ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: PUERTO RICO AQUEDUCT AND SEWER AUTHORITY, Petitioner v. METCALF & EDDY, INC.

CASE NO: 91-1010

PLACE: Washington, D.C.

DATE: November 9, 1992

PAGES: 1-37

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IN THE SUPREME COURT OF THE UNITED STATES

- X

PUERTO RICO AQUEDUCT AND SEWER :

AUTHORITY, :

Petitioner :

v. : No. 91-1010

METCALF & EDDY, INC. :

- X

Washington, D.C.

Monday, November 9, 1992

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:01 a.m.

APPEARANCES:

RICHARD G. TARANTO, ESQ., Washington, D.C.; on behalf of the Petitioner.

PETER W. SIPKINS, ESQ., Minneapolis, Minnesota; on behalf of the Respondent.

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P R O C E E D I N G S

(10:01 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in Number 91-1010, Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.

Mr. Taranto.

ORAL ARGUMENT OF RICHARD G. TARANTO

ON BEHALF OF THE PETITIONER

MR. TARANTO: Mr. Chief Justice, and may it please the Court:

The question presented in this case is whether an order denying a state entity's claim of Eleventh Amendment immunity is immediately appealable as a collateral order. The question arises in this case because of the well-established law that Puerto Rico, though not itself a state, is entitled to sovereign immunity under the same standards as apply directly to states under the Eleventh Amendment. The district court held that the Puerto Rico Aqueduct and Sewer Authority is not an arm of the state and denied the Authority's immunity claim.

QUESTION: Mr. Taranto, did you -- we haven't held that Puerto Rico is a state for purpose of the Eleventh Amendment, have we?

MR. TARANTO: No, this Court has not spoken to

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that question. This Court has spoken many times to the general question of whether Puerto Rico is entitled to sovereign immunity both under its status before 1952 and since 1952. The Court has said that the commonwealth status has only increased its sovereign status. The First Circuit has clearly held repeatedly that Puerto Rico is to be treated as a state for Eleventh Amendment --

QUESTION: But it's really an open question in this Court.

MR. TARANTO: Yes, it is an open question in this Court.

QUESTION: But it's not an issue in this case.

MR. TARANTO: That's right, it's not. The only question in this case is the appealability of the order denying the claim of Eleventh Amendment immunity.

QUESTION: I see.

QUESTION: Do you think it's a jurisdictional question whether --

MR. TARANTO: The merits of the Eleventh Amendment claim?

QUESTION: Whether Puerto Rico is covered by the Eleventh Amendment.

MR. TARANTO: No, and Puerto Rico doesn't claim to be covered by the Eleventh Amendment, merely to be entitled to sovereign immunity under the same standards

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that states have under the Eleventh Amendment because of the structure that Congress established in granting it semi-sovereign status in the Commonwealth Act in 1952.

QUESTION: Could we raise the issue sua sponte here?

MR. TARANTO: I don't think it is a jurisdictional matter. This Court has said in fact in general that Eleventh Amendment questions are not jurisdictional in the sense that the Court is obliged to notice them, as they are with subject matter jurisdiction.

QUESTION: Even if it is jurisdictional we're assuming it to be true, aren't we? We're assuming that there is sovereign immunity.

MR. TARANTO: For purposes of the appeal --

QUESTION: For purposes of the question we are reaching we are assuming that there is sovereign immunity.

MR. TARANTO: Yes.

QUESTION: So even if it were jurisdictional we would have authority to behave that way, wouldn't we?

MR. TARANTO: I think that the question comes to this Court on the assumption that the merits of the claim, going to the appealability issue, that the claim is meritorious, and the only question then is whether the denial of that assumedly meritorious claim should be immediately appealable.

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The First Circuit held that the denial of sovereign immunity is not a collateral order, and its only rationale was that the Eleventh Amendment in its view protects only a state's interest in avoiding the imposition of monetary judgments and interests that can be vindicated by appeal after trial.

Our position is that the First Circuit was wrong because it misunderstood the basic character of Eleventh Amendment immunity. The rationale is squarely contradicted by this Court's repeated holdings that apply the Eleventh Amendment to bar equitable relief. Cases as far back as Ex parte Ayers and more recently Alabama against Pugh and Cory against White directly hold that the Eleventh Amendment immunity, as the language of the Amendment itself requires, goes beyond protecting against monetary relief. More broadly, the First Circuit's holding was wrong.

My central point is that the Eleventh Amendment immunity, where it applies, must be viewed as protecting a state's right not to be sued.

QUESTION: But have we held that an agency of this state, apart from the state itself, is entitled to anything more than protection against monetary liability?

MR. TARANTO: Yes. In Alabama against Pugh --

QUESTION: But Alabama itself was --

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MR. TARANTO: The Department of Corrections was also a, one of the two petitioners.

QUESTION: Wasn't the state itself a party in that case?

MR. TARANTO: The state was, and the Department of Corrections, and this Court I think summarily ordered the dismissal of both of those parties. And the Puerto Rico Aqueduct and Sewer Authority claims to be an arm of the state in the same sense as any department of the state would be, notwithstanding its somewhat different form of organization.

The First Circuit's contrary view rested on a mistake in treating a doctrine that overrides the Eleventh Amendment, the Ex parte Young doctrine, as if it changed the nature of the immunity where the immunity is not overridden. And a right not to be tried, where finally denied by the district court, presents an appealable collateral order.

Like the First Circuit, I am focusing on the nature of the Eleventh Amendment right, because all of the other elements of a collateral order are clearly satisfied. First, an order like the one here is a final rejection of the claim of immunity. There wasn't anything tentative about the district court decision, and nothing later in the litigation could be expected to alter it.

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There is therefore no risk that appellate review now either will be advisory or will have to be repeated later.

Second, the issue whether the Authority is an arm of the state is completely separate from and collateral to the merits of the litigation, whether there has been a breach of contract and if so what damages may have resulted. There is therefore no risk that the court of appeals will be less than fully able to decide the immunity issue before the merits have been resolved.

QUESTION: I gather from the opinion of the First Circuit in this case, Mr. Taranto, that they may have felt differently about it than you do. Isn't there some expressions in that opinion that it's a very sketchy record that they have to go on?

MR. TARANTO: I don't think so. The First Circuit did not, as I recall, comment on the merits of the claim of immunity, and the district court's decision turned on one simple fact, the potential monetary liability of the Commonwealth for any judgment in this case. The First Circuit in an earlier case had expressed some doubt about the claim of PRASA to sovereign immunity, but that I think cannot be overplayed in its significance.

The First Circuit with respect to the Tourism Company in Puerto Rico expressed quite similar doubts, only 2 years later upon full examination of the issue to

find that the Tourism Company was indeed an arm of the state. I don't think that there is anything less than complete about the record given the factors that go into the arm of the state analysis.

This Court in I think its two most extensive analyses of that issue, the Lake Country Estates case and the Mount Healthy case, noted that the factors essentially turn on the state's legal treatment of the entity, who appoints the governing board of the entity, whether it is declared to be performing a private or a governmental function, whether it is declared to be an instrumentality, what the financial relationship is, whether there is tax immunity. These are matters that in general at least can be determined from looking at the statutes of Puerto Rico.

QUESTION: That issue is not before us here.

MR. TARANTO: The nature of the factors that go into the immunity claim are not before -- that issue is not before the Court. The only issue is whether the denial of the claim that PRASA is an arm of the state is immediately appealable under the Cohen standards. And not only here was the denial final, the district court said PRASA is not an arm of the state. Whether it's determined to have breached a contract or imposed any damages can't change that judgment. It is obviously collateral to those issues. And finally, the issue is obviously both not a

matter for district court discretion, after all PRASA either is or is not an arm of the state, and it is also important.

QUESTION: But the complexity of the issue could have something to do with whether it's immediately appealable.

MR. TARANTO: I think that this Court has said that the discretionary nature of the issue could have something to do with that. I think complexity is no more a problem here than it is in double jeopardy or official immunity cases where some significant amount of legal analysis may be required to identify what the state of the law was at the time of the defendant's conduct, or even in the speech or debate context, whether a particular aide is serving as an alter ego of a member of Congress or whether the member was performing a legislative versus a political function. These are issues that, while they may have several factors involved in them, do not involve any district court discretion and so can be decided de novo by a court of appeals as a matter of law.

QUESTION: Well, I take it that if the claim of immunity were somehow bound up with a decision on the merits of the case the result could be different?

MR. TARANTO: Yes, I think that's right. This --

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QUESTION: Just understanding the principles of Cohen v. Beneficial Loan?

MR. TARANTO: That's right. There is a, one of the requirements for a collateral order under Cohen is that the issue be separate from and collateral to the claim on the merits. The question whether a particular entity is an arm of the state is, I think in general, certainly in this case, a completely separate from, separate issue from the question whether there has been a breach of contract. It simply involves an examination of what the, of where, of what place Puerto Rico Aqueduct and Sewer Authority has in the legal structure of the Puerto Rican government.

QUESTION: Mr. Taranto, if we agree with you here, does it mean that there would be an interlocutory appeal in all Federal tort claims cases whenever the Government asserts that it has not waived liability under the Federal Tort Claims Act? I mean, my impression is that those cases have not been interlocutorily appealed, and there are a lot of them.

MR. TARANTO: I think that would not follow.

QUESTION: Why wouldn't it follow?

MR. TARANTO: Because the nature of the sovereign immunity claim in an Eleventh Amendment context is different from the sovereign immunity claim for the

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United States. When sovereign immunity is claimed by a state, or Puerto Rico, what it is claiming is that another sovereign has no authority to call it to the bar of the court and demand that it answer. The sovereign immunity claim of the United States in its own courts is, does not involve the underlying dignitary interest of one sovereign demanding that another answer.

So that the Eleventh Amendment sovereign immunity interest is much more akin to the foreign sovereign immunity interest where the law is I think uniformly clear in the lower courts that a denial of foreign sovereign immunity is immediately appealable because of the underlying purpose. And this Court last term in the Argentina against Weltover case indeed ruled on the merits of a foreign sovereign immunity claim where the order came up from the district court on a collateral order without questioning the propriety of that jurisdiction.

QUESTION: You think somehow in the domestic sovereign immunity situation there is no right not to be tried, there is just a right not to have a judgment? Is that the difference?

MR. TARANTO: I'm not entirely sure what, how the United States, the domestic sovereign immunity case ought to come out. The point that I'm making here is that

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the underlying dignitary interest of one sovereign imposing its authority on another is not present there. Whether there is another --

QUESTION: Well, that's a difference, but why is it a difference that ought to make a difference? I mean, sure, it's a different issue, but none of the Cohen factors are any different by reason of that. I mean, all the Cohen factors would apply to that the same way as they apply to this case.

MR. TARANTO: Well, I'm not sure it would because to start with, whether the United States has waived its sovereign immunity will in general be the same question as whether there is a cause of action, because the causes of action tend to be in fact the waivers of sovereign immunity, I think, with the United States.

But on the third factor as well, the question of whether a denial is unreviewable after the final judgment, in turn I think goes back to the question of what the nature of the right is, whether it's a right not to be tried. And in the foreign sovereign immunity and state sovereign immunity context the reason I think we know that it is such a right is that the underlying interest is present from the beginning of the lawsuit, that one sovereign through its courts not essentially fail to respect the dignity of another sovereign. So I think the

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United States case is a different case.

QUESTION: Mr. Taranto, I didn't go back in the First Circuit cases behind this one, the ones that they relied on for precedent. Do the earlier First Circuit cases turn on the distinction, a distinction based on the need to respect the dignitary interest, i.e. even though instrumentalities of the state may ultimately be entitled to share in the immunity they do not present such an insistent dignitary claim that we will accord them an immediately appealable status? Do the cases turn on that?

MR. TARANTO: As far as I am aware the only full discussion of this issue in the First Circuit is in the Libby against Marshall case. That's the case that the court below in this case relied on, and that case doesn't, as I recall, contain any extensive discussion of any argument about the dignitary interest. It simply looks at Ex parte Young and Edelman against Jordan, concludes that as a practical matter there is not really much left to the Eleventh Amendment after those cases except an interest in avoiding monetary judgments. That I think is where it went wrong.

The Young and Edelman doctrines do not rest on the judgment that the nature of the Eleventh Amendment immunity is somehow limited to a protection against certain judgments. They reflect a decision that because

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of the needs of the Federal system, whatever the Eleventh Amendment immunity is, it has to be overridden in certain circumstances. And one primary indication of that is that after Edelman came down the argument was in fact presented to this Court that Edelman's focus on monetary relief really did change the nature of the Eleventh Amendment immunity and rendered it merely a limit on monetary judgments, and this Court explicitly rejected that argument in Cory against White and implicitly did so in Alabama against Pugh.

It would also, I think, be a mistake to overread Young and Edelman because those cases, after all, apply in only one type of Eleventh Amendment case, only in official capacity suits brought against state officials under Federal law. The whole Young-Edelman distinction based on monetary relief has no application in a case like this one for at least two reasons. One, it's not brought against state officials, and second, it is brought under state law. So I think where the First Circuit went wrong was in misreading one limitation on one class of cases that raise Eleventh Amendment issues as transforming the nature of the underlying interest protected by the Eleventh Amendment.

QUESTION: Would the distinction you have just drawn, Mr. Taranto, lead to a different result as to

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appealability in official capacity suits against individuals as opposed to suits against an entity like this one?

MR. TARANTO: I think that the answer would be the same, that when a individual state, when a state official is sued in his or her official capacity and the claim is, and that official says this suit is improper because the claim is barred by Edelman against Jordan, is really a claim for retrospective monetary relief, that what that claim means is that the state official is saying I am the state. And when the state's official says I am the state, that means that the state is asserting a right not to be tried.

It is true in that circumstance that there is a different issue presented about whether the claim about the nature of the relief is wholly collateral to the merits of the litigation, an issue that's not at all presented when the claim is made by a state entity. But I do think that the answer would end up being the same because in that case, as in this, the Court need not determine the facts, what the defendant did, or the law in the sense of whether those, that conduct violated any applicable legal norm.

The basic sources for determining that the right at issue here is a right not to be tried begin with the

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language of the Eleventh Amendment itself. That language focuses on protecting states from the very bringing of the lawsuit and from the entire process of litigation, and not just from the judgment, when it speaks of the whole judicial power being excluded from a suit when it is commenced and while it is prosecuted. This Court's opinions also repeatedly treat the right as a right not to be sued.

All other circuits except the First that have addressed this issue, eight now in number, agree that an Eleventh Amendment immunity claim raises a right not to be tried and is therefore immediately appealable. And, as I noted, the closest analogy, the Foreign Sovereign Immunities Act, is treated uniformly the same way.

I'd like to make one final point. The dignitary interest that underlies the claim of Eleventh Amendment immunity must be treated as real and important even though it is necessarily somewhat abstract. That's why the states reacted so swiftly to Chisolm against Georgia, why framers like Madison and Hamilton and Chief Justice Marshall made such a point of reassuring the states that their sovereign immunity would be respected under the Constitution, and it is why this Court has kept the Ex parte Young doctrine a limited one and has set high standards for finding a waiver or congressional abrogation

of the immunity. If the immunity is important in all of those respects, then in Cohen's terms it is too important to be denied review.

For those reasons we suggest that the First Circuit was wrong and that its holding should be reversed so that the very harm the immunity protects against will not be irreparably suffered before an appeal can be taken.

QUESTION: Thank you, Mr. Taranto.

Mr. Sipkins, we'll hear from you.

ORAL ARGUMENT OF PETER W. SIPKINS

ON BEHALF OF THE RESPONDENT

MR. SIPKINS: Mr. Chief Justice, and may it please the Court:

The respondent urges two basic positions upon the Court today with all due respect. First we urge that this Court find that the Eleventh Amendment is a fiscally driven jurisdictional limitation on the Article III powers of the Federal courts, and that amendment is not motivated by any true concerns for sovereignty or sovereign immunity. As such, we urge that this Court find that interlocutory appeals from denials of motions that are based on that amendment should not lie.

Secondly, we urge another position on the Court today. We urge that this Court should take this opportunity to develop a balancing test, a balancing test

between two critically important and sometimes conflicting principles of sovereignty on the one hand and the final judgment, and the final judgment requirements of section 1291 on the other. In so balancing we believe that any notions of sovereignty pale in the context of the Eleventh Amendment when it is not the state itself, the state qua state, that is seeking to invoke the Eleventh Amendment, but rather, where as here, it is a sewer corporation that has been chartered by an entity that is, has not been determined to be a state for the purpose of the Eleventh Amendment by this very Court.

Generally speaking and at a minimum as a matter of law we urge that this Court determine that where sovereignty cannot be found as a matter of law that interlocutory appeals do not lie from the Eleventh Amendment.

QUESTION: The instrumentality issue isn't what the court of appeals relied on, is it?

MR. SIPKINS: That is correct, Justice White. Nevertheless we believe that for purpose of the balancing test a determination that that question is unanswered neither expands nor alters the decision of the court below, and the court of --

QUESTION: So you would suggest affirmance on that ground?

MR. SIPKINS: In part correct, among others. It is clear that the Eleventh Amendment itself is not based on anything other than fiscal concerns and that it is certainly not based --

QUESTION: Then why wasn't it phrased in terms of judgments rather than suits?

MR. SIPKINS: Well, the purpose, we believe, of the Eleventh Amendment was to make clear at the time of Chisolm v. Georgia, Justice Souter, that matters that were pending at that time in Federal courts had to be dismissed. And as a result the amendment, itself having gone through a number of iterations, ultimately utilized the terms suits and actions commenced or prosecuted, and as a --

QUESTION: We're still, perhaps from your standpoint, stuck with the text, and the text still says suits, not judgments.

MR. SIPKINS: Correct, Your Honor, it does clearly say suits. Nevertheless the language, the historical language of the amendment itself clearly indicates that the framers of that amendment, who knew how to express themselves and what they wanted, did not develop a clear prohibition as they did in the speech and debate clause and in the double jeopardy clause with respect to not having to stand trial.

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For example, the first iteration of the Eleventh Amendment as enacted in the House of Representatives the day, or introduced in the House of Representatives the day after Chisolm v. Georgia stated that no judicial power shall lie to make a state a defendant in the Federal courts. That was then amended shortly thereafter to include the language that we currently have that the jurisdictional power, the judicial power of the United States shall not be construed to extend to suits that are prosecuted or commenced.

And so what I am suggesting, Justice Souter, is that the framers of the Constitution themselves, understanding the implications of sovereignty and the implications that they had at the time, did not utilize language which clearly precluded the state from being hailed into court.

In addition there were no true concerns for sovereignty at the time that the amendment, that the Article III of the Constitution was enacted since after all of the Article III headings three of them specifically mention states themselves, six of them do not mention the states but nevertheless do not expressly exclude states from Federal jurisdiction.

The Eleventh Amendment arose after Chisolm v. Georgia clearly as a result of concern for the colonies,

then states, that they were fiscally strapped and they did not want to have after the war the state treasuries invaded by the Federal jurists. This was not a situation where the framers of the amendment stated clearly and unequivocally that there should be no ability of the Federal courts to bring the states before the bar.

QUESTION: Well, to what extent, Mr. Sipkins, can we look behind the language of the amendment which, as Justice Souter pointed out, speaks in terms of suits? You say you can look back to earlier drafts?

MR. SIPKINS: Mr. Chief Justice, what I am suggesting is that you can look back to earlier drafts to determine whether the framers clearly intended to preclude suits against sovereigns, and that it was clear that they did not in the earlier drafts because the language was far more clear in the earlier drafts with respect to what they intended.

QUESTION: Well then why not infer that there was some change of intent between the earlier drafts and the language that was finally adopted?

MR. SIPKINS: Precisely so, sir. Mr. Chief Justice, what we're suggesting is that in making that change the framers of the Eleventh Amendment intended that in certain circumstances you could bring the states before the bar of the court, you simply could not invade the

fisk, that this was a fiscally motivated amendment.

QUESTION: But how do you draw that deduction from the language of the amendment itself?

MR. SIPKINS: Because in those instances -- well, you can't from the language of the amendment itself. But if you look at the amendment in the context of the Article III powers of the Constitution and if you look at the amendment, particularly with respect to the speech and debate clause and with respect to the double jeopardy clause where the framers of the Constitution intended to preclude any jurisdiction whatsoever they clearly stated so, and they did not state so here with respect to the Eleventh Amendment.

There are problems --

QUESTION: Mr. Sipkins, your argument is that it's only meant to protect the state fisk? How does that square with the fact that we have held that it does protect the states against equitable actions? Isn't that something of an obstacle to your position?

MR. SIPKINS: It is indeed an obstacle, and I clearly admit that, Justice Scalia. What we believe is, and what we suggest today is that this Court's utilization of the concept of sovereign immunity since Hans v. Louisiana in 1890 as a framework or a basis for a number of decisions that this Court has rendered dealing with the

Eleventh Amendment was not necessary, and that in fact the concept of sovereign immunity gave rise to a series of decisions that perhaps were not well considered by this Court over time.

And that, the reason for Hans v. Louisiana and the need to have state sovereignty as the basis for the Eleventh Amendment was because at the time of Hans v. Louisiana the law of what law, the rule of what law applied to matters pending in Federal courts was Swift v. Tison. And the states and this Court were concerned that states would have their liability determined not under the substantive law of that own jurisdiction, but rather under Federal law.

Since 1938 in Erie v. Tompkins those concerns of the states and the concerns of the courts expressed in Hans v. Louisiana don't exist, and none of the decisions of this Court from Edelman through Pennhurst to Atascadero need to have sovereignty as the basis for that determination.

QUESTION: So you're asking us to overrule our earlier cases that say you cannot bring equitable actions against the states?

MR. SIPKINS: Justice Scalia, we do not believe that it's necessary to overrule --

QUESTION: Just leave them there, but they're

wrong.

MR. SIPKINS: They are founded upon a basis that was not necessary for the determination.

QUESTION: So, then the theory you are urging upon us today is inconsistent with those cases, you acknowledge that?

MR. SIPKINS: That is correct. There are indeed some problems with the current reading of those cases. First this Court has held that the Eleventh Amendment is a jurisdictional bar. Nevertheless, although the language of the amendment itself is clear that the judicial power of the United States shall not extend, clearly this Court has held where states waive their sovereignty they can in a sense create that very judicial power, a ruling or a holding which we believe is inconsistent.

In addition this amendment affects the Federal courts and limits the judicial power of the Federal courts, but says nothing whatsoever about Congress which can abrogate the Eleventh Amendment in appropriate circumstances.

Another problem with the current reading of the Eleventh Amendment is that states but not political subdivisions of states such as counties or cities or other local governments are entitled to invoke the Eleventh Amendment.

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QUESTION: Well, do you think it really would make sense from this Court's point of view to give the Eleventh Amendment the sort of overhaul that you're proposing in a case where we're trying to decide whether there is, an order denying Eleventh Amendment immunity is collaterally appealable?

MR. SIPKINS: What we're suggesting, Chief Justice Rehnquist, is that this Court utilize this opportunity to develop some very clear guidelines for when a matter of this nature is appealable, and that we believe that this case presents such a forum or such a vehicle for the Court to utilize to do that.

QUESTION: Well, what's wrong with the guidelines that were in Cohen v. Beneficial Loan?

MR. SIPKINS: One of the problems with the guidelines in Cohen v. Beneficial Loan is that -- first of all there are no problems, and we think that if you apply those standards as enunciated and as stated in Coopers & Lybrand v. Livesay several years later that it is easy to say that this particular case does not meet at least two of the three standards of Cohen. For example, in order to determine that the second test of Cohen has been met it is necessary to determine that this matter presents an issue that is too important to be denied interlocutory review, and the only basis upon which it can be determined that

this matter is too important to be denied interlocutory review is if this Court determines that indeed the Eleventh Amendment is based upon precepts of sovereignty. Because if it is not sovereignty but jurisdictional matters themselves which give rise to the Eleventh Amendment, then we are not dealing here with an animal that is too important to be denied review.

In addition we believe that if it is, as we have posited, the state fisk that is principally involved in the Eleventh Amendment protections, then certainly the state's fisk, that is the right to force the state to pay or the right to face the state to do something, will be protected upon an appeal from a final judgment after trial.

QUESTION: I have the same problem as does the Chief Justice. It seems to me that you're asking us to adopt a very fundamental position that the idea of sovereign immunity, which was the explicit articulation in Hans v. Louisiana, a rationale that four of the justices explored very, very carefully in Pennsylvania v. Union Gas, simply be overturned. True, I suppose that's open to you to argue and to us to decide, but that hasn't really been the terms in which the issue has been joined. It seems to me the states would be very surprised if we used this case as a vehicle for a wholesale revision of the

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Eleventh Amendment doctrine.

MR. SIPKINS: Well, as I stated, Justice Kennedy, we have suggested two alternative grounds to uphold the opinion of the First Circuit below. The first is that the Eleventh Amendment applies only to the protection of the state fisk and therefore the question of sovereignty is clearly raised. On the other hand if the balancing test that we urge upon the Court is something which the Court is inclined to adopt, it need not even reach in this instance the question of sovereignty, because if it is not the state itself, it is not the sovereign itself with which we are dealing, then all of the grand notions and implications of sovereignty which the petitioner has attempted to thrust upon the Court need not be dealt with here.

The reason is clear that as the Court looks at this balancing test of the protection of sovereignty on the one hand and the interests of preserving limited Federal jurisdiction as set forth in Congress in section 1291, then as you get further and further away from the state sovereign itself and towards some entity which has been created by it, a creature which has been created by it, you'd need not reach the question of sovereignty at all.

QUESTION: Why, if we were impressed by this

argument, and I don't say we shouldn't be, but why shouldn't we just remand and ask the First Circuit to decide whether this instrumentality deserves to be treated like the state?

MR. SIPKINS: That is precisely the relief which the petitioners have asked for, and what that would require is that --

QUESTION: But don't you think the First Circuit assumed that it was?

MR. SIPKINS: No. In fact to the contrary, and contrary to the statement made by counsel for the petitioner upon a question I believe asked by Justice, Chief Justice Rehnquist. The First Circuit has reiterated its position here that this entity is unlikely to be held as a state, as an arm of the state. In its decision denying a motion for a stay pending the petition for certiorari to this Court the First Circuit said that one of the bases for denying that request for a stay was that it continued to harbor substantial doubts that this entity, that this sewer company was indeed an arm of the state. So the First Circuit didn't act on this issue only with respect to the case cited --

QUESTION: It -- rather than decide that question it preferred to differ from how many courts of appeals?

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MR. SIPKINS: Well, it did differ, as counsel for petitioner suggests, from at the time I believe four and now perhaps up to as many as eight. But I suggest, with all due respect, Justice White, that it in fact upon a careful reading of those circuits does not differ from them. Several years ago, several terms ago this Court decided the case of Mitchell v. Forsyth, a qualified immunity case involving the attorney general of the United States, and the issues there on qualified immunity had to do with both the attorney general's immunity from suit with respect to actions that he took as a prosecutor and also with respect to actions that the attorney general took in investigatory capacities.

And in that case this Court held that if the ability to claim qualified immunity could not be determined as a matter of law but it was necessary to take factual evidence and to decide on the basis of that factual evidence how the attorney general was acting, that qualified immunity did not lie.

Following Mitchell v. Forsyth four or five of the circuit courts that have determined the question about Eleventh Amendment have held that only where immunity, sovereign immunity can be determined as a matter of law, where it is the state itself that can be determined as a matter of law, should Eleventh Amendment immunity lie, and

that the protections of Eleventh Amendment should not lie where it is necessary to make factual determinations.

QUESTION: So your balancing test that you're urging upon us, Mr. Sipkins, would say that if the state eo nomine so to speak is a party it may, it might be entitled to qualified, rather to immediate appeal if its Eleventh Amendment claim is turned down, but an entity that claims to be like the state, like the petitioner here, would not be?

MR. SIPKINS: That is correct.

QUESTION: But if the state itself is a party it seems to me it will never be turned down.

MR. SIPKINS: Correct. Then of course --

QUESTION: So that you're really giving absolutely nothing away.

MR. SIPKINS: Well, what I'm giving away is that where it can be determined as a matter of law that it is the state. For example, where in Alabama v. Pugh it's the Alabama Department of Corrections, or in Welch where it's the Texas Department of Corrections, or in any number of other jurisdictions where it is clearly a department of the state through which the state has acted, that is the state qua state or the state itself.

QUESTION: So you're not limiting your balancing just to where the state is a party as such, but it could

be a state department or so, that might have the right to immediately appeal?

MR. SIPKINS: That is correct, Justice Rehnquist.

QUESTION: And why isn't, why isn't that question a matter of law here?

MR. SIPKINS: It's not a question of as a matter of law here because the petitioner itself has raised issues of fact that are still open and have not yet been decided. For example, it suggests, Justice Scalia, that one of the reasons upon which it can claim that it is an arm of the state and entitled to the protections of the Eleventh Amendment is because the judgment sought by the respondent is so large that it will be forced to go back to the Commonwealth of Puerto Rico in order to attempt to get funds to satisfy the judgment. That is a factual question that frankly can't be determined until trial itself is completed. And unless that fact has been determined clearly a factual question PRASA itself, the petitioner itself suggests that the issue is not a closed question.

QUESTION: Well, boy, that's a strange kind of -- I mean, there are always factual questions. There is no such thing as an abstract question of law that's presented. I mean, you have to decide whether the

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individual sued is indeed the treasurer of the state. I mean, that's a question of fact, I suppose, isn't it?

MR. SIPKINS: There are indeed questions of fact, but there --

QUESTION: Are you saying whenever there's a question of fact the game is off?

MR. SIPKINS: No, there are shadings of questions of fact. Clearly --

QUESTION: Ah, shadings of questions of fact.

MR. SIPKINS: Clearly, Justice --

QUESTION: How do we paint those shadings in deciding this question of whether there should be an interlocutory appeal?

MR. SIPKINS: If the issue can be determined as a matter of law, and here the issue can't be determined as a matter of law.

QUESTION: Nothing can be determined as a matter of law without some factual content, it seems to me.

MR. SIPKINS: I don't believe, Justice Scalia, that the question ought to be whether there are facts that are in issue. It ought to be whether that there need to be factual determinations made that can't be determined or can't be made until the conclusion of trial.

Let me point by way of example to two recent decisions of the First Circuit involving the Ports

Authority of the Commonwealth of Puerto Rico. In one of the cases, the H/V Manhattan Prince case, which proceeded to trial, the First Circuit reversed the holding of the trial court and found indeed that in that instance involving pilots and the licensing of pilots for the harbors of San Juan, that the Ports Authority was acting in a state capacity and that therefore it was entitled to claim Eleventh Amendment immunity. That was after trial and the development of facts during trial that assisted the entity in proving, so to speak, that it was entitled to Eleventh Amendment protection.

2 years later, in August of this year, in a case entitled Royal Caribbean v. the Ports Authority, the Eleventh, the First Circuit found that the Eleventh Amendment did not apply to that very same, very same Puerto Rican public corporation. And so the question is factually determinative in the sense that you need to determine what it is that the public corporation is engaged in in order to determine whether it is acting as an arm of the state.

QUESTION: Mr. Sipkins, the court of appeals though decided that Cohen just didn't apply and treated the case as though Puerto Rico itself was before it.

MR. SIPKINS: That is correct, it did.

QUESTION: And that's the issue that we, I

thought we were addressing here, and we don't need to say that the, that this instrumentality is the state. I suppose we could disagree with you on the appealability issue and remand to the court of appeals to decide an issue that it didn't decide.

MR. SIPKINS: I believe, Justice White, that --

QUESTION: And so -- but you suggest that we don't even decide the appealability issue but just remand to decide the instrumentality issue?

MR. SIPKINS: I believe that on its face this Court can determine that there are open questions of fact and that it was not necessary to permit an interlocutory appeal from the First Circuit with respect to this instrumentality.

QUESTION: But for what it's worth, those open issues of fact are not in any way, at least that I understand, implicated by the issues raised by the suit. I mean, whether you overcharged them or whether you didn't overcharge them is not going to, I presume, involve litigation about their status for Eleventh Amendment purposes. So what is to be gained by saying it shouldn't be litigated now?

MR. SIPKINS: What is to be gained, Justice Souter, is that we will not know whether or not PRASA has finally exhausted its arguments that it is an arm of the

state until we are able to determine precisely how large any judgment that might obtain is.

QUESTION: Mr. Sipkins --

QUESTION: Go ahead. I don't want to proceed.

QUESTION: Mr. Sipkins, do you propose that we apply this new approach to the other areas of entitlement to interlocutory appeal as well? I mean, we certainly don't do this, this balancing that you propose, this inquiry into whether there are any factual issues involved, we don't do it in the double jeopardy area, do we?

MR. SIPKINS: No, you're correct, Justice Scalia, you don't do it where --

QUESTION: We don't do it for the speech and debate clause.

MR. SIPKINS: You don't do it there, and you don't do it in those instances where the Constitution itself is clear that there is an absolute right not to go to trial.

QUESTION: So ultimately even this argument collapses back into your first argument that there is no, no categorical Eleventh Amendment immunity.

MR. SIPKINS: That there is no --

QUESTION: I mean, if I think this is an Eleventh, that the Eleventh Amendment is like the speech

or debate clause or the double jeopardy clause, that it entitles the state to stay out of the court, I don't see any reason to treat this any different from the way we treat claims under those clauses.

MR. SIPKINS: It collapses into the essence of the Eleventh Amendment and whether or not sovereign immunity is the basis for the Eleventh Amendment on the issue of when the state itself is the defendant or when the state or a state department or agency is the state defendant, but not so where it is something that is so far extended from the sovereign itself.

For the reasons which I have stated and for the reasons set forth in the brief of the respondent we urge that this Court affirm the decision of the First Circuit below.

QUESTION: Thank you, Mr. Sipkins.

Mr. Taranto, you have 10 minutes remaining.

MR. TARANTO: If the Court has no further questions I have no rebuttal. Thank you.

CHIEF JUSTICE REHNQUIST: Thank you.

The case is submitted.

(Whereupon, at 10:45 a.m., the case in the above-entitled matter was submitted.)

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BY Ann-Marie Federico

(REPORTER)