No. 95-851

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNIVERSITY OF HOUSTON, ET AL., PETITIONERS

v.

DENISE CHAVEZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether Congress has authority under the Constitution to authorize a suit against a State for violations of the Copyright and Lanham Acts.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution and statutes:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A20) is reported at 59 F.3d 539. The opinion of the district court (Pet. App. A22) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 1995. A petition for rehearing was denied on August 30, 1995. Pet. App. A23-A24. The petition for a writ of certiorari was filed on November 27, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent Denise Chavez, a nationally known author, entered into an agreement for the publication of her work with the University of Houston, which is funded and operated by the State of Texas. The University agreed to do a first printing of a collection of short stories written by respondent entitled *The Last of the Menu Girls*. A copyright of *Menu Girls* was registered in respondent's name as author and owner, and the University published the book. The parties twice agreed on contracts for additional printings of *Menu Girls*. Each contract specified a particular number of copies to be printed. Respondent then refused to permit petitioner to print any more copies of *Menu Girls*. The University, however, asserted that it had a contractual right to print additional copies and that it intended to do so. Pet. App. A2-A3.

The University also published a collection of plays called *Shattering the Myth*. The University's catalog stated that respondent had chosen the plays to be included in the collection. Although the statement in the catalog was accurate, the University had not received respondent's permission to identify her as the selector of the plays. Pet. App. A3.

2. In 1993, respondent filed suit in federal district court against the University alleging that its publication of *Menu Girls* without her permission violated the Copyright Act, 17 U.S.C. 101 *et seq.*, and that its identification of her as the selector of the plays in *Shattering the Myth* without her permission violated the Lanham Act, 15 U.S.C. 1051 *et seq.* Pet. App. A3. Respondent also sued Nicholas Kanellos, who had acted on behalf of the University at all

relevant times. *Id.* at A2-A3. Kanellos was sued in both his individual and official capacities. *Id.* at A3.

The University and Kanellos moved to dismiss. The University claimed immunity under the Eleventh Amendment for both itself and Kanellos in his official capacity; Kanellos asserted qualified immunity. The district court denied both motions, and the University and Kanellos appealed. Pet. App. A4.

3. On appeal, the University argued that Congress lacked power to abrogate the State's immunity from suit and that the Copyright and Lanham Acts were therefore unconstitutional to the extent they authorized suit against the State. See 17 U.S.C. 501, 511 (authorizing suit against a State for violations of the Copyright Act); 15 U.S.C. 1122 (authorizing suit against a State for violations of the Lanham Act). The United States intervened to defend those Acts.

The court of appeals affirmed in part and reversed in part. Pet. App. A1-A20. The court held that Congress had acted constitutionally in subjecting the States to suit under the Copyright and Lanham Acts. The court concluded that, under *Parden* v. *Terminal Ry. of Alabama State Docks Dep't*, 377 U.S. 184 (1964), and *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1 (1989), Congress may use its Article I powers "to compel states to waive sovereign immunity from private suits * * * when the states opt to conduct business for profit in areas where Congress conditions participation upon waiver of immunity." Pet. App. A16. Applying that analysis, the court concluded that Congress had validly exercised its power under the Copyright Clause of the Constitution, Article I, § 8, Cl. 8, to subject States to suit under the Copyright and Lanham Acts. Pet. App. A16-A18. The court of appeals did not address the

contention that subjecting the States to suit under the Copyright and Lanham Acts also reflected valid exercises of Congress's power under Section 5 of the Fourteenth Amendment. *Id.* at A6 n.4.

The court held that Kanellos was entitled to qualified immunity from respondent's claim under the Copyright Act because he reasonably could have believed that the University's contract with respondent authorized the printing of additional copies of respondent's book. Pet. App. A19. It held that Kanellos was entitled to qualified immunity from respondent's claim under the Lanham Act because respondent had failed to allege facts that would enable her to recover under that Act. *Ibid.*

ARGUMENT

Since the court of appeals issued its decision in this case, this Court issued its decision in *Seminole Tribe of Florida* v. *Florida*, No. 94-12 (Mar. 27, 1996). In *Seminole*, the Court held that Congress lacks authority under the Indian Commerce Clause to abrogate a State's immunity from suit. Slip op. 1. The Court concluded that, "[e]ven when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." *Id.* at 27. The Court acknowledged that *Union Gas* had held that Congress has power to abrogate a State's immunity from suit. *Id.* at 14. The Court concluded, however, that "the result in *Union Gas* and the plurality's rationale depart from [the] established understanding of the Eleventh Amendment and undermine the accepted function of Article III." *Id.* at 21. The Court therefore overruled *Union Gas*. *Ibid.*

The Court in *Seminole* did not disturb the decision in *Parden*, which it characterized as standing for "the unremarkable, and completely unrelated, proposition that the States may waive their sovereign immunity." Slip op. 20. The Court also did not call into question the holding in *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976), that Congress has power under Section 5 of the Fourteenth Amendment to subject States to suit. Slip op. 20. In a footnote, the Court briefly discussed the present case and the implications of its decision on suits to enforce the copyright laws. *Id.* at 27 n.16.

Seminole alters the constitutional analysis applicable in determining whether Congress has authority to subject States to suit. The court of appeals' decision in this case should therefore be vacated and the case remanded for further consideration by the court of appeals in light of *Seminole*.[1]

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[1] Respondent has filed a conditional cross-petition, No. 95-1075, challenging the court of appeals' holding that Kanellos is entitled to qualified immunity from suit under the Copyright and Lanham Acts. The United States did not address that contention below. We therefore take no position on that issue here.

CONCLUSION

The University's petition for a writ of certiorari should be granted, the judgment below should be vacated, and the case should be remanded for further consideration in light of *Seminole*.

Respectfully submitted.

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