

In the Supreme Court of the United States

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BI-STATE DEVELOPMENT AGENCY OF THE
MISSOURI-ILLINOIS METROPOLITAN
DISTRICT, Doing Business as METRO,
Petitioner,

—v—

UNITED STATES EX REL. ERIC FIELDS,
Respondent.

On Petition for Writ of Certiorari to the United
States Court of Appeals for the Eighth Circuit

REPLY BRIEF OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT

The Petitioner, the Bi-State Development Agency of the Missouri-Illinois Metropolitan District, doing business as Metro, is a public entity, and therefore has no corporate parents or shareholders.

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REPLY BRIEF OF PETITIONER

In his Brief in Opposition, Fields suggests that there is no compelling reason to grant Bi-State's petition for certiorari, contending that there is no conflict of law between *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994), and *Fed Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002), and that the Eighth Circuit properly analyzed the facts and applied the law. Bi-State contends that *Hess's* emphasis on the potential fiscal impact cannot stand against the backdrop established by this Court in *S.C. State Ports Auth.* that the preeminent purpose of the Eleventh Amendment is to accord the States their proper dignity interest as a sovereign. Moreover, Missouri's State Legal Expense Fund statute is clear. Contrary to the Eighth Circuit's conclusion, Bi-State, as an interstate compact entity, is entitled to receive SLEF funds, which means that it would indeed have the requisite fiscal impact on the state treasury even if *Hess* is correct. Finally, *Hess* is factually distinct.

I. THIS PETITION IS AN IDEAL VEHICLE TO CONCLUSIVELY RESOLVE THE QUESTION OF WHETHER THE ELEVENTH AMENDMENT'S PREEMINENT PURPOSE IS TO ACCORD THE STATES THE DIGNITY DUE THEM AS JOINT SOVEREIGNS OR WHETHER THE UNDERLYING PURPOSE BEHIND THE ENACTMENT OF THE ELEVENTH AMENDMENT WAS FISCALLY MOTIVATED

As far back as *In re Ayers*, this Court has held that the preeminent purpose of state sovereign

immunity is to accord the States their proper dignity interest as a sovereign. As this Court explained:

The very object and purpose of the eleventh amendment were to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties. It was thought to be neither becoming nor convenient that the several states of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer to complaints of private persons, whether citizens of other states or aliens, or that the course of their public policy and the administration of their public affairs should be subject to and controlled by the mandate of judicial tribunals, without their consent, and in favor of individual interests.

In re Ayers, 123 U.S. 443, 505 (1887). Placing undue weight on the potential impact an entity may have on the state treasury runs afoul of this long-standing principle. This Court's opinion in *S.C. State Ports Auth.* makes this clear. As this Court explained: "While state sovereign immunity serves the important function of shielding state treasuries and thus preserving 'the States' ability to govern with the will of their citizens,' . . . the doctrine's central purpose is to 'accord the States the respect owed to them as' joint sovereigns." *S.C. State Ports Auth.*, 535 U.S. at 765 (internal citations omitted) (emphasis supplied). Moreover, as the D.C. Circuit recognized recently in *Puerto Rico Ports Auth. v. Fed. Mar. Comm'n*, 531

F.3d 868, 873 (D.C. Cir. 2008), focusing predominantly on an entity's financial impact on the state treasury and whether the state must pay judgment against the entity misreads *Hess*. As the D.C. Circuit explained:

Hess does not require a focus solely on the financial impact of the entity on the State. Rather, *Hess* “pays considerable deference to the dignity of the state, focusing on both explicit and implicit indications that the state sought to cloak an entity in its Eleventh Amendment immunity.”

Id. at 874.

While the fiscal aspect of the inquiry may indeed be an important factor, it cannot trump the dignity aspect when determining whether an entity is entitled to Eleventh Amendment immunity in light of *In re Ayers* and its progeny.

II. MISSOURI'S STATE LEGAL EXPENSE FUND APPLIES TO BI-STATE

In a related vein, Respondent suggests that the Eighth Circuit considered and resolved the question of whether Bi-State was entitled to SLEF funding, concluding that Bi-State had not cited any authority for its contention that it was so entitled. But, Missouri's statute is clear. Namely, the statute expressly provides that SLEF funds shall be available “for the payment of any claim or any amount required by any final judgment rendered by a court of competent jurisdiction against . . . any agency of the state, pursuant to section 536.050 or 536.087 or 537.600.” (App.85a) Section 537.600 defines a “public entity” to include “any multi-state compact agency created by a compact formed

between this state [Missouri] and any other state which has been approved by the Congress of the United States.” (App.99a) Bi-State is such an entity. (App.75a-84a, 99a-107a)

III. *HESS* IS FACTUALLY DISTINCT

Second, the purported fiscal underpinnings in *Hess* stem from the fact that the Port Authority, unlike Bi-State, was financially independent from the States of New York and New Jersey. *Hess*, 513 U.S. at 45. As the Court noted, the Port Authority was “[c]onceived as a fiscally independent entity financed predominantly by private funds” that “generate[d] its own revenues, and for decades [had] received no money from the States.” *Id.* As the Court itself explained, “The Port Authority’s anticipated and actual financial independence—its long history of paying its own way—contrasts with the situation of transit facilities that place heavy fiscal tolls on their founding States.” *Id.* at 49.

Quite simply, the same cannot be said of entities, like Bi-State, which are fiscally reliant upon the compacting states. Notably, in *Alaska Cargo Transport, Inc. v. Alaska R. Corp.*, 5 F.3d 378 (9th Cir. 1993), Eleventh Amendment immunity was accorded a thinly capitalized railroad that depended for its existence on a state-provided “financial safety net of broad dimension.” *Id.* at 381. So, too, in *Morris v. Washington Metropolitan Area Transit Auth.*, 781 F.2d 218 (D.C. Cir. 1986), Eleventh Amendment immunity was accorded an interstate transit system whose revenue shortfall Congress and the cooperating states anticipated from the beginning—an enterprise which was constantly dependent upon funds from participating governments

to meet its sizable operating deficit. *Id.* at 225-27. As the *Morris* court concluded: “[W]here an agency is so structured that, as a practical matter, if the agency is to survive a judgment, it must expend itself against state treasuries, common sense and the rationale of the eleventh amendment to require that sovereign immunity attach to the agency.” *Id.* at 227. *See also, Hess*, 513 U.S. at 50.

Moreover, while the indicators of immunity pointed in different directions in *Hess*, with three factors pointing toward Eleventh Amendment immunity, two away from Eleventh Amendment immunity, and one neutral, *Hess*, 513 U.S. at 45, the same cannot be said here where two factors (control) point in favor of finding that Bi-State is immune and two factors (fiscal) arguably point against, with the remaining two factors being neutral. As indicated above, contrary to the Eighth Circuit’s pronouncement, Missouri’s SLEF statute is clear and expressly provides that Bi-State, as an interstate compact entity, qualifies to receive SLEF funds.

IV. BI-STATE HAS NOT MISSTATED THE LAW OR THE FACTS

Fields contends that Bi-State misstated the law by contending that *Hess* was superseded by this Court’s decision in *S.C. State Ports Auth.* *See* Opp.11. While Bi-State’s petition presents this very question in light of this Court’s clear pronouncements that the central purpose of the Eleventh Amendment is to accord the States their proper dignity consistent with their status as sovereign entities, it is not, as Fields contends, a misstatement of the law. Rather, it is a question that this Court should resolve as highlighted

by Fields's reliance on a Second Circuit case which conflicts with other courts on the importance of *S.C. State Ports Auth.* on the issue of state sovereign immunity.

Fields's sole support for his assertion that Bi-State has misstated the law is his reliance on the Second Circuit's opinion in *Woods v. Rondout Valley Central School Dist. Bd. of Educ.*, 466 F.3d 232 (2d Cir. 2006), a case that did not involve an interstate compact entity. In *Woods*, the Board of Education argued that this Court's decision in *S.C. State Ports Auth.* required the Second Circuit to abandon the arm-of-the-state test, which the Second Circuit rejected. Unlike the Board of Education in *Rondout*, Bi-State has not argued that *S.C. State Ports Auth.* requires a different test be applied in determining whether an interstate compact entity is an arm of its compacting state. Rather, Bi-State urges only that while the fiscal aspect of the arm-of-the-state inquiry may indeed be an important factor, it cannot trump the dignity aspect when determining whether an entity is entitled to Eleventh Amendment immunity in light of *In re Ayers* and its progeny, including *S.C. State Ports Auth.*

In fact, a number of courts that have considered the impact of *S.C. State Ports Auth.*, have reached the conclusion that this Court's pronouncement demonstrates that the dignity interest is the primary consideration. For example, in determining whether a regional transportation authority was an arm of the state of Pennsylvania entitled to Eleventh Amendment immunity, the Supreme Court of Pennsylvania explained that *S.C. State Ports Auth.* was a "clear affirm-

ation by the high Court that preservation of the inherent dignity of the state is now, as a general matter, the paramount consideration in any matter involving the determination of the scope of protection afforded by the Eleventh Amendment, whenever the *Lake Country* factors do not uniformly support a conclusion regarding an entity's status." *Goldman v. Se. Pennsylvania Transp. Auth.*, 618 Pa. 501, 540-41, 57 A.3d 1154, 1178 (Pa. 2012).

Similarly, the Sixth Circuit noted that in *S.C. State Ports Auth.*, this Court renewed the emphasis on the dignity aspect in Eleventh Amendment immunity considerations. *S.J. v. Hamilton Cty., Ohio*, 374 F.3d 416, 421 (6th Cir. 2004). As the Sixth Circuit explained: "Examining the contours of related sovereign immunity doctrines reinforces the impression that values beyond guarding the public fisc play a role in the arm-of-the-state inquiry." *Id.* So, too, the Fourth Circuit noted that this Court's decision in *S.C. State Ports Auth.* suggested that while protection of the fisc remains an important factor, "it does not deserve dispositive preeminence." *U.S. ex rel. Oberg v. Pennsylvania Higher Educ. Assistance Agency*, 745 F.3d 131, 137 (4th Cir. 2014). *See also, Holder v. Gualtieri*, 2016 WL 1721405, at *10 (M.D. Fla. Apr. 29, 2016) citing *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 769 (2002); *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 267 (2011) ("[M]ore recent Supreme Court cases instruct that 'the primary function of sovereign immunity is not to protect state treasuries, . . . but to afford the States the dignity and respect due sovereign entities.'"); *Cane v. Nevada State Bd. of Accountancy*, 2016 WL 593563, at *2 (D. Nev. Feb. 12, 2016) ("The Supreme Court held long

ago that even as to injunctive relief only state officials may be sued, not a state itself, which shows that an impact on a state's treasury is not the *sine qua non* of sovereign immunity. The Supreme Court has been emphatic in recent years that sovereign immunity is essentially a matter of dignity, not financial security.”) (internal citations omitted); *Grady v. Spartanburg Sch. Dist. Seven*, 2014 WL 1159406, at *15, n.2 (D.S.C. Mar. 21, 2014) (noting that before *S.C. State Ports Auth.*, “the ‘state treasury’ factor was viewed as the most important, if not determinative factor”).

Likewise, Bi-State has not misstated the facts. First, as explained above, Bi-State is an agency of the state by statute for purposes of the SLEF. Second, while Bi-State receives only modest funding directly from the states, it receives substantial funding indirectly through appropriations authorized specifically by state statutes providing for a transportation tax to be used for mass transit, which are required to be deposited with the state treasurer in a special trust fund. *See*, Mo. Rev. Stat. §§ 94.600-655; Mo. Rev. Stat. § 94.660; 70 Ill. Comp. Stat. 3610/1 *et seq.*



CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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