SUPREME COURT OF THE UNITED STATES

No. 93–1197

ALBERT HESS AND CHARLES F. WALSH, PETITIONERS *v.* PORT AUTHORITY TRANS-HUDSON CORPORATION

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

[November 14, 1994]

JUSTICE O'CONNOR, with whom CHIEF JUSTICE REHNQUIST, JUSTICE SCALIA, and JUSTICE THOMAS join, dissenting.

The Court's opinion, as I read it, makes two different points. First, an interstate compact entity is presumptively not entitled to immunity under the Eleventh Amendment, because the States surrendered any such entitlement "[a]s part of the federal plan prescribed by the Constitution." *Ante*, at 11. When States act in concert under the Interstate Compact Clause, they cede power to each other and to the Federal Government, which, by consenting to the state compact, becomes one of the compact entity's creators. As such, each individual State lacks meaningful control over the entity, and suits against the entity in federal court pose no affront to a State's "dignity." *Ante*, at 11. Second, in place of the various factors recognized in *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U. S. 391 (1979), for determining arm-of-the-state status, we may now substitute a single overriding criterion, vulnerability of the state treasury. If a State does not fund judgments against an entity, that entity is not within the ambit of the Eleventh Amendment, and suits in federal court may proceed unimpeded. By the Court's reckoning, the state treasury is not implicated on these facts. Neither, it follows, is the Eleventh Amendment.

I disagree with both of these propositions and with the ultimate conclusion the Court draws from them.

The Eleventh Amendment, in my view, clothes this interstate entity with immunity from suit in federal courts.

Despite several invitations, this Court has not as yet had occasion to find an interstate entity shielded by the Eleventh Amendment from suit in federal court. See *Port Authority Trans-Hudson Corp.* v. *Feeney*, 495 U. S. 299 (1990) (assuming Eleventh Amendment applies, but finding waiver); *Lake Country*, *supra* (finding no reason to believe entity was arm of the State); *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U. S. 275 (1959) (same as *Feeney*). As I read its opinion, the Court now builds upon language in *Lake Country* to create what looks very much like a *per se* rule that the Eleventh Amendment never applies when States act in concert. To be sure, the Court leaves open the possibility that in certain undefined situations, we might find "`good reason'" to confer immunity where States structure an entity to enjoy immunity and we see evidence that "`Congress concurred in that purpose.'" *Ante*, at 13, quoting *Lake Country*, *supra*, at 401. But the crux of the Court's analysis rests on its apparent belief that the States ceded their sovereignty in the interstate compact context in the plan of the convention. See *ante*, at 10–11 ("As part of the federal plan prescribed by the Constitution, the States agreed to the power sharing, coordination, and unified action that typify Compact Clause creations"). Such broad reasoning brooks few, if any, exceptions.

In reaching its conclusion, the Court attaches undue significance to the requirement that Congress consent to interstate compacts. Admittedly, the consent requirement performs an important function in our federal scheme. In *Cuyler* v. *Adams*, 449 U. S. 433 (1981), we observed that "the requirement that Congress approve a compact is to obtain its political judgment: Is the agreement likely to interfere with federal activity in the area, is it likely to disadvantage

other States to an important extent, is it a matter that would better be left untouched by state and federal regulation?" *Id.*, at 440, n. 8, quoting *United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U. S. 452, 485 (1978) (White, J., dissenting). But the consent clause neither transforms the nature of state power nor makes Congress a full-fledged participant in the underlying agreement; it requires *only* that Congress "check any infringement of the rights of the national government." J. Story, Commentaries on the Constitution of the United States §1403, p. 264 (T. Cooley ed. 1873). In consenting, Congress certifies that the States are acting within their boundaries in our federal scheme and that the national interest is not offended. Once Congress consents to cooperative state activity, there is no reason to presume that immunity does not attach. Sovereign immunity, after all, inheres in the permissible exercise of state power. "If congress consent[s], then the states [are] in this respect restored to their original inherent sovereignty; such consent being the sole limitation imposed by the constitution, when given, [leaves] the states as they were before. . . ." *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 724 (1838); see also L. Tribe, American Constitutional Law §6–33, p. 523 (2d ed. 1988).

Even if the Court were correct that the States ceded a portion of their power to Congress in ratifying the consent provision, it would not logically or inevitably follow that any particular entity receives no immunity under the Eleventh Amendment. In *Fitzpatrick* v. *Bitzer*, 427 U. S. 445, 455–456 (1976), we held that the States surrendered a portion of their sovereign authority to Congress in ratifying §5 of the Fourteenth Amendment. Despite this, we have consistently required "`an unequivocal expression of congressional intent to overturn the constitutionally guaranteed immunity of the several States'" before allowing suits against States to proceed in federal court. *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 240 (1985), quoting *Pennhurst State School and*

Hospital v. *Halderman*, 465 U. S. 89, 99 (1984). Assuming *arguendo* that States ceded power to Congress to abrogate States' Eleventh Amendment immunity in the interstate compact realm, our precedents caution that we should be reluctant to infer abrogation in the absence of clear signals from Congress that such a result was, in fact, intended. At the least, I would presume the applicability of the Eleventh Amendment to interstate entities unless Congress clearly and expressly indicates otherwise.

The Court ignores these abrogation cases, however, in favor of exactly the opposite presumption. By the Court's reckoning, the Eleventh Amendment is inapplicable unless we have "good reason" to believe that Congress affirmatively *concurs* in a finding of immunity. In other words, the baseline is no immunity, even if the State has structured the entity in the expectation that immunity will inhere. If, however, Congress manifests a contrary intent, the Eleventh Amendment shields an interstate entity from suit in federal court. Congress, therefore, effectively may dictate the applicability of the Eleventh Amendment in this context. The notion that Congress possesses this power, an extension of dictum in *Lake Country*, 440 U. S., at 401, has little basis in our precedents. Congress may indeed be able to confer on the States what in fact *looks* a lot like Eleventh Amendment immunity; but we have never held that Eleventh Amendment immunity itself attaches at the whim of Congress.

The Court shores up its analysis by observing that each State lacks meaningful power to control an interstate entity. As an initial matter, one wonders how important this insight actually is to the Court's conclusion, given that the opinion elsewhere disclaims reliance on a control inquiry. *Ante*, at 16–17. In any event, that we may sometimes, or even often, in the application of arm-of-the-state analysis, find too attenuated a basis for immunity does not mean we should presume such immunity *altogether* lacking in this context. Two sovereign States acting together may, in most situations, be as deserving of immunity as either State acting apart. I see no reason to vary the analysis for interstate and intrastate entities.

The Court wisely recognizes that the six-factor test set forth in *Lake Country*, *supra*, ostensibly a

balancing scheme, provides meager guidance for lower courts when the factors point in different directions. Without any indication from this Court as to the weight to ascribe particular criteria, the Courts of Appeals have struggled, variously adding factors, see *Puerto Rico Ports Authority* v. *M/V Manhattan Prince*, 897 F. 2d 1, 9 (CA1 1990) (considering seven factors), distilling factors, see *Benning* v. *Board of Regents of Regency Universities*, 928 F. 2d 775, 777 (CA7 1991) (considering four factors), and deeming certain factors dispositive, compare *Brown* v. *East Central Health Dist.*, 752 F. 2d 615, 617–618 (CA11 1985) (finding state treasury factor determinative), with *Tuveson* v. *Florida Governor's Council on Indian Affairs, Inc.*, 734 F. 2d 730, 732 (CA11 1984) (suggesting that state courts' characterization of entity is most important criterion). See generally Note, Clothing State Governmental Entities with Sovereign Immunity: Disarray in the Eleventh Amendment Arm-of-the-State Doctrine, 92 Colum. L. Rev. 1243 (1992) (summarizing diffuse responses).

In light of this confusion, the Court's effort to focus the *Lake Country* analysis on a single overarching principle is admirable. But its conclusion that the vulnerability of the state treasury is determinative has support neither in our precedents nor in the literal terms of the Eleventh Amendment. The Court takes a *sufficient* condition for Eleventh Amendment immunity, and erroneously transforms it into a *necessary* condition. In so doing, the Court seriously reduces the scope of the Eleventh Amendment, thus underprotecting the state sovereignty at which the Eleventh Amendment is principally directed. See *Puerto Rico Aqueduct and Sewer Authority* v. *Metcalf & Eddy, Inc.*, 506 U. S. ___ (1993) (slip op., at 7) ("The Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity."); *Atascadero State Hospital* v. *Scanlon*, *supra*, at 238

("[T]he significance of this Amendment `lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III' of the Constitution") (citation omitted).

The Court's assertion that the driving concern of the Eleventh Amendment is protection of state treasuries, see *ante*, at 18–19, is belied by the text of the Amendment itself. The Eleventh Amendment bars federal jurisdiction over "any suit in law *or equity*" against the States. As we recognized in *Cory* v. *White*, 457 U. S. 85, 91 (1982), the Eleventh Amendment "by its terms" clearly extends beyond actions seeking money damages. "It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the State itself simply because no money judgment is sought." *Id.*, at 90. While it may be clear that *Chisholm* v. *Georgia*, 2 Dall. 419 (1793), a money damages action, gave initial impetus to the effort to amend the Constitution, it is equally clear that the product of that effort, the Eleventh Amendment itself, extends far beyond the *Chisholm* facts. Recognizing this, we have long held that the Eleventh Amendment bars suits against States and state entities *regardless* of the nature of relief requested. See *Puerto Rico Aqueduct and Sewer Authority* v. *Metcalf & Eddy, Inc.*, *supra*, at slip op., 4–6; *Cory*, *supra*, at 90–91; *Alabama* v. *Pugh*, 438 U. S. 781, 782 (1978).

The Court *is* entirely right, however, to suggest that the Eleventh Amendment confers immunity over entities whose liabilities are funded by state taxpayer dollars. If a State were vulnerable at any time to retroactive damage awards in federal court, its ability to set its own agenda, to control its own internal machinery, and to plan for the future—all essential perquisites of sovereignty—would be grievously impaired. I have no quarrel at all with the many cases cited by the Court for the proposition that *if* an

entity's bills will be footed by the State, the Eleventh Amendment clearly precludes the exercise of federal jurisdiction. See, *e.g.*, *Hutsell* v. *Sayre*, 5 F. 3d 996, 999 (CA6 1993) (liability of university tantamount to claim against state treasury); *In re San Juan Dupont Plaza Hotel Fire Litigation*, 888 F. 2d 940, 943–944 (CA1 1989) (70–75% of funds provided by taxpayer dollars).

But the converse cannot also be true. The Eleventh Amendment does not turn a blind eye simply because the state treasury is *not* directly implicated. In my view, the proper question is whether the State possesses sufficient *control* over an entity performing governmental functions that the entity may properly be called an extension of the State itself. Such control can exist even where the State assumes no liability for the entity's debts. We have always respected state flexibility in setting up and maintaining agencies charged with furthering state objectives. See, *e.g.*, *Highland Farms Dairy, Inc.* v. *Agnew*, 300 U. S. 608, 612 (1937) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself"). An emphasis on control, rather than impact on the state treasury, adequately protects state managerial prerogatives while retaining a crucial check against abuse. So long as a State's citizens may, if sufficiently aggravated, vote out an errant government, Eleventh Amendment immunity remains a highly beneficial provision of breathing space and vindication of state sovereignty.

An arm of the State, to my mind, is an entity that undertakes state functions and is politically accountable to the State, and by extension, to the electorate. The critical inquiry, then, should be whether and to what extent the elected state government exercises oversight over the entity. If the lines of oversight are clear and substantial—for example, if the State appoints and removes an

entity's governing personnel and retains veto or approval power over an entity's undertakings—then the entity should be deemed an arm of the State for Eleventh Amendment purposes. This test is sufficiently elastic to encompass the Court's treasury factor. It will be a rare case indeed where the state treasury foots the bill for an entity's wrongs but fails to exercise a healthy degree of oversight over that entity. But the control test goes further than the Court's single factor in assuring state governments the critical flexibility in internal governance that is essential to sovereign authority. See Note, 92 Colum. L. Rev., at 1246–1252 (describing structural innovations among state governments).

The Court dismisses consideration of control altogether, *ante*, at 16–17, noting that States wield ultimate power over cities and counties, units that have never been accorded Eleventh Amendment immunity. See *Lincoln County* v. *Luning*, 133 U. S. 529, 530 (1890). This criticism, based on a supposed line-drawing problem, is off the mark. That "political subdivisions exist solely at the whim and behest of their State," *Port Authority Trans-Hudson Corp.* v. *Feeney*, 495 U. S., at 313 (Brennan, J., concurring), does not mean that state governments actually exercise sufficient oversight to trigger Eleventh Amendment immunity under a control-centered formulation. The inquiry should turn on real, immediate control and oversight, rather than on the potentiality of a State taking action to seize the reins. Virtually every enterprise, municipal or private, flourishes in some sense at the behest of the State. But we have never found the Eleventh Amendment's protections to hinge on this sort of abstraction. The control- centered formulation necessarily looks to the structure and function of state law. If the State delegates control and oversight of an entity to municipalities under state law, the requisite state-level control is lacking, and the Eleventh Amendment

does not shield the entity from suit in federal court.

Turning to the instant case, I believe that sufficient indicia of control exist to support a finding of immunity for the Port Authority, and hence, for the PATH. New Jersey and New York each select and may remove 6 of the Port Authority's 12 commissioners. See N. J. Stat. Ann. §32:1–5 (West 1990); N. Y. Unconsol. Law §6405 (McKinney 1979). The Governors of each State may veto the actions of that State's commissioners. See N. J. Stat. Ann. §32:1–17 (West 1990); N. Y. Unconsol. Law §6417 (McKinney 1979). The quorum requirements specify that "no action of the port authority shall be binding unless taken at a meeting at which at least three of the members from each state are present, and unless a majority of the members from each state present at such meeting but in any event at least three of the members from each state, shall vote in favor thereof." N. J. Stat. Ann. §32:1–17 (West 1990); N. Y. Unconsol. Law §6417 (McKinney 1979). Accordingly, each Governor's veto power is tantamount to a full veto power over the actions of the Commission. The Port Authority must make annual reports to the state legislatures, which in turn must approve changes in the Port Authority's rules and any new projects. See N. J. Stat. Ann. §32:1–8 (West 1990); N. Y. Unconsol. Law §6408 (McKinney 1979). Each State, and by extension, each State's electorate, exercises ample authority over the Port Authority. Without setting forth a shopping list of considerations that govern the control inquiry, suffice it to say that in this case, the whole is exactly the sum of its parts. I would hold that the Eleventh Amendment shields the PATH and Port Authority from suits in federal court. I respectfully dissent.