IN THE SUPREME COURT OF FLORIDA

Case No. 68,932

ROBERT EDWARD SPOONER,

Petitioner,

vs.

DEPARTMENT OF CORRECTIONS,

Respondent.

ON REVIEW FROM THE DISTRICT COURT OF
APPEAL OF FLORIDA FOR THE FIRST DISTRICT

BRIEF OF AMICUS CURIAE

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INTRODUCTION

This brief is filed for the benefit of the court and the parties. It addresses solely the legal issues presented and not the particular facts of this case.

ISSUE PRESENTED FOR REVIEW

The question of great public importance that was certified by the district court of appeal is:

> Has the State of Florida, pursuant to Section 768.28, Florida Statutes (1983), waived its Eleventh Amendment and state common law immunity and consented to suits against the State and its agencies under 42 U.S.C. Section 1983?

Spooner v. Department of Corrections, 488 So.2d 897, 898 (Fla. 1st DCA 1986).

SUMMARY OF ARGUMENT

The Eleventh Amendment applies only to the judicial power of the United States. As the petitioner has sought to invoke the judicial power of the State of Florida, that amendment has no effect on this action.

Florida is not a sovereign with regard to 42 U.S.C. §1983, because that law was adopted by a higher authority, the Congress of the United States. In joining the union the states relinquished their sovereignty in those areas where they granted the national government authority to regulate in a fashion that could not be challenged by the states. One of these areas is the field of enforcement of the principles embodied in the Fourteenth Amendment. As the state's freedom to act has been lawfully subordinated to

the authority of the United States, there is no state sovereignty to be invaded.

The supremacy clause precludes state law from determining what defenses can be imposed in an action brought under 42 U.S.C. §1983. The policies of the act cannot be defeated by assertions of state power. Any restrictions can only arise from federal law.

A state, as a body politic, is a person as that term is used in 42 U.S.C. §1983. The statute was intended as a provision to enforce the Fourteenth Amendment. As the amendment, by its express terms, is directed at the states, so is the enforcing statute. The persons who drafted and adopted the law intended that it apply to the states and they explained this in the Congressional debates.

The result of allowing lawsuits against a state under 42 U.S.C. §1983 conforms to the principles of loss allocation favored by the U.S. Supreme Court. The statute was enacted to provide a meaningful monetary remedy. Allowing a lawsuit against the state will further this purpose.

ARGUMENT

I.

ELEVENTH AMENDMENT IMMUNITY

The Eleventh Amendment says:

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

By its terms, the amendment applies only to the judicial power of

the United States. The petitioner in the present case has invoked the judicial power of the State of Florida. On its face, it appears that the amendment was not intended to restrict the authority of any Florida court.

The United States Supreme Court has confirmed the plain meaning of the words of the amendment, saying that:

> No Eleventh Amendment question is present, of course, where an action is brought in a state court since the Amendment by its terms restrains only "[t]he Judicial power of the United States.

Maine v. Thiboutot, 448 U.S. 1, 9 n. 7 (1980).

The concurring opinion of the Justice Marshall in Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare, 411 U.S. 279, 287-298 (1973), expressly recognizes the right of individuals to sue a state in a state court for a claim based on a federal statute, even though individuals are barred from bringing the same claim in federal court. The opinion says at page 298:

> While constitutional limitations upon the federal judicial power bar a federal court action by these employees to enforce their rights, the courts of the State nevertheless have an independent constitutional obligation to entertain employee actions to enforce those rights.

This portion of Justice Marshall's concurring opinion is cited with approval by a maiority of the U.S. Supreme Court in Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 123 (1984). The court in that case also said:

> Under Edelman v. Jordon, supra, a suit against state officials for retroactive monetary relief, whether based on federal or state law, must be brought in state court. Challenges to the validity of state tax systems under 42 U.S.C. §1983 also must be brought in state court.

Halderman, supra at 122. If the Eleventh Amendment did apply to state court actions it would make no sense for the court to say what it did.

Last year, Justice Marshall's concurring opinion in Employees was again cited and quoted with approval by a majority of the U.S. Supreme Court in Atascadero State Hospital v. Scanlon, ___U.S.___, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985), where it is stated:

> As Justice MARSHALL has noted, "the issue is not the general immunity of the States from private suit ... but merely the susceptibility of States to suit before federal tribunals." Employees v. Missouri Public Health & Welfare Dep't., supra, 411 U.S. at 293-294, 93 S.Ct. at 1622-1623 (MARSHALL, J., concurring in the result) (emphasis added). It denigrates the judges who serve on the state courts to suggest that they will not follow the supreme law of the land.

Atascadero, supra, 105 S.Ct. at 3146 n.2, 87 L.Ed.2d. at 178 n.2. The emphasis added to the words federal tribunals is as it appears in the Supreme Court Reporter. The United States Law Week, 53 U.S.L.W. at 4987, also shows the words federal tribunals as emphasized. The Lawyers Edition while having the words "emphasis added" does not have any emphasis on the words "federal tribunal". The last sentence quoted above indicates, though, that what the Supreme Court meant was that suits against states under federal law

were to be tried in state court and that state judges were to be trusted to correctly interpret the law of the United States.

Quern v. Jordan, 440 U.S. 332 (1979), is often cited for the contrary rule. Quern involved an action brought in a United States district court. Quern was decided the same day as Nevada v. Hall, 440 U.S. 410 (1979). These decisions should be read together in order to understand the position of the U.S. Supreme Court on this issue. Justice Rehnquist, the author of the majority opinion in Quern v. Jordan, supra, dissented in Nevada v. Hall. In his dissent, 440 U.S. at 437, Justice Rehnquist argued for the application of the Eleventh Amendment to state court proceedings. The majority rejected this argument, saying:

> But all of these cases, and all of the relevant debate, concerned questions of federal-court jurisdiction and the extent to which States, by ratifying the Constitution and creating federal courts, had authorized suits against themselves in those courts. These decisions do not answer the question whether the Constitution places any limit on the exercise of one's State's power to authorize its courts to assert jurisdiction over another state. Nor does anything in Art. III authorizing the judicial power of the United States, or in the Eleventh Amendment limitation on that power, provide any basis, explicit or implicit, for this Court to impose limits on the powers of California exercised in this case.

Nevada v. Hall, supra at 420-421.

In discussing the issue of the Eleventh Amendment and a state's immunity to suit, a leading authority has written:

> This provision acts as a jurisdictional

> bar to suits brought against state governments in the federal courts. It does not grant the state true immunity, for its does not exempt them from the restrictions of the federal law; it only means that some types of suits against them must be brought in state rather than federal court. (footnote ommitted).

1 Rotunda, Nowak & Young, Treatise on Constitutional Law: Substance and Procedure §2.12 at p.81. The position that the Eleventh Amenment is not applicable to cases brought in state court is also supported by the Note, Amenability of States to Section 1983 Suits: Reexamining Quern v. Jordan, 62 B.U.L. Rev. 731, 742 n. 67 (1982) [hereinafter cited as Note, Amenability of States.]

II.

SOVEREIGN IMMUNITY

The State of Florida is not a "sovereign", for purposes of sovereign immunity, with regard to 42 U.S.C. §1983. As explained by Justice Holmes in Kawananakoa v. Polybank, 205 U.S. 349, 353 (1907):

> A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.

This opinion is cited with approval in Nevada v. Hall, supra at 415-416.

The United States, and not the State of Florida, made 42 U.S.C. §1983 and the Fourteenth Amendment. With regard to these provisions the state is not a sovereign. This same conclusion is also reached

by L. Wolcher, Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations, 69 Calif. L.Rev. 189, 196-197 (1981). Sovereignty is a question of power and it rests on the assumption that the sovereign authority is superior to the law it has adopted. The Western Maid, 257 U.S. 419, 432 (1922). We know from the U.S. Const. art. VI, cl.2 that the State of Florida is not superior to 42 U.S.C. §1983. Therefore, it is not a sovereign with regard to that statute.

The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the U.S. Constitution. Parden v. Terminal Railway of Alabama, 377 U.S. 184, 191 (1964). At the time the constitution was adopted it was understood that:

> ... this alienation of State sovereignty would only exist in three cases; where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority would be absolutely and totally contradictory and repugnant.

The Federalist No. 32, at 200 (A. Hamilton) (J. Cooke ed. 1961).

The alienation of sovereignty with which we are here concerned is the third category. The statute that is now codified at 42 U.S.C. §1983 was passed for the express purpose of enforcing the provisions of the Fourteenth Amendment. Lynch v. Household Finance Corp., 405 U.S. 538, 545 (1972). Section 5 of the amendment gives Congress

the power to enforce the other provisions. When Congres acts pursuant to section 5, not only is it exercising legislative authority that is plenary within the terms of the consitutional grant, it is exercising that authority under one section of a constitutional amendment where other sections by their own terms embody limitations on state authority. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976). If the states had an equal authority to exclude from the ambit of 42 U.S.C. §1983 that which Congress chose to include, such a similar authority would be contradictory and repugnant.

In an analogous situation the Supreme Court said:

> By empowering Congress to regulate commerce, then, the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation.

Parden v. Terminal Railway of Alabama, supra at 192. In the same light, when the states empowered Congress to regulate the rights, privileges and immunities secured by the Consitution and laws, they surrendered any portion of their sovereignty that would stand in the way of such regulation.

The issue of the effect of the Fourteenth Amendment on state claims to sovereign immunity was addressed by the U.S. Supreme Court in Ex Parte Virginia, 100 U.S. 339, 346 (1880) as follows:

> Nor does it make any difference that such legislation is restrictive of what the State might have done before the constitutional Amendment was adopted. The prohibitions of the 14th Amendment are directed to the States, and they are to a degree restrictions of state power. It is these which Congress is empowered to enforce, and

> to enforce against state action, however put forth, whether that action be executive, legislative or judicial. Such enforcement is no invasion of state sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact. This extent of the powers of the General Government is overlooked, when it is said, as it has been in this case, that the Act of March 1, 1875, interferes with state rights. It is said the selection of jurors for her courts and the administration of her laws belong to each State; that they are her rights. This is true in the general. But in exercising her rights, a State cannot disregard the limitations which the Federal Constitution has applied to her power. Her rights do not reach to that extent. Nor can she deny to the General Government the right to exercise all its granted powers, though they may interfere with the full enjoyment of rights she would have if those powers had not been thus granted. Indeed, every addition of power to the General Government involves a corresponding diminution of the governmental powers of the States. It is carved out of them.

42 U.S.C. §1983 was a product of a vast transformation from the concepts of federalism that had prevailed before. Mitchum v. Foster, 407 U.S. 225, 242 (1972). The cornerstone of this vast transformation, the Fourteenth Amendment, effected an expansion of Congress' power and a corresponding diminution of state sovereignty. Fitzpatrick v. Bitzer, supra at 455. In doing so it subordinated the sovereignty of the states to the authority of the federal government. Bute v. Illinois, 333 U.S. 640, 658 (1948). Casting aside for a moment other issues, and directing attention solely to that of sovereign immunity, it would be a strange situtation

if the state could be held subject to the law and liable for a violation, yet could not be sued without its consent. Parden v. Terminal Railway of Alabama, supra at 193.

State law is not controlling in determining what the incidents of rights under a federal statute shall be and states are not permitted to have the final say as to what defenses can and cannot be properly imposed to suits under a federal statute. Dice v. Akron, Canton & Youngstown Railroad Company, 342 U.S. 349, 361 (1952). The policy unerlying a federal statute may not be defeated by an assertion of state power. Anderson v. Abbott, 321 U.S. 349, 365 (1944). A state law immunity provision does not control a §1983 cause of action that is being asserted in state court. Martinez v. California, 444 U.S. 277, 284 (1980). Conduct which is wrongful under 42 U.S.C. §1983 cannot be immunized by state law. A construction of this federal statute which permitted a state immunity defense to have a controlling effect would transmute a basic quarantee into an illusory promise and be contrary to the supremacy clause. Martinez, supra at 284 n. 8.

The power of a state to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them is subject to the retrictions imposed by the federal constitution. McKnett v. St. Louis & San Francisco Railway Co., 292 U.S. 230, 233 (1934). The federal consitution prohibits state courts of general jurisdiction from refusing to accept a case solely because the suit is brought under federal law. McKnett, supra at 233-234. As Section 768.28, Fla. Stat. (1983),

allows the courts of general jurisdiction in Florida to hear an action against the state and its agencies based on tortious conduct, the state cannot, constitutionally, refuse to hear the same case if brought pursuant to 42 U.S.C. §1983.

A closely related issue is whether a state is a person as that term is used in 42 U.S.C. §1983. The statute makes subject to its prohibition "every person" who deprives another of any rights, privileges or immunities secured by the constitution and laws. Only if a state is a "person" will it be subject to being sued under this law.

In determining who is a "person", it should be kept in mind that it was the intent of Congress that 42 U.S.C. §1983 be liberally and beneficently construed to give it the largest latitude consistent with the words employed. Monell v. New York City Department of Social Services, 436 U.S. 658, 684 (1978). The purpose of the statute was to carry out the principles of the Fourteenth Amendment. Monroe v. Pape, 365 U.S. 167, 171 (1961). The substantive provisions of the Fourteenth Amendment are by express terms directed at the states. Fitzpartick v. Bitzer, supra at 453, and the amendment was intended to be a limitation on the power of the states. Ex Parte Virginia, supra at 345 (1880). The terms of §1983 are as comprehensive as the Fourteenth Amendment. Monell, supra at 685-686 n. 45. If the amendment is directed at the states, and intended to be a limit on the power of the states, and if the statute is as comprehensive as the amendment and is to be liberally construed, it follows that the states should fall

within the terms of the statute.

Section 1983 was intended to cover legal as well as natural persons. Monell, supra at 683. The Dictionary Act, passed only months earlier in 1871 and intended as a guide to construction of acts of Congress, defined persons to extend to bodies politic. Monell, supra at 688 and 689 n. 53. We now know from the Monell opinion at footnote 53 that these definitions were intended to be mandatory. A state is a body politic and in the plain language of Monell, supra at 689 n. 53, "the language of that section should prima facie be construed to include 'bodies politic' among the entities that could be sued."

The two leading proponents of the Civil Rights Act of 1871 were Representative Shellabarger, the chairman of the committee that wrote the law, and Representative Bingham, the author of the Fourteenth Amendment. Both of these men intended that the law be applied to the states. Rep. Shellabarger viewed the law as:

> necessary affirmative legislation to enforce the personal rights which the Constitution guarantees, as between persons in the State and the State itself.

Cong. Globe App. 42nd Cong. 1st. Sess. p. 70.

Rep. Bingham viewed the debates as one over the issue of:

> the power of Congress to provide by law for the enforcement of the powers vested by the Constitution in the Government of the United States, both against individuals and States ...

Cong. Globe App. 42nd Cong. 1st Sess. p. 81. Bingham concluded that:

> These last amendments - thirteen, fourteen and fifteen - do, in my judgment,

> vest in Congress a power to protect the rights of citizens against States, and individuals in states, never before granted.

Cong. Globe App. 42nd Cong. 1st Sess. p. 83.

The Monell court, supra at 686-687, felt that Rep. Bingham drafted the Fourteenth Amendment in response to Barron v. City of Baltimore, 32 U.S. (7 Pet.) 243 (1833). It should be kept in mind that the holding in the Barron case was that none of the Bill of Rights applied to the states, but only to the federal government. To remedy this, the Fourteenth Amendment made those constitutional provisions applicable to the states.

The Supreme Court said in Alabama v. Pugh, 328 U.S. 781, 782 (1978): "there can be no doubt, however, that suit against the State and its Board of Corrections is barred by the Eleventh Amendment, unless Alabama has consented to the filing of such a suit." If a state were not a "person" for purposes of §1983, Alabama and its agencies would never fall within the ambit of the law and could not consent to change the meaning of a word that Congress has established. As stated in Note, Amenability of States, supra at 741:

> Thus, taken together, the decisions in Pugh and in Quern suggest that states are "persons" under section 1983 but that the eleventh amendment will bar section 1983 suits against states (footnote omitted).

The result suggested by this brief conforms to the general principles set down by the Supreme Court in Owen v. City of Independence, 445 U.S. 622 (1980). There, the court said that: 1) it is

fairer to allocate any resulting loss from a deprivation of rights to the cost of government borne by all taxpayers, than to allow its impact to be felt solely by those whose rights have been violated, Owen, supra at 655; 2) it is good to have government officials consider the financial injury to the government and whether his or her decision comports with constitutional mandates, Owen, supra at 656; and 3) the principal of loss-spreading has joined fault as a factor in distributing the costs of official misconduct. Owen, supra at 657.

The statute by its terms allows for both actions at law and suits in equity. The Owen court, supra at 654, recognized that Congress enacted 42 U.S.C. §1983 to provide a monetary remedy for abuses of official power. Without the constraints of the Eleventh Amendment, the courts of the states should be faithful to the Congressional intent.

CONCLUSION

Amicus recommends that the court adopt the rule that a lawsuit in state court against the State of Florida or its agencies under 42 U.S.C. §9183 is not barred by either the Eleventh Amendment or the doctrine of sovereign immunity.

CERTIFICATE OF SERVICE

We certify that copy hereof has been furnished by mail this 29th day of July, 1986 to F. Kendall Slinkman, 1665 P.B. Lakes Boulevard, West Palm Beach, Florida 33401; Philip M. Burlington of Edna L. Caruso, P.A., Suite 4B - Barristers Building, 1615 Forum Place, West Palm Beach, Florida 33401; Louis F. Hubener,

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