

1991

Wendell E. Brumley, et al. v. Utah State Tax Commission, et al. : Reply Brief

Utah Supreme Court

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BRIEF

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IN THE UTAH SUPREME COURT

WENDELL E. BRUMLEY, et al.,	:	
	:	
Plaintiffs/Cross-Appellants,	:	Appeal No. 91-0242
	:	
vs.	:	
	:	
UTAH STATE TAX COMMISSION,	:	
et al.,	:	Priority No. 11
	:	
Defendants/Appellants.	:	

REPLY BRIEF OF PLAINTIFFS/CROSS-APPELLANTS

Interlocutory Appeal from the Tax Division of the
Third Judicial District Court.

Judge David S. Young, Presiding.

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UTAH

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ARGUMENT

I. PLAINTIFFS' AMENDED COMPLAINT STATES A CAUSE OF ACTION UNDER 42 U.S.C. § 1983.

Defendants claim Plaintiffs' did not allege "factual allegations" to support a 42 U.S.C. § 1983 civil rights action. Df Reply Br p. 35. This is not true. Plaintiffs set forth on page 95 of their brief some of those factual allegations contained in the amended complaint. They include the following factual allegations:

1. Defendants knew Utah's taxation scheme violated § 111 yet continued to represent to Plaintiffs that they need not file a claim for refund. R. 92.

2. Defendants, knowing Utah's taxation scheme was unlawful, proceeded to collect taxes from Plaintiffs for the 1988 tax year. R. 95.

3. Defendants, by releasing inaccurate and misleading information between March 28, 1989 and April 17, 1989, denied Plaintiffs the equal protection, privileges and immunities provided under the Constitution or laws of the United States. R.97.

A clear reading of Plaintiff's amended complaint indicates Plaintiffs are seeking relief under § 1983 only for the 1988 tax year. Plaintiffs' amended complaint alleges the actions committed by the individual Defendants in their individual capacities during 1989 deprived Plaintiffs of their rights, privileges and immunities secured by the Constitution for the 1988 tax year. Plaintiffs have not made the same allegations against the individual defendants for the other tax years. These allegations, presumed to be true for purposes of a motion to dismiss, give rise to a § 1983 action.

II. PLAINTIFFS ARE ENTITLED TO FULL RELIEF UNDER 42 U.S.C. § 1983.

Section 1983 is the principal vehicle for private enforcement of federal law against state officials.¹ In *Monroe v. Pape*, 365 U.S. 167 (1961), the Court identified the purposes of § 1983 as: (1) overriding any state law which conflicted with the remedies available under § 1983; (2) providing a remedy when the state remedy was inadequate; and (3) providing a federal remedy where the state remedy, though adequate in theory, was not available in practice. *Id.* at 173-74. The Court also held that § 1983 supplements state-created remedies stating that "[t]he federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Id.* at 183. (emphasis added).

State courts have concurrent subject matter jurisdiction with federal courts over § 1983 actions. *Martinez v. California*, 444 U.S. 277, 283 n.7 (1980). Moreover, the United States Constitution requires state courts to enforce federal claims such as § 1983. In *Testa v. Katt*, 330 U.S. 386, 394 (1947), the United States Supreme Court held that state trial courts generally cannot decline enforcement of a federal claim because such a refusal would fly "in the face of the fact that the States of the Union constitute a nation" and would disregard the "purposes and effect of" the

¹42 USC § 1983 provides in pertinent part: "Every person, who under color of any statute . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit and equity, or other proper proceeding for redress."

Supremacy Clause of the Constitution. *Id.* at 389. The Court also made it clear that "the obligation of states to enforce . . . federal laws is not lessened by reason of the form in which they are cast or the remedy which they provide." *Id.* at 391. (emphasis added).

A. Consistent With The Supreme Court's Recent Holdings, a Violation of 4 U.S.C. § 111 is Actionable Under 42 U.S.C. § 1983.

In their reply brief (p. 35) Defendants state that a violation of 4 U.S.C. § 111 is not actionable under § 1983 against officials who reasonably rely on existing law unless their conduct violates a clearly established right. Under the United States Supreme Court's holdings, a violation of § 111 is actionable under § 1983.

The Supreme Court has repeatedly held that "the coverage of [§ 1983] must be broadly construed." *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 105 (1989), See e.g., *Felder v. Casey*, 487 U.S. 131, 139 (1988); *Maine v. Thiboutot*, 484 U.S. 1, 4 (1980). Section 1983 "provides a remedy 'against all forms of official violation of federally protected rights.'" *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106 (1989). The Court has specifically stated: "As the language of the statute plainly indicates, the remedy encompasses violations of federal statutory as well as constitutional rights." *Id.* at 105.

The Supreme Court has stated that, in determining whether a violation of a federal statute like 4 U.S.C. § 111 is actionable under § 1983, only two inquiries are to be undertaken by the trial court: (1) whether the plaintiff has asserted a violation of a

federal right; and (2) whether the defendants have proven that Congress specifically foreclosed a remedy under § 1983. *Id.* See also *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 19 (1981); *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 28 (1981).

1. Plaintiffs have Asserted a Violation of a Federal Right.

With respect to the first inquiry, the Court has explained that a federal statute creates an enforceable right under § 1983 if the statute allegedly violated imposes obligations binding upon state officials to either act or refrain from acting in a certain manner as opposed to expressing merely a "congressional preference for certain kinds of treatment." *Golden State*, 493 U.S. at 106, citing *Pennhurst*, 451 U.S. at 19.

The decision of *Davis v. Michigan Dep't of Treas.*, 489 U.S. 803 (1989), leaves no doubt that § 111, from the date of enactment of the Public Salary Tax Act, imposed a binding obligation upon state officials to tax federal civilian retirees in a nondiscriminatory fashion.² Moreover, it is manifestly clear that § 111 was intended to benefit the Plaintiffs. As noted by the Court in *Davis*, "[s]ection 111 by its terms applies to 'the taxation of pay or compensation for personal services as an officer or employee of the United States.'" *Davis* at 808 (emphasis

²Section 4 U.S.C. § 111 provides in pertinent part that "[t]he United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States . . . by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of pay or compensation."

added). The Court went on to state that the nondiscrimination clause of 4 U.S.C. § 111 was designed to prohibit discriminatory taxation of "retired federal civil servants." *Id.* at 809-10. The Court emphasized that, while intergovernmental tax immunity is based, in part, upon the need to protect the federal governmental operations from undue interference:

[I]t does not follow that private entities or individuals who are subjected to discriminatory taxation on account of their dealings with the sovereign cannot themselves receive the protection of the constitutional doctrine. Indeed, all precedent is to the contrary.

Id. at 814 (emphasis added).

2. Defendants Cannot Prove Congress Foreclosed a § 1983 Remedy.

Second, when a violation of a federal statute is cognizable under § 1983, "the defendant may show that Congress 'specially foreclosed a remedy under § 1983' . . . by providing a 'comprehensive enforcement mechanis[m] for protection of a federal right.'" *Golden State*, 493 U.S. at 106 (citations omitted). Section 111 does not contain any remedial mechanism, let alone a comprehensive scheme. Nor do defendants suggest the contrary. The "burden to demonstrate that Congress has expressly withdrawn the [§ 1983] remedy is on the defendant." *Id.* at 107. "We do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy' for the deprivation of a federally secured right." *Id.* quoting *Wright v. Roanoke Redevelopment and Housing Auth.*, 479 U.S. 418, 423-24 (1987) (emphasis added). Under current case law, a violation of 4 U.S.C. § 111 is actionable under § 1983.

B. Plaintiffs' § 1983 Damage Claim Against Defendants in their Individual Capacity is not Barred by Sovereign Immunity or the Eleventh Amendment.

Defendants have been sued in their individual and official capacities. Plaintiffs' § 1983 damage claim is brought against Defendants in their individual capacities. Plaintiffs' claims for declaratory and injunctive relief were brought against Defendants in their official capacities. Defendants argue the State is the real party in interest with respect to Plaintiff's § 1983 individual capacity damage claim. Df Reply Bf p. 39.

Plaintiffs' amended complaint unequivocally demonstrates that, as to their § 1983 damage claim, Plaintiffs seek to impose personal liability upon the Defendants as individuals. The state treasury will remain unaffected by any judgment against the Defendants in their individual capacity, unless the state elects to indemnify the officials.

1. Plaintiffs' § 1983 Damage Claim can be Characterized as an Individual Capacity Action Even if One Assumes the Defendants were Carrying Out a Policy of the State.

As stated above, Plaintiffs' § 1983 damage claim only seeks to impose personal liability on Defendants. Consequently, any further inquiry into the characterization of the § 1983 damage claim as an "official" or "individual" capacity claim is unnecessary. However, because Defendants claim the individual Defendants are "being sued in their official capacities", Df Reply Br p. 38, Plaintiffs will address this issue.

In *Farid v. Smith*, 850 F.2d 917 (2nd Cir. 1988), a prison inmate brought a § 1983 damage claim against the superintendent of

a New York State correctional facility for unconstitutional confiscation of property. The complained of confiscation was made by the state official pursuant to a mailroom policy promulgated by the state. The state official argued that the inmate's action could only be characterized as an official capacity action because the policy was promulgated by the state as opposed to him personally. Therefore, the state official argued that the Eleventh Amendment barred recovery.

The court initially noted that, "[t]he eleventh amendment... does not protect [a state official] from personal liability if he is sued in his 'individual' or 'personal' capacity." *Id.* at 921. The court then addressed the state official's argument as follows:

[E]ven if [a state official] were to prove that he was merely carrying out a policy of the state, he would not be protected from personal liability under the eleventh amendment.

* * *

As the Supreme Court has noted, 'an agent's liability for torts committed by him cannot be avoided by pleading the direction or authorization of the principal. The agent is himself liable whether or not he has been authorized or even directed to commit the tort.' *Pennhurst II*, 465 U.S. at 113 n.23. Accordingly, the Court has consistently held that the eleventh amendment does not protect state officials from personal liability when their actions violate a federal law, even though state law purports to require such actions . . . [E]very case before the Supreme Court in which 'under color of state law' provisions were invoked 'involved action taken either in strict pursuance of some specific command of state law or within the scope of executive discretion in the administration of state laws.'

Id. at 921.

The court went on to point out that none of the authorities relied upon in an earlier decision, "stands for the proposition that state officials cannot be personally liable for carrying out an unconstitutional state policy." *Id.* at 923. In view of the

foregoing, the fact Defendants acted under the guise of a state taxing scheme does not change the characterization of this suit from an individual capacity action.

C. State and City Taxing Officials are not Entitled to Qualified Immunity as a Matter of Law.

1. Congress has Preempted Defendants' Affirmative Defense of Qualified Immunity Since State Taxing Officials were not Accorded the Defense of Qualified Immunity in 1871, When § 1983 was Enacted.

Defendants' discussion regarding qualified immunity incorrectly assumes that all government officials, under all circumstances, are entitled to claim qualified immunity. The U.S. Supreme Court has expressly rejected this premise. Certain government officials are entitled to this defense when an action is brought pursuant to § 1983, but, state taxing officials are not included in this group.

The United States Supreme Court in *Felder v. Casey*, 487 U.S. 131 (1988), discussed the applicability of the immunity defense in actions brought pursuant to § 1983. The Court stated that "[a]ny assessment of the applicability of a state law to federal civil rights litigation . . . must be made in light of the purpose and nature of the federal right." *Id.* at 139. The court expressly stated:

Accordingly, we have held that a state law that immunizes government conduct otherwise subject to suit under § 1983 is preempted, even where the federal civil rights litigation takes place in state court, because the application of the state immunity law would thwart the congressional remedy....

Id. (citation omitted). The Court then recognized that Congress has provided some immunities for certain state officials. *Id.*

However, state tax officials are not among those state officials entitled to claim qualified immunity.

The Supreme Court's decision in *Tower v. Glover*, 467 U.S. 914 (1984), is dispositive on this issue. In *Tower*, the plaintiff was convicted of robbery. Subsequent to his conviction, the plaintiff brought a § 1983 suit against the public defender seeking punitive damages on grounds the public defender had conspired with various state officials to secure the plaintiff's conviction. The defendant's motion to dismiss was granted by the district court on grounds that public defenders enjoy absolute immunity from § 1983 liability. On appeal, the Ninth Circuit reversed the district court's decision and the case came before the Supreme Court. The Court affirmed the Ninth Circuit's reversal of the district court.

The Supreme Court acknowledged that, "[o]n its face § 1983 admits no immunities." *Id.* at 920. The court further stated that it has recognized that certain officials are entitled to absolute or qualified immunity. *Id.* The Court noted, however, that "[s]ection 1983 immunities are 'predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it.'" *Id.*, citing *Imbler v. Pachtman*, 424 U.S. 409, 421 (1976). See also *Pulliam v. Allen*, 466 U.S. 522, 529 (1984). The Court stated that an official is entitled to claim immunity only if, as a threshold matter, the official "was accorded immunity from tort actions at common law when the Civil Rights Act was enacted in 1871." *Tower*, 476 U.S. at 920. The Court in *Tower* rejected the defendant's claim of immunity

stating that "[n]o immunity for public defenders . . . existed at common law because there was, of course, no such office or position in existence at that time." *Id.* at 921.³ Like the public defender in *Tower*, state tax officials did not enjoy any immunity at common law "when the Civil Rights Act was enacted in 1871."

The law is well-settled that a party claiming immunity has the burden of proving they are entitled to the defense. See *Laverne v. Corning*, 376 F.Supp 836 (S.D. N.Y. 1974), aff'd, 522 F.2d 1144 (2nd Cir. 1975);⁴ Yet, Defendants do not claim any court has held that state taxing officials were entitled to claim immunity from suit at common law when § 1983 was enacted in 1871.⁵ This court should reject Defendants' claim of immunity as a matter of law.

Even if this court is persuaded that state taxing officials enjoyed immunity from suit in 1871, its inquiry is not finished. In *Tower*, the Court stated: "If an official was accorded immunity

³Accord, *Owen v. City of Independence*, 445 U.S. 622, 650 (1970) ("In sum, we can discern no 'tradition so well grounded in history and reason' that would warrant the conclusion that in enacting § 1 of the Civil Rights Act, the 42d Congress *sub silentio* extended to municipalities a qualified immunity based on the good faith of their officers").

⁴See also *Bauer v. Norris*, 713 F.2d 408, 411 (8th Cir. 1983); *De Vasto v. Faherty*, 658 F.2d 859, 865 (1st Cir. 1981); *Tanner v. Hardy*, 764 F.2d 1024, 1027 (4th Cir. 1985); *Alexander v. Alexander*, 706 F.2d 751, 754 (6th Cir. 1983); *Cook v. City of Topeka*, 232 Kan. 334, 654 P.2d 953 (1982); *McGrath v. State*, 312 N.W.2d 438 (Minn. 1981).

⁵In fact, at the time of the enactment of § 1983, the leading tax case was the landmark decision of *Osborn v. Bank of the United States*, 22 U.S. 738, 859 (1824), where the court held that, "[i]f the law of the State of Ohio be repugnant to the constitution, or to a law of the United States made in pursuance thereto . . . [it can] furnish no authority to those who took or those who received the [taxes] for which the suit was instituted."

from tort actions at common law . . . in 1871, the court next considers whether § 1983's history or purposes nonetheless counsel against recognizing the same immunities in § 1983 actions." *Tower*, 467 U.S. at 920, citing *Imbler v. Pachtman*, 424 U.S. at 424-429. Defendants have set forth no explanation as to why the history and purpose of § 1983 favor the recognition of qualified immunity in this dispute.

The history and purpose of § 1983 counsel against the defense in the present action. The Supreme Court has stated that "the central objective of [§ 1983] is to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief." *Felder*, 487 U.S. at 139, citing *Burnett v. Grattan*, 468 U.S. 42, 55 (1984). "Section 1983 accomplishes this goal by creating a form of liability that, by its very nature, runs only against a specific class of defendants: government bodies and their officials." *Felder*, 487 U.S. at 141. In the instant action, Plaintiffs have been subjected to a discriminatory tax in contravention of a federal statute and the United States Constitution. In addition, Defendants have consistently taken the legal position that, despite Plaintiffs' established right to refunds under Utah law and the United States Constitution, they will not grant refunds to Plaintiffs even though similarly circumstanced individuals are awarded refunds in perfectly analogous circumstances. If Defendants are immune from suit, Plaintiffs will be deprived of their right of redress under § 1983 for violations of their federal constitutional and statutory

rights.

This is an action in which qualified immunity should not be recognized. This case is unlike those where qualified immunity has been recognized. This is not a case in which liability is sought from an official as a result of violations of vague or complicated legal concepts such as "probable cause," or "cruel and unusual punishment." This case involves a violation of "the plain language" of a federal statute. *Davis* at 808.

Defendants compounded this violation by ignoring the mandate of *Davis* and collecting an unlawful tax liability even after the announcement of the *Davis* decision. The well-founded justifications underlying the doctrine of qualified immunity will be undermined if Defendants are permitted to successfully invoke the defense in this case.

The *Tower* Court expressly stated that, despite "well founded" concerns of the possibility that an official's effectiveness may be impaired by the threat of § 1983 actions, the Court does not "have a license to establish immunities from § 1983 actions in the interest of what we judge to be sound policy." *Tower*, 467 U.S. at 922-23. The Court held that:

It is for Congress to determine whether § 1983 litigation has become too burdensome to state or federal institutions and, if so, what remedial action is appropriate.

Id. at 923 (emphasis added). Only Congress has the authority to create a qualified immunity defense for state taxing officials.

2. Under *Harlow v. Fitzgerald*, Defendants are not Entitled to Qualified Immunity as a Result of Their Nondiscretionary, Ministerial Acts.

Even those officials who are not precluded under *Tower*, supra, from asserting the defense of qualified immunity must satisfy other requirements before they can raise this defense. In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the United States Supreme Court held that "government officials performing discretionary functions may be shielded from liability for civil damages in a § 1983 action by the doctrine of qualified immunity." *Id.* at 818 (emphasis added). As a condition precedent to invoking qualified immunity as a defense under *Harlow*, Defendants must show their conduct was in furtherance of a discretionary act. In *Davis v. Scherer*, 468 U.S. 183, 196 n.14 (1984), the Court unequivocally stated that, "the Court's doctrine grants qualified immunity to officials in the performance of discretionary, but not ministerial functions." In *Breault v. Chairman of Bd. of Fire Comm'rs.*, 401 Mass. 26, 513 N.E.2d 1277 (1987), the Massachusetts Supreme Court recognized the defense of qualified immunity "is available, as a threshold matter under *Harlow*, only where the defendant official was 'performing discretionary functions.'" *Breault*, 513 N.E.2d at 1281, citing *Harlow*, 457 U.S. at 818.

In the instant action, Defendants suggest they should escape liability by claiming that, "The State's reliance on long established and unchallenged state law was reasonable. At the time the actions complained of took place, they were lawful." Df Reply Br p. 36. Defendants apparently are asserting their conduct

involved no discretion and was, instead, ministerial in nature. This was precisely the issue before the Supreme Court of Massachusetts in *Breault*. There, a firefighter brought a § 1983 action against the defendant chairman of the board of fire commissioners seeking damages against the commissioner in his individual capacity. The commissioner, like Defendants here, raised qualified immunity as a defense. The appellate court affirmed the trial court's denial of the defendant's claim of qualified immunity on the basis the defendant was acting in a ministerial function when he committed the alleged civil rights violation. *Breault*, 513 N.E.2d at 1281. The court, in reaching this determination, reasoned that the statute upon which the defendant acted in pursuance thereof, "mandated" the defendant's course of action. *Id.* at 1282. The court concluded that, "[b]ecause the defendant enjoyed no statutory discretionary authority to withhold reinstatement, he acted in a ministerial capacity. Immunity was properly denied." *Id.*

Therefore, accepting, *arguendo*, Defendants' conduct as ministerial, they are not entitled to claim qualified immunity as a defense.

3. As Stated by the Supreme Court in *Davis*, the Law Violated by Defendants was Both "Settled" and "Unmistakable". Therefore, Defendants are not Entitled to Claim Qualified Immunity.

This court should entertain the merits of Defendants' qualified immunity defense only if Defendants convince the court that (1) state tax officials were accorded the defense of qualified immunity in 1871, when § 1983 was enacted; and (2) that Defendant's

violative acts were not ministerial in nature, i.e., involved more than "minimal discretion". In any event, Defendants are not entitled to qualified immunity since, as the *Davis* decision itself unequivocally states, the rights violated by Defendants in the instant action were clearly established.

(a) The Clearly Established Standard.

Defendants have misconstrued the degree to which Plaintiffs' rights must be established in order for this court to accept the defense of qualified immunity. Df Reply Bf p. 35. In *Anderson v. Creighton*, 483 U.S. 635 (1987), the United States Supreme Court concluded that an official can be held to violate clearly established rights even though the "very action in question" was not previously held to be unlawful. *Id.* at 639.

As stated in *Harlow*, "a reasonably competent public official should know the law governing his conduct." *Harlow*, 457 U.S. at 819. Public officials are also charged with knowledge of the meanings of federal statutes, see *Cole v. Railroad Retirement Bd.*, 289 F.2d 65 (8th Cir. 1961); the contents of federal regulations, see *FDIC v. Merrill*, 332 U.S. 380 (1947); and applicable state law, see *United States v. Yeazell*, 382 U.S. 341 (1966).

After the *Davis* case was issued in March of 1989, Defendants stand defenseless to claim they acted reasonably in collecting unlawful taxes. Plaintiffs sought \$1983 relief for the 1988 tax year because the Supreme Court had spoken and Defendants still refused to acknowledge and grant to Plaintiffs the "rights, privileges or immunities secured by the Constitution and laws" of

the United States. 42 U.S.C. § 1983. Whatever argument Defendants had prior to March 1989 justifying their position, evaporated when the Supreme Court spoke.

The test this Court should implement is whether or not the rights afforded Plaintiffs under 4 U.S.C. § 111 and the United States Constitution were clearly established when violated by Defendants. The test is not, as Defendants maintain, whether the state law under which the Defendants acted was clearly established or ever called into doubt. It is, therefore, irrelevant how many states had taxing schemes which violated the rights of its citizens.⁶ Even if all fifty states had discriminatory taxing schemes like that present in Utah, Plaintiffs' rights under the Constitution and § 111 would be no less clearly established. In fact, the conclusion that Plaintiffs' constitutional and statutory rights were clearly established even before the U.S. Supreme Court spoke in *Davis* is supported by the fact that there was no final authority which sustained the principle that federal retirees' benefits could be discriminatorily taxed.

⁶As noted by the United States Supreme Court, " . . . where the power to tax is not unlimited, validity is not established by the mere imposition of a tax." *Mullaney v. Anderson*, 342 U.S. 415, 418. It seems state legislatures and the tax authorities who advise them err on the side of parochial interest. An example of this is the discriminatory taxing schemes, one of which was at issue in *ATA, Inc. v. Scheiner*, 107 S.Ct. 2829 (1987), relentlessly enforced by several states against out-of-state truckers. These schemes were not saved by the defense that everyone else is doing it. In a similar fashion, the United States Supreme Court knew full well that many states were violating 4 U.S.C. § 111 when it awarded Mr. Davis retroactive relief because the list appears in the decision. See, *Davis*, 489 U.S. at 822 n.3. (Stevens, J., dissenting).

(b) As Davis Explained, Plaintiffs' Statutory and Constitutional Rights Violated by Defendants were Clearly Established.

This court need look no further than the *Davis* decision in deciding whether or not Plaintiffs' rights were clearly established. *Davis* is replete with analysis and express language which unequivocally states that the law in this area has been clearly established. It is significant to note from the outset that it was the defendant, the State of Michigan, that attempted to persuade the *Davis* Court to depart from clearly established law. The Supreme Court rejected the State's invitation:

The state offers no reason for departing from this settled law, and we decline to do so.

Davis., 489 U.S. at 815 (emphasis added).⁷

The statute Defendants violated, 4 U.S.C. § 111, was enacted in 1939 as part of the Public Salary Tax Act. *Davis*, 489 U.S. at 810. *Davis* makes this dispositive statement:

The overall meaning of § 111 is unmistakable: it waives whatever immunity past and present federal employees would otherwise enjoy from state taxation . . . of retirement benefits . . . paid on account of their employment with the Federal Government, except to the extent that such taxation discriminates on account of the source of compensation.

Id. (emphasis added). The Court specifically stated that any other "hypertechnical reading" of the statute would be "implausible at best." *Id.* at 810-811. *Davis* did not announce a new principle of law. It merely affirmed that § 111, by its plain language,

⁷The phrase, settled law, has been interpreted to mean "unquestioned constitutional rights." *Wood v. Strickland*, 420 U.S. 308, 329 (1975) (Powell, J., concurring in part and dissenting in part).

states that the plaintiff in *Davis*, like the retirees in the instant action, could not be subject to a discriminatory state tax. By itself, the *Davis* decision is sufficient for this court to rule that the rights set forth in § 111 were clearly established.

The *Davis* Court emphasized just how clearly established Plaintiffs' rights are by explaining that the long-standing principle of intergovernmental tax immunity, as codified in § 111, had its "genesis in *McCulloch v. Maryland*, 4 Wheat. 316, 4 L.Ed. 579 (1819)." *Davis*, 489 U.S. at 810. In *McCulloch*, the United States Supreme Court held that the State of Maryland could not impose a discriminatory tax on a federal instrumentality of the United States. The *Davis* court further noted that after the 1939 decision of *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939):

[I]ntergovernmental tax immunity barred only those taxes that were imposed directly on one sovereign by the other or that discriminated against a sovereign of those with whom it dealt.

Davis, 489 U.S. at 811 (Emphasis added).⁸ The *Davis* court stated that "the nondiscrimination component of the constitutional immunity doctrine has, from the time of *McCulloch v. Maryland*, barred taxes that 'operat[e] so as to discriminate against the Government or those with whom it deals.'" *Id.* at 812. (citations omitted). The Court stated that § 111 was drafted "against the backdrop" of the Supreme Court's tax cases and, as such, is

⁸The Court in *Davis* makes specific mention of the fact that just prior to the adoption of 4 U.S.C. § 111 in 1939 it was "unclear whether state taxation of federal employees was still barred by intergovernmental tax immunity." *Davis*, at 811-812. The enactment of 4 U.S.C. § 111 resolved this uncertainty. *Id.*

"coextensive with the modern constitutional doctrine of intergovernmental tax immunity." *Id.* at 813.

Moreover, in rejecting Michigan's argument that individuals should not receive protection of the constitutional doctrine of intergovernmental immunity, the Court in *Davis* expressly stated that "all precedent is to the contrary." *Id.* at 814 (emphasis added). This statement evidences two crucial aspects in favor of finding that the law affirmed in *Davis* was clearly established. First, it shows the existence of case law sufficiently on point. The Court lists no fewer than five Supreme Court tax cases dating back to 1842 in support of the proposition that federal retirees may not be taxed discriminatorily. *Id.* at 814-815. Second, it indicates that the law in this area has been consistent, or in other words, that there was no split of authority as to this issue. *Id.* These two points further show why the Court phrased the law as "settled."⁹

The five Supreme Court tax decisions cited by the *Davis* Court have one consistent theme: whenever a state attempted to place a discriminatory tax upon an entity associated with the United States, regardless of the basis, the tax was struck down as unconstitutional.

Based upon the "settled rule" espoused in the cases cited in *Davis*, it is inconsistent for Defendants to assert before this

⁹The word "settle" is defined as a term meaning "to establish." *BLACKS LAW DICTIONARY* 1230 (5th ed. 1979). Thus, in stating that the rule affirmed in *Davis* was "settled," the Court has conclusively stated that, contrary to Defendants assertions, the rule was clearly established.

court that the decision in *Davis* could not have been foreshadowed. Consistent with the doctrine of intergovernmental tax immunity and/or 4 U.S.C. § 111, each and every time a state attempted to discriminatorily tax a person or an entity associated with the federal government, the Supreme Court invalidated the tax.

Defendants would have this court believe the *Davis* decision was reached in a vacuum when, in fact, just the opposite is true. It was an inevitable and unmistakable conclusion based upon existing precedent. The Public Salary Tax Act of 1939 not only gave Congress' consent to nondiscriminatory taxation of federal employees, but also amended the Internal Revenue Code to, for the first time, tax compensation for personal service "including personal service as an officer or employee of a state, or any political subdivision thereof" Public Salary Tax Act of 1939, Title I, § 1. The same legislation specified that "[t]he terms used in this act shall have the same meaning when used in Chapter I of the Internal Revenue Code." , *Id.* Title II, § 206. The term "compensation for personal service" as used in the Internal Revenue Code at the time of the adoption of the Public Salary Tax Act of 1939 included pensions of retired government employees.

In addition, based upon the doctrine of intergovernmental tax immunity, state pensions had consistently been excluded from federal income taxation under the Internal Revenue Code prior to the passage of the Public Salary Tax Act of 1939. See T.D. 2831, 21 Treas. Dec. Int. Rev. 170, 180 (1920) (Treasury Regulation under

the Internal Revenue Code defined compensation for personal services to include "retired pay of federal and other officers, and pensions or retiring allowances paid by the United States or private persons.")

4. Plaintiffs are Entitled to Recover Damages from Defendants for their Continued Enforcement of the Scheme After the Decision in Davis Was Announced.

If, *arguendo*, as Defendants assert, the rule of law was first established on March 28, 1989, the date of the *Davis* decision, the individual Defendants are individually liable for their conduct after March 28, 1989.

In *Arebaugh v. Dalton*, 730 F.2d 970 (4th Cir. 1984), the court reversed and remanded the district court's decision to grant the defendant government official summary judgment on the basis of qualified immunity notwithstanding the recentness of a United States Supreme Court holding. In *Arebaugh*, the defendant's complained of actions that occurred only twelve days after similar actions by another official were declared improper by the Supreme Court. The *Arebaugh* court noted that "[t]welve days may well turn out to have been sufficient time for someone with a direct interest to have learned of, read and digested the [Supreme Court's] holding." *Id.* at 973.¹⁰ Here, Defendants had twenty days. The court in *Arebaugh* went on to state:

Obviously, the office of the Commonwealth's Attorney General called upon regularly to represent the agency in which the defendants served, had at least a responsibility to currently

¹⁰Here, of course, there is no question Defendants were aware of *Davis* and had analyzed its impact on Utah. See press release dated on April 5, 1989. R. 595.

keep up to date in the legal area in which the case . . . fell. To escape liability, the defendants, with the burden of proof reposing on them, had the responsibility to demonstrate that there existed a good faith explanation either for the failure of those responsible to know of the decision . . . or, if those responsible were in fact aware of the decision, for the subsequent failure to communicate that knowledge to the prison officials.

Id. at 972.¹¹ Similarly, in *Ware v. Heyne*, 575 F.2d 593 (7th Cir. 1978), prison officials were held liable for failing to give a prisoner written notice of charges against him in advance of a prison disciplinary proceeding. The prisoner's right to advance written notice was clearly established in an opinion decided two months before the disciplinary proceeding, but the opinion was not published in the West Publishing Co. advance sheets until two months after the disciplinary proceeding. The court found the right at issue was clearly established despite the defendant's ignorance of the unreported opinion. The same result was reached in *Muzychka v. Tyler*, 563 F. Supp. 1061 (E. D. Pa. 1983), where the court held that an alleged illegal search violated clearly established law based upon the fact that the Supreme Court had decided a case "very much on point" approximately "three weeks before the search occurred." *Id.* at 1065.

In Missouri, one of the states affected by *Davis*, the attorney general issued a formal opinion on April 17, 1989, advising the Department of Revenue that the state's taxing scheme was "invalid

¹¹It should be emphasized that prior to the Supreme Court's holding relied upon by the Fourth Circuit in *Arebaugh*, the lower courts were split on the implicated issue. *Arebaugh*, 73 F.2d at 973 n.3. Here, no such split existed. *Davis* merely reaffirmed "settled law."

and discriminatory" and that the monies collected under the scheme must be refunded, even for prior years. As such, Defendants are not entitled to assert qualified immunity for any taxes collected after the *Davis* decision was announced.¹²

5. Defendants have Denied Rights Secured to Plaintiffs Under the Laws of Utah and the Constitution of the United States in Violation of the Fourteenth Amendment of the United States Constitution.

The law is settled that violations of a Plaintiffs' rights under the Fourteenth Amendment are actionable under 42 U.S.C. § 1983. *Hague v. CIO*, 307 U.S. 496 (1939). See also *Hoffman v. Halden*, 268 F.2d 280, 293 (9th Cir. 1959); *R.W. Agnew v. City of Compton*, 239 F.2d 226, 236 (9th Cir. 1957); *French v. Heyne*, 547 F.2d 994, 997 (7th Cir. 1976).

Plaintiffs have a statutory refund right under U.C.A. § 59-10-529. The term "overpayment" is construed by reference to the federal analog found in § 6511 of the Internal Revenue Code. Under § 6511 of the Internal Revenue Code, "overpayments" arising because of payment of a tax later held to be unconstitutional are recoverable in the same manner as other payments, i.e., recovery may be had if a timely claim is filed. Contrary to what Defendants' now implicitly assert, there is no authority which suggests, let alone holds, that the Utah legislature has carved out an exemption from the unqualified statutory right to refund which would enable Defendants, when they so choose, to deny refunds because Defendants feel a tax collected in violation of the

¹²It is undisputed that this tax liability was not due until April 17, 1989.

constitution does not have to be given back retroactively. Just the opposite is true. In *Jones v. Liberty Glass Co.*, 332 U.S. 524, 531 (1947), the Court said:

[W]e read the word 'overpayment' in its usual sense, as meaning any payment in excess of that which is properly due. Such an excess payment may be traced to an error in mathematics or in judgment or in interpretation of facts or law. And the error may be committed by the taxpayer or by the revenue agents. Whatever the reason, the payment of more than is rightfully due is what characterizes an overpayment.

In the instant case, Defendants have not appealed the trial court's ruling that Utah's discriminatory scheme is unconstitutional. Moreover, the law is abundantly clear that it is these Defendants who are charged with the responsibility to pay refunds. See, e.g. U.C.A. § 59-1-210(5) and U.C.A. § 59-10-529(6). However, these Defendants have announced and have, in fact, denied Plaintiffs' their unqualified refund right otherwise available and routinely honored in the case of any other similarly circumstanced taxpayer who has "overpaid" his tax. For a discussion of this issue directly on point, see *Hackman v. Director of Revenue*, 771 S.W.2d 77 (Mo. banc 1989), cert. denied, 110 S.Ct. 718 (1990).

The denial of refunds by Defendants in this case violates the Supreme Court's declaration of "equality" in *Davis*, supra, and is, in itself, unconstitutional because the result of such a decision would be to deny Plaintiffs tax treatment equal to that afforded the favored class of state retirees for the tax years 1985 through 1988. As noted by Justice Brandeis in *Iowa-Des Moines Nat'l. Bank. v. Bennett*, 284 U.S. 239, 247 (1931):

A taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law,

cannot be required himself to assume the burden of seeking an increase of the taxes which the other should have paid The petitioners are entitled to obtain in these suits refund of the excess of taxes exacted from them.

See also *Gosnell Dev. Corp. v. Arizona Dept. of Revenue*, 154 Ariz. 539, 744 P.2d 451, 454 (App. 1987) (a refund of taxes was the only remedy available to cure unequal treatment of taxpayers).

D. Plaintiffs are Not Required to Exhaust Administrative Remedies.

Defendants have raised as a defense that Plaintiffs are required to exhaust administrative remedies. Df Reply bf p.44. The law is settled that Plaintiffs in a § 1983 action are not required to exhaust administrative remedies.

1. The Supreme Court has Expressly Stated that Only Congress has Authority to Place Exhaustion Requirements on a § 1983 Claim.

In *Felder v. Casey*, 487 U.S. 131 (1988), the Supreme Court held that failure to resort to administrative procedures may not be asserted to bar or restrict a § 1983 action brought in state court. The United States Supreme Court reversed the Wisconsin Supreme Court, holding that § 1983 preempted the Wisconsin Statute. *Felder*, 487 U.S. at 138.¹³

The Court ruled:

[T]he notice provision operates, in part, as an exhaustion requirement, in that it forces claimants to seek satisfaction

¹³The *Felder* court expressly rejected the Wisconsin Court's reliance on its prior decision in *Kramer v. Horton*, 128 Wis.2d 404, 383 N.W.2d 54, cert. denied, 479 U.S. 918 (1986), which stated that "where state administrative remedies are adequate and available, a plaintiff bringing a § 1983 claim is required to exhaust his administrative remedies prior to commencing suit in state court." See *Felder* at 147-148, rev'g *Felder* 139 Wis.2d at 622-23, citing, *Kramer*, 128 Wis.2d at 419.

in the first instance from the governmental defendant. We think it plain that congress never intended that those injured by governmental wrongdoers could be required, as a condition of recovery, to submit their claims to the government responsible for their injuries.

Id. at 142.

The Court saw no reason to suppose Congress contemplated plaintiffs who bring a § 1983 claim in state court "could be required to seek redress in the first instance from the very state officials whose hostility to those rights precipitated their injuries." *Id.* at 147.

The court noted further:

These [§ 1983] causes of action . . . exist independent of any other legal or administrative relief that may be available as a matter of federal or state law. They are judicially enforceable in the first instance.

Id. at 148. See also *Patsy v. Bd. of Regents*, 457 U.S. 496 (1982) (holding that § 1983 plaintiffs are not required to exhaust administrative remedies prior to initiating § 1983 actions in federal court).

2. There is No Adequate Administrative Remedy Available to Plaintiffs.

Defendants' assertion that Plaintiffs should have exhausted administrative remedies in pursuing their § 1983 civil rights action mistakenly assumes the commission has jurisdiction to resolve civil rights claims.

(a) The State Tax Commission Lacks Subject Matter Jurisdiction to Entertain a § 1983 Claim Brought Against Defendants in Their Individual Capacities.

Plaintiffs' § 1983 damage claim seeks recovery from the Defendants in their individual capacities. There simply is no

statutory authority which confers subject matter jurisdiction upon the State Tax Commission to entertain this type of civil rights action.

(b) The State Tax Commission Lacks Authority to Declare a Taxing Scheme Unconstitutional.

It is well established that an administrative agency lacks authority to rule on the constitutionality of a statute. See, e.g., 73 C.J.S., *Public Administrative Law and Procedure*, § 48, at 491 ("The administrative process cannot resolve a constitutional attack on a statute, rule or regulation, and it is for the courts, and not an administrative body, to determine the constitutionality of a statute"). The leading treatise on administrative agencies unequivocally states that "we do not commit to administrative agencies the power to determine the constitutionality of legislation. Only the courts have authority to take action which runs counter to the expressed will of the legislative body." 3 DAVIS, *ADMINISTRATIVE LAW TREATISE*, § 20.04 at 74 (1985).

The Supreme Court has likewise held that an administrative body can only be expected to entertain issues where the agency proceeding involves "no remnant of [a] constitutional question." *Public Util. Comm'n. v. United States*, 355 U.S. 534, 539-40 (1958). There also appears to be universal agreement among state courts, including Utah, which have squarely addressed this issue that administrative agencies lack authority to pass on the constitutionality of a statute. See, full argument at pp. 75-79 of Plaintiffs' brief.

(c) In Light of Defendants' Predisposition Against Granting Plaintiffs' Relief, Resort to Administrative Procedures Would Be Futile.

It is widely recognized that where resort to administrative procedures would be futile, such a burden cannot be imposed on a party. It is uncontested that the Commission issued a widely publicized press release shortly after the *Davis* decision announcing its position with regard to denying refunds under *Davis*. The Commission has never backed away from that position either in public or in this litigation.

In, *Walker Bank & Trust Co. v. Taylor*, 15 Utah 2d 234, 390 P.2d 592 (1964), the court stated, "The question here involved, being strictly one of law, is for the courts and an appeal to the Board of Examiners would have been futile and useless." See full argument in Plaintiffs' brief at pp. 75-79.

With respect to each claim in the amended complaint, Plaintiffs were excused from exhausting administrative remedies by specific factual findings made by the trial court. These factual findings may only be overturned upon a finding of abuse of discretion by the trial court. Defendants have not claimed the trial court abused its discretion in ruling there were "indications that the Utah State Tax Commission has preliminarily decided that *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989) does not mandate refunds in Utah." R. 252. Any resort before the Commission would be futile. As stated previously, the Utah State Tax Commission lacks subject matter jurisdiction to vindicate Plaintiff's § 1983 damage claims because they are brought against

Defendants in their individual capacities. Similarly, the Commission lacks authority to declare a statute unconstitutional. These factors, standing alone, would be sufficient for a finding of futility. They do not, however, stand alone.

Defendants have summarily denied claims for refunds made by members of the putative class. R. 598, 917-925. Moreover, Defendants' counsel have repeatedly asserted that Defendants have no legal obligation to pay refunds for any tax year prior to 1989. Df Reply Bf p.35. Defendant's counsel are the same attorneys who advise Defendants with regard to legal matters at the State Tax Commission and who would represent the State of Utah's interests in a hearing before that administrative body. These additional factors demonstrate that a proceeding before the Commission in the instant action would be futile.

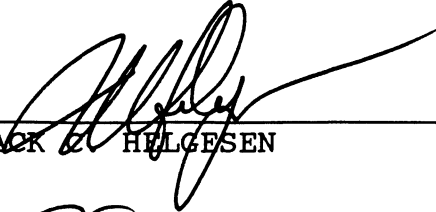
Defendants' assertion that Plaintiffs should exhaust administrative remedies before bringing a § 1983 action is misplaced since exhaustion is not required for § 1983 actions and because there is no showing the trial court abused its discretion in relieving Plaintiffs of any exhaustion requirements.

CONCLUSION

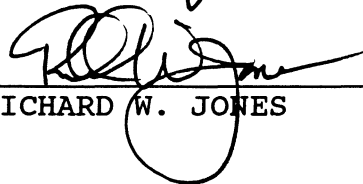
Defendants' appeal should be denied and this matter remanded to the trial court for the purpose of issuing an order to the Utah State Tax Commission to issue refunds to members of the class, plus interest, costs and attorney's fees.

DATED this 30 day of March, 1992.

LYON, HELGESEN, WATERFALL & JONES



JACK Z. HELGESEN



RICHARD W. JONES

CERTIFICATE OF MAILING

I hereby certify that I hand delivered four true and correct copies of the foregoing document this _____ day of March, 1992, to the following:

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A P P E N D I X

**TABLE OF CURRENT STATUS OF FEDERAL RETIREE TAX REFUND LITIGATION
IN OTHER STATES (as of 03/28/92)**

STATE	TRIAL COURT OR ADMINISTRATIVE AGENCY	STATE SUPREME COURT	U.S. SUPREME COURT	COMMENTS
AL	Refunds granted per state refund statute.	Pending (Court of Appeals).		
AZ	Partial refunds granted.	Pending (Court of Appeals).		
AK	Refunds granted per state refund statute.	Upheld refunds.	Petition for Cert. filed in 1991. Now pending.	
CO	Refunds granted.	Upheld refunds.		Refunds now being processed. Claims involved only military retirees.
IA	Pending.			
KS	Refunds denied to military retirees.	Affirmed trial court.	Cert. granted; oral arguments heard 03/04/92; pending.	
KT	Received injunction.	Pending.		
MO	The director of Revenue denied refunds as he had no authority to declare a state law unconstitu- tional.	Reversed and granted refunds pursuant to the state refund statute.	Denied Petition for Cert.	Refunds have been paid.
MI	Refunds granted.	Upheld refunds.		

STATE	TRIAL COURT OR ADMINISTRATIVE AGENCY	STATE SUPREME COURT	U.S. SUPREME COURT	COMMENTS
MT	Denied refunds per <u>Chevron</u> .	Affirmed trial court.	Petition for Cert. filed.	
MS	Refunds granted per state refund statute.	Pending.		
NC	Refunds granted.	Reversed trial court per <u>Chevron</u> analysis.	Petition for Cert. filed.	
NM	Granted refunds per state refund statute.	No appeal.		Refunds paid.
NY	Refunds granted.	Reversed trial court per <u>Chevron</u> .		Appeal to State Supreme Court
OK	State Tax Commission denied refunds per <u>Chevron</u> - non-retro- activity.	Pending.		
OR	Refunds denied.	Remanded to trial court for further proceedings.		
SC	Refunds granted per state refund statute.	Reversed trial court per <u>Chevron</u> analysis - non-retroactivity.	Cert. granted, vacated and remanded 06/91 per <u>Beam</u> . A second petition for cert. was filed in 03/92 after the State Supreme Court on remand refused to apply <u>Beam</u> ; Cert. pending.	

STATE	TRIAL COURT OR ADMINISTRATIVE AGENCY	STATE SUPREME COURT	U.S. SUPREME COURT	COMMENTS
UT	Refunds granted per state refund statute.	Pending.		
VA	Denied refunds per <u>Chevron</u> - non-retro- activity.	Affirmed trial court.	Cert. granted, vacated and remanded per <u>Beam</u> . A second petition for Cert. was filed 11/91; Cert. pending.	
WI	Pending.	Appeal on procedural issues only, remanded to trial court for further proceedings.		
WV	Refunds granted; misc. issues remain.			

**LIST OF CITATIONS TO OPINIONS IN FEDERAL RETIREE
TAX REFUND LITIGATION IN OTHER STATES**

- AL Rinehart v. Sizemore, CV-89-704-M (App. B).
- AZ Bonn v. Waddell, TX-89-00050 (Ariz. Tax. Ct.).
- AK Pledger v. Bosnik, 811 S.W. 2d 286 (Ark. 1991), petition for cert. filed No. 91-375.
- CO Kuhn v. Colorado, 817 P.2d 101 (Colo. 1991).
- IA McManus v. Iowa, No. C89-179 (N.D. Iowa); Hagge v. Iowa, LA 20859 Linn County.
- KS Barker v. State, 815 P.2d 46 (Kan. 1991), cert. granted, oral arguments were heard on March 4, 1991, by the United States Supreme Court No. 91-611.
- KT Gossum v. Kentucky, No. 89-CI-248 (Marshall Cir. Ct.).
- MI Fonger v. Dept. of Treasury, _____ N.W.2d _____ (Mich. Ct. App. February 4, 1992).
- MO Hackman v. Director of Revenue, 771 S.W.2d 77 (Mo. 1989), petition for cert. denied, 110 S.Ct. 718 (1991).
- MT Sheehy v. Montana, 820 P.2d 1257 (Mont. 1991).
- MS Todd v. Tax Comm'n, No. 139915 and Winstead v. Marx, No. 141652 (Chancery Ct. 1st Jud. Dist. of Hines County).
- NC Swanson v. North Carolina, 407 S.E. 2d 791 (N.C. 1991), petition for rehearing denied.
- NM Burns v. New Mexico, No. SF 89-1314(c)(1st Jud. Dist. Santa Fe County, April 5, 1990).
- NY Duffy v. Wetzler, _____ A.2d _____ (N.Y. App. Div. January 15, 1992).
- OK Worrell v. Tax Comm'n, No. DR-46 (Okla. Tax Division).
- OR Nutbrown v. Munn, 811 P.2d 131 (Or. 1991), petition for cert. pending, No. 91-457.
- SC Bass v. South Carolina, 395 S.E.2d 171 (S.C. 1990), cert. granted, vacated and remanded 111 S.Ct. 2881 (1991); the State Supreme Court issued a second opinion and there is now a second petition for cert. pending at the United States Supreme Court.

- UT Brumley v. Tax Comm'n, No. 89-0903618 (Utah Dist. Ct.).
- VA Harper v. Virginia, 401 S.E.2d 868 (Va. 1991), cert. granted, vacated and remanded, 111 S.Ct. 2881 (1991), 410 S.E.2d 629 (Va. 1991), second petition for cert. pending No. 91-794.
- WI Hogan v. Musolf, 471 N.W.2d 216 (Wis. 1991), petition for cert. pending.
- WV Brown v. Mierke, CV90-C-3341 (Circuit Court of Kanawha County).