure you're right. South Carolina would rather be tried in its own courts than in Federal court. Yet, submitting to trial in its own courts is every bit as offensive and intrusive as subjecting itself to trial in the Federal courts, maybe even more so.

One of the opinions of this Court discussed the ancient background of sovereign immunity in the feudal system of old England, and referred to the fact that lower sovereigns could be hailed into the courts of higher sovereigns. And that was not infringement upon the lower sovereign's immunity.

But here, if you liken that to modern times as best you can, it's not so offensive for South Carolina to have to appear in the court of a higher sovereign as it is to be made to subject itself to suit in its own courts. I mean, that is a real slap in the face.

While this case was pending before the South Carolina Supreme Court -- it may not have been this case;

it may have been the earlier case, Freeman, upon which this case was based -- this Court decided Will. And we regarded that as dispositive. And for that reason we filed supplemental briefs.

And the Supreme Court of South Carolina ultimately regarded it as dispositive because what we had been arguing, based strictly on logic, was to take the Eleventh Amendment clear statement test and apply it to the statutory interpretation side of the equation. And all we had to go on was logic, at least what we regarded as logical. Perhaps some of the members of this Court don't see it that way, judging from some of the questions, but that's our position.

And Will for the first time made that transposition for us. It explicitly considered Eleventh Amendment considerations in determining the meaning of the words chosen by Congress.

QUESTION: Well, in the Welch case it said the act involve there didn't apply, that the State was immune from suit in Federal court under the Eleventh Amendment. But it didn't purport to disturb those cases, those Jones Act cases that said the Jones Act covered States.

MR. SIMONS: No, sir. It did not. And it did not need to because it disposed of the case on jurisdictional grounds.

QUESTION: Well, they disposed of it on Eleventh Amendment grounds.

MR. SIMONS: Correct.

QUESTION: There's no -- hardly any reason to do that if the Jones Act didn't cover it at all.

MR. SIMONS: In my limited experience in litigating --

QUESTION: You always talk about jurisdiction first?

MR. SIMONS: Yes, sir. If the Court doesn't have jurisdiction, the court doesn't reach the merits. And certainly whether the statute applied was a matter on the merits.

And in that case, Texas, as I recall, briefed the issue of whether FELA or the -- excuse me, the Jones Act applied. And the court declined to reach the issue. And we raised that issue in this case. And the one that this Court declined to reach in Welch, we're asking the Court to grapple with today.

The South Carolina Supreme Court and the South Carolina Public Railways Commission believe that Welch and Will, you put those two cases together and the case closed. But there's more to applying the clear statement rule in this context than just simply a couple of this Court's opinions.

In Garcia, this Court backed off, if you will, from a governmental functions test of limitations on the commerce clause and held, as best as I can understand that case, that the limitations on congressional power under the commerce clause were to be found in the structure of our Government. And that the political process would ensure that undue encroachments upon the States would not be enacted.

QUESTION: Well, when Congress determines whether or not it's going to exercise its authority to expressly apply the act to a State, is it making a jurisdictional decision when it talks about the Eleventh Amendment?

MR. SIMONS: Yes.

QUESTION: Well, why is it jurisdictional when it weighs the Eleventh Amendment but substantive when it determines whether or not it's going to apply to the State? I'm not quite -- how do you know when it's jurisdictional and when it's substantive?

MR. SIMONS: Because the decision to make the State suable in Federal court implicates jurisdictional concerns. The decision to make the State suable at all implicates substantive concerns, is the way I would answer that question.

It seems to me that one accommodates Garcia by



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saying that if Congress is going to pass a law that substantively impacts the States, particularly to create a monetary liability that prior thereto had not existed, and prior thereto was under the sovereign right of the State to decide whether it existed, if Congress is going to exercise that type of power, they ought to do so clearly. You put language in the bill that puts everyone on notice that the States maybe impacted, and then the States can marshall their political forces if they oppose it.

QUESTION: What's your best case that says that every common carrier by railroad doesn't include a State-owned railroad? Is it Welch?

MR. SIMONS: I suppose it is, yes, sir. Because it did not include a State-owned railroad for purposes of abrogating Eleventh Amendment immunity. And it's not clear enough for that purpose.

QUESTION: So you're saying the same rule has to apply as to whether or not the statute even covers the State.

MR. SIMONS: I believe it should, yes, sir. That would certainly have a salutary effect of simplifying this area of the law.

QUESTION: You think Welch is better for you than Will, don't you?

MR. SIMONS: Well, reading them together, I



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believe I win. Will, I will grant you, went further than just the language of the statute and looked at other indicia of congressional intent. I believe that if you apply the same analysis that the Will court did, you reach the same result.

I mean, there was no legislative history whatsoever, and as the Court said in Will, nothing that rose to the --

QUESTION: I know, but not every reasonable person would think the word "person" includes a State, would you?

MR. SIMONS: I think it's just as reasonable to suppose that not every reasonable person would read the word "common carrier," which ordinarily applies --

QUESTION: No, but every common carrier.

MR. SIMONS: Well, a State is not a common carrier.

QUESTION: I know, but every common carrier -- it's a railroad.

MR. SIMONS: We have here State that is providing carriage of goods for a fee. That does not make the State a common carrier in the sense that those words probably were understood by people in 1908. And I hasten to add that I have searched high and low to try to figure out what Congress meant by the words "common carrier" or

"carrier" in 1908. I have found nothing that would shed light on that.

I'd like to close, if I may --

QUESTION: Well, when was the -- how long had railroads been regulated in 1908?

MR. SIMONS: I don't know, sir.

QUESTION: The Interstate Commerce Act of 1887 was the first Federal regulation.

QUESTION: And didn't they -- weren't they talking about common carriers in those days?

MR. SIMONS: Yes, sir. But I have not found anything that would have included a State within the words "common carrier."

In Garcia, and if I may, I'd like to close with one very brief passage. I think it's one sentence. The Garcia court said that any substantive restraint on the exercise of commerce clause powers must find its justification in the procedural nature of this basic limitation and it must be tailored to compensate for possible failings in the national political process. What is more fundamental to our understanding of procedure than notice? And what is better calculated to prevent misunderstandings between Congress and the States and between Congress and this Court than a clear explication within the words of the statute as to what Congress



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intends, particularly when Congress intends to exercise and assumed sweeping power to abrogate the States' historical immunity in their own courts?

If there are no further questions, thank you.

QUESTION: Thank you, Mr. Simons.

Mr. Beckham, do you have rebuttal?

REBUTTAL ARGUMENT BY ROBERT J. BECKHAM

ON BEHALF OF THE PETITIONER

MR. BECKHAM: To answer one of the questions, the Jones Act borrows the language of the FELA. The Jones Act states, and this is from the opinion in Parden, I believe -- no, in Welch -- in Welch. "Any seaman who shall suffer personal injury in the course of his employment may bring a lawsuit."

QUESTION: It doesn't describe the defendant any more that that, I take it.

MR. BECKHAM: It incorporates by reference the FELA.

QUESTION: Well, I know, but in the course of --

MR. BECKHAM: And that gets us back to any common carrier.

QUESTION: It says in the course of his employment. What employment?

MR. BECKHAM: The seaman's, the seaman's



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employment.

QUESTION: I know, but I'm sure that both -- a lot of the definitions of what a seaman is and what maritime employment is.

MR. BECKHAM: And it says in such actions, all statutes of United States modifying or extending the common law right of remedy in case of personal injury to railway employees shall apply. So it's a borrowing statement.

QUESTION: Yeah, but is there any counterpart in the Jones Act to the language in the FELA that says "every common carrier by railroad," which names a class of potential defendant?

MR. BECKHAM: It is "every employer of a seaman."

QUESTION: Every employer of a seaman.

MR. BECKHAM: They just borrow the statute entirely. And they say that it goes in addition to seaworthiness and the other maritime remedies traditionally available. They made the statutory remedy also available.

Now, he talks in terms of needing some advice about being impacted, one of the things that our amicus brief points out is that in 1939 there was wholesale amendment of the FELA by Congress. And by that time this

Court had already held that States were subject to the regulatory power of the Federal Government. And Congress did not address that in any way when they made the wholesale.

Another question that was asked about the remedies. When Mr. Simons was asked a question by the South Carolina Supreme Court, my recollection is he told them that the man really was remediless. We point out in our brief that he is specifically excluded from the Tort Claims Act because the tort claims act didn't become effective until after his injury. We point out also that he is specifically excluded from the workers' comp laws by definition. And this is very significant.

We've had cited you a Higginbotham case. The Higginbotham case was a case before Parden which held the same way that Parden did. But its significance is this. Higginbotham is Louisiana. Here we're in South Carolina. There has been a subsequent case to the Court's opinion in Welch, the Laughinghouse case, out of the appeal court in North Carolina, all showing that States have relied upon the concept of preemption and Federal regulation and pervasiveness. And railroad men are routinely excluded from other schemes of compensation for on-the-job injuries.

And you'll find this -- and the South Carolina

statutes exclude it. I know from my home State of Florida that you find it. You'll find it in the Laughinghouse case. The Laughinghouse case, the man -- the North Carolina court dismissed his case for lack of jurisdiction in the Workman's Comp Bureau on the basis of Parden and Welch. They said true, Welch overruled the preemptive effect of the FELA for jurisdiction in the Federal court, but it's still good law insofar as the FELA being the sole remedy because Congress has preempted the field.

And you will find this -- I haven't done a State-by-State survey, but I will venture to say that you will find in many, many, many States, and this is why we mention it in our reply brief the significance of overruling these precedents because of the reliance factor that Mr. Chief Justice referred to just last term in talking about considerations when cases are overruled or not overruled. And you're looking at a steady stream of opinions out of this Court concerning the railroad industry and it's uniqueness in this country and it its jurisprudence.

And to overrule these cases is going to create not only havoc with the other laws that we talked about, but you're going to throw a lot of people out. They won't be covered anywhere because everybody has relied upon it, and the legislatures in the various States have enacted

legislation accordingly.

We know, in answer to the question concerning Feeney and the Petty cases, some argument was made about the fact that they weren't States. In each of those cases this Court proceeded arguendo as if they were States. And so certainly the bench and the bar of this Nation in reading these opinions reads them as this Court's pronouncements concerning State court issues.

Strangely enough, again, respondent acknowledges that it doesn't make sense, doesn't make sense to talk about jurisdiction unless there is a cause of action underneath it. And certainly that's the case here. The PATH case only makes sense if the statute applies to that State entity. Otherwise, the Court didn't need to be concerned as to whether or not it waives its jurisdiction to be sued under FELA or Jones Act in the Federal court. If there wasn't any cause of action there to begin with, the case would have been moot and the Court wouldn't have heard it.

At page 22 of our Amicus Brief, counsel has cited the Court to the Lowden case, the U.S. v. Lowden, where the Court packaged up all the various railroad laws, including the FELA, did not make the distinction that counsel would make against us here that, well, if it's a regulation law that's different than if it's a

money-damage law. Number one, the Safety Appliance Act is a penalty. While certainly the Federal Government can extract a penalty common carrier by rail who violates the Safety Appliance Act. It is also, however, a safety statute enacted for the protection of employees, and it's part of the package.

And the Court said in the plurality opinion in Union Gas, many times money damages are the only way to enforce congressional dictate. And the Court further said in that case we are in a situation where only Congress can act. Only Congress can act.

There is no question this is an interstate rail operation. There is no question it's preempted. Everything about this operation falls under Federal control except now they would say they want to carve out this one exception. And it just doesn't make sense. It tears at the fabric of the scheme of things that has been put together by Congress and has been consistently approved by this Court.

I don't know the answer as to whether, quote, "sovereign immunity," that principal that floats around the Eleventh Amendment, whether that protects an otherwise susceptible defendant from the application of a congressional statute. But if it does, we know it's clear it's not the pure Eleventh Amendment that protects in



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their own State court. If there is any principal floating around that they're trying to take advantage of here, it is that principal of sovereign immunity somehow floating with the Eleventh Amendment.

Now, if the waiver can be found of that explicit Federal court lack of jurisdiction, we submit that consent or a waiver can also be found so as to get rid of that sovereign immunity theory that otherwise would protect them in their own court, if indeed there are two sovereign immunities in the Eleventh Amendment.

And if indeed the more stringent on, the one that's explicitly stated as a bar to jurisdiction, if that could be waived, then we'd take it as a given, that the subsidiary "common law," quote, type of immunity can also be waived. And if it can be waived, they have done it in this case.

They've done it by the virtue of their statutes showing that they knew when they came in we're going to be subject to the Federal regulation. They have done it by carving out railroad workers and not giving them a remedy under their comp law -- again acknowledging that they know where the scheme for regulation comes from.

And they have done it also in terms of acknowledging by virtue of their statutes that the Railway Labor Act applies, that they simply are governed by



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Federal law. Now -- and they engage in interstate commerce.

They went into a pervasively regulated area. All of this -- all of this was done knowingly. All of this was done after this Court had repeatedly placed it on notice.

We think in this case that we are not dealing with the historic powers of State government that was of major concern to this Court in cases like the Will case. We were not dealing with matters going to the heart of representative Government that the Ashcroft case spoke of last year. These are not governmental proprietary distinctions we're making, but in the UTU case, a unanimous Court, led by Chief Justice Burger.

In the UTU case, a unanimous Court said hey, this is railroading. This is not State government. If the State government wants to do it, that's fine. We're not interfering with State government, we're simply talking railroads. And so we are not addressing here, and this Court's opinion will not reach here. Any so-called heartbeat of America federalism problem. We just don't have that.

The case should be remanded for trial. Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr.



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Beckham.

The case is submitted.

(Whereupon, at 2:35 p.m., the case in the above-entitled matter was submitted.)



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BY Michelle Saunders

*(REPORTER)*