

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 NORTHERN INSURANCE COMPANY :

4 OF NEW YORK, :

5 Petitioner :

6 v. : No. 04-1618

7 CHATHAM COUNTY, GEORGIA. :

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9 Washington, D.C.

10 Wednesday, March 1, 2006

11 The above-entitled matter came on for oral  
12 argument before the Supreme Court of the United States  
13 at 11:07 a.m.

14 APPEARANCES:

15 MIGUEL A. ESTRADA, ESQ., Washington, D.C.; on behalf of  
16 the Petitioner.

17 DAN HIMMELFARB, ESQ., Assistant to the Solicitor  
18 General, Department of Justice, Washington, D.C.; on  
19 behalf of the United States, as amicus curiae,  
20 supporting the Petitioner.

21 R. JONATHAN HART, ESQ., Chatham County Attorney,  
22 Savannah, Georgia; on behalf of the Respondent.

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23  
24  
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C O N T E N T S

	PAGE
ORAL ARGUMENT OF	
MIGUEL A. ESTRADA, ESQ.	
On behalf of the Petitioner	3
DAN HIMMELFARB, ESQ.	
On behalf of the United States,	
as amicus curiae, supporting the Petitioner	13
R. JONATHAN HART, ESQ.	
On behalf of the Respondent	21
REBUTTAL ARGUMENT OF	
MIGUEL A. ESTRADA, ESQ.	
On behalf of the Petitioner	40

1 P R O C E E D I N G S

2 (11:07 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 next in 04-1618, Northern Insurance Company of New  
5 York v. Chatham County, Georgia.

6 Mr. Estrada.

7 ORAL ARGUMENT OF MIGUEL A. ESTRADA

8 ON BEHALF OF THE PETITIONER

9 MR. ESTRADA: Thank you, Mr. Chief Justice,  
10 and may it please the Court:

11 In this admiralty case, the Eleventh Circuit  
12 held that Chatham County, a political subdivision of  
13 the State of Georgia, is entitled to sovereign immunity  
14 in Federal court. That is wrong for at least two  
15 reasons. First, for well over a century, this Court  
16 consistently has held that counties and other political  
17 subdivisions are not entitled to sovereign immunity.  
18 And second, in the specific context of in personam  
19 admiralty cases, the same rule has been recognized for  
20 over 100 years.

21 To go to my first point, in Lincoln County v.  
22 Luning, decided in 1890, this Court squarely held that  
23 counties and other political subdivisions are not  
24 entitled to sovereign immunity. There are three, or at  
25 least three, significant aspects of Lincoln County that

1 bear emphasis.

2           The first one is that even by 1890, the Court  
3 was able to say that in its own cases it could see  
4 decades of case law where counties had been a defendant  
5 without any objection being raised.

6           The second was that an important aspect of  
7 the Court's reasoning was the recognition that when a  
8 county is sued, the State is not a real party in  
9 interest, not the real party in interest, which is  
10 another way of saying that the county is not an arm of  
11 the State, the issue before here today.

12           JUSTICE GINSBURG: Can a county be an arm of  
13 the State for some things?

14           MR. ESTRADA: I am not aware of any county  
15 that has been organized so as to meet the requirements  
16 that this Court set forth in Hess and other cases for  
17 an arm of the State. This is, of course, not a  
18 question of labeling. It is possible that the -- that  
19 a -- that a particular State would associate so closely  
20 with a county, so closely control its -- its acts, and  
21 be on the hook for its liabilities, that under this  
22 Court's cases it could be an arm of the State, but that  
23 is not the case here. In fact --

24           CHIEF JUSTICE ROBERTS: I assume it's -- I  
25 assume it's sort of a -- a case-by-case inquiry. In

1 other words, the county could be an arm of the State  
2 for some purposes but not others.

3 MR. ESTRADA: That is -- that is a  
4 possibility, Mr. Chief Justice. I'm not aware that this  
5 county would meet that inquiry with respect to what we  
6 have here.

7 What we have in this case is essentially two  
8 propositions. One is that the county, like every other  
9 county in the country, exercises a slice of State  
10 power, and that was something that was found  
11 unremarkable by this Court in Lake Country Estates.  
12 And the second one is that this county, like many other  
13 organs of government, may get funding, even substantial  
14 funding, from the State, and again, that was found  
15 unremarkable in Mt. Healthy by this Court.

16 What is controlling here is that the county,  
17 like most counties or maybe all counties, enjoys a  
18 significant amount of autonomy, has the power under the  
19 State law to raise its own revenues through taxes and  
20 bonds, and that the State is ultimately not liable for  
21 its debts. And under -- under those factors, the  
22 county is unable to meet any definition of arm of the  
23 State that has ever been articulated by this Court's  
24 cases.

25 JUSTICE KENNEDY: Is -- is the failure to

1 extend immunity to counties and municipal entities in a  
2 State just a historical relic? It depends on  
3 semantics. Or is there some normative or good  
4 government policy that dictates the distinction?

5 MR. ESTRADA: Well, I think as a -- as a  
6 fundamental feature of the Federal system and -- and  
7 the plan of the Convention, that the States came  
8 together as sovereigns to form a new country, and under  
9 this Court's cases, the immunity that they retain is  
10 called residual because it is recognized that insofar  
11 as they did not relinquish it to the National  
12 Government, they kept it. There is no historical  
13 record of the founding that contemplates that counties  
14 came to the Convention as sovereigns.

15 CHIEF JUSTICE ROBERTS: It's just a -- it's  
16 just a close textual reading of the Eleventh Amendment.  
17 Right?

18 MR. ESTRADA: Well --

19 CHIEF JUSTICE ROBERTS: It says a State. It  
20 doesn't say county.

21 MR. ESTRADA: That might be the end of the  
22 case, in fairness, Mr. Chief Justice, if the Eleventh  
23 Amendment were the source of the sovereign immunity  
24 that this Court has recognized, but we know from cases  
25 like *Alden v. Maine* that the Eleventh Amendment is

1 merely an example of the structural immunity that is  
2 implicit in the structure of the Constitution.

3 JUSTICE KENNEDY: So it's -- it's a matter of  
4 respecting the dignity of the States because they  
5 participated in the Convention, the plan of Convention?

6 MR. ESTRADA: And because they came to the  
7 Convention as sovereigns. Let me say that --

8 JUSTICE SCALIA: Well -- I -- I guess, in --  
9 in going beyond the Eleventh Amendment, we were  
10 appealing to an understanding of sovereignty that  
11 existed at the time of the framing.

12 MR. ESTRADA: Exactly right.

13 JUSTICE SCALIA: And at the time of the  
14 framing, counties in England did not enjoy the -- the  
15 sovereign immunity of the king, did they?

16 MR. ESTRADA: I do not believe that counties  
17 anywhere at the time of the founding enjoyed the  
18 sovereign immunity that was -- that has been recognized  
19 by this Court's cases.

20 And you're right, Justice Scalia, that this  
21 has been reflected in -- in the Federalist Papers, 81,  
22 by Hamilton. It was clear, at least to some of the  
23 Founders, that this was a feature that need not be  
24 stated in the Constitution in order to be recognized.

25 JUSTICE KENNEDY: So it's a historical relic

1 based on the dignity of the State, or the king in one  
2 case, and of corresponding lack of dignity of the  
3 entities on the other?

4 MR. ESTRADA: Well, it is -- it is what the  
5 history was and what the plan of the Convention was,  
6 and it's also a recognition, even functionally, that  
7 we're talking about sovereign immunity. And I think  
8 most common sense understandings of what a sovereign is  
9 would imply at least the ability to prescribe law for  
10 the government of others without having to draw your  
11 authority for that from a higher source and without  
12 being accountable to a higher source. A State within  
13 the respective sphere would meet that requirement, but  
14 that would not be true of counties.

15 I will point out, as my third point with  
16 respect to the Lincoln County case, is that the -- the  
17 case came down March 3rd, 1890, which was the same day  
18 that the Court handed down Hans v. Louisiana. And that  
19 is significant because, as the Court is aware, the  
20 holding of Hans has been the subject of significant  
21 disagreement over the years since by members of past  
22 and current courts, and many members of the courts have  
23 viewed Hans as an unwarranted extension of sovereign  
24 immunity.

25 If the Court was not prepared to extend

1 immunity to counties on the day that it ruled on Hans,  
2 it seems hard to see why it would do it now. And in  
3 fact, the history of this Court's cases since then  
4 reflects an almost inflexible understanding, again and  
5 again, that counties and political subdivisions are not  
6 entitled to the State's immunity.

7 With respect to my second point --

8 JUSTICE KENNEDY: Would you -- would you say  
9 thoughtful rather than inflexible?

10 (Laughter.)

11 MR. ESTRADA: I will settle for thoughtful,  
12 but I'm hoping for inflexible.

13 (Laughter.)

14 MR. ESTRADA: With respect to my second  
15 point, Mr. Chief Justice, *Workman v. City of New York*  
16 squarely dealt with the question whether a political  
17 subdivision, a -- a municipality made up of four  
18 counties in that case, was entitled to immunity in an  
19 admiralty suit in personam, and the Court concluded  
20 that the answer was no.

21 Now, the only argument I have heard for why  
22 *Workman* is not controlling in this case has been that  
23 somehow in *Ex parte New York No. 1*, this Court cast  
24 doubt on that holding. But if you look at the portion  
25 that is being relied on, all that the Court said in *Ex*

1 parte New York was it cited one of the distinctions  
2 between the New York case and Workman, when it could  
3 have cited two. That's not enough to override what the  
4 case actually says.

5 And one of the reasons that I started with  
6 the Luning County is that even if there were any doubt  
7 on the question or even if Ex parte New York had cast  
8 enough doubt under Workman, despite the uniform  
9 understanding since Workman that that's what the rule  
10 is, the fact that this Court in every other context of  
11 sovereign immunity has consistently held that counties  
12 are not entitled to sovereign immunity ought to be  
13 dispositive of the question there as well.

14 JUSTICE SCALIA: Do you -- do you agree that  
15 -- that it's possible that an entity can have sovereign  
16 immunity in admiralty where -- where the same entity  
17 would -- would not have it elsewhere?

18 MR. ESTRADA: No --

19 JUSTICE SCALIA: I find that discussion quite  
20 perplexing.

21 MR. ESTRADA: I do not believe that is  
22 possible, and with respect to the argument to that  
23 effect that is being advanced by Respondent, a close  
24 reading of the cases being cited will disclose that  
25 they're not, in fact, unique to admiralty. They are

1 common law cases about what the -- what the power --

2 JUSTICE SCALIA: They're talking about  
3 immunity in most of the cases, not necessarily --

4 MR. ESTRADA: Sovereign immunity.

5 JUSTICE SCALIA: -- not necessarily sovereign  
6 immunity.

7 MR. ESTRADA: That's right.

8 And -- and another important distinction,  
9 Justice Scalia, is that even if one could unearth a --  
10 a body of case law that recognized municipal immunity  
11 at the time of the founding, it would not become  
12 sovereign immunity, and that's the only issue that is  
13 -- that is in contention here.

14 JUSTICE STEVENS: But -- but there is a  
15 textual basis for drawing a distinction between  
16 admiralty and law and equity. The Eleventh Amendment  
17 doesn't extend to -- to admiralty.

18 MR. ESTRADA: That is right, Justice Stevens.  
19 And if this Court had held that the Eleventh Amendment  
20 were the source or even the sole source of sovereign  
21 immunity, that would be a compelling argument. The  
22 main holding of the Ex parte New York No. 1 case is,  
23 indeed, that that limitation does not apply because, as  
24 understood by Hans, which had been ruled on some 31  
25 years earlier, the sovereign immunity really comes from

1 the structure of the Constitution.

2 And the state of this -- this Court's  
3 doctrine is that the Eleventh Amendment's sole purpose  
4 was to overrule the holding in Chisholm, and that but  
5 for the fact that Chisholm came down, the Eleventh  
6 Amendment never -- if the Eleventh -- if the Eleventh  
7 Amendment had never been enacted, every sovereign  
8 immunity case would come out the same way. That is the  
9 current understanding by the Court about how the  
10 doctrine works.

11 JUSTICE STEVENS: Alden tells us what the  
12 understanding of the Founders was. Of course, it's the  
13 understanding of some of the Founders. It did not  
14 include those who were in the majority in Chisholm.

15 MR. ESTRADA: That is -- that is true, though  
16 with respect to Chisholm and the issue in this case,  
17 Justice -- Justice Stevens, it is very instructive that  
18 both sides of the argument in the Chisholm case  
19 understood that the issue was whether States may get  
20 sovereign immunity. Both sides conceded that political  
21 subdivisions didn't.

22 Chief Justice Jay for the majority argued  
23 that it made no sense to extend sovereign immunity when  
24 a -- where -- where a city like the size of  
25 Philadelphia was the same size and had as many

1 inhabitants as the State of Delaware, and that's what he  
2 argued.

3           And Justice Iredell, whose views have come to  
4 command a majority of the Court, saw it to his argument  
5 to distinguish political subdivisions from States, so  
6 that even though this Court's first holding was not  
7 until 1890, it was embedded in the understanding at the  
8 founding, as -- as shown even by Chisholm, that  
9 political subdivisions were not entitled to sovereign  
10 immunity.

11           I would like to reserve the remainder of my  
12 time, if I may, Mr. Chief Justice.

13           CHIEF JUSTICE ROBERTS: Thank you, counsel.

14           Mr. Himmelfarb.

15           ORAL ARGUMENT OF DAN HIMMELFARB

16           ON BEHALF OF THE UNITED STATES,

17           AS AMICUS CURIAE, SUPPORTING THE PETITIONER

18           MR. HIMMELFARB: Mr. Chief Justice, and may  
19 it please the Court:

20           States enjoy a constitutionally protected  
21 immunity from suit, but cities and counties do not.  
22 That principle has been established by an unbroken line  
23 of precedent dating back to the 19th century and was  
24 applied to an admiralty suit more than 100 years ago in  
25 Workman v. City of New York.

1           Both Workman and the principle it applied  
2 answered the question presented in this case. Workman  
3 held that, as a matter of the Federal law of admiralty,  
4 a political subdivision is not entitled to immunity  
5 from suit. In the course of deciding that question,  
6 the Court explained that if the government entity  
7 defendant in an admiralty suit were a sovereign, it  
8 would be entitled to immunity, not as a matter of  
9 admiralty law, but as a matter of the law of sovereign  
10 immunity, in which case the Court would be without  
11 jurisdiction.

12           The Court went on to say, however -- and this  
13 is at page 570 of the opinion -- the municipal  
14 corporation of the City of New York unlike a sovereign  
15 was subject to the jurisdiction of the Court.  
16 Workman's holdings resolved the issue in the case.

17           But the result would be the same even if  
18 Workman had never been decided. From the Lincoln  
19 County case in 1890 through the Richland County case in  
20 2003, this Court has repeatedly held that States, but  
21 not cities or counties, are sovereign and that States,  
22 but not cities or counties, are therefore entitled to  
23 sovereign immunity. A city or county is no more a  
24 sovereign in an admiralty case than it is in any other  
25 type of case.

1           The theory on which the court of appeals  
2           apparently relied was that not only States but what it  
3           called political subdivisions of States are entitled to  
4           sovereign immunity, at least when the -- the political  
5           subdivision is exercising a power delegated by the  
6           State.

7           But that's no different from saying that  
8           cities and counties are, after all, entitled to  
9           sovereign immunity because every city or county is a  
10          political subdivision of a State and every city or  
11          county exercises power delegated by the State, what  
12          this Court has called a slice of State power. So the  
13          apparent rationale of the court of appeals is just  
14          flatly inconsistent with more than a century of this  
15          Court's precedent.

16                 CHIEF JUSTICE ROBERTS: You don't doubt that  
17          a county could have sovereign immunity if it qualified  
18          as an arm of the State in a particular instance.

19                 MR. HIMMELFARB: That's absolutely correct,  
20          Mr. Chief Justice. Of course, as this case comes to  
21          the Court, all agree that Chatham County is not an arm  
22          of the State for purposes of this Court's  
23          constitutional sovereign immunity doctrine. So the  
24          only issue in this case is whether there is some other  
25          ground on which the county would be entitled to

1 immunity, and there's none.

2 Respondent's theory is that there are two  
3 distinct notions of sovereign immunity, what it calls  
4 Eleventh Amendment immunity and what it calls residual  
5 sovereign immunity. A fundamental flaw in that theory  
6 is that there is only one doctrine of -- of  
7 constitutional sovereign immunity. What Respondent  
8 calls residual sovereign immunity and what this Court  
9 has sometimes identified as the immunity associated  
10 with the residuary sovereignty that comes from  
11 Federalist 39 is the doctrine of constitutional  
12 sovereign immunity.

13 JUSTICE SCALIA: Hans -- Hans is residual  
14 sovereign immunity.

15 MR. HIMMELFARB: That's absolutely right,  
16 Justice Scalia, and every case that --

17 JUSTICE SCALIA: Some -- some of our brethren  
18 don't -- don't agree with it. They don't like the  
19 residue and would limit it to the Eleventh Amendment.

20 MR. HIMMELFARB: Well --

21 JUSTICE SCALIA: If you're going to have a  
22 residue, Hans is it I suppose.

23 MR. HIMMELFARB: That's true, Justice Scalia.

24 The -- the theory of residual immunity is  
25 that before the Constitution was established, States

1 were sovereign. When they entered the Union, they  
2 surrendered some aspects of their sovereignty and  
3 retained other aspects of it. One aspect that they  
4 retained was an immunity from suit. A city or county  
5 is not entitled to sovereign immunity because it wasn't  
6 a sovereign at the time of the founding and thus had no  
7 immunity -- no sovereignty either to surrender or to  
8 retain. From that --

9 CHIEF JUSTICE ROBERTS: Your -- your friend  
10 in the -- in the red brief, though, reviews a lot of  
11 old cases, suggesting at the time of the founding, that  
12 counties were not subject to suit.

13 MR. HIMMELFARB: Well, I don't think the  
14 cases that Respondent cites do, in fact, stand for that  
15 proposition. In fact, the principal authority on  
16 which Respondent relies, the Men of Devon case, which  
17 is an English case, so far as I can tell, was neither  
18 an admiralty case nor a case that accorded immunity to  
19 the county. The case, as far as I can tell, was a  
20 straightforward negligence case, and the holding of the  
21 case was that inhabitants of the county, as distinct  
22 from the corporate entity, the county itself, cannot be  
23 held liable in a negligence suit. So I don't think  
24 that that case provides any support for Respondent's  
25 theory.

1           JUSTICE SCALIA:  Nor could charities.  They  
2  were immune as well.  But it -- it certainly wasn't  
3  sovereign immunity.

4           MR. HIMMELFARB:  That's absolutely right,  
5  Justice Scalia.  At the time of the founding, various  
6  entities, including sub-State governmental entities,  
7  were entitled to some forms of immunity.  This Court  
8  traces the history of municipal immunity at some length  
9  in the Owen v. City of Independence case.  But as -- as  
10 you just pointed out, Justice Scalia, whatever immunity  
11 that was, it was not sovereign immunity, and there's no  
12 basis for constitutionalizing it in the context of this  
13 Court's constitutional sovereign immunity doctrine any  
14 more than there's a basis for constitutionalizing the  
15 immunity that a private entity or an even an individual  
16 might have enjoyed at the time of the founding.

17           JUSTICE STEVENS:  May I ask you this?  
18 Supposing a State passed a statute that said that the  
19 following counties shall hereby be designated arms of  
20 the State and be entitled to immunity, period.  Would  
21 that provide an adequate defense, do you think?

22           MR. HIMMELFARB:  That in and of itself,  
23 Justice Stevens, would not.  This Court's cases make  
24 clear that in deciding whether an entity is an arm of  
25 the State, there are three principal considerations to

1 take into account. You've identified one of them,  
2 which is the classification of the entity under State  
3 law. The other two, which are probably more important,  
4 are whether the State would ultimately be liable for a  
5 judgment against the political entity and also the  
6 extent of control exercised by the State over the  
7 entity.

8           It's important to point out, with respect to  
9 the latter of those two considerations, that control in  
10 this context doesn't mean simply that the county has  
11 been delegated authority by the States since, after  
12 all, all counties are -- are delegated authority by the  
13 State. It means that there's more of a day-to-day  
14 control, for example, that it is the Governor who  
15 appoints the members of the commission that governs the  
16 particular entity, the Governor who has the power to  
17 remove them. The Governor may have veto power. That's  
18 the sort of considerations that courts have taken into  
19 account in deciding whether the control element of the  
20 arm of the State inquiry is satisfied.

21           There is no basis for any notion of  
22 constitutional sovereign immunity beyond the one  
23 identified by this Court. Consequently, there's no  
24 basis for any arm of the State test other than that  
25 applied by the Court in its cases involving the one

1 doctrine of constitutional sovereign immunity.

2           The only other possibility that would entitle  
3 Respondent to prevail in this case would be some notion  
4 of non-constitutional immunity unique to admiralty.  
5 But, of course, whatever else Workman held -- and  
6 Respondent takes the position that Workman did not  
7 decide the constitutional issue. We think it did, for  
8 the reasons I've already stated. But whatever else it  
9 held, it clearly held that, as a matter of the Federal  
10 law of admiralty, political subdivisions are not  
11 entitled to immunity from suit. So the Court could not  
12 adopt a non-constitutional rule of immunity limited to  
13 the admiralty context without overruling Workman.  
14 Respondent does not ask the Court to do that. And  
15 indeed, so far as I can tell from reading Respondent's  
16 brief, it does not even advocate a non-constitutional  
17 rule of immunity for admiralty cases.

18           So there's no non-constitutional basis for  
19 immunity. The only constitutional basis for immunity  
20 is when the political entity is an arm of the State.  
21 As this case comes to the Court, all agree that Chatham  
22 County is not. It necessarily follows, therefore, that  
23 Chatham County was not entitled to immunity and that  
24 the judgment of the court of appeals should be  
25 reversed.

1 JUSTICE SCALIA: The question presented is --  
2 is only sovereign immunity, isn't it? It's -- we don't  
3 have to decide whether there might be some other type  
4 of immunity.

5 MR. HIMMELFARB: That's right. That's right,  
6 Justice Scalia. To the extent that sovereign immunity  
7 is understood to mean constitutional immunity, as  
8 distinct from some judge-made or statutory immunity,  
9 that's right.

10 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
11 Himmelfarb.

12 Mr. Hart.

13 ORAL ARGUMENT OF R. JONATHAN HART

14 ON BEHALF OF THE RESPONDENT

15 MR. HART: Mr. Chief Justice, may it please  
16 the Court:

17 The county that has been expressly delegated  
18 the core sovereign function by the State, unique or  
19 sovereign function, such as navigable waters, is  
20 entitled to residual sovereign immunity in an in  
21 personam admiralty action.

22 Justice Ginsburg just asked a question about  
23 counties in cases. I know of no case where a State has  
24 delegated a core sovereign function, cloaked the entity  
25 with immunity, in which this Court has ruled it's not the

1 arm of the State.

2 JUSTICE GINSBURG: Who pays judgments? Who  
3 pays judgments against the county?

4 MR. HART: Who pays judgments against the  
5 county is initially probably the county, but under  
6 Georgia law, the department of DOT -- Department of  
7 Transportation has a fund in which they can contribute  
8 towards that. And if you've looked in -- and I think  
9 funding matters less here than -- than the fact that  
10 these big projects are generally a collage of funding  
11 issues. You have State and Federal money usually mixed  
12 in. So you're in a situation where, you know, if you  
13 went back 50 years ago and looked at funding, it might  
14 be very definitive. In these days and times, if you  
15 look at projects, you know, you got money coming from  
16 all sources, and if you start tracing the -- the money,  
17 you can go in six different directions.

18 JUSTICE SCALIA: Mr. Hart --

19 MR. HART: And I think the dignity interest  
20 -- excuse me.

21 JUSTICE SCALIA: Mr. --

22 JUSTICE GINSBURG: I thought that was one of  
23 the main indicia of whether an entity had been set up  
24 as an arm of the State, that is, the State would be  
25 directly liable.

1           MR. HART: Well, I think the Hess case says  
2 that -- that it -- that it's one of the default issues,  
3 and then you go to the dignity interest and the funding  
4 interest. But if you go back and look at the  
5 California Regents case v. John Doe, in that case, it  
6 shows and explains why funding becomes not a whole lot  
7 in the way of meaningful factor because if you looked at --

8           JUSTICE SCALIA: Well, core -- core  
9 government functions isn't -- isn't the test either. I  
10 mean --

11          MR. HART: I understand that.

12          JUSTICE SCALIA: -- you know, the Federal  
13 Government and I think some States gave -- gave  
14 railroads the power to condemn land. Did that make  
15 railroads sovereigns entitled to sovereign immunity? I  
16 don't think so.

17          MR. HART: No, sir, I wouldn't argue that either.

18          JUSTICE SCALIA: So the mere fact that --  
19 that your county is exercising some, quote, core  
20 government functions, that -- that doesn't -- doesn't  
21 get you there.

22          MR. HART: Well, I think you look at the --  
23 the history, you look at the dignity of the State, and  
24 you look at the functional realities of State  
25 management. And if you look at the history, counties

1 were immune at common law in England. Counties were  
2 immune at the time of the framing.

3 CHIEF JUSTICE ROBERTS: That was -- in many  
4 of those cases cited in your brief, it was because the  
5 duties they were performing they were performing pro  
6 bono publico.

7 MR. HART: Sure.

8 CHIEF JUSTICE ROBERTS: And the doctrine  
9 extended immunity to them on that basis, not -- not as  
10 sovereigns.

11 MR. HART: Well, it extended -- it extended  
12 to them as part of an overall sovereignty -- sovereign  
13 immunity picture.

14 JUSTICE SCALIA: It wasn't sovereign  
15 immunity. It was -- charities had immunity until very  
16 recently. Some States still had it when I was in law  
17 school. You couldn't sue a charity for tort.

18 MR. HART: I still think if you go back and  
19 look at these core functions and if you -- if you  
20 define that as something that's being delegated by the  
21 State where the State says we want you to have  
22 sovereign immunity, then that's something that should  
23 be respected as part of the dignity of the State.

24 In this particular case, Georgia is extremely  
25 strong on that point. It's in the constitution that --

1 that counties can handle bridges. It's in the  
2 constitution that they're immune. You can only waive  
3 it by an act of the legislature.

4 JUSTICE ALITO: What -- what other sorts of  
5 torts would this apply to, as applied to Chatham  
6 County? If Chatham County --

7 MR. HART: Torts?

8 JUSTICE ALITO: -- were sued, yes -- if  
9 Chatham County were sued for something done by a law  
10 enforcement officer, would your theory apply?

11 MR. HART: I think the -- I think -- no, sir,  
12 I don't think under -- like a 1983 action or a  
13 Fourteenth Amendment exception under section 5, I don't  
14 think the immunity would reach that far. I think the  
15 county would still be exposed to the liability there  
16 under that case law. I don't think you have to do away  
17 with what you have under the Fourteenth Amendment --  
18 excuse me -- under the Eleventh Amendment or the case  
19 laws thereunder. But I don't think that those -- those  
20 cases under there define the whole of sovereign immunity  
21 of the general principles of sovereign --

22 JUSTICE ALITO: Well, has the Eleventh  
23 Circuit or did the old Fifth Circuit ever apply this  
24 doctrine in any area outside of admiralty?

25 MR. HART: Not that I am aware of.

1           JUSTICE SCALIA: What are you relying on in  
2 the Georgia constitution? It doesn't mention counties,  
3 does it? It just says except as specifically provided  
4 in this paragraph, sovereign immunity extends to the  
5 State and all of its departments and agencies.

6           MR. HART: Yes, sir. And there's strong case  
7 law, the Millwood case, that says basically counties  
8 are part of the sovereign of the State. And as  
9 recently as last year, in a lawsuit against the  
10 Department of Corrections, the -- the Attorney General  
11 of the State argued that the county was a sovereign of  
12 the State, part of the State, took the position it  
13 couldn't be sued because a sovereign can't sue itself.

14           JUSTICE SCALIA: There can be no -- no --  
15 well, I assume you have a -- a tort -- tort claims act  
16 that waives sovereign immunity in some circumstances.

17           MR. HART: Yes, sir.

18           JUSTICE SCALIA: But apart from that, you  
19 can't sue counties in tort.

20           MR. HART: You can -- generally in the -- in  
21 -- as a county -- as a State law claim, no, unless  
22 there's a waiver. Now, the legislature has waived --  
23 there's been quite a few waivers in the last year.  
24 They just waived in automobile insurance cases, for  
25 example. And -- and that's a matter of the State.

1 JUSTICE GINSBURG: To what -- what other area  
2 would this apply? If the county has sovereign  
3 immunity, how about the county school board?

4 MR. HART: We would contend that the core  
5 sovereign function has to truly be a core sovereign  
6 function and it has to be supported by some type of  
7 history, some type of -- of State dignity there and --  
8 and some reality --

9 JUSTICE GINSBURG: And education would not --

10 MR. HART: And we would not put education in  
11 that class. If you go back and look at the history at  
12 the time of framing, you would have to start looking at  
13 what government did do and didn't do. Now, you could do a  
14 historical analysis, and maybe I would be wrong and the  
15 history would show that education was important. But  
16 my understanding is education at that time was probably  
17 a pretty local matter.

18 JUSTICE GINSBURG: How about the sanitation  
19 department?

20 MR. HART: That would get sort of iffy there  
21 from the standpoint that public health, quarantines,  
22 those type of services for disease were handled by the  
23 State and were handled in a -- in a manner that you  
24 might be able to define it as a core function, but that  
25 would probably be a stretch.

1           This is a narrow exception and we think it  
2 deserves that insofar as the navigable waters.

3           CHIEF JUSTICE ROBERTS: Well, I'm not sure  
4 that operating bridges at the time of the framing was a  
5 core sovereign function.

6           MR. HART: Well, it --

7           CHIEF JUSTICE ROBERTS: There are an awful  
8 lot of private bridges.

9           MR. HART: Yes, sir.

10          The -- the exception, though, was at common  
11 law, counties could not be liable for the operation and  
12 maintenance of bridges, and that was adopted by Georgia  
13 prior to the time of the framing and that was the law  
14 of the State. And we would take the position that that  
15 survived under this residual sovereign immunity theory.

16          JUSTICE SCALIA: Well, that's bridge  
17 immunity, not sovereign immunity. I mean --

18          MR. HART: Well, we're -- we're focusing that --

19          JUSTICE SCALIA: -- it doesn't come -- it  
20 doesn't come within the Federal Constitution.

21          MR. HART: Well, neither does Federal  
22 sovereign immunity come textually within the  
23 Constitution.

24          JUSTICE SCALIA: Well, no, I'm not talking  
25 about textually. I'm talking about in structure.

1 There's nothing in the structure that has anything to  
2 do with bridges.

3 MR. HART: The answer to that question is  
4 that if you look at the -- the function of -- of State  
5 government and you look at what they define as being  
6 important -- and in this case, Georgia has defined that  
7 as one of the functions under its constitution and  
8 under its statutes -- then there's a dignity interest  
9 there that ought to be respected insofar as outside  
10 that realm.

11 One of the --

12 JUSTICE STEVENS: May I ask this? Are you  
13 suggesting that a county could be an arm of the State  
14 for some purposes but not for others?

15 MR. HART: Yes, sir, I believe that. We  
16 don't concede that we might not fit in the -- that we  
17 could -- could not fit in within the arm of the State.  
18 The Court chose in the question presented not to  
19 address that issue and asked us to address the issue  
20 outside -- assuming we were not an -- we were a non-arm  
21 of the State. And our brief does make some mention of  
22 -- of the arm of the State analysis within it.

23 CHIEF JUSTICE ROBERTS: But the -- the court  
24 of appeals has said that you weren't asserting that you  
25 were an arm of the State.

1           MR. HART: Well, we were asserting that we  
2 were -- we were immune under residual sovereign  
3 immunity and we conceded for -- that the county has not  
4 generally been recognized under the Eleventh Amendment  
5 as being sovereign -- as sovereign -- having sovereign  
6 immunity. That is not to -- and -- and we needed some  
7 way to distinguish that from the immunity that we're  
8 arguing, the immunity retained by the States. And we  
9 feel that that's something that could -- could have  
10 broader parameters than -- than the current arm of the  
11 State test.

12           And the focus ought to be on these core  
13 functions, history and dignity, and the functionality of  
14 the State. That takes you away from your Eleventh  
15 Amendment analysis where you're dealing with sovereign  
16 immunity all the time in -- in that context, and you're  
17 now moving to discussing general principles of  
18 sovereign immunity outside the context of the Eleventh  
19 Amendment in defining those contours, and we feel like  
20 this might give you a mechanism by which to do that.

21           And it's a very narrow exception, and it  
22 would be something that the Court could rule on or the  
23 Court could simply rule that counties were immune in in  
24 personam admiralty actions, if you wanted to make it  
25 even a more narrow ruling.

1           One of the things that has been argued by the  
2           Solicitor General is that there's a single sovereign  
3           immunity, that there's this unified sovereign immunity.

4           And it's -- and to the extent that we're talking about  
5           general principles of sovereign immunity, we agree with  
6           that. We do not agree with the part that says that  
7           when we deal with Eleventh Amendment arm of the State,  
8           that that part defines the whole.

9           And when you get into a situation of -- of  
10          how do you define the sovereign -- sovereign immunity,  
11          you have sovereign immunity at the Federal Government  
12          level, and if it's a single sovereign immunity that you  
13          accept and as argued by the -- by -- by the Solicitor  
14          General's office, then the question becomes, is there a  
15          reciprocal sovereign immunity that's coextensive with  
16          Federal sovereign immunity? And that's an argument  
17          that -- that certainly could be made. It -- and it was  
18          addressed somewhat or raised somewhat in Alden where  
19          they discussed we're not ready to say if the Federal  
20          Government is raising sovereign immunity, which they do  
21          on a regular basis, that perhaps the States might not  
22          have that.

23          Now, we're not arguing that the county in any  
24          way would have sovereign immunity to the extent of the  
25          Federal Government. We're saying that insofar as these

1 functions that have a history at common law at the time  
2 of the framing and has been consistently recognized by  
3 the Supreme Court, navigable waters and the soils  
4 thereunder have always been considered to be a  
5 sovereign interest of the State by this Court.

6           If you go back and look at the St. Anthony  
7 Falls case, at that time they were dealing with  
8 riparian rights, and -- and there was a deference to  
9 the State in regard to that. You also had the Coeur  
10 D'Alene Indian Tribe dealing with submerged lands, and  
11 you recognized the sovereign interests of the State in  
12 those situations, and in the Seminole Tribe case, said  
13 there's no exceptions in regard to carving out an  
14 exception to an admiralty immunity.

15           CHIEF JUSTICE ROBERTS: All that establishes  
16 is simply that if the State were operating this bridge  
17 and if the State were on the hook for any judgments and  
18 if the State had control over the people who were  
19 making the decisions, that there might be an issue of  
20 State sovereign immunity.

21           MR. HART: Yes, sir.

22           CHIEF JUSTICE ROBERTS: The whole problem is  
23 that it's the county that's doing all that.

24           MR. HART: We understand that, but we're  
25 acting on behalf of the State and acting as the State

1 there and --

2 CHIEF JUSTICE ROBERTS: Well, the State  
3 doesn't pay the damages.

4 MR. HART: The State --

5 CHIEF JUSTICE ROBERTS: The State doesn't  
6 tell you how to do it.

7 MR. HART: The State has the potential to pay  
8 damages there through -- through the DOT, the  
9 Department of Transportation funds.

10 JUSTICE SCALIA: If it wishes. If it wishes.

11 MR. HART: If it wishes. I have to concede  
12 that point.

13 But from the -- from the standpoint, if you  
14 go back to California Regents case, there wasn't a  
15 whole lot of potential liability there. Theoretically  
16 they may have, but they had a contract. The State had  
17 a contract there in which it was indemnified by -- by  
18 the Federal Government.

19 JUSTICE SCALIA: The State can pay my damages  
20 if it wishes. It just doesn't happen to have a statute  
21 to that effect right now. But I mean, that -- surely,  
22 that doesn't -- doesn't --

23 MR. HART: Well, we take the position that  
24 the funding issue and the control issue ought to be  
25 less -- outside of the Eleventh Amendment analysis, arm

1 of the State ought to be something that matters less.

2 The dignity interest ought to matter more.

3           The funding issue is something that in every  
4 major project, you've got a collage of funding, and it  
5 comes from all different sources. And to some extent,  
6 who pays the bill and how they pay the bill depends on  
7 the structure of the deal. And I don't think it's very  
8 enlightening, as it was once 50 years ago when things  
9 were much simpler. We're also talking about, in bridge  
10 cases or most building road projects, you have the  
11 situation where a lot of times the State comes to one  
12 of its entities and says, we'll give you the money,  
13 build a bridge. We'll build -- build the road. Quite  
14 frequently that happens all the time in larger  
15 counties. If the county does the function that it's  
16 doing for the State --

17           CHIEF JUSTICE ROBERTS: But that's a  
18 different question. The immunity looks to where the  
19 money is going to come from to satisfy a judgment. I  
20 don't think it looks to where the funding came from in  
21 the first instance.

22           MR. HART: Well, the -- the --

23           CHIEF JUSTICE ROBERTS: It's the claim on the  
24 treasury of the judgment that raises the sovereign  
25 immunity issues.

1           MR. HART: Insofar as this case goes, there  
2 is the potential for payment by the State, and -- and  
3 that's about all we can say there. We'll have to -- we  
4 -- as Justice Scalia said, is -- is there a absolute  
5 duty for them to pay it? But -- but the practicality  
6 of it is usually when they delegate you the function  
7 and the State arms you with sovereign immunity and  
8 tells you to go out and do that, they will step up to  
9 the batter's box at the time something like that would  
10 occur because they have sort of delegated that core  
11 function to you to do.

12           The control issue we feel is something that  
13 the dignity issue ought to take precedence over. The  
14 control issue is something that the State decides  
15 during the delegation, and if you wish to place an  
16 emphasis on the control, then you're asking -- asking  
17 basically, do you require the State to make a certain  
18 kind of delegation?

19           Earlier we had a question that -- that  
20 followed up on the issue of if there -- if we just did  
21 a single function alone, built a bridge without  
22 anything else, would that alone create a responsibility  
23 on the part of the county? And I think in -- in regard  
24 to that, the core function here is the county accepting  
25 the responsibility of the State.

1 JUSTICE GINSBURG: What about the South  
2 Carolina Supreme Court's opinion in the Hines case  
3 which seems to run counter to your argument?

4 MR. HART: Yes, ma'am. The Hines case was an  
5 Eleventh Amendment case, number one. Number two, it --  
6 it did state, in the front end of the case, that they  
7 would apply the substantive law of admiralty  
8 irrespectively of the forum. But the residual  
9 sovereign immunity issue was never argued by either  
10 side in the case. That case went up on -- as a result  
11 of the granting of a motion to dismiss on a fairly  
12 skimpy record there, and the funding issue was never  
13 really -- really analyzed there. So we see that as a  
14 -- a case that typically is Eleventh Amendment case  
15 and there has not been any ruling whatsoever in -- in  
16 the context of whether there would be residual  
17 sovereign immunity.

18 JUSTICE STEVENS: Mr. Hart, may I ask this  
19 question? In the -- I noticed the opinion is a per  
20 curiam opinion of the Eleventh Circuit. Was the case  
21 argued orally in the Eleventh Circuit or was it  
22 submitted?

23 MR. HART: No, sir, it was not.

24 JUSTICE STEVENS: It was submitted.

25 MR. HART: Just submitted.

1                   The --

2                   JUSTICE GINSBURG: The -- the Eleventh  
3 Circuit had a prior decision, didn't they?

4                   MR. HART: Yes. Yes, ma'am. There had been  
5 a similar case arising out of Chatham County, and it  
6 went up and was affirmed per curiam, and then there was  
7 a short opinion the second time the case went -- went  
8 -- the second case went up, and there was a very short  
9 opinion in regard to that, taking deference to their  
10 decision in the -- in the first opinion and talking a  
11 little bit about the residual sovereign immunity issue  
12 that we had here.

13                   JUSTICE SCALIA: That was an old Fifth  
14 Circuit case --

15                   MR. HART: Yes. There was a Wickman case  
16 that -- that was several years ago that is still good  
17 in the Fifth, and our circuit adopted that when they  
18 put in the new circuit.

19                   What we're asking here today is basically a  
20 very narrow holding. We're asking that there be  
21 limited sovereign immunity -- there -- excuse me --  
22 that there be -- in unique circumstances where core  
23 functions of the State are delegated to the county,  
24 that the county would have sovereign immunity, and that  
25 a State can cloak a county with sovereign immunity. It

1 seems that that is an issue that the State ought to be  
2 able to do out of its delegation -- out of its dignity  
3 function. They ought to have the right to run the  
4 State and -- and delegate those functions as they see  
5 fit.

6 CHIEF JUSTICE ROBERTS: It's not unusual that  
7 counties maintain and run bridges in your State, is it?  
8 I mean, that's --

9 MR. HART: Yes, sir, that's --

10 CHIEF JUSTICE ROBERTS: That's the normal --

11 MR. HART: I don't know if I'd go so far as  
12 normal, but for larger communities, yes, sir.

13 CHIEF JUSTICE ROBERTS: Then -- then how do  
14 we know it's a core dignity function of the State if  
15 they're -- the normal rule is somebody else does it?

16 MR. HART: Well, it's a function that  
17 historically in the Constitution was recognized would  
18 be a function on behalf of the State with the counties.

19 And -- and it has traditionally historically been a  
20 function of the States to build roads and run bridges.

21 And in regard to that, you're talking about navigable  
22 waters, and the State has an interest in its own  
23 navigable waters. They're delegating a function of the  
24 government to build a bridge over their navigable  
25 waters and the soils thereunder. So we would take the

1 position there that -- that that is a core sovereign  
2 function, that the navigable waters are a sovereign  
3 interest of the State, and that should have the dignity  
4 and respect of that.

5           The design of the Constitution was that there  
6 would be dual sovereignty created both in federalism  
7 and under State sovereignty. There's not a single case  
8 you all are going to have that's going to be able to  
9 define all the principles of general sovereign  
10 immunity, but we think this is a situation in which the  
11 Court, by making a holding in in personam actions, can  
12 recognize the State's residual immunity, not so much  
13 focus on the Eleventh Amendment and the cases  
14 thereunder, but try to come up with a set of principles  
15 that you can begin talking about the whole of general  
16 sovereign immunity.

17           And we do not necessarily agree that the --  
18 the State -- the arm of the State test has to apply in  
19 all situations. We think this is an exception. It's a  
20 narrow exception. Core sovereign functions are going  
21 to be narrowly defined, especially when a county is  
22 acting. You're going to have to support it with some  
23 history. You're going to have to support it with some  
24 State dignity where the State has given a clear  
25 indication through their State laws that it's a

1 function that the county ought to do, and -- and that  
2 needs to be respected from the standpoints that States  
3 are given wide latitude in the way that they set up and  
4 run their government.

5 And we respectfully request that you make a  
6 finding that we have the right to have sovereign  
7 immunity in this particular narrow set of circumstances  
8 involving navigable waters as -- as it stands. Thank  
9 you.

10 CHIEF JUSTICE ROBERTS: Thank you, Mr. Hart.

11 Mr. Estrada, you have 8 minutes remaining.

12 REBUTTAL ARGUMENT OF MIGUEL A. ESTRADA

13 ON BEHALF OF THE PETITIONER

14 MR. ESTRADA: Mr. Chief Justice, just a few  
15 points.

16 On the issue that was raised by Justice  
17 Alito, the -- this doctrine comes from the Wickman case  
18 from the old Fifth Circuit. That case relied primarily  
19 on a -- on a case called Kegan from the Supreme Court  
20 of Florida, which was, indeed, a bridge case, but it  
21 was not an admiralty case. It was a case in which  
22 someone who was crossing a bridge with a heavy truck  
23 fell through the bridge because the -- the bridge was  
24 structurally unsafe. The old Fifth Circuit sort of  
25 took it as a bridge case and took over that doctrine.

1           If that fact -- scenario were to come up  
2     in Chatham County and the plaintiffs and the defendants  
3     were diverse, there is no question that -- that the  
4     county would be entitled to plead its State law  
5     immunity under Erie.

6           I will point out incidentally that even  
7     though in this case there is a diversity of citizenship  
8     and admiralty jurisdiction, this Court held in 1953 in  
9     a case called Pope & Talbot v. Hawn that in that  
10    circumstance, any defense that is available solely on  
11    the diversity side under Erie gets trumped by the  
12    uniform application of the maritime law. So that would  
13    not be an issue here.

14           With respect to the question that was raised  
15    by Justice Ginsburg, Hines was an admiralty case in  
16    State court. Under no stretch of construction could  
17    that be viewed as an Eleventh Amendment case since it  
18    was not a case in law or equity and it was not in  
19    Federal court.

20           And number three, the proprietary  
21    governmental distinction has been rejected in the  
22    Workman case itself where it was raised in the specific  
23    context of admiralty. I will point out it has never  
24    been part of this Court's sovereign immunity doctrine,  
25    and with respect, other areas of federalism law tend to

1 indicate that it should not be adopted now.

2           You may recall that such a distinction  
3 between core and non-core governmental functions was at  
4 the core of the -- of this -- this Court's cases under  
5 National League of Cities v. Usery, and in the Garcia  
6 case, the Court overruled National League of Cities  
7 primarily on the point that the distinction between  
8 core and non-core governmental functions had proven to  
9 be unworkable.

10           CHIEF JUSTICE ROBERTS: You're -- are you  
11 suggesting that the -- the State would enjoy sovereign  
12 immunity in proprietary activities?

13           MR. ESTRADA: I am suggesting that if you  
14 named the State on the wrong side of the caption on the  
15 V in Federal court, it does enjoy sovereign immunity,  
16 irrespective of what your cause of action is. Yes, Mr.  
17 Chief Justice.

18           CHIEF JUSTICE ROBERTS: But I would have  
19 thought, particularly when we're talking about the arm  
20 of the State doctrine, that the -- the nature of the  
21 activity is one of the key questions we look at.

22           MR. ESTRADA: I think --

23           CHIEF JUSTICE ROBERTS: Maintaining bridges  
24 is one thing. You know, operating a for-profit  
25 activity would be something else.

1           MR. ESTRADA: I think it's -- it's sort of  
2 inherent in all of the cases that have been ruled upon,  
3 Mr. Chief Justice, that what tends to be delegated are  
4 those that are the normal functions of government, but  
5 I don't think this Court has ever held that it is the  
6 function of sovereign immunity doctrine to tell the  
7 States what are the appropriate functions of  
8 government. So I don't think there would be a  
9 distinction that would be supported by the cases.

10           JUSTICE SCALIA: I always thought the  
11 governmental proprietary distinction really came up in  
12 State law cases involving municipal liability. That's  
13 principally where it --

14           MR. ESTRADA: It did early on, and that was  
15 -- that was one of the issues that was put forth in the  
16 Workman case, Justice Scalia. With respect to the  
17 admiralty jurisdiction of the U.S. courts, this Court  
18 said in 1901 that it carried no weight.

19           Thank you, Mr. Chief Justice. I have nothing  
20 further.

21           CHIEF JUSTICE ROBERTS: Thank you, counsel.

22           The case is submitted.

23           (Whereupon, at 11:55 a.m., the case in the  
24 above-entitled matter was submitted.)

25