

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: ALBERT HESS AND CHARLES F. WALSH, Petitioners
v. PORT AUTHORITY TRANS-HUDSON
CORPORATION

CASE NO: No. 93-1197

PLACE: Washington, D.C.

DATE: Monday, October 3, 1994

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IN THE SUPREME COURT OF THE UNITED STATES

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ALBERT HESS AND CHARLES F. :
WALSH, :
Petitioners :
v. : No. 93-1197
PORT AUTHORITY TRANS-HUDSON :
CORPORATION :
- - - - -X

Washington, D.C.
Monday, October 3, 1994

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
1:00 p.m.

APPEARANCES:

LAWRENCE A. KATZ, ESQ., Bala Cynwyd, Pennsylvania; on
behalf of the Petitioners.
HUGH H. WELSH, ESQ., New York, New York; on
behalf of the Respondent.

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

2 (1:00 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 93-1197, Albert Hess and Charles F. Walsh v.
5 the Port Authority Trans-Hudson Corporation.

6 Mr. Katz.

7 ORAL ARGUMENT OF LAWRENCE A. KATZ

8 ON BEHALF OF THE PETITIONERS

9 MR. KATZ: Mr. Chief Justice and may it please
10 the Court:

11 This case involves a very narrow issue: whether
12 the Port Authority, a Compact Clause entity, and PATH, its
13 subsidiary, are entitled to the protection of the Eleventh
14 Amendment.

15 This Court, in its Lake Country decision,
16 instructed that Compact Clause entities are not
17 automatically entitled to the protection of the Eleventh
18 Amendment.

19 QUESTION: Why does one follow from the other?
20 Is it necessarily so that if PATH has immunity -- well, is
21 it necessary to sort of -- if the Port Authority has
22 immunity that PATH does? PATH is a wholly owned
23 subsidiary, as it's described.

24 MR. KATZ: The statute creating PATH gives it
25 all the rights and immunities of the Port Authority. We

1 believe that --

2 QUESTION: But if a State created a corporation
3 and gave it all the immunities of the State, it wouldn't
4 necessarily follow that it would have immunity as a matter
5 of Federal law. That would still be for us to determine.

6 MR. KATZ: That's correct, Your Honor.

7 QUESTION: So I'm not -- so nothing turns, in
8 your view, on the fact that this is a wholly-owned
9 subsidiary of the Port Authority?

10 MR. KATZ: We believe that there is certainly a
11 connection between the Port Authority and PATH that would
12 in all probability permit this Court to find that if the
13 Port Authority is entitled to the Eleventh Amendment
14 immunity, it is likely that PATH is similarly, because
15 their structure is very similar.

16 QUESTION: Then that's the analysis that we have
17 to follow here, isn't it?

18 MR. KATZ: Yes, Your Honor. We don't believe,
19 though, that the Port Authority is entitled to the
20 Eleventh Amendment immunity.

21 QUESTION: But in any case, the terms of the
22 corporate charter have nothing to do with our inquiry
23 except insofar as it identifies the powers of the
24 corporation and allows us to determine whether the
25 corporation is equivalent to the Authority, and hence

1 whether the Authority is equivalent to the State.

2 MR. KATZ: That's correct. There's a step
3 procedure that must be followed. We must first see
4 whether or not PATH is the functional equivalent of the
5 Port Authority, and then the constitutional issue, whether
6 the Port Authority is then the functional equivalent of
7 the State. Technically --

8 QUESTION: But you don't think anything turns on
9 that first inquiry, as I understand your brief. You treat
10 PATH just as if it were the Port Authority.

11 MR. KATZ: We do, because by statute it is
12 considered the same.

13 QUESTION: But if it is the same, it's not
14 because its charter says it's the same, it's because under
15 straight Eleventh Amendment analysis it is the same.
16 Nothing is added by their saying, this is the same, any
17 more than anything is added to the analysis by the Port
18 Authority's enabling act saying this is the State.

19 MR. KATZ: The only thing that at all is added
20 is the fact that the discussion relating to the Port
21 Authority in several instances will also apply to PATH
22 because the same Compact is used in creating the rights
23 and regulations with regard to both under State law.

24 QUESTION: Yes.

25 QUESTION: Well, it may work one way and not the

1 other way. That is to say, if the Port Authority is not
2 entitled to sovereign immunity, surely PATH is not, but if
3 the Port Authority is, perhaps PATH is and perhaps it
4 isn't. Would you agree with that?

5 MR. KATZ: Justice Scalia, I would agree with
6 that. I believe that PATH, because of the nature, acting
7 for all intents and purposes as a private business owned
8 by State entities, could be found to not possess Eleventh
9 Amendment protection, where, if the Court was so inclined,
10 the Port Authority could be found to possess that
11 protection.

12 We do not believe that is the case, though. We
13 believe that this case is controlled by the Lake Country
14 decision, and the importance of Lake Country, as we view
15 it, is the fact that this Court held that bi-State Compact
16 Clause entities are not automatically entitled to the
17 protection of the Eleventh Amendment, and that with
18 respect to these Compact Clause entities, the limited
19 language of the Eleventh Amendment is not to be
20 expansively applied.

21 Now, with both regard to the Port Authority and
22 PATH, it is clear, first of all, that neither is a State,
23 it is also equally as clear that neither is controlled by
24 any individual sovereign State and, finally, it is clear
25 that neither is the functional equivalent of any

1 individual sovereign State.

2 Lake Country --

3 QUESTION: Let's take a similar internat -- do
4 you think that is enough just with those givens we can say
5 it's not entitled to sovereign immunity, neither a State
6 nor --

7 MR. KATZ: A State or the functional equivalent
8 of a State --

9 QUESTION: Right.

10 MR. KATZ: -- that would show the relationship
11 between them. I believe --

12 QUESTION: Right, nor can it act -- can a State
13 require its action.

14 MR. KATZ: That's critical --

15 QUESTION: Yes.

16 MR. KATZ: -- to the case, Your Honor.

17 QUESTION: What about an international
18 organization like OPEC, for example, an international
19 organization of sovereigns to operate in one particular
20 field, or what about something like a joint command of a
21 military operation like a crusade in Europe, I mean, the
22 unified forces?

23 MR. KATZ: Justice Scalia, I would have to know
24 how those international agencies are structured. If
25 they're structured similar to the Port Authority, where

1 neither State on its own can compel the Port Authority to
2 act, then I would say that under an analogous situation
3 the same result should apply as --

4 QUESTION: Really?

5 MR. KATZ: -- we seek here.

6 QUESTION: You think OPEC is suable in American
7 courts?

8 MR. KATZ: Well, no, I don't think that OPEC is
9 covered by the Eleventh Amendment at all. The Eleventh
10 Amendment does not apply.

11 QUESTION: Well, I'm talking about sovereign
12 immunity in the international sense, which has a lot of
13 bearing upon what sovereign immunity in the Eleventh
14 Amendment is.

15 MR. KATZ: Your Honor, I must be --

16 QUESTION: You see, I've always thought that an
17 organization like OPEC surely is not suable.

18 MR. KATZ: Your Honor, I would have to plead
19 ignorance to OPEC, because I'm not certain as to their
20 structure. If they are structured so that there is a
21 direct relationship between any individual member, any
22 individual nation, and OPEC --

23 QUESTION: No individual nation can control it.
24 Just as in a joint military operation no individual State
25 can control it. It has to have the consent of all.

1 MR. KATZ: If the consent of all the States are
2 necessary, then using an Eleventh Amendment analysis, I
3 would contend that OPEC is not protected by the Eleventh
4 Amendment or the analogous international law.

5 What's very important to --

6 QUESTION: I think you're wrong, but --

7 QUESTION: Mr. Katz, am I wrong in thinking that
8 you are relying dominantly on, this is an entity that
9 raises its own money and pays its own way? I thought that
10 that's what -- you were emphasizing that and not the
11 business of who controls, or how is the control spread.

12 MR. KATZ: Well, we believe that this Court has
13 indicated that the significant factor to look at is in
14 fact what's been called the Treasury factors. It's a flip
15 side. Where does the money come from, and are the States
16 liable to it?

17 We take the position that it is the most
18 important factor because of this Court's language in Lake
19 Country.

20 QUESTION: Well, can we talk about that a little
21 bit? The States are liable up to \$100,000?

22 MR. KATZ: That is not correct, Justice
23 O'Connor. It is, in fact, the fundamental error of the
24 Third Circuit decision below.

25 Compact Article XV says that the Port Authority

1 can request funding for certain administrative expenses
2 and if the legislatures of both States approve that
3 funding with the approval of the Governor.

4 The problem below in the Third Circuit was that,
5 when they quoted the statute, when they quoted Compact
6 Article XV, they ignored the language, with the approval
7 of the Governor. There is no way that the States can be
8 compelled to contribute funds. It's a totally
9 discretionary act.

10 QUESTION: Even up to the \$100,000?

11 MR. KATZ: Even up to the \$100,000.

12 QUESTION: What about the other side of the
13 coin? If the Port Authority and the related entities make
14 money, and there's something left over, that goes back to
15 the States?

16 MR. KATZ: No, it does not, Your Honor. That
17 money goes to a general surplus revenue fund. That money
18 is available for the cooperative States for use, but we
19 submit that the statute does not permit -- and Justice
20 O'Connor, if I might, this is why the fact that the Port
21 Authority is a Compact Clause entity is pivotal in this
22 case.

23 This is not a situation where the State of New
24 York or the State of New Jersey has their own entity that
25 they can control. In this case, the extra reserves in the

1 fund stay in that fund unless both States cooperate and
2 agree to their expenditures.

3 If from this day until the end of the world the
4 States of New Jersey and New York cannot agree on how that
5 money is spent, it will stay there. If the --

6 QUESTION: But why should the fact that two
7 States are involved, or two sovereigns are involved,
8 eliminate sovereign immunity? It seems to me you have
9 double the claim to sovereign immunity, if anything. I
10 don't understand that it follows.

11 MR. KATZ: On its face, Your Honor, it certainly
12 appears that way. That's simply not constitutionally
13 accurate.

14 The reason that two States are not better than
15 one State, for lack of a better phrase, is the Compact
16 Clause itself. In a single State entity, any individual
17 State can compel the entity to act. No two --

18 QUESTION: Well, that's very true --

19 MR. KATZ: -- can do so.

20 QUESTION: -- but so what? That's very true,
21 but so what? I mean, we've said that the Eleventh
22 Amendment is simply a reflection of preexisting notions of
23 sovereign immunity that came along with our union before
24 the Eleventh Amendment was even adopted.

25 MR. KATZ: A tradition --

1 QUESTION: It seems to me that those standard
2 conceptions of sovereign immunity extend to two sovereigns
3 acting jointly just as they extend to a single sovereign.

4 MR. KATZ: By entering into this Federal system,
5 Your Honors, the Founding States and all subsequent States
6 have as part of the plan to the Convention, as part of the
7 Compact Clause, changed their role with respect to
8 interstate Compact entities.

9 The reason for that is that sovereign States, on
10 their own -- sovereign colonies before this Constitution
11 was enacted -- had the ability to create entities, had the
12 ability to form coalitions. When they joined the Union,
13 they approved the Compact Clause, and today, a
14 sovereign -- today, a State does not have the sovereign
15 power to create a Compact Clause entity without the
16 approval of the Congress.

17 QUESTION: That's true, but why does that lead
18 to the conclusion -- that says they cannot act jointly
19 without the approval of Congress, but why does it follow
20 from that that when -- moreover, which is what you're
21 saying, when they do act jointly, they no longer have
22 sovereign immunity the way they used to? I don't see how
23 that follows.

24 MR. KATZ: They don't have sovereign immunity
25 any longer because the practical day-to-day realities of

1 bi-State Compact entities is that the States cannot
2 exercise their sovereign control over the entity.

3 QUESTION: Well, are you saying as a matter of
4 law if there's a bi-State entity it does not have Eleventh
5 Amendment immunity?

6 MR. KATZ: No, Your -- Mr. Chief Justice, I am
7 not saying that. What I am saying is that a bi-State
8 entity, structured as the Port Authority is structured,
9 does not have the ability to claim the Eleventh Amendment.
10 It is possible --

11 QUESTION: You would apply no different test to
12 a bi-State entity than to a single State entity, then. Is
13 that --

14 MR. KATZ: No, on the contrary. I believe that
15 the burden that a bi-State entity has to show in order to
16 establish that it's entitled to the protection of the
17 Eleventh Amendment is stronger because of its unique role
18 in our constitutional system. Bi-State entities require
19 not only the cooperation of the other States, but the
20 concurrence of Congress. I believe there's --

21 QUESTION: Well, in the Lake Country Estates
22 there's certainly no suggestion, as I read the opinion,
23 that the analysis is different because it's a bi-State
24 entity rather than a single-State entity.

25 MR. KATZ: I believe implicit in Lake Country is

1 the underlying factor that this is a Compact Clause
2 entity, and for that reason, the Court was not willing to
3 extend the Eleventh Amendment protection any further than
4 it did.

5 QUESTION: Well, the reason -- I thought you had
6 just said your main argument doesn't have to do with who
7 controls, or it's bi-State, but it has to do with how this
8 organiz -- what it's operation is, how it pays for that
9 operation. That would be the same if it were one State or
10 two States, right?

11 MR. KATZ: That would be correct, but I believe
12 the burden of proof is stronger with a multi-State entity.

13 Justice Ginsburg, responding to the question
14 that you asked earlier, we believe that the Treasury
15 factors are the most important factor to look at, and the
16 reason it's the most important factor is that in Lake
17 Country this Court explained that the reason that some
18 entities who are not the State itself are entitled to the
19 protection of the Eleventh Amendment is in order to
20 protect the State Treasury.

21 The rationale for the extension from State to
22 entity was given in Justice Stevens' opinion as the
23 protection of State Treasuries.

24 In an Eleventh Amendment case, it's important to
25 recognize that there's a two-step process involved. The

1 first step is whether or not the entity is entitled to the
2 Eleventh Amendment. The second step is then whether or
3 not the Eleventh Amendment applies in light of issues such
4 as abrogation and waiver.

5 In that first step, Lake Country and other
6 decisions of this Court emphasized the Treasury factor,
7 and in this case, the Treasury factor is fully supportive
8 of the proposition that the Eleventh Amendment does not
9 apply to the Port Authority and PATH.

10 QUESTION: Well, I tried to ask you about
11 whether the States would receive any surplus revenues, and
12 you never really answered the question. You went off --

13 MR. KATZ: I apologize.

14 QUESTION: -- in a different direction.

15 MR. KATZ: The answer to that question --

16 QUESTION: Now, it is possible that the States
17 may receive surplus revenues under this scheme?

18 MR. KATZ: It is possible.

19 QUESTION: And have there ever been years in
20 which there were such revenues that the States shared?

21 MR. KATZ: In response to the first question,
22 yes, it is possible for the States, by cooperative
23 decision of the legislatures and their Governors, to share
24 the general revenue fund. Yes, there are situations where
25 that has been done, and I believe that the Port Authority

1 has cited some of those situations in their brief.

2 By the same token, there are other examples
3 where an individual State, seeking to pursue what it
4 believed was its sovereign policy, wanted to take that
5 money, and they weren't permitted to because the agreement
6 of the other State was not available.

7 It is that situation, the practical realities
8 that once they cannot act on its own, that leads to the
9 conclusion that this entity cannot be sovereign, is not
10 entitled --

11 QUESTION: Well, then you're saying as a matter
12 of law a bi-State entity cannot have Eleventh Amendment
13 protection. You don't need to examine all these other
14 factors, because in no bi-State entity will you find that
15 one State can act on its own.

16 MR. KATZ: Mr. Chief Justice, based on the
17 current posture of this case, I agree, but I disagree with
18 the conclusion.

19 QUESTION: Well, but you've agreed with several
20 totally inconsistent propositions, it seems to me. First,
21 no bi-State entity can have Eleventh Amendment -- second,
22 that it depends on the facts and circumstances. What is
23 your position?

24 MR. KATZ: Let me give you an example, Mr. Chief
25 Justice.

1 QUESTION: Well, just tell me.

2 MR. KATZ: My position is that any entity
3 structured as the Port Authority is structured is not
4 entitled to the protection of the Eleventh Amendment. I
5 believe that the States and Congress concurring could
6 create a statutory framework where each State has the
7 opportunity to either exercise some control or dip into
8 the funds themselves, where there is significant authority
9 exercised by the States and, if that structure did exist,
10 those entities would be entitled to the Eleventh Amendment
11 protection.

12 QUESTION: Isn't that kind of a silly approach?
13 If Congress wanted there to be immunity from suit in
14 Federal courts, all it would have to do would be to say in
15 its consent there should be immunity from suit in Federal
16 court. Then you don't have to worry about all the details
17 of the structure.

18 MR. KATZ: Well, Justice Stevens, we believe
19 that's another argument supporting our position here, that
20 in fact there's nothing in the Compact itself to indicate
21 that the States intended to give Eleventh Amendment
22 immunity to this entity. Lake Country --

23 QUESTION: What's the intent got to do -- as I
24 understand it, what Justice Stevens has suggested is not
25 Eleventh Amendment immunity. It would be the equivalent

1 of statutory immunity created for this entity by Congress
2 on the theory that the Compact is treated as Federal law.

3 MR. KATZ: I believe that's true. I've tackled
4 with that problem, and I'm not certain there's an actual
5 difference between a congressional statute precluding
6 these cases from Federal court and the ramifications of
7 the Eleventh Amendment precluding them from Federal court.
8 The effect is still the same, and I'm not certain
9 technically which would have applied.

10 I think the significance, though, is that Lake
11 Country speaks about the need for congressional
12 concurrence. Concurrence indicates the need to agree with
13 something. If the Compact is silent, then it's clear that
14 Congress did not concur, and without congressional
15 concurrence, the suggestion that Justice Stevens raised,
16 the hypothetical that he raised, could not exist and does
17 not exist in this case.

18 QUESTION: Well, let me ask you -- and I suppose
19 this is just a theoretical question, but let's assume that
20 in this case we were to find an intent on the part of the
21 compacting parties, approved by Congress, to extend
22 immunity to PATH. Would you lose, in that case?

23 MR. KATZ: Let me make certain I understand the
24 question.

25 QUESTION: Because we took a case, as I

1 understand it, to decide what the Eleventh Amendment
2 provides, and I think you have agreed with me that
3 whatever this immunity might be based on intent with
4 congressional approval, it wouldn't necessarily be
5 Eleventh Amendment immunity.

6 MR. KATZ: If this Court were to find that the
7 parties -- that the States specifically intended to confer
8 some sort of sovereign immunity from suit in Federal court
9 to this entity, and that Congress, understanding that
10 intention, specifically and explicitly concurred with it,
11 then I would agree that under Federal law, Article III
12 jurisdiction would not vest in the Federal courts.

13 QUESTION: Then the Treasury factor isn't
14 important at all. Even if this is the biggest moneymaker
15 for the State, it wouldn't matter, as long as the States
16 intended it to be immune?

17 MR. KATZ: The Treasury factor is an extremely
18 relevant, the most relevant factor in the analysis on the
19 constitutional issue. The statutory issue is a totally
20 different approach. Such a statute does not exist in this
21 case. There is no specific congressional concurrence for
22 protection from suit in Federal court. In the absence of
23 that, the only issue that remains is the Eleventh
24 Amendment issue, and the Eleventh Amendment issue looks
25 primarily to the Treasury factors.

1 I believe there's another important factor --

2 QUESTION: It looks to the Treasury factors when
3 there's any doubt whether you're suing the State. If you
4 sued a department of the State to get the State to get
5 particular State action, is there any doubt the Eleventh
6 Amendment would apply, unless there's a --

7 MR. KATZ: None at all, Your Honor. The reason
8 we must address the Treasury --

9 QUESTION: -- Treasury or no Treasury, you can't
10 sue a State agency as such.

11 MR. KATZ: That's right. The issue before this
12 Court is whether or not the Port Authority is such a State
13 agency, and in determining that question, Lake Country and
14 other cases indicate reliance on the Treasury factor.

15 QUESTION: It's one factor, but don't make it
16 the be-all and end-all. It's certainly a sufficient
17 factor, I think. I'm not sure it's anywhere near a
18 necessary --

19 MR. KATZ: Justice Scalia, let me address
20 another factor, then. In Lake Country, this Court noted
21 that the most forceful evidence of autonomy between the
22 Tahoe agency and the States was evidence that the States
23 had to go to court to litigate against the entity.

24 I believe that that factor being called the most
25 forceful was evidence for the court's position that

1 actions speak louder than words, that regardless of what
2 the Port Authority says today, let's look at what they
3 did.

4 In this case, we had that situation. We have a
5 situation where the Attorney General of New York went into
6 court to compel the Port Authority to stop polluting the
7 water around the Kennedy Airport. The judge who heard
8 that injunction hearing noted that it was in fact unusual
9 that the Port Authority, being a quasi-State agency of
10 some sort, would come in and basically take the position,
11 don't enjoin us, we should be able to pollute the water
12 because we don't know that it's our pollution that's
13 causing the damage.

14 Now, the Port Authority in their reply brief
15 indicates that the presence of this lawsuit is actually
16 some indication of State connection. They take the
17 position that the Attorney General has to screen these
18 suits, and the reason for that is because the Port
19 Authority is related to the State.

20 I submit that's simply not true. The statute
21 gives the Attorney General discretion. If not polluting
22 the waters near the Kennedy Airport was an important State
23 policy, sufficiently important that the Attorney General
24 would want to pursue it, and in his discretion decided to
25 pursue it through litigation, then if the Port Authority

1 was sufficiently connected to the State to make it the
2 functional equivalent of the State, or if the Port
3 Authority was subject to the control of an individual
4 State, the Attorney General would not have had to go to
5 court. It could have been handled within the executive
6 branch.

7 QUESTION: That all reduces back down to your
8 basic argument that you have no sovereign unless you are
9 within the control of a single State, and that being
10 within the control of two sovereign States suddenly
11 eliminates sovereign immunity.

12 MR. KATZ: The reason that eliminates sovereign
13 immunity unless the statutory structure gives those
14 individual States some independent control is because the
15 purpose of extending sovereign immunity is because the
16 agency is derivative of the sovereign.

17 In this case, the States are not effectively
18 sovereign as to this entity, because it can't exercise
19 control as to that entity. If today --

20 QUESTION: It's derivative of two sovereigns.
21 The two sovereigns are the only people that can exercise
22 control over it instead of one sovereign. You know, two
23 sovereigns are twice as good as one sovereign, it seems to
24 me, not half as good.

25 MR. KATZ: Only if they had the authority to act

1 and they can agree.

2 QUESTION: Well, do you agree with that,
3 counsel? Why isn't two sovereign -- isn't two sovereigns
4 just half of the control that a State usually has?

5 MR. KATZ: Personally, I believe, Justice
6 Kennedy, that two sovereigns are the equivalent of no
7 sovereign with respect to a bi-State entity, because
8 independently --

9 QUESTION: All right, so --

10 MR. KATZ: -- they cannot exercise control.

11 QUESTION: -- and that's almost always the case
12 with any State agency, so why isn't your argument that,
13 sui generis, this is a category where no State, no
14 Eleventh Amendment immunity can apply?

15 MR. KATZ: Because I don't believe that -- let
16 me rephrase that. I believe that the Court would take the
17 position that -- such as that set forth in the concurrence
18 in the Feeney case that Eleventh Amendment immunity should
19 never apply to a Compact Clause entity. That would be a
20 constitutionally correct decision.

21 I do not believe it is necessary for the Court
22 to go to that extreme in this decision, because this
23 decision can be reached on narrower grounds and still hold
24 the constitutional principles of the Compact Clause.

25 QUESTION: Would you make a distinction between

1 an entity that enriches the State by making -- or makes
2 its own money, so it doesn't deplete this Treasury.
3 That's your big Treasury factory. It doesn't deplete the
4 Treasury. It may enrich the Treasury, but should that --
5 those be equal? 1) It doesn't deplete the Treasury, 2)
6 It enriches the Treasury.

7 MR. KATZ: May I say two things in response to
8 that question? The first is, there's another very
9 important factor of the Treasury test. Not only is it
10 self-sustaining in terms of its own financial ability, but
11 its debts cannot become the debts of the Compacting
12 States.

13 But a more direct response to your question, I
14 do not believe that the Port Authority does enrich the
15 States, because --

16 QUESTION: And if it did, would that account
17 against your argument? This large Treasury factor -- I
18 understand the part they don't deplete the Treasury. If
19 it swells the Treasury, does that indicate it's a State
20 agency?

21 MR. KATZ: I believe that if the individual
22 States had the authority to independently take money out
23 of that surplus fund toward its own use, that would point
24 in favor of Eleventh Amendment immunity. It's important
25 to remember, though, that if either the State --

1 QUESTION: And the fact that they can do it
2 jointly by agreement with one another, we have to rule
3 that out of accounting?

4 MR. KATZ: I believe there are several
5 historical examples to show that the States often cannot
6 agree, and therefore -- the concept of sovereign --

7 QUESTION: Well, what do you do? It's their
8 money. If New York and New Jersey agree, it's their
9 money.

10 MR. KATZ: Absolutely, but the concept of
11 sovereign is that the sovereign has the power to do
12 something. The State of New York does not have the power
13 to take this money, and the State of New Jersey does not
14 have the power to take this money.

15 Mr. Chief Justice, if there are no questions, at
16 this time I'd like to reserve the remainder of my time.

17 QUESTION: Very well, Mr. Katz. Mr. Welsh,
18 we'll hear from you.

19 ORAL ARGUMENT OF HUGH H. WELSH
20 ON BEHALF OF THE RESPONDENT

21 MR. WELSH: Thank you, Mr. Chief Justice, and
22 may it please the Court:

23 For more than 30 years, the Port Authority of
24 New York and New Jersey shared the sovereign immunity of
25 the two States that created it, and it was not until 1951

1 that the two States passed legislation that permitted
2 suits against the Port Authority in the first place.

3 This Court has found that that conditional
4 waiver of the sovereign immunity also contained language
5 that constituted a conditional waiver of the Eleventh
6 Amendment, and so when this case was filed beyond the
7 1 year within which such suits may be bought, it was only
8 logical, then, for the District of New Jersey and later
9 the Third Circuit to dismiss the case because of the lack
10 of jurisdiction of the Federal court, because the Eleventh
11 Amendment would bar this action being bought against an
12 arm of the State in the Federal courts.

13 The Court over the years has considered many
14 factors to determine whether a State agency is in fact an
15 arm of the State entitled to Eleventh Amendment immunity,
16 and I suggest to you that if one takes a look at the Port
17 Authority of New York and New Jersey and its subsidiary,
18 PATH, it's quite clear that it does share the indicia, or
19 the criteria, that the Court has applied in a number of
20 cases.

21 If you take all of the indicia, all of the
22 criteria that have been considered over the years, you'll
23 find that they really come down to two fundamental
24 questions, and one is, did the States create an agency
25 that was an arm of the State and entitled to share in the

1 immunity, and secondly, did they continue to exercise
2 control over that agency and, in both cases, that is the
3 case of the Port Authority.

4 So if we apply the indicia from Lake Country
5 Estates or from the Mount Healthy decision, both decisions
6 of this Court, I think it's quite clear that the Port
7 Authority does share that immunity.

8 A number of questions were asked relating to the
9 State Treasury test. Justice O'Connor asked about the
10 limit of \$100,000 on the State's obligation to the Port
11 Authority. I believe what we were referring to there was
12 an obligation at the time the Port Authority was created
13 for each State to commit up to \$100,000 each until such
14 time as the Port Authority became self-supporting.

15 There were other times in its history that the
16 Port Authority was supported by the States of New York and
17 New Jersey. In its early days when there was a danger of
18 defaulting on the bonds, the two States actually gave to
19 the Port Authority the operation and control over the
20 Holland Tunnel, and the revenues from that facility, which
21 was built by the two States, helped to support the Port
22 Authority, and then, since then, the Port Authority has
23 been self-supporting.

24 The Treasury argument, or the Treasury criteria,
25 certainly is not the only criteria that the Court has

1 looked at over the years, but even if one focuses on that
2 with regard to the Port Authority, it's quite clear that
3 the Port Authority is very closely linked to the
4 Treasuries of both of the States that created it.

5 It's true that the Port Authority may not pledge
6 the credit of either the State of New York or New Jersey.
7 It's also true that a judgment against PATH or the Port
8 Authority will not be paid for directly out of the State
9 Treasury of either State.

10 QUESTION: May I ask a background question? You
11 mentioned that between 1922, or whenever it was they
12 formed this, and 1951, they retained their sovereign
13 immunity?

14 MR. WELSH: Yes. There's a series of cases that
15 came down during that period of time that made it quite
16 clear that the Port Authority shared the sovereign
17 immunity of the two States until 1951.

18 QUESTION: Those were all -- all those were New
19 York and New Jersey cases, were they?

20 MR. WELSH: That's right, yes.

21 QUESTION: What did a person injured by the
22 negligence of the Port Authority do during that period?
23 Was there just no remedy?

24 MR. WELSH: There was no remedy. Normally those
25 issues, those cases were dealt with through resolutions

1 that were passed, much like many States used to deal with
2 claims against --

3 QUESTION: Resolutions passed by whom?

4 MR. WELSH: By the Board of Commissioners of the
5 Port Authority resolving the cases and providing for
6 payment.

7 QUESTION: I see. I see.

8 MR. WELSH: And it's my understanding that a
9 number of cases before they waived -- a number of States
10 before they waived sovereign immunity would deal with
11 claims in a similar manner, until they created court of
12 claims or decided to waive it through some tort claims
13 act.

14 But if one looks at the Port Authority and the
15 history of the relationship between the two -- the Port
16 Authority and the two States that created it, it's quite
17 evident that there is a very close link financially
18 between the States and the Port Authority. The Port
19 Authority is somewhat unique for State agencies, because
20 the Port Authority is essentially lending its support to
21 the States that created it, so any judgment against the
22 Port Authority is an impact on the State fisc.

23 If one considers the State Treasuries of the
24 other two States to be for the benefit of the people, and
25 in fact the Treasury of the Port Authority to be for the

1 benefit of the people, this --

2 QUESTION: But how would that be different from
3 the Bolden and the later cases involving Pennsylvania,
4 just a one-State authority? It seems that those later
5 Third Circuit Cases accept that the Treasury factor is
6 prime. That is, is this entity making its own money.

7 MR. WELSH: In Bolden and other Third Circuit
8 cases, the Third Circuit did focus on the fact that the
9 Treasury factor was an important factor, but it made it
10 quite clear it was not the only factor, and they applied a
11 balance of those factors.

12 Interestingly in Bolden --

13 QUESTION: But they did say, did they not, that
14 it was probably the most important factor, and they
15 distinguished the Third Circuit -- whose decision is
16 before us for review -- distinguished the Port Authority
17 cases on the ground that the States really would come to
18 the rescue of the Port Authority, that the State's credit
19 really did stand behind that entity?

20 MR. WELSH: That was part of the distinction
21 that was made in Bolden to, I think it was the Southeast
22 Pennsylvania Transit Authority in the Bolden case, that
23 they focused on the fact that the States might step in in
24 the case of the Port Authority, but I suggest that they
25 also looked at other factors in Bolden.

1 In Bolden, the Third Circuit, sitting en banc,
2 considered a continuum with the Port Authority at one end
3 as an example of an agency that was entitled to Eleventh
4 Amendment immunity, and I think at Rutgers University at
5 the other end, and they were trying to determine where on
6 that continuum SPTA fit in, but they didn't rely solely on
7 the Treasury -- argument of the Treasury issue to
8 determine that case.

9 The Port Authority over the years has committed
10 vast resources to the support of the two States that
11 created it. This was done through bi-State legislation
12 that was passed by the two States authorizing and
13 directing the Port Authority to undertake various
14 projects, and we set forth a number of examples in our
15 brief with citations to the authorizing legislation.

16 As an example, the Port Authority has committed
17 \$440 million, \$220 million to each State, to acquire buses
18 that are being used by the two States for the benefit of
19 their people. We have provided railroad connections when
20 requested by the State, and we've committed \$106 million
21 pursuant to legislation to develop the so-called Oak Point
22 connection, and this was done at the request of the State
23 of New York.

24 And there are a number of other projects that
25 the States have come to the Port Authority to ask for the

1 Port Authority -- in effect direct the Port Authority and
2 authorize the Port Authority to support the State in its
3 endeavors, so there is a very close financial link between
4 the Port Authority and the two States.

5 QUESTION: Do you want us to say that the Port
6 Authority is an arm of the State of New York?

7 MR. WELSH: Yes, I believe it is an arm of the
8 State, of both New York and New Jersey.

9 QUESTION: Well, it seems it has a more
10 autonomous existence than that when the State of New York
11 has to go into court to sue it.

12 MR. WELSH: Yes, Justice --

13 QUESTION: To compel it to take action that it
14 wishes, that New York wants.

15 MR. WELSH: Justice Kennedy, there are a number
16 of cases such as that where the State Attorney General has
17 lent his office and his name to injunctive actions that
18 would award against the Port Authority, and that was one
19 of them.

20 We suggested in our brief, and I believe it is a
21 valid suggestion, that that in fact is an argument in
22 support of the fact that the Port Authority is an arm or
23 an agency of the State. The two State legislatures have
24 stated that one may not get an injunction against the Port
25 Authority unless the action is bought by the Attorney

1 General of the State, thereby limiting the actions that
2 can be bought against the agency.

3 The New Jersey supreme court, in a case entitled
4 Evans-Aristocrat Industries v. the Port Authority, made it
5 clear what the purpose of that provision was in the
6 statute, and they stated that the purpose was to permit a
7 State governmental authority, in this case an Attorney
8 General, to screen the actions that are being bought
9 against the Port Authority to assure that strike suits or
10 similar actions would not be bought that would delay or
11 prevent the undertaking of valid, much-needed public
12 projects by the Port Authority.

13 So at least the State of New Jersey has viewed
14 that provision that requires the Attorney General in all
15 cases to seek an injunction --

16 QUESTION: But you're not saying that one may
17 sue the Port Authority only by going to the Attorney
18 General and having him bring the suit in your stead, are
19 you?

20 MR. WELSH: The cases have held that a suit for
21 an injunction against the Port Authority may only be
22 bought by the Attorney General of one of the States.

23 QUESTION: But a suit for damages is otherwise.

24 MR. WELSH: A suit for damages is otherwise.
25 That limitation relates only to suits for injunctive

1 relief.

2 QUESTION: You mean, if the Port Authority were
3 trespassing on my property, as a private property owner I
4 couldn't obtain an injunction?

5 MR. WELSH: No. You would have to go to the
6 Attorney General to seek an injunction. The Attorney
7 General would have to file that suit on your behalf or
8 endorse the action that was being brought. You could, of
9 course, bring a suit for money damages as a taking in that
10 particular case. You wouldn't be barred because of that
11 provision of what we call the suability --

12 QUESTION: And does PATH have the same
13 protection --

14 MR. WELSH: Yes, it does.

15 QUESTION: -- that only the Attorney General can
16 enjoin PATH?

17 MR. WELSH: Yes, it does. The statute that
18 created PATH, the bi-State legislation that created PATH
19 and authorized the Port Authority to establish a railroad,
20 states quite clearly that the subsidiary corporation will
21 share in all of the privileges and immunities of the Port
22 Authority as if it was --

23 QUESTION: I thought PATH was created by the
24 Compact. Am I --

25 MR. WELSH: No. PATH was created by bi-State

1 legislation between the two States. PATH was not created
2 until 1961.

3 QUESTION: Well, that -- I mean, just saying it
4 doesn't make it so. If we're in agreement, and I think
5 you are, that whether sovereign immunity on the part of an
6 entity exists or not depends to a large degree upon the
7 functions that that entity performs, simply creating a
8 subordinate entity which may do something that is not
9 essential to State action and what-not, and that does not
10 bring any money into the State Treasury or take any money
11 out, if you do that, even though you say it shall share in
12 all the sovereign immunity that I have, that wouldn't be
13 effective, would it?

14 MR. WELSH: Well, the --

15 QUESTION: So you have to convince us not only
16 that the Port Authority but that PATH meets the test that
17 you've been talking about.

18 MR. WELSH: The -- I believe that if we find
19 that the Port Authority shares the Eleventh Amendment
20 immunity of the States, and it was created as such an
21 agency -- not necessarily with the intent, but because of
22 its fundamental nature is an arm of the State, I believe
23 it does follow that that subsidiary corporation, because
24 it is established under the authority from the two States,
25 would share in the immunity.

1 But the legislation does state that PATH, the
2 subsidiary, in undertaking the development of the
3 railroad, is doing it for the benefit of the people of the
4 two States, for their prosperity, and has a great deal of
5 language in the bi-State legislation --

6 QUESTION: I'm not sure you answered my
7 question. Do you agree that we have to look to the
8 activities and the functions performed by PATH?

9 MR. WELSH: I think the functions are one of the
10 criteria that has to be looked for. That's certainly a
11 valid inquiry.

12 QUESTION: Then can you tell me --

13 QUESTION: For instance, if a State said that a
14 municipality were to have Eleventh Amendment immunity, as
15 a matter of Federal law we would just ignore that. We
16 would look to see what the function was.

17 MR. WELSH: Exactly.

18 QUESTION: The fact that the State says it is
19 not controlling.

20 MR. WELSH: Well, the State's announcement is
21 certainly strong evidence of the nature of the agency, but
22 that alone does not, of course, grant a State agency
23 Eleventh Amendment immunity. It's the nature of the
24 agency itself.

25 The States do not bestow Eleventh Amendment

1 immunity, nor does Congress bestow Eleventh Amendment
2 immunity.

3 QUESTION: Mr. Welsh, if it's the function that
4 counts now, how does this PATH differ from the
5 Pennsylvania -- the Southeastern Pennsylvania, the New
6 Jersey Transit, and why -- explain to me rationally why
7 PATH would get immunity that Southeastern Pennsylvania
8 Transit Authority didn't have in the Third Circuit's view
9 and the New Jersey Transit rail operators didn't have.

10 MR. WELSH: To be perfectly honest, Justice
11 Ginsburg, I have a great deal of difficulty understanding
12 the Fitchik case involving New Jersey Transit. I think
13 the Third Circuit was somewhat inconsistent there. Very
14 frankly, I think New Jersey Transit should share in the
15 Eleventh Amendment immunity also. I have difficulty. I
16 can distinguish PATH, however, from both of those
17 enterprises.

18 There are very, very strong controls over the
19 Port Authority that I am not sure exists with regard to
20 those other agencies in it -- beyond the State Treasury
21 argument. An example is the Commissioners of the Port
22 Authority themselves, the governing body, are appointed by
23 the Governors of the two States, and the Governors
24 maintain --

25 QUESTION: And in the other cases they were

1 appointed by --

2 MR. WELSH: I'm not sure how they were
3 appointed. I think that New Jersey Transit may be an
4 appointed board, also. I'm not sure of the element of
5 control.

6 In the case of the Port Authority, the Governor
7 can exercise veto power over the activities of the
8 Commissioners, and has a right within 10 working days to
9 veto any action that's taken. I'm not sure that exists in
10 the case of New Jersey transit.

11 But beyond that, of course, the Port Authority
12 and PATH operate in a far wider field.

13 QUESTION: May I ask a question about your --
14 you earlier explained to us in injunctive actions that the
15 citizen has to go to the Attorney General to bring the
16 action. That, of course, is in State court cases.

17 MR. WELSH: That's right.

18 QUESTION: In a Federal -- if there were a
19 Federal question such as whether the authority had
20 violated an environmental statute or something like that,
21 would you contend the same procedure had to be followed?

22 MR. WELSH: Yes, I do.

23 QUESTION: That the Federal court would not have
24 jurisdiction of an individual's complaint unless the
25 individual went to the --

1 MR. WELSH: Unless we can find --

2 QUESTION: Do you have any authority for that?

3 MR. WELSH: No case on point, other than cases
4 that involved other statutes. Unless one can point to a
5 piece of Federal legislation where there has been an
6 explicit abrogation of Eleventh Amendment, for some
7 reason --

8 QUESTION: You can enjoin the officer acting on
9 behalf of the authority --

10 MR. WELSH: Yes, you can.

11 QUESTION: -- just as you can enjoin a State
12 officer.

13 MR. WELSH: You can enjoin the State officer
14 prospectively, and there are a number of cases involving
15 grants-in-aid and the like, or a violation of civil
16 rights, where you can seek an injunction against the
17 officer barring their prospective action.

18 QUESTION: You're talking about Federal actions.

19 MR. WELSH: You may not bring the action for
20 past damages.

21 QUESTION: You're talking about Federal court
22 actions now, but you couldn't do that in the State court,
23 I don't suppose.

24 MR. WELSH: Well, there's a --

25 QUESTION: Your bar would apply to an action

1 brought against an officer of PATH as well as PATH itself,
2 wouldn't it?

3 MR. WELSH: I suggest that there is a cause of
4 action available against a State officer as opposed to the
5 agency itself.

6 QUESTION: In State court?

7 MR. WELSH: In the State court, an action in
8 lieu of prerogative writ, or in the State of New York, an
9 Article 78 action would be available against the officer
10 even though it would not be permitted against the State
11 agency itself. In many cases, it might be considered to
12 be ultra vires. So that remedy is available.

13 QUESTION: So why does anybody bother with the
14 Attorney General, then?

15 MR. WELSH: Frankly, I don't know. They would
16 have to establish the fact that the officer was acting
17 ultra vires and beyond his authority, or some other
18 standard that would apply to an action in lieu of
19 prerogative writ. Normally, they attack the policy of the
20 Port Authority in such actions, rather than the activity
21 of a State officer, we find. From experience I've seen
22 that.

23 But there is a remedy available, I suggest, and
24 in a number of occasions in New York people have sought
25 such a remedy through --

1 QUESTION: May I ask you one other question,
2 since I've interrupted you already? The first argument
3 that we made in our opinion for the Court in the Lake
4 Country Estate was a plain language argument, that the
5 plain language of the Eleventh Amendment applies to suits
6 against "any one State." What's your response to that
7 argument?

8 MR. WELSH: Well, if one remembers that the
9 Eleventh Amendment immunity is a constitutional provision
10 that protects the States -- State or States, there's no
11 reason to distinguish between the immunity that a State
12 has, acting as one State, or if that one State chooses --

13 QUESTION: Except that in the Lake Country
14 opinion we said there was, based on the plain language.

15 MR. WELSH: Well, in Lake Country the Court
16 looked at the Compact itself, and it found language in the
17 Compact itself that it felt was a clear indication that it
18 was -- the States did not intend for this new agency that
19 was created to have Eleventh Amendment immunity, and then
20 it went on, I believe -- I think -- I believe it's page
21 401 of the Lake Country Estates.

22 There's a two-sentence paragraph, and it refers
23 to the fact that a review of the Compact does not find
24 evidence for the support that it was the intention of the
25 States to create such an entity, and then goes on to say,

1 in the absence of such a finding, but it was referring to
2 that specific Compact when it referred to --

3 QUESTION: So there's nothing in the Compact
4 that would justify reading additional meaning into the
5 limited language of the amendment. That's at page 401.

6 MR. WELSH: Yes. It was nothing in that
7 particular Compact, but it was in light of the fact that
8 there was strong language in there --

9 QUESTION: But you think there's something in
10 this Compact that justifies a departure from a general
11 rule that the Eleventh Amendment means what it says.

12 MR. WELSH: I believe the general rule should be
13 that in the absence of language, one should assume that
14 the Eleventh Amendment does protect the agency if it is an
15 agency of a nature that would make it an arm of the State
16 for those purposes.

17 QUESTION: Mr. Welsh, I thought you were going
18 to say that we've also had cases subsequent to Lake
19 Country which say that the Eleventh Amendment means more
20 than it says, that it is simply exemplary of a sovereign
21 immunity which was assumed to exist even before the
22 Eleventh Amendment was passed, and that --

23 MR. WELSH: Yes.

24 QUESTION: -- it simply addressed the most
25 common instance of it.

1 MR. WELSH: There have been cases --
2 QUESTION: And that is all post Lake Country.
3 MR. WELSH: And one of the recent cases --
4 QUESTION: And different language --
5 MR. WELSH: -- was Puerto Rico Aqueduct, but one
6 has to remember that the Eleventh Amendment immunity is
7 not bestowed by the States, nor is it bestowed by
8 Congress. It's bestowed by the Constitution onto the
9 States, and if the States -- if one State would have that
10 Eleventh Amendment immunity and would have the right,
11 under the Constitution, to create an agency as its arm
12 that also shares in that Eleventh Amendment immunity, I
13 see no reason why two States can combined, each exercising
14 its own sovereign rights to create a bi-State agency, and
15 that agency also share in the Eleventh
16 Amendment immunity --
17 QUESTION: Well, I guess the reason might be the
18 lack of political control. Each State is controlled by
19 its citizens, but a bi-State agency is not.
20 MR. WELSH: In --
21 QUESTION: It's controlled only half by each
22 State, and you are creating an entity, a new governmental
23 entity which is now exempt from suit. This is a very
24 serious immunity.
25 MR. WELSH: The petitioner suggests that the

1 Port Authority is not either legally or politically
2 controlled by the two States. That simply isn't the fact.
3 The Port Authority may not act unless it has legislative
4 authority from the two States that created it. It
5 requires bi-State approval for the various projects.

6 A good example of that was the construction of
7 the third tube of the Lincoln Tunnel. Interestingly, it
8 was Justice Brennan, then sitting as a justice in the New
9 Jersey supreme court, that ruled that the Port Authority
10 lacked the authority to undertake the construction in that
11 tube, absent specific authority coming from the two State
12 legislatures.

13 So there is legal control over the agency.
14 There's also the veto power that the Governor, an elected
15 official, exercises over the acts of the Board of
16 Commissioners of the Power Authority. Those Commissioners
17 are appointed by the chief executive officer of each
18 State, and their appointment is subject to the approval
19 process of each of the States, in both cases through the
20 Senate of each of the State --

21 QUESTION: For a fixed term of years at the
22 pleasure of the Governor, or what?

23 MR. WELSH: They serve for a 6-year term, but
24 they can be removed for cause either by the Governor of
25 one State after a hearing, or the State Senate in New

1 Jersey can remove them, but there is a fixed term.

2 QUESTION: And New York unilaterally can remove
3 New York appointees?

4 MR. WELSH: Yes. Each State reserved the right
5 to enact legislation relating to the appointment of their
6 Commissioners. In the case of New York, they have
7 provided for the removal by the Governor after -- it's a
8 for-cause removal, but the Governor exercises that right.

9 In New Jersey, the right is exercised by the
10 State Senate.

11 QUESTION: You say for both of them their
12 actions can be vetoed by the Governor within 30 days?

13 MR. WELSH: No, 10 days. The Board of
14 Commissioners of the Port Authority acts, like most
15 boards, through resolutions. Their actions in passing
16 resolutions approving the activities of the Port Authority
17 is subject to the veto of the Governors of the States, so
18 they can actually veto the minutes of the meeting, veto
19 these resolutions and --

20 QUESTION: Line-item veto, or --

21 MR. WELSH: It's a very precise veto.

22 QUESTION: It is.

23 MR. WELSH: It is a line-item veto. It deals
24 with a specific resolution that would be passed by the
25 board authorizing the staff to do things.

1 QUESTION: What would the resolutions deal with,
2 proposed future projects?

3 MR. WELSH: The resolutions, Mr. Chief Justice,
4 can deal with any of the activities of the Port Authority.
5 They could range to the Port Authority undertaking the
6 planning for a -- you know, a new airport, an airport
7 connection, down to a resolution adopting the budget of
8 the agency, resolution authorizing the award of certain
9 contracts -- they are all subject to a veto power.

10 QUESTION: Could a resolution dealing with
11 personnel matters --

12 MR. WELSH: The personnel matters are usually
13 found in a budget resolution. The specific hiring and
14 firing is left to the executive director, but policies
15 that are found in board resolutions would be subject to
16 the veto, pay raises as contained in the budget resolution
17 of course would be subject to --

18 QUESTION: Is this -- are you describing the
19 Port Authority of New York and PATH?

20 MR. WELSH: Yes. The minutes of PATH are also
21 subject to gubernatorial veto. The Board of Commissioners
22 of the Port Authority are in fact the board of directors
23 of PATH, by the legislation that created PATH and the by-
24 laws of PATH. The Board of Commissioners also function as
25 the board of directors. They are the exact same people,

1 and their actions are also subject to gubernatorial veto.

2 So there is a great deal of legal control over
3 the activities of the agency. In addition, of course,
4 there's more subtle control in the form of political
5 control. The Board, the Port Authority consists of 12
6 Commissioners who are the appointees of the Chief
7 Executive Officer of the two States.

8 QUESTION: Mr. Welsh, you were candid enough to
9 say that you have a little problem with Bolden and
10 Fitchik, and I think it might be helpful -- you say the
11 Third Circuit seems to be going in the opposite direction
12 in those cases.

13 MR. WELSH: Well now, I mentioned the fact that
14 the Third Circuit established a continuum in doing
15 an analysis.

16 QUESTION: But they did say without
17 qualification that who pays the judgments is the most
18 important factor. Bolden I think said that fairly flat-
19 out, didn't it, and there's another -- what do you make of
20 the Puerto Rican Port Authority case saying you have to
21 look at the function that's being performed -- running a
22 railroad, operating a dock?

23 MR. WELSH: If you're referring to the recent --
24 well --

25 QUESTION: I'm referring to Royal Caribbean

1 against --

2 MR. WELSH: Yes. Well, that was a case decided
3 in the First Circuit, and --

4 QUESTION: Yes, by a well-respected jurist.

5 (Laughter.)

6 MR. WELSH: And in the Puerto Rican Port
7 Authority case they looked at the functions of the agency,
8 among other things. They considered the State Treasury
9 issue, but in addition they -- there was an analysis that
10 included a proprietary governmental function analysis, and
11 they viewed the Puerto Rican Port Authority as an agency
12 that was more akin to a private corporation because it
13 leased port facilities and it paid as it went, and there
14 wasn't a great deal of discussion as to the political or
15 the legal controls over the agency, other than the general
16 functions of the agency.

17 QUESTION: What functions does PATH perform here
18 that you would characterize as essentially governmental
19 functions?

20 MR. WELSH: Well, one -- first of all, it's the
21 operation of a mass transit system that the two States
22 have specifically found to be a governmental undertaking.

23 QUESTION: Well, I mean, they can say it's so,
24 but is it so? I mean, most railroads are not run by
25 States. I think it's rather unusual to have a State-run

1 railroad, isn't it?

2 MR. WELSH: Actually, one fine example of that
3 is right here in the Washington Metropolitan Area in
4 Washington Metro, where the Washington Metro has been held
5 to share the Eleventh Amendment immunity of the States of
6 Virginia and Maryland.

7 I believe that the operation of mass transit
8 systems has come to be a governmental function. If one
9 looks around the country, you'll find that most public
10 transit systems today are being operated by agencies of
11 either municipalities or State government.

12 We could go around the country and look at them,
13 ranging from San Francisco all the way to the East, but a
14 good example is right here in this city with Washington
15 Metro.

16 In the case of PATH, the enabling legislation
17 that authorized the Port Authority --

18 QUESTION: We haven't held Washington Metro to
19 be immune, right?

20 MR. WELSH: Yes, you did.

21 QUESTION: Huh?

22 MR. WELSH: Yes. In a decision by Judge Bork
23 that I believe Your Honor concurred in.

24 QUESTION: I mean, we, us here, I don't mean --
25 I don't mean --

1 MR. WELSH: Not this one.

2 (Laughter.)

3 QUESTION: I never -- I never use the editorial
4 "we" Mr. Welsh. I never do that.

5 MR. WELSH: No, this Court has not. It hasn't
6 reached this Court, but the --

7 QUESTION: You're not urging that that WMATA
8 case is distinguishable, that it wouldn't be consistent to
9 hold WMATA -- why don't you just tell us what was the
10 reason for the holding of immunity in WMATA?

11 MR. WELSH: WMATA was -- focused on the control
12 that was being exercised by the creating States over that
13 agency that was created to operate the transit system.
14 Treasury was one of the issues, and I believe WMATA is
15 dependant on both the Federal Government and the States
16 for a certain amount of support, but in addition, there
17 was a focus on the fact that the two States did exercise
18 control over that agency, so --

19 QUESTION: What about who pays? Who pays?

20 MR. WELSH: Well, it was acknowledged there that
21 the judgment would be paid by WMATA, but ultimately it
22 might be borne by the riders or be borne by the two States
23 that are subsidizing it. That was provided in WMATA, but
24 my point is that they didn't focus solely on the State
25 Treasury test in WMATA.

1 This is one of the difficulties that the courts
2 around the country and the circuits courts are faced with,
3 and it's the fact that we could have a railroad in one
4 State that seemingly has the characteristics of a railroad
5 in the other State, and one circuit will hold that there
6 is immunity and the other State will not.

7 The Puerto Rican Port Authority was held not to
8 have immunity, and yet in the Fourth Circuit, the South
9 Carolina Port Authority was held to have Eleventh
10 Amendment immunity, and the focus has been --

11 QUESTION: Well, maybe our multifactor test
12 doesn't work very well.

13 MR. WELSH: the multifactor test is usually
14 applied in a determination that the agency does not have
15 the Eleventh Amendment immunity, and yet there hasn't been
16 clear direction given to the courts and to public agencies
17 as to what should be included to make sure that there is
18 Eleventh Amendment immunity, or what we should look for to
19 determine that an agency is entitled to it. It's usually
20 put in a negative form in the findings, such as Lake
21 Country Estates and Mount Healthy.

22 But all of those indicia really come down to two
23 fundamental issues, and one is the nature of the agency
24 that was created, and secondly is the elements of control
25 that continue to be exercised by the States, and I suggest

1 to you in both cases the Port Authority and its
2 subsidiary, PATH, should share in that Eleventh Amendment
3 immunity. The control is there, there is very strong
4 political control, there's a very strong legal control
5 that's been written in by the two States that have created
6 those agencies.

7 If there are no further questions --

8 QUESTION: Thank you, Mr. Welsh. Mr. Katz, you
9 have 5 minutes remaining.

10 REBUTTAL ARGUMENT OF LAWRENCE A KATZ

11 ON BEHALF OF THE PETITIONER

12 MR. KATZ: Justice Ginsburg, I'd like to begin
13 by responding to one of your questions to Mr. Welsh
14 concerning the difference between Fitchik, Bolden, and
15 this case and Police Benevolent.

16 I believe that the Lake Country decision
17 indicated this Court's instructions that the Treasury
18 factor, while not necessarily the only factor, is the most
19 strongly weighted factor in determining these issues.

20 The Third Circuit has recognized that to be
21 true, as is evidenced by the formula that it follows in
22 deciding its cases. Amici for the Port Authority has also
23 indicated that not only did the Third Circuit believe
24 that's what this Court has said in its past cases, but
25 almost every other circuit has agreed the same.

1 The problem with this case, the problem with the
2 Police Benevolent case, and the reason that the Port
3 Authority has been handled differently than the other
4 entities is, as I discussed earlier, simply because the
5 Third Circuit misread the statute. This Court can resolve
6 this matter on a very narrow holding.

7 This Court can confirm that in fact, as stated
8 in Lake Country, when determining whether or not an entity
9 is entitled to the protection of the Eleventh Amendment,
10 the State Treasury factors are the reason that some
11 entities are extended that protection.

12 This Court can then find that the Third Circuit
13 simply misread the statute and misapplied that
14 constitutional formula. Had the Third Circuit included
15 those last three or four words of the statute, it would
16 not have found that there was a discretion -- or, I'm
17 sorry, it would not have found that there was a compulsive
18 requirement on the part of the States to fund the entity.
19 That is the narrow ruling of this case, and it goes to the
20 heart of why there is that discrepancy between the Third
21 Circuit's opinions.

22 Mr. Welsh indicated the importance of the
23 consent to sue statute, and its relevance in terms of the
24 position of the States with respect to sovereign immunity.

25 QUESTION: Mr. Katz, before you get off that

1 question, why should it make a difference whether there is
2 technically an obligation on the part of the State of New
3 York and New Jersey to come to the assistance of a now-
4 bankrupt Port Authority, or PATH?

5 I mean, if, in fact, the alternative is that the
6 whole Port -- you don't really think New York and New
7 Jersey are going to let the Port Authority cease to
8 function.

9 MR. KATZ: Your Honor, I don't expect that the
10 State of New York is going to let New York City go totally
11 bankrupt, either, but New York City would not be entitled
12 to the protection of the Eleventh Amendment. Likewise,
13 any other State and any other political subdivision.

14 This Court has recognized that political
15 subdivisions, counties, and municipalities, are not
16 entitled to the protection of the Eleventh Amendment.

17 QUESTION: Not -- there are good reasons why New
18 York would not be entitled to sovereign immunity, but I
19 question whether the good reason is just simply the State
20 of New York does not bear the expenses of the City of New
21 York.

22 MR. KATZ: The State of New York and the State
23 of New Jersey do not --

24 QUESTION: If in all other respects the unit in
25 question is at a State level, is performing State

1 functions, is governed by State officers, I don't know
2 that it makes a whole lot of difference whether
3 technically the funds come directly out of the Treasury or
4 the functions are so important to the State that, as a
5 practical matter, if the entity is bankrupt the State is
6 going to have to reach into its pocket to support it. It
7 doesn't seem to me to be a factor of that overwhelming
8 significance.

9 MR. KATZ: Justice Scalia, let us actually look
10 at the Port Authority. First of all, although admittedly
11 the members of the Board of Governors are appointed by the
12 Governors, these are not State officials. It's not as if
13 the State Department of Transportation Secretary sits on
14 the board.

15 The members of the Board of Governors are
16 primarily leading members of industry. Like in Lake
17 Country, they're oriented toward the Port district. Two-
18 thirds of the members of the Board of Governors must be
19 voting members of the Port district. In addition to
20 whatever --

21 QUESTION: They're subject to a veto in 10 days
22 of anything that they do, which, of course, you know the
23 councilmen from New York are not.

24 MR. KATZ: Subject to a veto, but if we presume
25 that there are -- we don't have to presume, it is true.

1 There are today certain rules and regulations existing for
2 the Port Authority. There are certain legislative
3 mandates for the Port Authority.

4 If the State of New York and the State of New
5 Jersey cannot agree on another issue with regard to the
6 Port Authority from now until the end of time, the Port
7 Authority will continue to operate on its own, following
8 the past legislative mandates, determining on its own the
9 rules and regulations.

10 I direct the Court's attention and invite your
11 attention to the fact that the Compact provides that all
12 of the details for the effectuation, the financing, the
13 leasing, the tolls, the rentals, et cetera, are within the
14 sole discretion and are controlling conclusive -- I
15 apologize. That's in a statute.

16 The Compact itself provides that the Port
17 Authority will have all powers necessary and appropriate
18 to effectuate the plan other than the power to tax. That
19 authority has enormous power on its own, and that power is
20 exercised as a large landlord in the New York area.

21 They own the World Trade Center. They own
22 several other complexes. It's important to remember that
23 the Port Authority district contains 1,500 square miles of
24 land centering in New York Harbor.

25 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Katz.

1 The case is submitted.

2 (Whereupon, at 2:00 p.m., the case in the above-
3 entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

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

CASE NO.:93-1197

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY *Ann Marie Federico*

(REPORTER)