

The Burger Court Opinion Writing Database

Kentucky v. Graham

473 U.S. 159 (1985)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



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

CHAMBERS OF
THE CHIEF JUSTICE

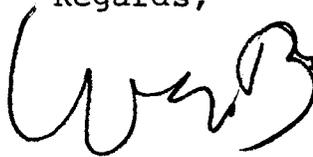
June 11, 1985

Re: No. 84-849 - Kentucky v. Graham

Dear Thurgood,

I join.

Regards,



Justice Marshall

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

May 28, 1985

No. 84-849

Kentucky v. Graham

Dear Thurgood,

I agree.

Sincerely,

Bill

Justice Marshall

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 5, 1985

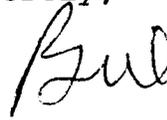
No. 84-849

Kentucky v. Graham

Dear Thurgood,

I think your opinion, which I have joined, may have some relation to what I am trying to put together in Atascadero. Would you mind holding announcement of Graham until I can get Atascadero around -- hopefully in a week or so?

Sincerely,



Justice Marshall

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 28, 1985

84-849 -

Kentucky dba Bureau of State Police v. Graham

Dear Thurgood,

I agree with your opinion except footnote 12 and the last 3 sentences on page 11. In these respects, I share Bill Rehnquist's view.

Sincerely,



01 JUN 03 1985

Justice Marshall

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 29, 1985

84-849 -

Kentucky dba Bureau of State Police v. Graham

Dear Thurgood,

I appreciate your making the changes that you did. I join fully, or would it have a better ring to "fully join."

Sincerely,

Justice Marshall

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To: The Chief Justice
Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Marshall

Circulated: MAY 22 1985

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-849

KENTUCKY, DBA BUREAU OF STATE POLICE, PETITIONER *v.* JAMES E. GRAHAM ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[May —, 1985]

JUSTICE MARSHALL delivered the opinion of the Court.

The question presented is whether 42 U. S. C. § 1988 allows attorneys' fees to be recovered from a governmental entity when a plaintiff sues governmental employees only in their personal capacities and prevails.

I

On November 7, 1979, a Kentucky State Trooper was murdered. Suspicion quickly focused on Clyde Graham, whose step-mother's car was found near the site of the slaying and whose driver's license and billfold were discovered in nearby bushes. That evening, 30 to 40 city, county, and State police officers converged on the house of Graham's father in Elizabethtown, Kentucky. Without a warrant, the police entered the home twice and eventually arrested all the occupants, who are the six respondents here. Graham was not among them.¹ According to respondents, they were severely beaten, terrorized, illegally searched, and falsely arrested. Kenneth Brandenburgh, the Commissioner of the State Police and the highest ranking law-enforcement officer in Kentucky, allegedly was directly involved in carrying out at least one of the raids. An investigation by the Kentucky Attor-

¹ Clyde Graham was killed by a Kentucky State Trooper a month later at a motel in Illinois.

PP. 5, 7, 11

To: The Chief Justice
Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Marshall

Circulated: _____

MAY 29 1985

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-849

KENTUCKY, DBA BUREAU OF STATE POLICE, PETITIONER *v.* JAMES E. GRAHAM ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[May —, 1985]

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¹ Clyde Graham was killed by a Kentucky State Trooper a month later at a motel in Illinois.

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PP. 8, 9, 10, 11

To: The Chief Justice
Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Marshall

Circulated: _____

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3th
~~4th~~ DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-849

KENTUCKY, DBA BUREAU OF STATE POLICE, PETITIONER *v.* JAMES E. GRAHAM ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June —, 1985]

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I

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¹ Clyde Graham was killed by a Kentucky State Trooper a month later at a motel in Illinois.

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 31, 1985

Re: No. 84-849, Kentucky v. Graham

Dear Thurgood:

Please join me.

Sincerely,

H.A.B.

Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 29, 1985

84-849 Kentucky v. Graham

Dear Thurgood:

As I read your second draft, it largely - if not entirely - meets the concerns of Byron and Bill with which I agreed.

There is one point that I would appreciate your considering in the spirit in which I make it. On page 9 and again in the final holding sentence on page 12, you rely on "current" Eleventh Amendment doctrine (emphasis is mine). At least since Edelman, decisions of this Court have made it explicitly clear that the Eleventh Amendment continues to be a part of the Constitution and as such must be respected. I know, of course, that you are not alone in disagreeing with these decisions. But the use of the word "current" in a Court opinion may be read as implying that the force of the Eleventh Amendment may be open to reexamination - an implication not present in any Court opinion.

I note that Part IV of your opinion accepts Hutto as the law. I am not at all sure that a majority of the Court agrees today with Hutto, but I recognize that unless and until it is overruled it is the law. I therefore would not say that "under the current view of Hutto" Of course, Hutto is easily distinguished from this case.

Omission of the unnecessary word "current" would not in any way affect what otherwise is now a fine opinion.

Sincerely,

Lewis

Justice Marshall

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 6, 1985

84-849 Kentucky v. Graham

Dear Thurgood:

Please join me.

Thank you for making the change I suggested.

Sincerely,

Lewis

Justice Marshall

lfp/ss

cc: The Conference

.82 78-3 10/12

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 23, 1985

Re: No. 84-849 Kentucky, dba Bureau of State
Police v. Graham

Dear Thurgood,

I of course agree with the result you reach in your circulating draft, and with almost all of the opinion. I do have these reservations:

(1) Footnote 11 on page 6 states:

"State or local indemnification provisions may, of course, indemnify officials for damages judgments against them in their personal capacity, but these indemnification provisions do not of their own force transform a personal-capacity action into an action against the governmental entity. Cf. Moor v. County of Alameda, 411 U.S. 693 (1973)."

This statement addresses, inter alia, I suppose, whether state indemnification of individuals might raise Eleventh Amendment questions which would not be raised in its absence. So far as I know, no case of ours has ever spoken on this subject, and I do not think the issue is presented in this case. I would therefore prefer to see the issue left open.

(2) In the last clause of the carryover sentence on page 6, you state:

"Thus, in an official-capacity suit the entity's 'policy or custom' must have played a part in the violation of federal law. Monell, supra; Oklahoma

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City v. Tuttle, _____ U.S. _____, (1985). (fn 12)
(emphasis supplied)."

Footnote 12 of your draft then seems to pick up word for word the last two sentences of footnote 5 of Bill Brennan's concurring opinion in Oklahoma City v. Tuttle. I think these issues ought to be thrashed out in Oklahoma City v. Tuttle, and not decided either in the text or the footnote in Kentucky v. Graham.

(3) The last three sentences on page 11 read as follows:

"Because the Amendment does not apply in state courts, relief under the relevant federal statutes, as well as fees under §1988, may be sought there. Rather than destroying §1988 in cases involving state officials, the result we reach today therefore affects only the forum in which certain forms of relief can be sought from state officials in their official capacity. The effect is a product of the Eleventh Amendment, not of our holding today."

I have several problems with the language. In the first place, to say that fees under §1988 "may be sought" in state courts rather clearly suggests a resolution of the issue in Spencer v. South Carolina which we recently affirmed by an equally divided Court. Again, I think that question should be reserved for a case squarely presenting it, and not decided by dicta in this case. My second objection is that we have never determined that a state is a "person" for purposes of §1983, and therefore quite apart from the Eleventh Amendment, or the applicability of §1988 and state courts, it is not clear that a state could be sued in state courts pursuant to §1983. Finally, even if we were to pretermitt these questions, I would think that the result in state court in a case identical to this one would have to be the same as we reach here, since we are simply deciding that the respondent was not a prevailing party against the state for purposes of §1988.

If you can see your way clear to accommodate my problems in some manner satisfactory to you, I will be happy to join.

Sincerely,

WHR/
WJ

Justice Marshall

cc: The Conference

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CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

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

June 3, 1985

Re: No. 84-849 Kentucky v. Graham

Dear Thurgood,

Please join me.

Sincerely,

WHR

Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 5, 1985

Re: 84-849 - Kentucky v. Graham

Dear Thurgood:

If you can make two relatively minor changes in your opinion, I would be happy to join you.

On page 8 you refer to Monell's "holding" that respondeat superior does not apply in a §1983 action against a municipality. In my dissent in Tuttle, I relied heavily on the fact that Part II of Monell was pure dicta. Because the difference between a holding and dicta is a matter of some importance, I wonder if you would consider revising the sentence, perhaps by substituting the word "ruling" or "determination." Any change that would eliminate the word "holding" would take care of my problem.

On page 10 in footnote 19 you quote Bill Rehnquist's statement that the Eleventh Amendment "partakes of the nature of a jurisdictional bar." I have never understood that sentence -- either the Eleventh Amendment is a jurisdictional bar or it isn't. In any event, I don't see why you could not simply omit the second half of the footnote, or perhaps the entire footnote.

Apart from these two flyspecks, I think the opinion is fine.

Respectfully,



Justice Marshall

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

b

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 6, 1985

Re: 84-849 - Kentucky v. Graham

Dear Thurgood:

Please join me.

Respectfully,



Justice Marshall

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 3, 1985

Re: No. 84-849 Kentucky v. Graham

Dear Thurgood,

Please join me.

Sincerely,

Sandra

Justice Marshall

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