

# The Burger Court Opinion Writing Database

*Employees of Department of Public Health and Welfare of Missouri v. Department of Public Health and Welfare of Missouri*

411 U.S. 279 (1973)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



8  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

March 30, 1973

Re: No. 71-1021 - Employees of the Department of Public  
Health & Welfare, State of Missouri v. Department of  
Public Health & Welfare, State of Missouri

Dear Bill:

Please join me.

Regards,

W.B.

Mr. Justice Douglas

Copies to the Conference

2nd DRAFT

*Wait for  
W/JB direct*

To: The Chief Justice  
Mr. Justice B.  
Mr. Justice S.  
Mr. Justice Wh.  
Mr. Justice Mai...  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

## SUPREME COURT OF THE UNITED STATES

No. 71-1021

FEB 3 1973

Circulated:

Recirculated:

Employees of the Department of  
Public Health & Welfare, State  
of Missouri, et al.,  
Petitioners,  
*v.*  
Department of Public Health &  
Welfare, State of Missouri,  
et al.

On Writ of Certiorari  
to the United States  
Court of Appeals for  
the Eighth Circuit.

[February —, 1973]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The Eleventh Amendment, adopted in 1795, provides:

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

The Eleventh Amendment is the basis of a motion by Missouri to dismiss a complaint filed by employees of state agencies of that State, the Department of Public Health and Welfare and two of its divisions, the Division of Mental Disease and the Division of Health and various officials of the Department and of the two Divisions.

Although the Eleventh Amendment is not literally applicable since petitioners, who brought suit, are citizens of Missouri, it is established that an unconsenting State is immune from suits brought in federal courts by its own citizens as well as by citizens of another State. See

2 and stylistic changes

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

FROM DOUGLAS, . . .

No. 71-1021

Circulated: \_\_\_\_\_

Recirculated: 3-23-73

Employees of the Department of  
Public Health & Welfare, State  
of Missouri, et al.,  
Petitioners,  
v.  
Department of Public Health &  
Welfare, State of Missouri,  
et al.

On Writ of Certiorari  
to the United States  
Court of Appeals for  
the Eighth Circuit.

[February —, 1973]

MR. JUSTICE DOUGLAS delivered the opinion of the  
Court.

The Eleventh Amendment, adopted in 1795, provides:

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commenced or prosecuted against one of the United  
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or Subjects of any Foreign State."

The Eleventh Amendment is the basis of a motion by  
Missouri to dismiss a complaint filed by employees of  
state agencies of that State, the Department of Public  
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of Mental Disease and the Division of Health and various  
officials of the Department and of the two Divisions.

Although the Eleventh Amendment is not literally  
applicable since petitioners, who brought suit, are citizens  
of Missouri, it is established that an unconsenting State  
is immune from suits brought in federal courts by its own  
citizens as well as by citizens of another State. See

S-1 p. 7  
4th DRAFT

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

## SUPREME COURT OF THE UNITED STATES

No. 71-1021

Circulated:

Recirculated:

Employees of the Department of  
Public Health & Welfare, State  
of Missouri, et al.,  
Petitioners,  
v.  
Department of Public Health &  
Welfare, State of Missouri,  
et al.

On Writ of Certiorari  
to the United States  
Court of Appeals for  
the Eighth Circuit.

[February —, 1973]

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The Eleventh Amendment is the basis of a motion by  
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3/6/81 my  
1  
To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

## 5th DRAFT

## SUPREME COURT OF THE UNITED STATES

From: Douglas,  
No. 71-1021  
Circulated: \_\_\_\_\_  
Recirculated: 4/11/73

Employees of the Department of  
Public Health & Welfare, State  
of Missouri, et al.,  
Petitioners,  
v.  
Department of Public Health &  
Welfare, State of Missouri,  
et al.

On Writ of Certiorari  
to the United States  
Court of Appeals for  
the Eighth Circuit.

[February —, 1973]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The Eleventh Amendment, adopted in 1795, provides:

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

The Eleventh Amendment is the basis of a motion by Missouri to dismiss a complaint filed by employees of state agencies of that State, the Department of Public Health and Welfare and two of its divisions, the Division of Mental Disease and the Division of Health and various officials of the Department and of the two Divisions.

Although the Eleventh Amendment is not literally applicable since petitioners, who brought suit, are citizens of Missouri, it is established that an unconsenting State is immune from suits brought in federal courts by its own citizens as well as by citizens of another State. See

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR. February 5, 1973

RE: No. 71-1021 Employees v. Department  
of Public Health and Welfare

Dear Bill:

In due course I shall circulate a dissent  
in the above.

Sincerely,



Mr. Justice Douglas

cc: The Conference

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

2nd DRAFT

From: Brennan, J.

No. 71-1021

Circulated: 3-19-73

Employees of the Department of  
Public Health & Welfare, State  
of Missouri, et al.,  
Petitioners,  
v.  
Department of Public Health &  
Welfare, State of Missouri,  
et al.

On Writ of Certiorari  
to the United States  
Court of Appeals for  
the Eighth Circuit.

[March —, 1973]

MR. JUSTICE BRENNAN, dissenting.

I dissent. Discovery of the grounds of decision in the Court's confusing opinion is difficult, but as best I can decipher them, none supports the Court's conclusion to affirm. *Parden v. Terminal R. Co.*, 377 U. S. 184 (1964), would appear plainly to require reversal. The Court does not deny this, since the opinion purports only to distinguish *Parden*. There is, of course, the distinction that the law suits were brought under different statutes. The law suit in *Parden* was brought under the Federal Employers Liability Act (FELA), 45 U. S. C. §§ 51-60, against the State of Alabama, owner and operator of a railroad engaged in interstate commerce, by citizens of Alabama in the employ of the railroad. The suit in the present case was brought under § 16 (b) of the Fair Labor Standards Act (FLSA), 29 U. S. C. §§ 201-219, as amended, Pub. L. 89-601, 80 Stat. 830 (1966), against the State of Missouri, operator of hospitals and other institutions covered by that Act, by citizens of Missouri employed in such institutions. But the lawsuits have in common that each is an action for damages in federal court brought against a State by citizens of the State

5, 6, 7, 8, 9  
and stylistic changes

file

4th DRAFT

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

SUPREME COURT OF THE UNITED STATES, U. S.

No. 71-1021

Circulated:

Recirculated: 3-23-73

Employees of the Department of  
Public Health & Welfare, State

of Missouri, et al.,

Petitioners,

v.

Department of Public Health &  
Welfare, State of Missouri,  
et al.

On Writ of Certiorari  
to the United States  
Court of Appeals for  
the Eighth Circuit.

[March —, 1973]

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*Changes throughout*

6th DRAFT

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

SUPREME COURT OF THE UNITED STATES

No. 71-1021

Circulated: \_\_\_\_\_

Recirculated: 3-29-73

Employees of the Department of  
Public Health & Welfare, State  
of Missouri, et al.,  
Petitioners,  
*v.*  
Department of Public Health &  
Welfare, State of Missouri,  
et al.

On Writ of Certiorari  
to the United States  
Court of Appeals for  
the Eighth Circuit.

[March --, 1973]

MR. JUSTICE BRENNAN, dissenting.

I dissent. Neither the Court's opinion nor the separate opinion by my Brother MARSHALL suffices to distinguish this case from *Parden v. Terminal R. Co.*, 377 U. S. 184 (1964).

I

Discovery of the grounds of decision in the Court's confusing opinion is difficult, but as best I can find them, none supports the Court's conclusion to affirm. Essentially, the Court purports only to distinguish *Parden*. There is, of course, the distinction that the lawsuits were brought under different statutes. The lawsuit in *Parden* was brought under the Federal Employers Liability Act (FELA), 45 U. S. C. §§ 51-60, against the State of Alabama, owner and operator of a railroad engaged in interstate commerce, by citizens of Alabama in the employ of the railroad. The suit in the present case was brought under § 16 (b) of the Fair Labor Standards Act (FLSA), 29 U. S. C. §§ 201-219, as amended, Pub. L. 89-601, 80 Stat. 830 (1966), against the State of Missouri, operator of hospitals and other institutions covered by that Act, by citizens of Missouri employed in such institutions. But

*Rewritten*

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

7th DRAFT

**SUPREME COURT OF THE UNITED STATES** Brennan, J.

No. 71-1021

Circulated: \_\_\_\_\_

Recirculated: 4-4-73

Employees of the Department of  
Public Health & Welfare, State  
of Missouri, et al.,  
Petitioners,  
*v.*  
Department of Public Health &  
Welfare, State of Missouri,  
et al.

On Writ of Certiorari  
to the United States  
Court of Appeals for  
the Eighth Circuit.

[March --, 1973]

MR. JUSTICE BRENNAN, dissenting.

I dissent. *Parden v. Terminal R. Co.*, 377 U. S. 184 (1964), compels reversal of the judgment of the Court of Appeals in this case and neither the Court's opinion nor my Brother MARSHALL's concurring opinion is persuasive that it does not.

I

Essentially, the Court purports only to distinguish *Parden*. There is, of course, the distinction that the lawsuits were brought under different statutes. The lawsuit in *Parden* was brought under the Federal Employers Liability Act (FELA), 45 U. S. C. §§ 51-60, against the State of Alabama, owner and operator of a railroad engaged in interstate commerce, by citizens of Alabama in the employ of the railroad. The suit in the present case was brought under § 16 (b) of the Fair Labor Standards Act (FLSA), 29 U. S. C. §§ 201-219, as amended, Pub. L. 89-601, 80 Stat 830 (1966), against the State of Missouri, operator of hospitals and other institutions covered by that Act, by citizens of Missouri employed in such institutions. But the lawsuits have in common that each is an action for damages in federal court

(7) M Minor changes throughout

8th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-1021

Employees of the Department of  
Public Health & Welfare, State  
of Missouri, et al.,  
Petitioners,  
*v.*  
Department of Public Health &  
Welfare, State of Missouri,  
et al.

To: Mr. Justice of Justice  
Mr. Justice Douglas  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall ✓  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

From: *Bill*, J.

Circulated:

Recirculated: 4-9-73

On Writ of Certiorari  
to the United States  
Court of Appeals for  
the Eighth Circuit.

[March —, 1973]

MR. JUSTICE BRENNAN, dissenting.

I dissent. *Parden v. Terminal R. Co.*, 377 U. S. 184 (1964), compels reversal of the judgment of the Court of Appeals in this case and neither the Court's opinion nor my Brother MARSHALL's concurring opinion is persuasive that it does not.

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Essentially, the Court purports only to distinguish *Parden*. There is, of course, the distinction that the lawsuits were brought under different statutes. The lawsuit in *Parden* was brought under the Federal Employers Liability Act (FELA), 45 U. S. C. §§ 51-60, against the State of Alabama, owner and operator of a railroad engaged in interstate commerce, by citizens of Alabama in the employ of the railroad. The suit in the present case was brought under § 16 (b) of the Fair Labor Standards Act (FLSA), 29 U. S. C. §§ 201-219, as amended, Pub. L. 89-601, 80 Stat 830 (1966), against the State of Missouri, operator of hospitals and other institutions covered by that Act, by citizens of Missouri employed in such institutions. But the lawsuits have in common that each is an action for damages in federal court

11/12/18

9th DRAFT

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall ✓  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

SUPREME COURT OF THE UNITED STATES  
From: BRENNAN, J.

No. 71-1021

Circulated: \_\_\_\_\_

Recirculated: 4-12-73

Employees of the Department of  
Public Health & Welfare, State  
of Missouri, et al.,  
Petitioners,  
v.  
Department of Public Health &  
Welfare, State of Missouri,  
et al.

On Writ of Certiorari  
to the United States  
Court of Appeals for  
the Eighth Circuit.

[March —, 1973]

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I dissent. *Parden v. Terminal R. Co.*, 377 U. S. 184 (1964), compels reversal of the judgment of the Court of Appeals in this case and neither the Court's opinion nor my Brother MARSHALL's concurring opinion is persuasive that it does not.

## I

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

March 29, 1973

Re: No. 71-1021, Employees v. Missouri  
Public Health Dept.

Dear Thurgood,

I should appreciate your adding my name  
to your separate opinion in this case.

Sincerely yours,

P.S.

Mr. Justice Marshall

Copies to the Conference

P.S. I have a couple of minor verbal suggestions  
that I have asked my law clerk, John Koeltl,  
to communicate to one of your law clerks.

*By AM*  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

February 9, 1973

Re: No. 71-1021 - Employees of the Department  
of Public Health & Welfare v.  
Department of Public Health & Welfare

Dear Bill:

Please join me.

Sincerely,



Mr. Justice Douglas

Copies to Conference

S

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-1021

From: Marshall, J.

Circulated: MAR 20 1973

Recirculated: \_\_\_\_\_

Employees of the Department of  
Public Health & Welfare, State  
of Missouri, et al.,  
Petitioners,  
*v.*  
Department of Public Health &  
Welfare, State of Missouri,  
et al.

On Writ of Certiorari  
to the United States  
Court of Appeals for  
the Eighth Circuit.

[March —, 1973]

MR. JUSTICE MARSHALL, concurring in the result.

I believe that proper analysis of whether these employees may sue their state employer in federal court for overtime compensation owed to them under the Fair Labor Standards Act<sup>1</sup> requires consideration of what I view as two distinct questions: (1) did Congress, in extending the protection of the FLSA to state employees such as these petitioners, effectively lift the State's protective veil of sovereign immunity; and (2) even if Congress did lift the State's general immunity, is the exercise of federal judicial power barred in the context of this case in light of Art. III and the Eleventh Amendment? Portions of the Court's opinion convey the impression that these questions are but a single issue; the Court seems to consider sovereign immunity and the Eleventh Amendment to be essentially interchangeable concepts.<sup>2</sup> But I do not.

Sovereign immunity is a common law doctrine that long predates our Constitution and the Eleventh Amend-

<sup>1</sup> 29 U. S. C. §§ 201-219.

<sup>2</sup> See *ante*, at 6.

WD

6-1

3rd DRAFT

To: The Chief Justice  
 >Mr. Justice Douglas  
 Mr. Justice Brennan  
 Mr. Justice Stewart  
 Mr. Justice White  
 Mr. Justice Blackmun  
 Mr. Justice Powell  
 Mr. Justice Rehnquist

**SUPREME COURT OF THE UNITED STATES** *Marshall, J.*

No. 71-1021

Circulated: \_\_\_\_\_

Recirculated: MAR 27 1975

Employees of the Department of  
 Public Health & Welfare, State  
 of Missouri, et al.,  
 Petitioners,  
 v.  
 Department of Public Health &  
 Welfare, State of Missouri,  
 et al.

On Writ of Certiorari  
 to the United States  
 Court of Appeals for  
 the Eighth Circuit.

[March —, 1973]

MR. JUSTICE MARSHALL, concurring in the result.

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Sovereign immunity is a common law doctrine that long predates our Constitution and the Eleventh Amend-

<sup>1</sup> 29 U. S. C. §§ 201-219.

<sup>2</sup> See *ante*, at 6.

WJ

110

Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

4th DRAFT

From: Marshall, J.

Circulated:

No. 71-1021

Recirculated: MAR 30 1973

SUPREME COURT OF THE UNITED STATES

Employees of the Department of  
Public Health & Welfare, State  
of Missouri, et al.,  
Petitioners,  
*v.*  
Department of Public Health &  
Welfare, State of Missouri,  
et al.

On Writ of Certiorari  
to the United States  
Court of Appeals for  
the Eighth Circuit.

[March —, 1973]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE STEWART joins, concurring in the result.

I believe that proper analysis of whether these employees may sue their state employer in federal court for overtime compensation owed to them under the Fair Labor Standards Act<sup>1</sup> requires consideration of what I view as two distinct questions: (1) did Congress, in extending the protection of the FLSA to state employees such as these petitioners, effectively lift the State's protective veil of sovereign immunity; and (2) even if Congress did lift the State's general immunity, is the exercise of federal judicial power barred in the context of this case in light of Art. III and the Eleventh Amendment? Portions of the Court's opinion convey the impression that these questions are but a single issue; the Court seems to consider sovereign immunity and the Eleventh Amendment to be essentially interchangeable concepts.<sup>2</sup> But I do not.

<sup>1</sup> 29 U. S. C. §§ 201-219.

<sup>2</sup> See *ante*, at 6.

60

5th DRAFT

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

SUPREME COURT OF THE UNITED STATES <sup>Argued</sup> Marshall, J.

No. 71-1021

Circulated:

Recirculated: APR 12 1973

Employees of the Department of  
Public Health & Welfare, State  
of Missouri, et al.,  
Petitioners,  
v.  
Department of Public Health &  
Welfare, State of Missouri,  
et al.

On Writ of Certiorari  
to the United States  
Court of Appeals for  
the Eighth Circuit.

[March —, 1973]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE STEWART joins, concurring in the result.

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Sovereign immunity is a common law doctrine that long predates our Constitution and the Eleventh Amend-

<sup>1</sup> 29 U. S. C. §§ 201-219.

<sup>2</sup> See *ante*, at 6.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

February 8, 1973

Re: No. 71-1021 - Employees of the Dept. of Public  
Health of Mo. v. Dept. of Public  
Health of Mo.

Dear Bill:

Please join me.

Sincerely,

*H. A. B.*

Mr. Justice Douglas

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

February 6, 1973

Re: No. 71-1021 - Employees of the Department of Public Health  
& Welfare, State of Missouri, et al. v. Department of  
Public Health & Welfare, State of Missouri, et al.

Dear Bill:

Please join me.

Sincerely,



Mr. Justice Douglas

cc: The Conference

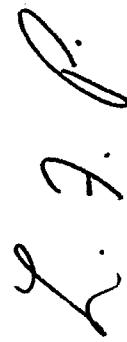
February 18, 1978

Re: No. 71-1021 - Employees of the Department  
of Public Health & Welfare v. Department  
of Public Health & Welfare

Dear Bill:

Please join me,

Sincerely,



Mr. Justice Douglas

cc: The Conference

3  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

February 5, 1973

Re: No. 71-1021 - Employees v. Department of  
Public Health & Welfare

Dear Bill:

Please join me in your opinion for the Court in this  
case.

Sincerely,

W.W.

Mr. Justice Douglas

Copies to the Conference