

Kentucky Vs. Graham

Kentucky Vs. Graham

SooperKanoon Citation : sooperkanoon.com/105873

Court : US Supreme Court

Decided On : Jun-28-1985

Appeal No. : 473 U.S. 159

Appellant : Kentucky

Respondent : Graham

Judgement :

Kentucky v. Graham - 473 U.S. 159 (1985)

U.S. Supreme Court Kentucky v. Graham, 473 U.S. 159 (1985)

Kentucky v. Graham, 473 U.S. 159 (1985)

No. 84-849

Argued April 16, 1985

Decided June 28, 1985

473 U.S. 159

*CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT*

SYLLABUS

Respondents were arrested following the warrantless raid of a house in Kentucky by local and state police officers who were seeking a murder suspect. Claiming a deprivation of federal rights allegedly resulting from the police's use of excessive force and other constitutional violations accompanying the raid, respondents filed suit in Federal District Court under, *inter alia*, 42 U.S.C. 1983, seeking money damages. Among the named defendants were the Commissioner of the Kentucky State Police, "individually and as Commissioner," and the Commonwealth of Kentucky, which was sued only for attorney's fees should respondents eventually prevail. The District Court, relying on the Eleventh Amendment, dismissed the Commonwealth as a party. On the second day of trial, the case was settled in favor of respondents, who then moved that the Commonwealth pay their costs and attorney's fees pursuant to 42 U.S.C. 1988, which provides that, in any action to enforce 1983, the court may allow "the prevailing party . . . a reasonable attorney's fee as part of the costs." The District Court granted the motion, and the Court of Appeals affirmed.

Held: Section 1988 does not allow attorney's fees to be recovered from a governmental entity when a plaintiff sues governmental employees only in their personal capacities and prevails; accordingly, since this case was necessarily litigated as a personal-capacity and not as an official-capacity action, it was error to award fees against the Commonwealth. Pp. [473 U. S. 163](#) -171.

(a) While 1988 does not define the parties who must bear the costs, the logical place to look for recovery of fees is to the losing party. Liability on the merits and responsibility for fees go hand in hand. Where a defendant has not been prevailed against, either because of legal immunity or on the merits, 1988 does not authorize a fee award against that defendant. Pp. [473 U. S. 163](#) -165.

(b) Personal-capacity suits seek to impose personal liability upon a government officer for actions he takes under color of state law, whereas official-capacity suits against an officer are generally treated as suits against the governmental entity of which the officer is an agent. With this distinction in mind, it is clear that a suit

against a government officer

Page 473 U. S. 160

in his or her personal capacity cannot lead to imposition of fee liability upon the governmental entity. Pp. [473 U. S. 165](#) -168.

(c) To hold that fees can be recovered from a governmental entity following victory in a personal-capacity action against government officials would be inconsistent with the rule that the entity cannot be made liable on the merits under 1983 on a *respondeat superior* basis. Nothing in 1988's history suggests that fee liability was intended to be imposed on that basis. Section 198 simply does not create fee liability where merits liability is nonexistent. P. [473 U. S. 168](#) .

(d) Although the State Police Commissioner was named as a defendant in both his "individual" and "official" capacities and the Commonwealth was named as a defendant for the limited purpose of a fee award, there can be no doubt, given Eleventh Amendment doctrine, that the action did not seek to impose monetary liability on the Commonwealth. Absent waiver by a State or valid congressional override, the Eleventh Amendment bars a damages action against a State in federal court, a bar that remains in effect when state officials are sued for damages in their official capacity. Accordingly, an official-capacity damages action could not have been maintained against the Commissioner in federal court. Respondents cannot seek damages from the Commonwealth simply by suing Commonwealth officials in their official capacity, nor did respondents' action on the merits become a suit against the Commonwealth by simply naming it as a defendant on the limited issue of fee liability. Pp. [473 U. S. 168](#) -170.

(e) *Hutto v. Finney*, [437 U. S. 678](#) , did not alter the basic philosophy of 1988 that fees and merits liability run together, nor did it hold or suggest that fees are available from a governmental entity simply because a government official has been prevailed against in his or her personal capacity. Pp. [473 U. S. 170](#) -171.

742 F.2d 1455, reversed.

MARSHALL, J., delivered the opinion for a unanimous Court.

Page 473 U. S. 161

JUSTICE MARSHALL delivered the opinion of the Court.

The question presented is whether 42 U.S.C. 1988 allows attorney's 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 stepmother'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. [[Footnote 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 Attorney General's office later concluded that the police had used excessive force and that a "complete breakdown" in police discipline had created an "uncontrolled" situation. App. to Brief for Respondents 21-22.

Alleging a deprivation of a number of federal rights, respondents filed suit in Federal District Court. [[Footnote 2](#)] Their complaint

Page 473 U. S. 162

sought only money damages and named as defendants various local and state law enforcement officers, the city of Elizabethtown, and Hardin County, Kentucky. Also made defendants were Commissioner Brandenburgh, "individually and as

Commissioner of the Bureau of State Police," and the Commonwealth of Kentucky. The Commonwealth was sued, not for damages on the merits, but only for attorney's fees should the plaintiffs eventually prevail. [[Footnote 3](#)] Shortly after the complaint was filed, the District Court, relying on the Eleventh Amendment, dismissed the Commonwealth as a party. Based on its Attorney General's report, the Commonwealth refused to defend any of the individual defendants, including Commissioner Brandenburgh, or to pay their litigation expenses.

On the second day of trial, the case was settled for \$60,000. [[Footnote 4](#)] The settlement agreement, embodied in a court order dismissing the case, barred respondents from seeking attorney's fees from any of the individual defendants, but specifically preserved respondents' right to seek fees and court costs from the Commonwealth. Respondents then moved, pursuant to 42 U.S.C. 1988, that the Commonwealth pay their costs and attorney's fees. At a hearing on this motion, the Commonwealth argued that the fee request had to be

Page 473 U. S. 163

denied as a matter of law, both because the Commonwealth had been dismissed as a party and because the Eleventh Amendment, in any event, barred such an award. Rejecting these arguments, the District Court ordered the Commonwealth to pay \$58,521 in fees and more than \$6,000 in costs and expenses. [[Footnote 5](#)] In a short per curiam opinion relying solely on this Court's decision in *Hutto v. Finney*, [437 U. S. 678](#) (1978), the Court of Appeals for the Sixth Circuit affirmed. *Graham v. Wilson*, 742 F.2d 1455 (1984).

We granted certiorari to address the proposition, rejected by at least two Courts of Appeals, [[Footnote 6](#)] that fees can be recovered from a governmental entity when a plaintiff prevails in a suit against government employees in their personal capacities. 469 U.S. 1156 (1985). We now reverse.

II

This case requires us to unravel once again the distinctions between personal- and official-capacity suits, see *Brandon v. Holt*, [469 U. S. 464](#) (1985), this time in the context of fee awards under 42 U.S.C. 1988. The relevant portion of 1988, enacted as the Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, provides:

"In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow *the prevailing party*, other than the United States, a reasonable attorney's fee as part of the costs."

(Emphasis added.)

Page 473 U. S. 164

If a plaintiff prevails in a suit covered by 1988, fees should be awarded as costs "unless special circumstances would render such an award unjust." S.Rep. No. 94-1011, p. 4 (1976); see *Supreme Court of Virginia v. Consumers Union of United States, Inc.*, [446 U. S. 719](#) , [446 U. S. 737](#) (1980). Section 1988 does not, in so many words, define the parties who must bear these costs. Nonetheless, it is clear that the logical place to look for recovery of fees is to the losing party -- the party legally responsible for relief on the merits. That is the party who must pay the costs of the litigation, see *generally* Fed.Rule Civ.Proc. 54(d), [[Footnote 7](#)] and it is clearly the party who should also bear fee liability under 1988.

We recognized as much in *Supreme Court of Virginia, supra*. There a three-judge District Court had found the Virginia Supreme Court and its chief justice in his official capacity liable for promulgating, and refusing to amend, a State Bar Code that violated the First Amendment. The District Court also awarded fees against these defendants pursuant to 1988. We held that absolute legislative immunity shielded these defendants for acts taken in their legislative capacity. We then vacated the fee award, stating that we found nothing

"in the legislative history of the Act to suggest that Congress intended to permit an award of attorney's fees to be premised on acts for which defendants would enjoy

absolute legislative immunity."

446 U.S. at [446 U. S. 738](#) . [[Footnote 8](#)]

Page 473 U. S. 165

Thus, liability on the merits and responsibility for fees go hand in hand; where a defendant has not been prevailed against, either because of legal immunity or on the merits, 1988 does not authorize a fee award against that defendant. [[Footnote 9](#)] *Cf. Pulliam v. Allen*, [466 U. S. 522](#) , [466 U. S. 543](#) -544 (1984) (state judge liable for injunctive and declaratory relief under 1983 also liable for fees under 1988).

A

Proper application of this principle in damages actions against public officials requires careful adherence to the distinction between personal- and official-capacity suits. [[Footnote 10](#)] Because this distinction apparently continues to confuse lawyers and confound lower courts, we attempt to define it more clearly through concrete examples of the practical and doctrinal differences between personal- and official-capacity actions.

Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. *See, e.g., Scheuer v. Rhodes*, [416 U. S. 232](#) , [416 U. S. 237](#) -238 (1974). Official-capacity suits, in contrast, "generally represent only another way of pleading an action against an entity of which an officer is an agent." *Monell v. New York City Dept. of Social Services*, [436 U. S. 658](#) , [436 U. S. 690](#) , n. 55

Page 473 U. S. 166

(1978). As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. *Brandon*, 469 U.S. at [468 U. S. 471](#) -472. It is *not* a suit against the official personally, for the real party in interest is the entity. Thus, while an award of damages against an official in his personal capacity can be

executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself. [[Footnote 11](#)]

On the merits, to establish *personal* liability in a 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right. See, e.g., *Monroe v. Pape*, [365 U. S. 167](#) (1961). More is required in an official-capacity action, however, for a governmental entity is liable under 1983 only when the entity itself is a " *moving force*" *behind the deprivation*, *Polk County v. Dodson*, [454 U. S. 312](#) , [454 U. S. 326](#) (1981) (quoting *Monell, supra*, at [436 U. S. 694](#)); 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 City v. Tuttle*, [471 U. S. 808](#) , [471 U. S. 817](#) -818 (1985); *id.* at [471 U. S. 827](#) - 828 (BRENNAN, J., concurring in judgment). [[Footnote 12](#)] When it comes to defenses to liability, an official in a personal-capacity action may, depending on his position, be able to assert personal immunity defenses, such

Page 473 U. S. 167

as objectively reasonable reliance on existing law. See *Imbler v. Pachtman*, [424 U. S. 409](#) (1976) (absolute immunity); *Pierson v. Ray*, [386 U. S. 547](#) (1967) (same); *Harlow v. Fitzgerald*, [457 U. S. 800](#) (1982) (qualified immunity); *Wood v. Strickland*, [420 U. S. 308](#) (1975) (same). In an official-capacity action, these defenses are unavailable. *Owen v. City of Independence*, [445 U. S. 622](#) (1980); see also *Brandon v. Holt*, [469 U. S. 464](#) (1985). [[Footnote 13](#)] The only immunities that can be claimed in an official-capacity action are forms of sovereign immunity that the entity, *qua* entity, may possess, such as the Eleventh Amendment. While not exhaustive, this list illustrates the basic distinction between personal- and official-capacity actions. [[Footnote 14](#)]

With this distinction in mind, it is clear that a suit against a government official in his or her personal capacity cannot lead to imposition of fee liability upon the governmental entity. A victory in a personal-capacity action is a victory against the individual defendant, rather than against the

entity that employs him. Indeed, unless a distinct cause of action is asserted against the entity itself, the entity is not even a party to a personal-capacity lawsuit, and has no opportunity to present a defense. That a plaintiff has prevailed against one party does not entitle him to fees from another party, let alone from a nonparty. *Cf. Hensley v. Eckerhart*, [461 U. S. 424](#) (1983). Yet that would be the result were we to hold that fees can be recovered from a governmental entity following victory in a personal-capacity action against government officials.

B

Such a result also would be inconsistent with the statement in *Monell, supra*, that a municipality cannot be made liable under 42 U.S.C. 1983 on a *respondeat superior* basis. Nothing in the history of 1988, a statute designed to make effective the remedies created in 1983 and similar statutes, suggests that fee liability, unlike merits liability, was intended to be imposed on a *respondeat superior* basis. On the contrary, just as Congress rejected making 1983 a "mutual insurance" scheme, 436 U.S. at [436 U. S. 694](#), Congress sought to avoid making 1988 a "relief fund for lawyers." *Hensley, supra*, at [461 U. S. 446](#) (opinion of BRENNAN, J.) (quoting 122 Cong.Rec. 33314 (1976) (remarks of Sen. Kennedy)). Section 1988 does not guarantee that lawyers will recover fees anytime their clients sue a government official in his personal capacity, with the governmental entity as ultimate insurer. Instead, fee liability runs with merits liability; if federal law does not make the government substantively liable on a *respondeat superior* basis, the government similarly is not liable for fees on that basis under 1988. Section 1988 simply does not create fee liability where merits liability is nonexistent.

III

We conclude that this case was necessarily litigated as a personal-capacity action, and that the Court of Appeals therefore erred in awarding fees against the Commonwealth of

Kentucky. [[Footnote 15](#)] In asserting the contrary, respondents point out that the complaint expressly named Commissioner Brandenburgh in both his "individual" and "official" capacities, and that the Commonwealth of Kentucky was named as a defendant for the limited purposes of a fee award. Nonetheless, given Eleventh Amendment doctrine, there can be no doubt that this damages action did not seek to impose monetary liability on the Commonwealth. [[Footnote 16](#)]

The Court has held that, absent waiver by the State or valid congressional override, the Eleventh Amendment bars a damages action against a State in federal court. [[Footnote 17](#)] See, e.g., *Ford Motor Co. v. Department of Treasury of Indiana*, [323 U. S. 459](#) , [323 U. S. 464](#) (1945). This bar remains in effect when state officials are sued for damages in their official capacity. *Cory v. White*, [457 U. S. 85](#) , [457 U. S. 90](#) (1982); *Edelman v. Jordan*, [415 U. S. 651](#) , [415 U. S. 663](#) (1974). That is so because, as discussed above, "a judgment against a public servant *in his official capacity*' imposes liability on the entity that he represents. . . ."

Brandon, supra, at [469 U. S. 471](#) . [[Footnote 18](#)]

Given this understanding of the law, an official-capacity action for damages could not have been maintained against Commissioner Brandenburgh in federal court. [[Footnote 19](#)] Although respondents fail to acknowledge this point, they freely concede that money damages were never sought from the Commonwealth, and could not have been awarded against it; [[Footnote 20](#)] respondents cannot reach this same end simply by suing state officials in their official capacity. Nor did respondents' action on the merits become a suit against Kentucky when the Commonwealth was named a defendant on the limited issue of fee liability. There is no cause of action against a defendant for fees absent that defendant's liability for relief on the merits. See *supra* at [473 U. S. 167](#) -168. Naming the Commonwealth for fees did not create, out of whole cloth, the cause of action on

the merits necessary to support this fee request. Thus, no claim for merits relief capable of being asserted in federal court was asserted against the Commonwealth of Kentucky. In the absence of such a claim, the fee award against the Commonwealth must be reversed.

IV

Despite the Court of Appeals' contrary view, the result we reach today is fully consistent with *Hutto v. Finney*, [437 U. S. 678](#) (1978). *Hutto* holds only that, when a State in a 1983 action has been prevailed against for relief on the merits, either because the State was a proper party defendant or because state officials properly were sued in their official capacity, fees may also be available from the State under 1988. *Hutto* does not alter the basic philosophy of

Page 473 U. S. 171

1988, namely, that fee and merits liability run together. As a result, *Hutto* neither holds nor suggests that fees are available from a governmental entity simply because a government official has been prevailed against in his or her personal capacity.

Respondents vigorously protest that this holding will "effectively destro[y]" 1988 in cases such as this one. Brief for Respondents 19. This fear is overstated. Fees are unavailable only where a governmental entity cannot be held liable on the merits; today we simply apply the fee-shifting provisions of 1988 against a preexisting background of substantive liability rules.

V

Only in an official-capacity action is a plaintiff who prevails entitled to look for relief, both on the merits and for fees, to the governmental entity. Because the Court's Eleventh Amendment decisions required this case to be litigated as a personal-capacity action, the award of fees against the Commonwealth of Kentucky must be reversed.

It is so ordered.

[[Footnote 1](#)]

Clyde Graham was killed by a Kentucky state trooper a month later at a motel in Illinois.

[[Footnote 2](#)]

Respondents asserted causes of action under 42 U.S.C. 1983, 1985, 1986, and 1988, as well as the Fourth, Fifth, Sixth, Eleventh, and Fourteenth Amendments. Complaint 13. Because the case was settled, there has been no need below to separate out or distinguish any of these purported causes of action. Before this Court, the parties briefed and argued the case as if it had been brought simply as a 1983 action and we, accordingly, analyze it the same way. Our discussion throughout is therefore not meant to express any view on suits brought under any provision of federal law other than 1983.

[[Footnote 3](#)]

The complaint states:

"Pursuant to the provisions of 42 U.S.C. Sec.1988, the Commonwealth of Kentucky, d/b/a Bureau of State Police, is liable for the payment of reasonable attorney fees incurred in this action."

Complaint 4(D). According to respondents, "[p]aragraph 4(D) . . . states the sole basis for including the Commonwealth as a named party." Brief for Respondents 14.

[[Footnote 4](#)]

Five thousand dollars came from the city and \$10,000 from the county. The remaining \$45,000 was to be paid by Commissioner Brandenburgh, both personally and as agent for the "Kentucky State Police Legal Fund." The latter was not a named defendant, but presumably represented the interests of the individual officers sued.

[[Footnote 5](#)]

Petitioner did not appeal from the award of costs and expenses, and we therefore have no occasion to consider the appropriateness of these portions of the award.

[[Footnote 6](#)]

Berry v. McLemore, 670 F.2d 30 (CA5 1982) (municipal officials); *Morrison v. Fox*, 660 F.2d 87 (CA3 1981) (same). At least one Court of Appeals appears to have reached the same result as that of the lower court in this case. See *Glover v. Alabama Department of Corrections*, 753 F.2d 1569 (CA11 1985).

[[Footnote 7](#)]

See 6 J. Moore, W. Taggart, & J. Wicker, *Moore's Federal Practice* 54.70[1], p. 1301 (1985) ("Costs" are awarded "against the losing party and as an incident of the judgment"); 10 C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* 2666, p. 173 (1983) ("*Costs*' refers to those charges that one party has incurred and is permitted to have reimbursed by his opponent as part of the judgment in the action").

[[Footnote 8](#)]

We did hold that the court and its chief justice in his official capacity could be enjoined from enforcing the State Bar Code, and suggested that fees could be recovered from these defendants in their enforcement roles. Because the fee award had clearly been made against the defendants in their legislative roles, however, the award had to be vacated and the case remanded for further proceedings. That fees could be awarded against the Virginia Supreme Court and its chief justice pursuant to an injunction against enforcement of the Code further illustrates that fee liability is tied to liability on the merits.

[[Footnote 9](#)]

The rules are somewhat different with respect to prevailing defendants. Prevailing defendants generally are entitled to costs, see Fed.Rule Civ.Proc. 54(d), but are

entitled to fees only where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant. See *Hensley v. Eckerhart*, [461 U. S. 424](#) , [462 U. S. 429](#) , n. 2 (1983).

We express no view as to the nature or degree of success necessary to make a plaintiff a prevailing party. See *Maher v. Gagne*, [448 U. S. 122](#) (1980).

[[Footnote 10](#)]

Personal-capacity actions are sometimes referred to as individual-capacity actions.

[[Footnote 11](#)]

Should the official die pending final resolution of a personal-capacity action, the plaintiff would have to pursue his action against the decedent's estate. In an official-capacity action in federal court, death or replacement of the named official will result in automatic substitution of the official's successor in office. See Fed.Rule Civ.Proc. 25(d)(1); Fed.Rules App.Proc. 43(c)(1); this Court's Rule 40.3.

[[Footnote 12](#)]

See *Monell*, 436 U.S. at [436 U. S. 694](#) ("[A] local government may not be sued under 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under 1983").

[[Footnote 13](#)]

In addition, punitive damages are not available under 1983 from a municipality, *Newport v. Fact Concerts, Inc.*, [453 U. S. 247](#) (1981), but are available in a suit against an official personally, see *Smith v. Wade*, [461 U. S. 30](#) (1983).

[[Footnote 14](#)]

There is no longer a need to bring official-capacity actions against local government officials, for under *Monell, supra*, local government units can be sued directly for damages and injunctive or declaratory relief. See, e.g., *Memphis Police Dept. v. Garner*, [471 U. S. 1](#) (1985) (decided with *Tennessee v. Garner*) (damages action against municipality). Unless a State has waived its Eleventh Amendment immunity or Congress has overridden it, however, a State cannot be sued directly in its own name regardless of the relief sought. *Alabama v. Pugh*, [438 U. S. 781](#) (1978) (per curiam). Thus, implementation of state policy or custom may be reached in federal court only because official-capacity actions for prospective relief are not treated as actions against the State. See *Ex parte Young*, [209 U. S. 123](#) (1908).

In many cases, the complaint will not clearly specify whether officials are sued personally, in their official capacity, or both. "The course of proceedings" in such cases typically will indicate the nature of the liability sought to be imposed. *Brandon v. Holt*, [469 U. S. 464](#) , [469 U. S. 469](#) (1985).

[[Footnote 15](#)]

The city and county were sued directly as entities, but that aspect of the case is not before us. See also [n](#) 3, *supra*.

[[Footnote 16](#)]

See also [note 3](#) *supra*.

[[Footnote 17](#)]

The Court has held that 1983 was not intended to abrogate a State's Eleventh Amendment immunity. *Quern v. Jordan*, [440 U. S. 332](#) (1979); *Edelman v. Jordan*, [415 U. S. 651](#) (1974). Because this action comes to us as if it arose solely under 1983, see [n](#) 2, *supra*, we cannot conclude that federal law authorized an official-capacity action for damages against Commissioner Brandenburgh to be brought in federal court.

As to legislative waiver of immunity, petitioners assert that the Commonwealth of Kentucky has not waived its Eleventh Amendment immunity. This contention is not disputed, and we therefore accept it for purposes of this case.

[[Footnote 18](#)]

In an injunctive or declaratory action grounded on federal law, the State's immunity can be overcome by naming state officials as defendants. See *Pennhurst State School & Hospital v. Halderman*, [465 U. S. 89](#) (1984); see also *Ex parte Young*, *supra*. Monetary relief that is "ancillary" to injunctive relief also is not barred by the Eleventh Amendment. *Edelman v. Jordan*, *supra*, at [415 U. S. 667](#) -668.

[[Footnote 19](#)]

No argument has been made that the Commonwealth waived its Eleventh Amendment immunity by failing specifically to seek dismissal of that portion of the damages action that named Commissioner Brandenburgh in his official capacity. Nor is the Commonwealth alleged to have done so by allowing him to enter the settlement agreement; the Commonwealth did not even have notice of the settlement negotiations.

[[Footnote 20](#)]

Brief for Respondents 17; Tr. of Oral Arg. 18.