RECORD NO. 20-1409

In The

United States Court Of Appeals
For The Fourth Circuit

**MAXWELL KADEL; JASON FLECK;
CONNOR THONEN-FLECK, by his next friends and parents;
JULIA MCKEOWN; MICHAEL D. BUNTING, JR.;
C.B., by his next friends and parents; SAM SILVAINE**

Plaintiffs - Appellees,

v.

**NORTH CAROLINA STATE HEALTH PLAN
FOR TEACHERS AND STATE EMPLOYEES,**

Defendant - Appellant,

and

**DALE FOLWELL, in his official capacity as State Treasurer of North Carolina;
UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL;
NORTH CAROLINA STATE UNIVERSITY; DEE JONES, in her official capacity as Executive Administrator of the North Carolina State Health Plan for Teachers and State Employees; UNIVERSITY OF NORTH CAROLINA AT GREENSBORO**

Defendants.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA AT GREENSBORO**

REPLY BRIEF OF APPELLANT

Mark A. Jones
Kevin G. Williams
BELL, DAVIS & PITT, PA
P. O. Box 21029
Winston-Salem, NC 27120
(336) 714-4122

Counsel for Defendant-Appellant

John G. Knepper
LAW OFFICE OF
JOHN G. KNEPPER, LLC
P. O. BOX 1512
CHEYENNE, WY 82003-1512
(307) 632-2842

Counsel for Defendant-Appellant

TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES

Page(s):

Cases:

Constitutional Provision:

Statutes:

Legislative Material:

Other:

ARGUMENT

The Plaintiffs' textual arguments fail to provide the careful review required for this Court to find a waiver of sovereign immunity.

In *Sossamon v. Texas*, the Supreme Court held that Congressional demands for a waiver of state sovereign immunity, like Congressional abrogation of sovereign immunity, must "be expressly and unequivocally stated in the text of the relevant statute." 563 U.S. 277, 290 (2011). As one court has noted, when sovereign immunity is at issue, Congress must use language "as clear as is the summer's sun." *Kimel v. State Bd. of Regents*, 139 F.3d 1426, 1431 (11th Cir. 1998), *aff'd sub nom. Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (quoting William Shakespeare, Henry V, act 1. sc. 2).

The demand for a clear statement ensures "that Congress has specifically considered state sovereign immunity and has intentionally legislated on the matter." *Sossamon*, 563 U.S. at 290. State sovereign immunity is "an important constitutional limitation on the power of the federal courts," *id.* at 284, and a Congressional decision to abrogate or to demand a waiver upsets "the fundamental constitutional balance between the Federal Government and the States, placing a considerable strain on the principles of federalism that inform Eleventh Amendment doctrine," *Dellmuth v. Muth*, 491 U.S. 223, 227 (1989) (internal punctuation and citations omitted).

Both of the Plaintiffs' legal theories should be rejected because they ask this Court to do what it cannot: reach beyond the text at issue—§ 1557 of the Affordable Care Act [42 U.S.C. § 18116]—to supply its own view on Congressional intent. First, the Plaintiffs argue that, in 2010, Congress must have intended to demand a waiver of sovereign immunity because § 1557 cites to other statutes where Congress demanded a waiver. For their second theory, the Plaintiffs argue Congress must have envisioned a statute like § 1557 when it enacted § 1003 of the Rehabilitation Act Amendments in 1986 [42 U.S.C. § 2000-d7].

This Court cannot make these inferences. With sovereign immunity, the courts cannot "fit together various sections" to supply the necessary intent, *Kimel*, 139 F.3d at 1431, or, as Plaintiffs urge, "look to substance, not to form," (Pl. Br. at 12). "[T]he need to construe one section with another, by its very nature, hints that no *unmistakable* or *unequivocal* declaration is present." *Kimel*, 139 F.3d at 1431 (emphasis in original). Without such an unmistakable demand for a waiver of sovereign immunity, the Plaintiffs' claim must be dismissed.

I. The text of § 1557 does not clearly demand a waiver of sovereign immunity.

The Plaintiffs' first argument is that § 1557 demands a waiver because "suits against states for money damages—with an accompanying waiver of sovereign immunity" are "provided for and available under" Title IX. (Pl. Br. at 10). The

statutory reference in § 1557 to Title IX incorporates "the remedial principles Congress has directed to apply to those statutes." (*Id.* at 12).

The Plaintiffs' argument, however, does not confront the text at issue:

> The enforcement mechanisms provided for and available under such title VI, title IX, section 794, or such Age Discrimination Act shall apply for purposes of violations of this subsection.

42 U.S.C. § 18116(a). As the Sixth Circuit has recently noted, the phrase 'enforcement mechanism' "covers the distinct methods available under the four listed statutes for compelling compliance with the substantive requirements of each statute." *Doe v. BlueCross BlueShield of Tennessee, Inc.*, 926 F.3d 235, 239 (6th Cir. 2019).

The Plaintiffs assume that § 1003 of the Rehabilitation Act Amendments of 1986 is such an "enforcement mechanism," (Pl. Br. at 10-11), so they argue that it is "provided for and available under" Title IX against the State Health Plan. This argument fails for two reasons. First, the natural reading of "enforcement mechanism" is that the term refers to a cause of action or other way to bring forward a claim of discrimination, not to a waiver of sovereign immunity. Second, the Plaintiffs' interpretation of § 1557 fails to confront the ambiguity in the phrase "provided for *and* available under," assuming it away as a single requirement.

A. A waiver of sovereign immunity is not an "enforcement mechanism."

The availability of a cause of action—that is, an "enforcement mechanism"—is analytically distinct from whether that enforcement mechanism can reach a particular defendant. A lack of jurisdiction may prevent a valid claim—a plaintiff may lack *in personam* jurisdiction, for example—but this does not mean a statute lacks an 'enforcement mechanism.' "The essence of sovereign immunity … is that remedies against the government differ from 'general remedies principles' applicable to private litigants." *Sossamon*, 563 U.S. at 291 n.8.

The Plaintiffs' claim against the State Health Plan is, at its root, an allegation that the State Health Plan discriminates on a "ground prohibited under … Title IX" (as opposed to a "ground prohibited" by Title VI, the Rehabilitation Act, or the Age Discrimination Act of 1975). 42 U.S.C. § 18116(a). The Supreme Court has described the "enforcement mechanisms" of Title IX, and it nowhere referenced waivers of sovereign immunity. *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246 (2009). In deciding that a plaintiff could bring suit under 42 U.S.C. § 1983 for a violation of Title IX, the Court noted Title IX's "only express enforcement mechanism, [20 U.S.C.] § 1682, is an administrative procedure resulting in the withdrawal of federal funding from institutions that are not in compliance." *Id.* at 255. "In addition, this Court has recognized an implied private

right of action." *Id.* The Court's description demonstrates the distinction between the "enforcement mechanism" for the substantive claim and the existence of an independent barrier to the court's jurisdiction over a claim made by a specific plaintiff.

Indeed, this distinction between "enforcement" through the federal courts and sovereign immunity is at the core of the Eleventh Amendment itself. Article III, section 2 of the U.S. Constitution provides for judicial power when "Cases" or "Controversies" exist "between a State and Citizens of another State." U.S. Const., art. III, sec. 2. When the Supreme Court applied this text literally, however, the people of the United States adopted the Eleventh Amendment, which "restore[d] the original constitutional design" by "expressing the will of the ultimate sovereignty of the whole country" and "actually revers[ing] the decision of the Supreme Court." *Alden v. Maine*, 527 U.S. 706, 723 (1999). The Eleventh Amendment did not "redefine the federal judicial power" to exclude suits against states, *id.* at 723, any more than sovereign immunity alters the enforcement mechanisms for § 1557. Sovereign immunity means just that *the federal courts* cannot enforce § 1557 on behalf of a private plaintiff without the consent of the state. *But see Alden*, 527 U.S. at 755 ("In ratifying the Constitution, the States consented to suits brought by other States or by the Federal Government.").

The State Health Plan does not argue that no private cause of action exists under § 1557 against *any* recipients of federal funds. *Franklin v. Gwinnett Cnty. Pub.*

Sch., 503 U.S. 60, 65-66 (1992). But a private cause of action does not imply federal court jurisdiction, as the Plaintiffs assume, because sovereign immunity places the Plan "on an entirely different footing than private parties." *Lane v. Pena*, 518 U.S. 187, 196 (1996). "Liability against nonsovereigns could not put the States on notice that they would be liable in the same manner, absent an unequivocal textual waiver." *Sossamon*, 563 U.S. at 289 n.6. At a minimum, the cause of action for § 1557 itself, not Title IX, must explicitly lie against states and demand a waiver of immunity. The failure of Congress to make this clear demand bars the Plaintiffs' claim.

B. Sovereign immunity is waived only when the statutory demand is so clear that no other interpretation is possible.

When "a statute is susceptible of multiple plausible interpretations, including one preserving immunity," then the courts "will not consider a State to have waived its sovereign immunity." *Sossamon*, 563 U.S. at 287. Not only is a waiver of sovereign immunity not an enforcement mechanism, but—even if it were otherwise—it is not an enforcement mechanism "provided for *and* available under" Title IX. 42 U.S.C. § 18116(a) (emphasis added).

The Plaintiffs treat this phrase as a unitary one, (Pl. Br. at 13-14), but interpretation "must give effect to every word that Congress used in the statute." *Lowe v. SEC*, 472 U.S. 181, 208 n.53 (1985). Under § 1557, the enforcement mechanism must be "provided for" a violation of a listed statute and the enforcement mechanism must also be "available under" the cited statute. 'Available under' must

have an independent meaning; it must be a second statutory condition. The phrase must mean that the enforcement mechanism must be "accessible" "according to" the specifically listed statutes. (*See* Pl. Br. at 12 (providing dictionary definitions)). Given that any questions about the scope of the waiver of sovereign immunity (*e.g.*, does it include money damages or only injunctive relief) can only be known by reading a statute *other than* Title IX, the waiver of sovereign immunity is not "available under" that statute.

"*And* is an elemental word in the English language used to combine items." *Navy Fed. Credit Union v. LTD Fin. Servs., LP*, 972 F.3d 344, 356 (4th Cir. 2020) (quoting Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 116 (2012)). "But *and* alone tells us little of *how* two items are to be combined." *Id.* "When the objects connected are independent, they are generally taken 'in addition,'" but "[w]hen they are dependent, they must be taken 'jointly.'" *Id.* at 357.

The Plaintiffs' interpretation of § 1557 is that the word "and" actually means "or." Their argument is that if a mechanism is either "provided for" or "available under" Title IX, then it is available to them. For a private party, the distinction between the two potential meanings of 'and' is immaterial. A court need only to look to Title IX to answer questions about the enforcement mechanisms. The Plaintiffs' interpretation only mattters when a waiver of sovereign immunity is at issue. It is

then that the court must look to § 1003 of the Rehabilitation Act Amendments of 1986. As the Supreme Court has repeatedly emphasized, however, when sovereign immunity is at issue, a statute must be "strictly construed, in terms of its scope, in favor of the sovereign." *Lane*, 518 U.S. at 192. That means that "provided for and available under" is additive, and courts can consult only the specifically listed statutes for enforcement mechanisms. The Plaintiffs argue this is a "crabbed" reading of the statute. Perhaps, but it is plausible. More to the point, this more restrictive reading is required. The courts cannot look beyond the listed statutes themselves for a waiver of sovereign immunity.

Indeed, the distinction put forward by the Plaintiffs—between the phrase "set forth in" as it appears in the Rehabilitation Act and "available under"— undermines the argument for a waiver of sovereign immunity. Such a careful textualist distinction is evidence that Congress has *not* "manifest[ed] a clear intent" to require each "State's consent to waive its constitutional immunity" to suit. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247 (1985). Congress could have cited to § 1003 of the Rehabilitation Act Amendments. Congress could have said "sovereign immunity" or "suits against states" or *something* that indicated the possibility of suit against a state to enforce § 1557 of the Affordable Care Act. The text is silent. "If Congress is not unmistakably clear and unequivocal in its intent to condition a gift or gratuity on a State's waiver of its sovereign immunity, we cannot presume that a

State, by accepting Congress' proffer, knowingly and voluntarily assented to such a condition." *Bell Atl. MD, Inc. v. MCI WorldCom, Inc.*, 240 F.3d 279, 292 (4th Cir. 2001), *reversed on other grounds* 535 U.S. 635 (2002). Congress has not been sufficiently clear, and the claim against the Plan should be dismissed.

II. The residual clause of § 1003 of the Rehabilitation Act Amendments of 1986 does not provide a waiver of sovereign immunity for Plaintiffs' suit.

The residual clause of § 1003 of the Rehabilitation Act Amendments of 1986 cannot provide an independent waiver of sovereign immunity either. A waiver of sovereign immunity requires more than the rationale articulated by the district court that 'this is the type of statute Congress must have been thinking about.'

At its heart, this argument is that states should have been prepared for § 1557 and any statute like it. The states should have known that whenever they accept federal funds, a demand for a waiver of sovereign immunity may attach to those funds at some later date. Spending Clause legislation, however, is "much in the nature of a *contract:* in return for federal funds, the recipients agree to comply with federally imposed conditions." *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 491-92 (4th Cir. 2005) (emphasis in original). Contract law does not allow this Court to imply a bargained-for waiver from § 1003 of the Rehabilitation Act Amendments of 1986, especially when it is this Court (not Congress) deciding which federal funds are covered, which types of discrimination

are covered, and which remedies in federal court are to be available (damages or injunctions or more).

The 1986 provision provides that a "State shall not be immune under the Eleventh Amendment … from suit in Federal court for a violation of [specific statutes or]… the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance." 42 U.S.C. § 2000d-7(a)(1). The courts "have regularly applied the contract-law analogy in cases defining the scope of conduct for which funding recipients may be held liable for money damages." *Barnes v. Gorman*, 536 U.S. 181, 186 (2002).

The Court should apply the same analysis here and hold that, without bargained-for consideration, no waiver exists. Contract law requires the parties exchange 'bargained for' consideration. The "promise and the consideration must purport to be the motive each for the other, in whole or at least in part." *Wisconsin & M. Ry. Co. v. Powers*, 191 U.S. 379, 386 (1903) (Holmes, J.). "It is not enough that the promise induces the detriment or that the detriment induces the promise, if the other half is wanting." *Id. See also* Restatement (Second) of Contracts § 71 (1) & (2) (1981) ("To constitute consideration, a performance or a return promise must be bargained for. A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.").

There is not, in the text of § 1003, even the hint of an exchange. Without an exchange, there can be no contract and therefore no waiver. This becomes most apparent when one tries to identify when, precisely, the parties agreed to exchange the State's sovereign immunity for federal funds. § 1003 cannot be the "relevant statute" because no such moment exists. The Plaintiffs appear to concede that the Plan did not waive its sovereign immunity in 2005 when it first accepted funding from the Retiree Drug Subsidy. (Pl. Br. at 24). For the Plaintiffs, the agreement occurred in 2010, when the Affordable Care Act was enacted. (*Id.*) But in 2010, nothing in § 1557 stated that a "health program or activity" extended beyond the provision of medical treatment. The Department of Health and Human Services did not issue its interpretation of § 1557, opining that "health program or activity" includes insurers, until 2016.[*] 81 Fed. Reg. 31,376 (May 18, 2016). Because only statutory text can demand a waiver of sovereign immunity, not federal regulations, 2016 is not the correct date for a waiver either. "[A] congressional gift in the form of federal funds will not validly waive a recipient State's Eleventh Amendment immunity unless Congress manifests a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional

[*] The Plaintiffs assert that the Plan has waived any argument that it is not a "health program or activity." This is incorrect. The Plan has "raised an immunity-based argument from this suit's inception." *Franchise Tax Bd. of California v. Hyatt*, 139 S. Ct. 1485, 1491 n.1 (2019).

immunity." *Bell Atl. MD, Inc.*, 240 F.3d at 292. The inability to identify when the waiver became effective is strong evidence that § 1003 of the Rehabilitation Act Amendments is not sufficiently clear to require a knowing waiver.

It is noteworthy that the United States Department of Health and Human Services no longer supports application of § 1557 to insurance plans. While pending lawsuits challenge this interpretation, no court has adopted the statutory interpretation the Plaintiffs offer. Rather, two district courts have refused to enjoin the new interpretation of "health program or activity," concluding the plaintiffs lack standing. *Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Human Servs.*, No. CV 20-1630 (JEB), 2020 WL 5232076, at *18-19 (D.D.C. Sept. 2, 2020) (no standing to challenge definition of covered entities); *Washington v. U.S. Dep't of Health & Human Servs.*, No. C20-1105JLR, 2020 WL 5095467 (W.D. Wash. Aug. 28, 2020) (Washington State lacks standing).

Ultimately, the Plaintiffs fall back to the sweeping argument they truly intend: the word "any" in the residual clause of § 1003 of the Rehabilitation Act Amendments of 1986 imposes a sweeping waiver of sovereign immunity that extends through time limited only by the creativity of Congress. But broad and unspecific language cannot meet the stringent requirements established by the Supreme Court for a waiver of sovereign immunity. *Cf. Madison v. Virginia*, 474 F.3d 118, 132 (4th Cir. 2006) (questioning whether "a catch-all provision could

suffice as an 'unequivocal textual waiver'"). The breadth of the Plaintiffs' claim is its own refutation. "Congress could have included a similar waiver provision in the [Americans with Disabilities Act] or added the ADA to the list of nondiscrimination statutes in [42 U.S.C. § 2000d-7], but it did not." *Levy v. Kansas Dep't of Soc. & Rehab. Servs.*, 789 F.3d 1164, 1171 (10th Cir. 2015). Similarly, no court has held that the Fair Housing Act includes a waiver of sovereign immunity against the states, even though that Act prohibits "discrimination in the sale or rental of housing" in "dwellings provided in whole or in part with the aid of loans, advances, grants, or contributions made by the Federal Government." 42 U.S.C.A. § 3603(a) & (a)(1)(B). *See, e.g.*, *McCardell v. U.S. Dep't of Hous. & Urban Dev.*, 794 F.3d 510, 521-22 (5th Cir. 2015) (noting the existence of 42 U.S.C. § 2000d-7 but finding no waiver of state sovereign immunity).

Where Congress speaks clearly about liability for states and identifies the federal funds at issue, then states can knowingly waive immunity. Such clarity must come from Congress, however, not from the courts piecing together a jigsaw puzzle of various provisions. The Plaintiffs' argument is that Congress must have been thinking about the possibility of future statutes like § 1557 when it included the residual clause in § 1003 of the Rehabilitation Act Amendments of 1986. And a later Congress, in 2010, must have been thinking about § 1003 of the Rehabilitation Act Amendments of 1986 when it imposed new requirements upon federal grantees.

They rely upon *the federal courts* to supply the Congressional intent for a waiver of sovereign immunity, and this is not permitted. Unless it can be "said with perfect confidence" that Congress intended to require a waiver of sovereign immunity, there is none. *Dellmuth*, 491 U.S. at 231. "[I]mperfect confidence will not suffice given the special constitutional concerns in this area." *Id.* The courts cannot imply intentions that are not expressed in statutory text.

CONCLUSION

The briefs from the Plaintiffs' *amici* indirectly highlight the limited question before this Court. *Amici* provide extensive briefing about the important policy goals they believe underlie § 1557. Nothing in the Plan's appeal requires this Court to reach any conclusion about these assertions. The importance of an underlying policy goal does not affect whether Congress has demanded a waiver of sovereign immunity, because the federalism values protected by sovereign immunity are a distinct concern. Congressional demand for a waiver "must be 'unequivocally expressed' in the text of the relevant statute" and the demand must extract a "clear declaration" that "the State in fact consents to suit." *Sossamon*, 563 U.S. at 284. "Waiver may not be implied." *Id.* Neither demand nor declaration is present here. The claim against the Plan should be dismissed.

Respectfully submitted, this the 21st day of October 2020.

/s/ *Mark A. Jones*
Mark A. Jones
Kevin G. Williams
BELL, DAVIS & PITT, P.A.
North Carolina Bar # 36215
100 N. Cherry St
Suite 600
Winston-Salem, NC 27101
Phone: (336) 714-4122
Facsimile: (336) 714-4101
Mjones@belldavispitt.com
Kwilliams@belldavispitt.com

John G. Knepper
LAW OFFICE OF
JOHN G. KNEPPER, LLC
P. O. BOX 1512
CHEYENNE, WY 82003-1512
(307) 632-2842
John@KnepperLLC.com

Counsel for Appellant

CERTIFICATE OF COMPLIANCE

1. This document complies with type-volume limits because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments):

   this document contains 3,421 words.

2. This document complies with the typeface requirements because:

   this document has been prepared in a proportional spaced typeface using Microsoft Word in 14 point Times New Roman.

Dated: October 21, 2020

/s/ Mark A. Jones
Mark A. Jones

Counsel for Appellant