No. 04-1618

IN THE SUPREME COURT OF THE UNITED STATES

NORTHERN INSURANCE COMPANY OF NEW YORK,
Petitioner

v.

CHATHAM COUNTY, GEORGIA,
Respondent

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

RESPONDENT'S BRIEF ON THE MERITS

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QUESTION PRESENTED FOR REVIEW

Whether an entity that does not qualify as an 'arm of the State' for Eleventh Amendment purposes can nonetheless assert sovereign immunity as a defense to an admiralty suit?

LIST OF PARTIES BELOW

In addition to the parties reflected in the caption, the current Petitioner was subrogated to the rights of James K. Ludwig, Jr. and Carol C. Ludwig. In the proceedings below, and upon certiorari to this Court, the named insurer was Zurich Insurance Company. See 126 S. Ct. 477 (2005); J.A. 9a, 70a, 81a .

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RESPONDENT'S BRIEF ON THE MERITS

OPINIONS BELOW

The opinion and judgment of the U.S. Court of Appeals for the Eleventh Circuit, *Zurich Insurance Co. v. Chatham County, Georgia*, No. 04-13308 (11th Cir. Jan. 28, 2005), is unreported and is reprinted at J.A. 81a. The District Court's Order of June 28, 2004, is unreported and reprinted at J.A. 70a.

STATEMENT OF JURISDICTION

Petitioner has been granted review from the opinion and judgment of the U.S. Court of Appeals for the Eleventh Circuit of January 28, 2005. J.A. 81a. Rehearing was denied by the Eleventh Circuit on March 4, 2005. J.A. 86a. A timely petition for writ of certiorari was filed June 1, 2005. This Court granted the Petition for Writ of Certiorari on October 11, 2005. The Supreme Court has jurisdiction to review cases from the courts of appeals under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the U.S. Constitution provides that "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

This case implicates the construction of a number of Georgia constitutional provisions and statutes, bearing on the delegation of authority, by the State of Georgia to Chatham

County, for the building and maintenance of bridges over navigable waters. They are collected and reprinted in the appendix to this brief. Additionally, the Act of Congress of March 23, 1906, c. 1130, § 1, 34 Stat. 84 (1906), 33 U.S.C. § 491, is also relevant to this case, reprinted at Resp. Br. App. 1.

STATEMENT

1. Causton Bluff Bridge[1] ("Bridge") is a drawbridge which is owned, operated and maintained by Respondent Chatham County ("County"). J.A. 39a. The Bridge is permanently connected to the roadway of Islands Expressway. Id. Islands Expressway is a public road maintained by Chatham County which connects the City of Savannah with Wilmington Island, Whitemarsh Island and Tybee Island. J.A. 39a, 42a.

The primary purpose of the Bridge is to allow passage of vehicles over the intercoastal waterway of the Wilmington River. J.A. 39a. Although the parties and lower courts have referred generically to an "intercoastal waterway," the federal regulation that the parties agree applies to the Bridge is entitled "Atlantic Intracoastal Waterway, Savannah River to St. Mary's River." 33 C.F.R. § 117.353(b). J.A. 50a, 54a. The Wilmington River is a part of the Atlantic Intracoastal Waterway and is maintained by the Army Corps of Engineers. See *Williams v. United States*, 581 F. Supp. 847, 848 (S.D. Ga. 1983), aff'd, 747 F. 2d 700 (11th Cir. 1984).

The Bridge consists of an elevated approach on piles with a concrete abutment on each side of the intracoastal waterway which contains controls, a motor, gearing, counterweights, and pivot and braking mechanisms for each half

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[1] The Bridge has also been known as the Sam Varnedoe Bridge.

of the span. J.A. 39a-40a. The Bridge permits passage of light pleasure craft, tug and tow vessels and commercial vessels over the waters of the intracoastal waterway of the Wilmington River. J.A. 40a. The County employs bridge tenders to open the bridge for that purpose. Id.

The County performs a governmental function in operating and maintaining the Bridge and this function serves a public purpose. J.A. 40a. There is no charge to anyone for crossing the Bridge or traversing the waters underneath. Id. Taxpayers' money provides the sole funding to the County to perform its governmental function of operating and maintaining the Bridge. Id. The County derives no income from operating and maintaining the Bridge. Id.

The Bridge was constructed in 1963 when the Islands Expressway was constructed as a two-lane roadway. J.A. 40a. In the 1980's, a second bridge was constructed when the Islands Expressway was widened to become a four-lane roadway. Id. There has been no additional construction or reconstruction to the Bridge since the 1980's. Id. The construction of the Bridge was approved by the Chief of Engineers and by the Secretary of the Army pursuant to the Federal Bridge Act of 1906, 33 U.S.C. § 491; Resp. Br. App. 1.

2. On October 6, 2002, James K. Ludwig was traveling in his vessel, The LOVE OF MY LIFE, on the intracoastal waterway of the Wilmington River. J.A. 43a. Mr. Ludwig contacted the operator of the Bridge and requested that it be raised to permit his vessel to transit the waters beneath the Bridge. Id.

The tender opened the Bridge pursuant to Mr. Ludwig's request. J.A. 44a. The tender noticed that the northwest span of the bridge was drifting down and immediately tried to make radio contact with Captain Ludwig. Id. The tender was unable

to contact the vessel because the Captain turned off his radio prior to entering the Bridge operational area. Id. The tender stopped the span and started it back up; however, The LOVE OF MY LIFE hit the span. J.A. 44a. The vessel did not enter the channel of the Bridge, but deviated to the southwest, striking the Bridge. Id.

3. The federal district court granted the County's motion for summary judgment, holding that the County was entitled to residual common law sovereign immunity. J.A. 70a-78a. The Eleventh Circuit affirmed. J.A. 81a-85a.[2]

That court of appeals adopted the district court's analysis of "common law" sovereign immunity, as distinct from Eleventh Amendment immunity. J.A. 80a, 56a-69a. The Eleventh Circuit held that a county could be deemed an "arm of the State," for sovereign immunity purposes, in certain exceptional cases where a State had delegated certain sovereign interests over the construction or maintenance of infrastructure on navigable waters. See J.A. 83a-85a.

A timely petition for writ of certiorari followed. This Court initially granted review without comment, 126 S. Ct. 415 (2005), but then amended the order granting the petition limited to the question as reflected, supra at (i). 126 S. Ct. 477 (2005).

SUMMARY OF THE ARGUMENT

I. The court of appeals held that Chatham County, even though not an "arm of the State" for Eleventh Amendment purposes, was so under principles of residual sovereign

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[2] The Eleventh Circuit had ruled in favor of the County in a substantially identical unpublished opinion, *Continental Ins. Co. v. Chatham County, Georgia*, Case No. 04-10661-F. J.A. 79a-80a.

immunity. The court's holding was limited to the circumstances presented in this case, where a political subdivision is delegated by the State essential functions implicating significant sovereign interests. J.A. 83a-85a. This argument is renewed here.

This Court has never categorically rejected the possibility that a county may be an arm of the State for certain purposes, but has only established an understandable presumption against such a finding. See *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 124 (1979). Indeed, in many other doctrinal contexts, this Court has recognized State delegations of power to counties, from which sovereign immunity flowed. See *City of Columbus v. Ours Garage & Wrecker Service*, 536 U.S. 424, 428-29 (2002); *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 607-08 (1991); *Community Communications v. City of Boulder*, 455 U.S. 40, 55 (1982).

Whether this Court applies its strict Eleventh Amendment test for arm of the State determinations, or a more generous standard under its wider sovereign immunity jurisprudence, Respondent qualifies for such status in the situation presented here. First, and most importantly, the State of Georgia expressly delegated its sovereign authority for the maintenance of bridges over navigable waters to its counties. See GA. CONST. art. 9, § 2, ¶ 3(a)(4); O.C.G.A. § 36-14-1. Under Georgia's Constitution and common law, this delegation of power was accompanied by a grant of sovereign immunity to the County. See GA. CONST. art. 1, § 2, ¶ 9(e); *Gilbert v. Richardson*, 264 Ga. 744, 745-6 (1994). This immunity for counties has never been waived by the Georgia General Assembly. As a subsidiary matter, there is also a potential risk, see *Regents of the University of California v. Doe*, 519 U.S. 425, 431 (1997), that State funds would be used to satisfy a

judgment against Chatham County in this case. See O.C.G.A. §§ 32-5-21(3), 32-5-25, 42-4-42(2).

The State of Georgia has delegated to its counties a significant sovereign function in the maintenance of bridges over navigable waters, which "uniquely implicate sovereign interests." *Idaho v. Couer D'Alene Tribe of Idaho*, 521 U.S. 261, 284 (1997). This Court has always recognized that a State's management of its navigable waters is entitled to substantial deference and sovereign immunity, consistent with federal plenary authority. See *St. Anthony Falls Water-Power Co. v. Board of Water Comm'rs of City of St. Paul*, 168 U.S. 349, 366 (1897); *Ouchita & Mississippi River Packer Co. v. Aiken*, 121 U.S. 444, 448-50 (1887).

II. A narrower ground for holding in favor of Respondent is that counties enjoy residual sovereign immunity in *in personam* admiralty actions. Such residual sovereign immunity extends well beyond the contours of the Eleventh Amendment, see *Alden v. Maine*, 527 U.S. 706, 723, 727 (1999); *Federal Maritime Comm'n v. South Carolina State Ports Authority*, 535 U.S. 743, 753 (2002), and is controlled by considerations of common law history, State dignity, and the functional realities of State management of navigable waters (along with lands underlying navigable waters) and the demands for uniformity of the federal maritime law. All these factors militate in favor of Respondent's immunity here.

Historically, counties were never subject to *in personam* admiralty suits for damages arising from the alleged improper maintenance of bridges over navigable waters. In England, admiralty jurisdiction simply did not extend to events occurring "within the body of a county." 15 Rich. II c. 3 (1378). Even more pertinently, in English common law, counties were immune in suits alleging injuries incurred by a member of the public for a county bridge being out of repair, provided the

bridge was operated by the county *pro bono publico*. See *Russell v. Men of Devon*, 100 Eng. Rep. 359 (K.B. 1788). These principles were all substantially adopted in the American law of sovereign immunity in admiralty proceedings. They were not substantially unsettled by this Court's decision in *Workman v. Mayor, Aldermen & Commonalty of the City of New York*, 179 U.S. 552 (1900), and, indeed, were reaffirmed in this Court's later landmark opinion of *In re State of New York*, 256 U.S. 490 (1921).

The dignity interests of States, as noted by this Court in *Federal Maritime Comm'n*, 535 U.S. at 760, and *Alden*, 527 U.S. at 748-49, are certainly advanced by extending counties sovereign immunity in admiralty cases, where the county is exercising core State functions in regard to navigable waters. Confirming such immunity for counties is only sensible, given the threat that entertaining *in personam* admiralty suits can pose to State sovereignty. See *Welch v. Texas Department of Highways & Public Transp.*, 483 U.S. 468 (1987); *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 698-99 (1982).

These historical and dignity considerations are confirmed by functional factors. Despite protestations to the contrary, granting Respondent sovereign immunity in this case will not spell the doom of the uniformity of the federal maritime law, for the simple reason that sovereign immunity is jurisdictional and substantive maritime law will be applied, irrespective of the forum Petitioner selects. Indeed, this Court has rejected such uniformity concerns as a ground for refusing sovereign immunity, see *State of New York*, 256 U.S. at 502-03; *Federal Maritime Comm'n*, 535 U.S. at 767-68, and should do so here. Moreover, to deny Respondent immunity will mean that many States will, of necessity, be compelled to reassume control of bridge maintenance (or other infrastructure projects

involving navigable waters) which they had previously delegated to political subdivisions, in order to secure for these operations immunity from suit.

ARGUMENT

I.

A COUNTY ENJOYS ARM OF THE STATE IMMUNITY WHEN IT IS DELEGATED ESSENTIAL FUNCTIONS BY THE STATE IMPLICATING SIGNIFICANT SOVEREIGN INTERESTS.

A. The "Arm of the State" Issue is Properly Before this Court.

The Eleventh Circuit decided the case below, in part, on a narrowly-tailored sovereign immunity analysis, premised on the holding that Chatham County could be considered an "arm of the state" for certain sovereign immunity purposes, even if it could not be so within the literal confines of the Eleventh Amendment. J.A. 83a-85a. Respondent is entitled to renew such an argument here. See *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979); *Blum v. Bacon*, 457 U.S. 132, 137 n.5 (1982); *United States v. New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977). This Court has limited its review to a modified Question Presented. See 126 S. Ct. 477 (2005). As the Question is posed by the Court, it does not foreclose Respondent's assertion that it is an "arm of the State" for general sovereign immunity purposes, even if it is not under the Eleventh Amendment.

B. States May Delegate Sovereign Powers to Counties, and, Under Unique Circumstances, Cloak Them with Arm of the State Immunity.

1. Respondent is mindful that generally counties do not enjoy Eleventh Amendment immunity. This Court has held, however, that where a county does truly act as an arm of the State, it is entitled to sovereign immunity. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 124 (1979) (ruling extended to five Pennsylvania counties); see also Erwin Chemerinsky, FEDERAL JURISDICTION 413-14 (2003).

In *Pennhurst*, this Court observed that

> We have held that the Eleventh Amendment does not apply to "counties and similar municipal corporations." *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 280 (1977); see *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890). At the same time, we have applied the Amendment to bar relief against county officials "in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself." *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979). See, e.g., *Edelman v. Jordan*, [415 U.S. 651 (1974)] (Eleventh Amendment bars suit against state and county officials for retroactive award of welfare benefits).

465 U.S. at 124 n.34.

This Court has thus held open the possibility that, under special and unique circumstances, a county or municipal corporation might be recognized as an arm of the State for

purposes of invoking some species of sovereign immunity. This is such a case.

2. The arm of the State doctrine is rooted in federalism's abiding respect for States' absolute discretion to delegate state authority, power, privileges, and immunities to state instrumentalities. *Pennhurst State School & Hosp.*, 465 U.S. at 116-117 ("[T]he Eleventh Amendment's restriction on the federal judicial power is based in large part on 'the problems of federalism inherent in making one sovereign appear against its will in the courts of another.' (quoting *Employees v. Missouri Pub. Health Dept.*, 411 U.S. 279, 294 (1973)); *Fed. Maritime Comm'n v. South Carolina Ports Authority*, 535 U.S. 743, 765 (2002) ("While state sovereign immunity serves the important function of shielding state treasuries and thus preserving the States' ability to govern in accordance with the will of their citizens, the doctrine's central purpose is to 'accord the States the respect owed them as' joint sovereigns." (quoting *Alden v. Maine*, 527 U.S. 706, 750-51 (1999), and *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993))).

This Court has thus recognized, in other doctrinal contexts, State delegations of sovereign authority to counties, from which there followed immunity consequences.

a. In nearly a hundred years of this Court's jurisprudence, the Court has consistently held that a fundamental principle of federalism is the freedom of States to experiment with different forms of delegation to counties and political subdivisions. This principle of federalism has been especially respected in the sphere of delegation of powers with a federal dimension, such as the regulation of commerce. In *City of Columbus v. Ours Garage & Wrecker Service*, 536 U.S. 424 (2002), this Court held that

> [o]rdinarily, a political subdivision may exercise whatever portion of state power the State, under its own constitution and laws, chooses to delegate to the subdivision. Absent a clear statement to the contrary, Congress' reference to the "regulatory authority of a State" should be read to preserve, not preempt, the traditional prerogative of the States to delegate their authority to their constituent parts.

Id. at 428-29.

Likewise, in *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991), this Court observed that "[t]he principle is well settled that local ' "governmental units" are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them' . . . in its absolute discretion." Id. at 607-08 (quoting *Sailors v. Bd. of Ed. of Kent City*, 387 U.S. 105, 108 (1967), which quoted *Reynolds v. Sims*, 377 U.S. 533, 575 (1964), which in turn was quoting *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907)). See also *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978).

b. This Court has also respected this principle of federalism in the area of antitrust immunity. See *Parker v. Brown*, 317 U.S. 341, 350-351 (1943). In *Community Communications v. City of Boulder*, 455 U.S. 40 (1982), the Court confirmed that a municipality may be eligible for state action immunity from antitrust liability, but only to the extent that it acts pursuant to a clearly articulated and affirmative delegation of authority by the State. See id. at 55.

This line of cases emphasized the endowment of immunity on a county or political subdivision, in cases where a State effectively delegated "a traditional governmental

function" to a county through a "clear articulation and affirmative expression" of such a delegation. See id.; *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 413 (1978); *Parker*, 317 U.S. at 351 (limitation of the exemption to "official action directed by a state"). Although counties are "not themselves sovereign; they do not receive all the federal deference of the States that create them," this Court has reconciled the grant of sovereign immunity to counties in certain situations with the broader proposition that counties are not normally "arms of the State" for Eleventh Amendment purposes. *City of Lafayette*, 435 U.S. at 412. They may be arms of the State under unique circumstances when an express delegation of State authority has been made. See *Pennhurst*, 465 U.S. at 124 n.34.

C. Chatham County Qualifies as an Arm of the State, Under the Unique Circumstances of this Case, Because It was Expressly Delegated an Essential Sovereign State Function and State Funds May be Used to Satisfy an Adverse Judgment.

Whether a State instrumentality is an arm of the State – at least under the Eleventh Amendment – is a federal question, but one that must be answered by looking to the provisions of State law that define "the relationship between the State and the entity in question." *Regents of the University of California v. Doe*, 519 U.S. 425, 429 (1997). See also *Mount Healthy*, 429 U.S. at 280 (stating as a first factor that the arm of the State determination depends upon the nature of the entity created by state law); *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401-02 (1979) (looking first to corporate relationship between the bistate entity in question and the compacting States, and then to the function performed by the entity); and *Lincoln County v. Luning*, 133 U.S. 529, 530

(1890) (Nevada constitution explicitly provided for the liability of counties to suit).

The Court has applied a variety of considerations in its arm of the State determinations. Such factors include whether the State is a real party in interest and whether the State constitution provides for counties' liability to suit. See id. at 530-31. Additional details are the nature of the entity created by State law, the degree of supervision by the State, and whether an entity has the power to raise its own funds. See *Mount Healthy*, 429 U.S. at 280. Lastly, it might be relevant whether a county was bestowed corporate powers, deemed a "local public entity," is liable for judgments, authorized to own and sell propety, and authorized to issue bonds. See *Moor v. County of Alameda*, 411 U.S. 693, 719-20 (1973).

A review of these Supreme Court precedents demonstrates that two factors are most often dispositive of "arm of the State" determinations for Eleventh Amendment purposes: (a) whether State law delegates to the instrumentality a sovereign State function and (b) whether State funds may potentially be used to satisfy an adverse judgment. Although precedent suggests a presumption against a county operating as an arm of the State for Eleventh Amendment purposes, Respondent submits that, as with the presumption against a bistate entity operating as an arm of the State, this presupposition may be overcome to afford arm of the State immunity where there is good reason to believe that "the State[] structured the [delegation] to enable [the entity] to enjoy the special constitutional protection of the States themselves." *Port Authority Trans-Hudson Corp. v. Hess*, 513 U.S. 30, 43-44 (1994) (quoting *Lake Country Estates, Inc.*, 440 U.S. at 401). The surmountability of this presumption through arm of the State status is acknowledged in *Moor v. Alameda County*. "[T]his Court has recognized that a political subdivision of a

State, unless it is simply the 'the arm or alter ego of the State,' is a citizen for diversity purposes." *Moor*, 411 U.S. at 717.

Finally, the analytical framework for arm of the State determinations may well be broader outside the confines of the Eleventh Amendment, as here. Where a State's residual sovereign immunity is at issue, the guiding inquiry should be whether the State has made a conscious choice, through an effective delegation of a core sovereign power to a county, thereby seeking to cloak that political subdivision with immunity from certain types of suits. Viewed in this way, whether or not State funds may potentially be used to pay a judgment against a county, matters rather less than the intent of the State in delegating a core governmental function to a county.

In this case, the Court need not make a sweeping declaration as to the contours of "arm of the State" status in non-Eleventh Amendment contexts. Chatham County qualifies as an "arm of the State" under any set of principles that exalts function over form, and eschews any categorical rejection of sovereign immunity for State political subdivisions, just because they are such.

D. Chatham County Was Expressly Delegated State Authority Over The Maintenance of Bridges, an Essential Sovereign Function.

1. An Express Delegation Was Accomplished Under the Georgia Constitution and Statutes, Resulting in Immunity Under Georgia Law.

The State of Georgia recognizes Chatham County as part of the sovereign power of the state, "clothed with public duties which belong to the state. . . ." *Georgia Department of Corrections v. Chatham County, Georgia*, 274 Ga. App. 865,

866, 619 S.E. 2d 373, 374 (2005). The County acts as a State agent for the public at large by performing the governmental function of operating and maintaining the Causton Bluff Bridge pursuant to explicit authority delegated by the State.

The State of Georgia has vested the County with explicit State sovereign power by granting the County the authority to build bridges over navigable waters. O.C.G.A. § 36-14-1 provides:

> The consent of the state is given to and authority is vested in the county governing authority to erect bridges across the navigable streams that lie wholly within the state, whenever in the judgment of the county governing authority the public interest may be subserved thereby, upon its compliance with the law of Congress requiring the approval of the secretary of transportation and the chief of engineers of the United States, as embodied in the statutes of the United States passed by the Fifty-fifth Congress and approved March 3, 1899.

See id.; Resp. Br. App. 6-7.

The County has been delegated power by the State to operate, construct and maintain bridges. Georgia Constitution Article 9, § 2, ¶ 3(a)(4), authorizes counties to provide for street and road construction and maintenance. This paragraph also reserves the right of the Georgia General Assembly to enact general laws and to regulate, restrict, or limit the exercise of this power. GA. CONST. art. 9, § 2, ¶ 3 (c) - (d); Resp. Br. App. 2-3. Chatham County has explicit authority under its Enabling Act to "establish, alter, or abolish public roads, private ways, bridges, and ferries, according to law." Georgia Laws 1984, at 5050, 5071, § 25(6); Resp. Br. App. 7.

The General Assembly has exercised its right to enact general laws regarding bridges. Counties are authorized to acquire property for public road purposes. O.C.G.A. § 32-3-1(a). "Public road purposes" includes bridges. O.C.G.A. § 32-3-1(b); Resp. Br. App. 7-8. O.C.G.A. § 32-4-42 sets forth the powers of counties regarding county road systems and refers to public roads. The definition of "public road" includes bridges. O.C.G.A. § 32-1-3(24)(B); Resp. Br. App. 13.

Georgia's legislature has prescribed the duties of counties with respect to county road systems. O.C.G.A. § 32-4-41; Resp. Br. App. 13-15. These duties include such things as planning, constructing, and maintaining an adequate road system; having control and responsibility for all construction, maintenance, and other work, administering funds for the road system from whatever source; and determining the maximum load for bridges in the county. Id.

The General Assembly has also provided a list of the county's powers relating to the county road system. O.C.G.A. § 32-4-42; Resp. Br. App. 8-13. Some county powers include: authority to enter into contracts for building or maintaining public roads; authority to accept and use federal and state funds to meet requirements of federal or state aid programs; ability to acquire real property; ability to enter on any lands of county for surveys and examinations; authority to employ and pay people needed for building, maintaining, operating a road system; ability to grant utility permits; authority to purchase supplies; and authority to levy and collect taxes. O.C.G.A. § 32-4-42 (1) - (8).

In Georgia, the right of taxation is a sovereign power that is always under the complete control of the State, unless the Georgia Constitution provides otherwise. GA. CONST. art. 7, § 1, ¶ 1; Resp. Br. App. 2. The State authorizes counties to exercise the State's taxation power to levy and collect taxes to

build and repair bridges. O.C.G.A. § 48-5-220(4); O.C.G.A. § 32-4-42(8); Resp. Br. App. 11-12, 16.

The State of Georgia has articulated a clear public interest in the construction and maintenance of bridges and roads. See O.C.G.A. § 32-3-1(b) (which refers to the development, growth, or enhancement of the public roads of Georgia); Resp. Br. App. 7. This interest is more pronounced because the Bridge at issue in this case traverses a navigable water. Chatham County serves both State and federal interests in operating and maintaining the Bridge which crosses navigable waters. See 33 C.F.R. § 117.353(b) (which specifically includes the Causton Bluff Bridge as a drawbridge regulated by the United States). Federal regulations provide that "[p]ublic vessels of the United States, tugs with tows, and vessels in a situation where a delay would endanger life or property shall, upon proper signal, be passed through the draw of each bridge in this section at any time." 33 C.F.R. § 117.353(a).

The United States has the primary jurisdiction to regulate drawbridges across the navigable waters of the United States. See 33 C.F.R. § 117.1. In fact, the note to this provision effectively precludes local regulation. See id. ("The primary jurisdiction to regulate drawbridges across the navigable waters of the United States is vested in the Federal Government. Laws, ordinances, regulations, and rules which purport to regulate these bridges and which are not promulgated by the Federal Government have no force and effect."). The U.S. Coast Guard has the enforcement power over the Causton Bluff Bridge. See 33 C.F.R. § 117.49.

2. Under Georgia Law, Chatham County is Entitled to Sovereign Immunity for Claims Arising out of the Construction and Maintenance of the Bridge.

a. Chatham County's sovereign immunity derives from the common law which pre-dates Eleventh Amendment immunity. The common law doctrine of sovereign immunity, adopted by the State of Georgia in 1784,[3] prior to the adoption of the U.S. Constitution, protected governments at all levels from unconsented-to legal actions. See *Gilbert v. Richardson*, 264 Ga. 744, 745-746, 452 S.E. 2d 476, 477-78 (1994). The doctrine was "imbedded in the common law of England at the time of the American Revolution." *Crowder v. Department of State Parks*, 228 Ga. 436, 439, 185 S.E. 2d 908, 911 (1971). The General Assembly of Georgia embraced the doctrine when it adopted the common law of England in 1784. Id. At common law, counties were not liable for damages resulting from the failure to repair bridges. *Millwood v. DeKalb County*, 106 Ga. 743, 32 S.E. 577 (1899) (citing *Russell v. Men of Devon*, 2 Term R. 667, 100 Eng. Rep. 359 (1788)).

The County's sovereign immunity as a subdivision of the State has had statutory authority since the Code of 1895 in Political Code § 341, subsequently codified as Code § 23-1502. Resp. Br. App. 16. See *Revels v. Tift County*, 235 Ga. 333, 333-334, 219 S.E. 2d 445, 446 (1975). Code § 23-1502 (currently codified at O.C.G.A. § 36-1-4) provides that "[a] county is not liable to suit for any cause of action unless made so by statute." See also *Revels*, 235 Ga. at 333-334, 219 S.E. 2d at 446. The

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[3] The U.S. Constitution was effective March 1789 after nine States ratified it in 1788. *Owings v. Speed*, 18 U.S. 420, 422-423 (1820). The Eleventh Amendment was ratified in 1798. *State of Louisiana v. Texas*, 176 U.S. 1, 16 (1900).

State's sovereign immunity was, at least until 1974, a judicially created rule. *Crowder*, 228 Ga. at 439-440, 185 S.E. 2d at 911; *Nelson v. Spalding County*, 249 Ga. 334, 335, 290 S.E. 2d 915, 918 (1982).

b. Common law sovereign immunity was given constitutional status in Georgia in 1974. *Gilbert*, 264 Ga. at 745, 452 S.E. 2d at 478 n.2. The State was absolutely immune from suit until 1983 when an amendment to the Georgia Constitution was approved waiving the sovereign immunity of the State or any of its departments and agencies in actions for which liability insurance protection was provided. Id. at 745-746, 452 S.E. 2d at 477-479. Counties were included in the 1983 amendment's reservation of immunity to the State or any of its departments and agencies. See *Toombs County v. O'Neal*, 254 Ga. 390, 391, 330 S.E. 2d 95, 96-98 (1985). A revision to the Georgia Constitution in 1983 authorized the State legislature to waive the immunity of counties by law. See GA. CONST. 1983, art. 9, § 2, ¶ 9; Resp. Br. App. 3; *Gilbert*, 264 Ga. at 745-746, 452 S.E. 2d at 478, n.3. The 1991 amendment to the Georgia Constitution extended sovereign immunity "to the state and all of its departments and agencies." Id. at 746, 452 S.E. 2d at 478. Counties are included. Id. at 747, 452 S.E. 2d at 479.

The 1991 amendment to the Georgia Constitution provides in relevant part:

> Except as specifically provided in this Paragraph, sovereign immunity extends to the state and all of its departments and agencies. The sovereign immunity of the state and its departments and agencies can only be waived by an Act of the General Assembly which specifically provides that sovereign immunity is thereby waived and the extent of such waiver.

GA. CONST. art. 1, § 2, ¶ 9(e); Resp. Br. App. 2.

It is clear that counties are included as departments and agencies of the State and therefore have the State's sovereign immunity. *Gilbert*, 264 Ga. at 747, 452 S.E. 2d at 479. See also *Thomas v. Hospital Authority of Clarke County*, 264 Ga. 40, 42, 440 S.E. 2d 195, 196 (1994) (specifically identifying counties as departments or agencies of the State); *Wojcik v. State*, 260 Ga. 260, 262, 392 S.E. 2d 525, 527 (1990) (which notes that "as a political subdivision of the state, a county functions as an instrumentality of state government at a more rudimentary level than does a municipal corporation.")

Counties have historically been recognized as State agencies in Georgia with a limited ability to be sued. Although there is a statute, originally adopted in 1863, which provides that counties may sue and be sued,[4] the State has consistently not authorized counties to be sued except when specifically authorized by law because counties "are political divisions, exercising a part of the sovereign power of the State." *Millwood*, 106 Ga. at 746, 32 S.E. at 578.

Since the sovereign State cannot be sued without its consent, counties as political subdivisions of the sovereign State may not be sued without the consent of the State, their creator. *Tounsel v. State Highway Department of Georgia*, 180 Ga. 112, 116, 178 S.E. 285, 287-288 (1935). Counties provide a local mechanism for the State to govern. *Millwood*, 106 Ga. at 744, 32 S.E. at 577. Although counties have corporate status, they are not viewed by the State as "ordinary municipal corporations, such as cities and towns." *Millwood*, 106 Ga. at 745, 32 S.E. at 577. Counties "are parts of the sovereign power, clothed with

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[4] This section is currently codified as O.C.G.A. § 36-1-3 and was adopted in 1863 as Code § 463. Resp. Br. App. 16, 17.

public duties which belong to the state, and for convenience divided among local organizations." Id. They "are subdivisions of the state, imposed upon the people for state purposes." Id., 32 S.E. at 578. "Counties are subdivisions of the state government to which the state parcels its duty of governing the people." *Troup County Electric Membership Corporation v. Georgia Power Company*, 229 Ga. 348, 352, 191 S.E. 2d 33, 36 (1972). "They are local, legal, political subdivisions of the state, created out of its territory, and are arms of the state, created, organized, and existing for civil and political purposes, particularly for the purpose of administering locally the general powers and policies of the state." Id.

c. The Georgia Supreme Court in *Millwood* recognized that a Georgia statute authorized counties to be sued for damages caused by neglect to keep bridges in repair. 106 Ga. at 745, 32 S.E. at 578 (citing *Hammond v. Richmond County*, 72 Ga. 188 (1883), and Code § 691, currently codified as O.C.G.A. § 32-4-71; Resp. Br. App. 17-18). The Georgia Constitution explicitly provides that sovereign immunity can only be waived by the General Assembly. GA. CONST. art. 1, § 2, ¶ 9(e); art. 9, § 2, ¶ 9; Resp. Br. App. 2-3.

O.C.G.A. § 32-4-71(b) authorizes counties to be sued for damages for a defective bridge occurring within seven years of the contractor's work on the bridge and its acceptance by the county. Resp. Br. App. 17-18. That Code section does not apply because the time limitation has passed. See J.A. 40a (Drewry Aff. ¶ 7). Therefore, there is no legislative waiver of the County's sovereign immunity in this instance. See *Kordares v. Gwinnett County*, 220 Ga. App. 848, 849-850, 470 S.E. 2d 479, 480-481 (1996).

E. State Funds Could Possibly be Used to Pay a Judgment for Claims Regarding the Bridge.

This Court has held that it is a State entity's potential liability for a judgment that is indicative of Eleventh Amendment immunity. See *Regents of the University of California v. Doe*, 519 U.S. 425, 431 (1997) ("[I]t is the entity's potential legal liability, rather than its ability or inability to require a third party to reimburse it, or to discharge the liability, that is relevant. . . ."); *Lincoln County*, 133 U.S. at 530-531 (both factors concerned potential liability of the State, as to (1) whether the State is a real party in interest and (2) whether the State constitution provides for counties' liability to suit); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. at 124 (holding that defendants, including five Pennsylvania counties, were entitled to Eleventh Amendment sovereign immunity when funding for the mental retardation programs in question came from the State and then the counties).

Such a potentiality exists in this case for Chatham County to have recourse to use State funds in satisfying any judgment in favor of Petitioner.[5] Under Georgia law, counties receive state funds for public roads. See O.C.G.A. § 42-4-42(2). O.C.G.A. § 32-5-25 allows the State Public Transportation Fund to be used to pay a damage award in relation to a bridge. See id. § 32-5-21(3); Resp. Br. App. 18-19. Grants of state funds to counties for roads and bridges are not "general revenue funds," but can be used for any public purpose, including the payment of a judgment. Id. § 36-17-1;

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[5] Notwithstanding Petitioner's suggestion, Respondent did not concede, in prior proceedings, that State funds could never be used to pay this judgment. Rather, the County specified that a judgment would not be paid out of "general revenue funds" or funds "earmarked" for such a purpose. See J.A. 51a, 55a.

Resp. Br. App. 19. The only prohibition on the use of this fund is for the construction or maintenance of private driveways, roads or bridges; or public roads that have since been abandoned. O.C.G.A. § 32-5-23 (1)-(2). State funds may be granted to counties based upon road mileage for any public purpose. O.C.G.A. § 36-17-1.

Finally, there is no question that where a bridge is designated as part of the State of Georgia's own highway system, the State is obligated to defend an action for negligent bridge maintenance brought against a county, and it could obviously claim both sovereign immunity and Eleventh Amendment immunity. Id. § 32-2-6(a); Resp. Br. App. 19-20. This means that, under Petitioner's argument, whether Eleventh Amendment immunity attaches would depend on a state highway designation. If this case is decided adversely to Respondent, in the future, counties (in Georgia and elsewhere) will simply redesignate county roads or bridges as state infrastructure, in order to secure immunity. This Court should reject the application of such formalisms when designing its sovereign immunity jurisprudence.

F. Maintenance of Bridges Over Navigable Waters is a Uniquely Core, Sovereign Function of the State.

1. Historically, lands underlying navigable waters have been considered as sovereign lands. See *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997). It has been observed that

> The Court from an early date has acknowledged that the people of each of the Thirteen Colonies at the time of independence "became themselves sovereign; and in that character hold the absolute right to all their navigable waters and

> the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government."

Id. at 283 (quoting *Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 367, 410 (1842)). This Court's conclusion was based on the principle that "navigable waters uniquely implicate sovereign interests," and an encroachment on such sovereign prerogatives "would be . . . fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury." Id. at 284. This principle derives from English law which is founded on the public right to navigation and the long-held concept that submerged lands are "tied in a unique way to sovereignty." Id. at 284-85.

The State of Georgia recognizes its sovereign power over tidal waters, navigable waters, and lands underlying navigable waters. The Wilmington River, which the Bridge spans, is a tidal river. *Dorroh v. McCarthy*, 265 Ga. 750, 462 S.E. 2d 708-709 (1995). O.C.G.A. § 52-1-2 provides:

> The General Assembly finds and declares that the State of Georgia became the owner of the beds of all tidewaters within the jurisdiction of the State of Georgia as successor to the Crown of England and by the common law. . . . The General Assembly further finds that the State of Georgia, as sovereign, is trustee of the rights of the people of the state to use and enjoy all tidewaters which are capable of use for fishing, passage, navigation, commerce, and transportation, pursuant to the common law public trust doctrine. Therefore, the General Assembly declares that the protection of tidewaters for use by the state and its citizens has more than local significance, is of equal

> importance to all citizens of the state, is of state-wide concern, and, consequently, is properly a matter for regulation under the police powers of the state.

Id.; Resp. Br. App. 4. The State of Georgia has thus explicitly authorized the construction and maintenance of the intracoastal waterway in the State of Georgia by the United States. See O.C.G.A. § 52-3-1 et seq. The construction and maintenance of the intracoastal waterway in the State of Georgia is intended to create a part of the navigable waters of the United States. See id.

2. It is well established that the maintenance of bridges, and highways, is an essential governmental function. This Court held in *Proprietors of Charles River Bridge v. Proprietors of the Warren Bridge*, 36 U.S. (11 Pet.) 420, 438 (1837), that a State's right to build a bridge over a navigable river was an exercise of its sovereign power. In *Atkin v. Kansas*, 191 U.S. 207 (1903), this Court held that

> it is one of the functions of government to provide public highways for the convenience and comfort of the people. Instead of undertaking that work directly, the State invested one of its governmental agencies with power to care for it. Whether done by the State directly or by one of its instrumentalities, the work was of a public, not private, character. . . . We rest our decision upon the broad ground that the work being of a public character, absolutely under the control of the State and its municipal agents acting by its authority, it is for the State to prescribe the conditions under which it will permit work of that kind to be done.

Id. 222.

This Court has also held that the States' sovereignty interests extend to prescribing the modalities of the maintenance of bridges over navigable waters, and that such matters are reserved to state courts, except where there has been an express preemption of jurisdiction by federal law. In *Ouchita & Mississippi River Packer Co. v. Aiken*, 121 U.S. 444 (1887), the Court ruled that

> [i]n all such cases of local concern, though incidentally affecting commerce, we have held that the courts of the United States cannot, as such interfere with the regulations made by the state, nor sit in judgment on the charges imposed for the use of improvements or facilities afforded, or for the services rendered under state authority. . . . If the state laws furnish no remedy, – in other words, if the charges are sanctioned by them, – then, as before stated, it is for congress, and not the United States courts, to regulate the matter, and provide a proper remedy.

Id. at 448-50. This deference to State sovereignty interests over navigable waters was elaborated in *St. Anthony Falls Water-Power Co. v. Board of Water Comm'rs of City of St. Paul*, 168 U.S. 349 (1897), where the Court observed that although the United States has jurisdiction over commerce and the navigation of rivers, "[t]he jurisdiction of the state over this question of riparian ownership has been always, and from the foundation of the government, recognized and admitted by this court." Id. at 366; see also *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 405 (1940); *Cardwell v. Americal River Bridge Co.*, 113 U.S. 205, 208-10 (1885); *Escanaba & Lake Michigan Transp. Co. v. City of Chicago*, 107 U.S. 678, 687-88 (1883).

3. These cases establish both a significant set of immunities for State entities in the exercise of sovereign functions in relation to navigable waters, as well as an important limiting principle for this case. State sovereign immunity is recognized in this line of decisions insofar as state courts are granted the power to rule on questions dealing with the maintenance of needful structures over navigable waters. *St. Anthony Falls*, 168 U.S. at 366; *Aiken*, 121 U.S. at 450. Respondent does not dispute Congress's plenary power of regulation and the supremacy of the federal maritime law. Federal maritime law would be applied in state courts or administrative tribunals on the issue of the liability of State political subdivisions for the maintenance of bridges over navigable waters.

These objectives of federalism can be accomplished while accommodating traditional notions of State sovereign immunity. If Congress believes that States are not properly entertaining actions or petitions involving the maintenance of bridges over navigable waters, it can prescribe a special mechanism for relief. Absent such a move, these cases are properly heard in state forums.

Indeed, the special "sovereignty interests" implicated with navigable waters, *Coeur d'Alene Tribe*, 521 U.S. at 284, counsels that this Court could well limit its sovereign immunity holding here precisely to situations where States delegate an essential government function to counties in relation to navigable waters. In such circumstances, the State interests in cloaking their political subdivisions with immunity are clear, express, and limited.

II.

CHATHAM COUNTY ENJOYS RESIDUAL COMMON LAW SOVEREIGN IMMUNITY IN AN *IN PERSONAM* ADMIRALTY PROCEEDING SUCH AS THIS.

A. This Court has Recognized That State Sovereign Immunity Can Extend Well Beyond the Contours of the Eleventh Amendment.

It can hardly be doubted that a State's residual sovereign immunity can extend doctrinally well beyond the limits of the Eleventh Amendment. In *Alden v. Maine*, 527 U.S. 706 (1999), it was noted that "the Court has upheld States' assertions of sovereign immunity in various contexts falling outside of the literal text of the Eleventh Amendment." Id. at 727. Just four years ago, this Court elaborated the point in *Federal Maritime Comm'n v. South Carolina State Ports Authority*, 535 U.S. 743 (2002), when it observed that

> the Eleventh Amendment does not define the scope of the States' sovereign immunity; it is but one particular, exemplification of that immunity. . . . Instead of explicitly memorializing the full breadth of the sovereign immunity retained by the States when the Constitution was ratified, Congress chose in the text of the Eleventh Amendment only to "address the specific provisions of the Constitution that had raised concerns during the ratification debates and formed the basis of the *Chisolm* decision."

Id. at 753 (quoting *Alden*, 527 U.S. at 723). See also *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991) ("We have understood the Eleventh Amendment to stand not so much

for what it says, but for the presupposition of our constitutional structure which it confirms.").

Likewise, when a State entity asserts its immunity to suit, the question is not the primacy of federal law but the implementation of the law in a manner consistent with the constitutional sovereignty of the States. *Alden*, 527 U.S. at 732. *Alden* teaches that it is the State that decides which of its entities is to be granted sovereign immunity. Id. at 730-736.

That leaves the question of what criteria are to be employed to define the contours of the States' common law, residual sovereign immunity under the *Alden* and *Federal Maritime Comm'n* formulations. Respondent would submit that this Court's jurisprudence reveals three relevant touchstones: the historic understanding and expectations of the Constitution's Framers, the dignity interests of the States themselves, and the functional necessity in extending sovereign immunity to particular State functions and activities. All three of these benchmarks strongly militate in favor of Chatham County enjoying sovereign immunity in this *in personam* admiralty proceeding.

B. Counties Have Historically Enjoyed Immunity in *In Personam* Admiralty Actions.

1. This Court has indicated that one reference point for the application of a residual state common law sovereign immunity was the understandings and expectations of the Framers of the Constitution, as conditioned by English common law. See *Alden*, 527 U.S. at 734 ("the contours of sovereign immunity are determined by the founders' understanding, not by the principles or limitations derived from natural law. . . the dissent has offered no evidence that the founders believed sovereign immunity extended only to cases where the sovereign

was the source of the right asserted. No such limitations existed on sovereign immunity in England, where sovereign immunity was predicated on a different theory altogether.").

This Court has observed that the States' common law sovereign immunity derives from a principle of English common law that a lord "could not be sued in his own court." Id. at 734 (quoting 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 465 (3d. ed. 1927)). See also *Nevada v. Hall*, 440 U.S. 410, 415 (1979) ("[The King] can not be compelled to answer in his own court, but this is true of every petty lord of every petty manor.") (quoting 1 F. POLLOCK & F. MAITLAND, HISTORY OF ENGLISH LAW 518 (2d ed. 1909)).

2. In English law contemporaneous with the Founding, counties could not be sued in a maritime proceeding. There were two analytically distinct reasons for this. The first was that the literal jurisdiction of the Admiralty did not extend landward to terrestrial events occurring in counties, irrespective of the identity of the county as a defendant in the proceeding. The second explanation was that counties had immunity in English common law courts for tort actions involving typical maritime incidents, including the alleged improper maintenance of bridges.

a. In England, before 1776, the jurisdiction of the English High Court of Admiralty did not extend to events occurring "within the body of a county" (*infra corpus comitatus*), even on a navigable water. A statute from the fifteenth year of King Richard II's reign provided

> that of all manner of contracts, pleas and quereles and of all other things done or arising within the bodies of counties, as well by land as by water . . . the admiral's court shall have no manner of cognizance, power nor jurisdiction;

> but all such manner of contracts, pleas and quereles, and all other things rising within the bodies of counties, as well by land as by water, as afore . . . shall be tried, determined, discussed and remedied, by the laws of the land, and not before or by the admiral.

15 Rich. II c. 3 (1378). This was confirmed in William Blackstone's famous treatise on English law, published on the eve of the American Revolution. See 3 William Blackstone, COMMENTARIES ON THE LAW OF ENGLAND *106.

This rule was recognized in countless cases decided by the High Court of Admiralty. See, e.g., *Clarke v. The FAIRFEILD*, 167 Eng. Rep. 559, Burrell 252 (Adm. 1678); *The PUBLIC OPINION*, 166 Eng. Rep. 289, 2 Hagg. 398 (Adm. 1832); *The King v. Forty-Nine Casks of Brandy*, 166 Eng. Rep. 401, 410, 3 Hagg. 257, 282-83 (Adm. 1836); see also George F. Steckley, *Collisions, Prohibitions and the Admiralty Court in Seventeenth-Century London*, 21 LAW & HIST. REV. 41, 64-66 (2003); Charles S. Cumming, *The English High Court of Admiralty*, 17 TUL. MAR. L. J. 209, 223, 234-35 (1993) .

It is important to recognize that this rule against admiralty jurisdiction was recognized in American jurisprudence (both in the colonial period and post-independence), until such time as this Court adopted a test of navigability for admiralty jurisdiction. See *The King v. Oldner & Brilehan*, 2 Va. Colonial Dec. B90, 1739 WL 4 (Va. Gen. Ct. 1739); *United States v. The SCHOONER BETSY*, 8 U.S. (4 Cranch) 443, 447-48 (1808). Even when later bridge allision cases were acknowledged as being within federal admiralty jurisdiction, the question of immunity for States and counties maintaining such bridges was reserved. See *Atlee v. Packet Co.*, 88 U.S. 389, 391 (1874); *City of Boston v. Crowley*, 38 F. 202, 204 (C.C.D. Mass. 1889).

b. Even outside the strictures of admiralty jurisdiction, English courts at the time of the American Revolution held that a county could not be sued for injuries sustained by a county bridge being out of repair. See *Russell v. Men of Devon*, 100 Eng. Rep. 359, 2 Term Reports 667 (K.B. 1788). The rule of *Russell* was based on the fact that County of Devon operated the bridge *pro bono publico*, and not as a proprietorship or for profit. This distinction was affirmed in later English law, see *Mersey Docks & Harbour Board v. Gibbs*, 11 H.L. 685 (1865), as well as in the United States. See, e.g., *Riddle vs. The Proprietors of the Locks and Canals on Merrimac River*, 7 Mass. 169, 187 (1810).

3. It would have thus been well-understood by the members of the Framing generation that counties, as political subdivisions of States, would have been immune from virtually all maritime proceedings, and certainly those involving bridge allisions. Early American decisions reinforced these rulings by recognizing county immunity in *in personam* maritime proceedings, whether initiated within common law or admiralty jurisdiction.

At the time of the Framing, it was recognized that state courts would continue to have jurisdiction over certain maritime causes of action, including actions against state or public entities. See *Scott v. Graves*, 8 Va. 372 (1790); *Nicholson v. The State*, 3 H. & McH. 109 (Gen. Ct. Md. 1792). See also the First Judiciary Act, Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 73 (codified as amended at 28 U.S.C. § 1333(1)), conferring exclusive jurisdiction on the federal courts "of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it. . . ."

Early state court decisions confirmed that counties could not be sued for the failure to properly maintain bridges or roads.

See *Carter v. Levy Court*, 31 A. 715, 13 Del. (8 Houst.) 14 (Del. Super. Ct. 1887) ("[T[he overwhelming weight of authority seemed to be in favor of the proposition that no action of tort will lie against such a public division of the State as the county or such a body as the Levy Court" arising from the improper maintenance of a bridge). The Massachusetts Supreme Judicial Court in *Hill v. Boston*, 122 Mass. 344 (1877), noted that this rule derived from English common law that no action could be maintained by one of the public in respect of injuries sustained through a public bridge or road being out of repair. See id. at 346 (citing BROOKE'S ABRIDGMENT of Y.B. 5 Edw. 4, at 2, pl. 24 (1466)); see also *Browning v. City of Springfield*, 17 Ill. 142, 143-144 (1855) (collecting cases from Massachusetts, New Hampshire, and New York).

Even in *in rem* admiralty actions, federal courts acknowledged the immunity of counties and municipalities, if the vessel libelled was used exclusively for public purposes. See *The FIDELITY*, 8 F. Cas. 1189, 1191 (C.C.S.D.N.Y. 1879) (citing English cases). All of this historical material, taken together, is strongly suggestive that counties of States have enjoyed sovereign immunity in many different sorts of admiralty proceedings, including *in personam* actions arising from allisions with bridges (or other structures over navigable waters) maintained by counties.

4. Both Petitioner and United States rely extensively on *Workman v. Mayor, Aldermen & Commonalty of the City of New York*, 179 U.S. 552 (1900), for the proposition that counties enjoy no immunity in *in personam* admiralty proceedings. This reliance is misplaced, for a number of reasons.

Workman was concerned with the substantive law of admiralty and implicitly recognized the immunity of States from *in personam* suits in admiralty. The Court in *Workman* focused

on the relevant law to be applied in maritime proceedings involving a vessel owned and operated by a municipality, but did not address the threshold questions of jurisdiction or sovereign immunity. *Workman* is inapposite because it addressed substantive admiralty law, not the Court's power to exercise jurisdiction over the person of the defendant. *Workman* simply held that admiralty law preempted local law and its opinion was limited to the "controlling effect of the admiralty law." Id. at 574.

In *Workman*, a vessel was struck and injured by a steam fire-boat owned by the City of New York. Id. at 553-54. The fire-boat had been called to put out a fire in a warehouse near the pier slip bulkhead when the accident occurred. Id. The district court applied local law, holding that the City was liable. Id. at 555-56. The court of appeals applied alternative principles of local law and held that the City was not liable. Id. at 556-57. Workman contended that even if the City was not liable under local law, the court of appeals erred because the City was liable under maritime law and maritime law should have controlled the determination. Id. at 557.

The issue before this Court was whether local law or maritime law applied and if maritime law applied, whether the City was liable. The Court described the issue before it:

> Does the local law, if in conflict with the maritime law, control a court of admiralty of the United States in the administration of maritime rights and duties, although judicial power with respect to such subjects has been expressly conferred by the Constitution (art. 3, § 2) upon the courts of the United States?

See id. at 557.

The Court stated that it was settled that "the local decisions of one or more states cannot, as a matter of authority, abrogate the maritime law." Id. at 564. In *Workman*, the admiralty court's jurisdiction over the City was not in question. See id. at 566. The Court stated that the public nature of the service performed by the City's vessel provided no basis for immunity in an admiralty court "where the court has jurisdiction." Id. at 570. The Court stated that since the City was subject to the jurisdiction of the admiralty court, "unlike a sovereign," the City could not escape liability. Id. The Court also noted that a sovereign could escape liability because courts would have no jurisdiction. Id.

On it own terms, then, *Workman* reserved the question of whether a political subdivision of a State was actually exercising sovereign State powers in conducting activities affecting maritime commerce. In any event, the City of New York was arguably not even accomplishing such sovereign functions in *Workman*, insofar as the fireboats at issue in that case were operated in a proprietary fashion. See id. at 564. Besides, the most compelling reason relied upon by the *Workman* Court to allow the *in personam* action in the case was to maintain the symmetry in admiralty law that would otherwise be destroyed if states were able to unilaterally extend immunity to state entities. See id. at 559. This uniformity rationale is not applicable here, for reasons that will be explained more fully, *infra*, at § II.D.

Workman dealt with a city corporation, whereas the case law pre-existing *Workman* and afterwards prescribed a different result for counties. See *The ALEX Y. HANNA*, 246 F. 157, 158-61 (D. Del. 1917); *The WEST POINT*, 71 F. Supp. 206, 208-11 (E.D. Va. 1947); *Broward County v. Wickman*, 195 F.2d 614, 615 (5th Cir. 1952). The *Wickman* case, relied upon by the court below in ruling in favor of Respondents, see J.A. 83a-84a, is

thus not an isolated or aberrant decision, as Petitioner and United States have suggested.

Georgia law (among those of the several States) has long recognized that counties are more deserving of immunity than municipalities. See *Millwood v. Dekalb County*, 106 Ga. 743, 744 (1899); see also *Heigel v. Wichita County*, 84 Tex. 392, 394 (1892). See also Edwin M. Borchard, *Government Liability in Tort*, 34 YALE L. J. 1, 40 (1924) (making the distinction between counties and cities). It thus may not be necessarily inconsistent to extend greater immunities to counties as political subdivisions in maritime disputes, than to municipalities.

5. Any doubts as to the possible effect of *Workman* on this case were dispelled by this Court's landmark decision in *In re State of New York*, 256 U.S. 490 (1921). *State of New York* not only limited *Workman* to its own terms and facts, see id. at 499, but also established a broader principle of sovereign immunity in admiralty cases. See id. at 497.

State of New York was an *in personam* admiralty action brought against the superintendent of the State of New York after damages were sustained to canal boats. Id. at 495-96. The New York attorney general asserted that a suit against the superintendent was a suit against the State and the court had no jurisdiction over the state which had not consented to be sued. Id. at 496. This Court held that the State's immunity from suit applied in admiralty and therefore the admiralty court had no jurisdiction over the State. Id. at 497-99. The Court emphasized the long-standing principle that a state may not be sued without its consent, citing the Eleventh Amendment which is "but an exemplification" of that fundamental rule. Id. at 497.

This Court distinguished *Workman* in *State of New York*. The Court in *State of New York* rightfully concluded that *Workman* simply was not dispositive on sovereign immunity

issues. The Court stated that *Workman* "dealt with a question of the substantive law of admiralty, not the power to exercise jurisdiction over the person of defendant, and in the opinion the court was careful to distinguish between the immunity from jurisdiction attributable to a sovereign upon grounds of policy, and immunity from liability in a particular case." Id. at 499.[6] The *State of New York* Court concluded that the symmetry and harmony of the admiralty law "consists in the uniform operation and effect of the characteristic principles and rules of the maritime law as a body of substantive law operative alike upon all who are subject to the jurisdiction of the admiralty, and binding upon other courts as well." Id. at 502-03.

The *State of New York* decision prescribed a practical approach for the extension of State sovereign immunity in maritime causes of actions to entities like counties. Concerning what is to be deemed "a suit against the state," the Court stated that it "has long been established" that the question is to be determined by "the essential nature and effect of the proceeding, as it appears from the entire record." 256 U.S. at 500. This is the essence of the test advanced here by Respondent: if the County is exercising a delegated function by the State of Georgia, under terms and conditions that the State would be immune if it were the named party, the County is entitled to sovereign immunity.

State of New York also dispensed with the policy rationale advanced in *Workman*, justifying a refusal of sovereign immunity for fear of a lack of uniformity in maritime proceedings. The *State of New York* Court emphasized that whether a tort action was brought in federal court, state court,

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[6] In essence, though unstated, *Workman* stood only as being a reverse-*Erie* case, discussed infra in § II.D.1, and sovereign immunity was not the issue.

or a state's own administrative tribunals (established to handle claims against the State), the substantive law to be applied was the federal maritime law. See 256 U.S. at 502-03.

6. The overwhelming weight of historical authority, *Workman* notwithstanding, is that counties enjoy a residual sovereign immunity in *in personam* admiralty actions, particularly those involving allisions with bridges maintained by such political subdivisions.

C. The Dignity Interest of States is Advanced by Confirming Sovereign Immunity in Admiralty Cases Where a County is Exercising Core State Functions in Regard to Navigable Waters.

This Court has recognized that, aside from its historic attributes, a fundamental imperative of sovereign immunity is protecting the dignity of States and State entities. Recently, in *Federal Maritime Comm'n*, this Court noted that

> [t]he preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities. . . . The founding generation thought it "neither becoming nor convenient that the several States of the Union, invested with that *large residuum of sovereignty* which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons."

535 U.S. at 760 (emphasis added) (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)). This view had been previously enunciated in this Court's *Alden* decision:

> The principle of sovereign immunity preserved by the constitutional design 'thus accords the

> States the respect owed them as members of the federation' . . . Private suits against nonconsenting states . . . present 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties,' regardless of the forum.

Alden, 527 U.S. at 748-49 (quoting *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc*., 506 U.S. 139, 146 (1993)); see also id. at 714 (The Constitution reserves to the states "a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status."); id. at 733 ("Although the sovereign immunity of the States derives at least in part from the common-law tradition, the structure and history of the Constitution make clear that the immunity exists today by constitutional design").

Part of the dignity so essential to State sovereignty is that States be allowed to determine which entities delegated core State functions are to be accorded sovereign immunity. Although the idiom of States as laboratories of democracy, see *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 292 (1990) (O'Connor, J., concurring); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), can be subject to abuse and distortion, it has real relevance here. Many States, including Georgia, have experimented with different forms of delegations of authority over the maintenance of roads and bridges to counties and other political subdivisions. These delegations of authority – and the immunity consequences that flow therefrom – are entitled to substantial deference by federal courts. It is entirely reasonable that States may desire that disputes concerning the maintenance of bridges over navigable waters be resolved in their own courts or administrative tribunals, and not in federal court. Such a desire reflects not only the actuation of real State policies, but also the

protection and preservation of the State's dignity in having a particular class of disputes, implicating the State's effective delegation of its power to a political subdivision, resolved in a forum of the State's own choosing.

This is particularly so in the class of *in personam* admiralty cases at issue here. This Court in *Welch v. Texas Department of Highways & Public Transp.*, 483 U.S. 468 (1987), reaffirmed the holding of *State of New York*. Id. at 488-89 ("In *Ex parte New York, No. 1*, 256 U.S. 490 (1921), a unanimous Court held that unconsenting States are immune from in personam suits in admiralty brought by private citizens."). While there has been justifiable controversy as to the contours of State sovereign immunity in *in rem* admiralty actions, see, e.g., *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 504 (1998), this has not been the case for *in personam* maritime proceedings. See *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 698-99 (1982) ("[A]n action – otherwise barred as an in personam action against the State – cannot be maintained through seizure of property owned by the State. Otherwise, the Eleventh Amendment could easily be circumvented . . . .") (opinion of Stevens, J.).

The rationale of Justice Stevens' opinion in *Treasure Salvors* is as applicable here. State sovereign immunity and dignity will be circumvented in cases where a State seeks to make an effective delegation of maritime authority to a political subdivision, only to have it frustrated by overly-literal or highly-technical limitations on a grant of immunity. The position taken here by Respondent is thus entirely consistent with this Court's teachings in *Federal Maritime Comm'n* and *Alden*, and the County is entitled to the same dignity interests afforded to the State in these circumstances.

D. No Derogation of the Uniformity of Maritime Law Will Occur Here if Chatham County is Accorded Sovereign Immunity, and the Functional Purposes of Sovereign Immunity Will be Advanced by Such a Recognition.

1. Granting Sovereign Immunity to Counties in *In Personam* Admiralty Actions Will Not Disrupt the Uniformity of the Federal Maritime Law.

Both Petitioner and United States argue that granting Chatham County sovereign immunity in this case will result in an untoward challenge to the uniformity of federal maritime law. This position is meritless.

a. This precise argument has been presented to – and rejected by – this Court, not once, but twice, the latest instance being just a handful of years ago. As noted above, this Court in *Workman* suggested that a reason to notionally refuse the City of New York immunity in an admiralty proceeding was to ensure the uniformity of the substantive maritime law. But, in *In re State of New York*, this Court repudiated that notion in an analysis that is worth reprinting at length:

> There is no substance in the contention that this result enables the state of New York to impose its local law upon the admiralty jurisdiction, to the detriment of the characteristic symmetry and uniformity of the rules of maritime law insisted upon in *Workman* . . . The symmetry and harmony maintained in those cases consists in the uniform operation and effect of the characteristic principles and rules of the maritime law as a body of substantive law operative alike upon all who are subject to the jurisdiction of the admiralty, and binding upon other courts as well. It is not inconsistent in

> principle to accord to the states, which enjoy the prerogatives of sovereignty to the extent of being exempt from litigation at the suit of individuals in all other judicial tribunals, a like exemption in the courts of admiralty and maritime jurisdiction.

256 U.S. at 502-03 (citing *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 215 (1917); *Union Fish Co. v. Erickson*, 248 U. S. 308, 313 (1919); *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 160 (1920); *Chelentis v. Luckenbach S. S. Co.*, 247 U. S. 372, 382 (1918)). In short, this Court concluded in *State of New York* that the objective of the uniformity of the substantive federal maritime law would not be frustrated by a grant of sovereign immunity to a State entity, because state courts and tribunals would still be expected to apply federal maritime law in any controversy.

If that were not enough, Petitioner's argument was raised – and disposed of – in this Court's *Federal Maritime Comm'n* decision in 2002. In that instance, it was the United States that raised the specter of dis-uniformity of the maritime law as a grounds for allowing federal administrative proceedings against State entities, at the instance of private parties. This Court made short work of this contention:

> The FMC maintains that sovereign immunity should not bar the Commission from adjudicating Maritime Services' complaint because "[t]he constitutional necessity of uniformity in the regulation of maritime commerce limits the States' sovereignty with respect to the Federal Government's authority to regulate that commerce." Brief for Petitioner 29. This Court, however, has already held that the States' sovereign immunity extends to cases

> concerning maritime commerce. See, e.g., *Ex parte New York*, 256 U.S. 490 (1921). Moreover, *Seminole Tribe* precludes us from creating a new "maritime commerce" exception to state sovereign immunity. Although the Federal Government undoubtedly possesses an important interest in regulating maritime commerce, see U.S. CONST., Art. I, § 8, cl. 3, we noted in *Seminole Tribe* that "the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area ... that is under the exclusive control of the Federal Government," 517 U.S., at 72. Thus, "[e]ven when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." Ibid.

535 U.S. at 767-68.

Whether Chatham County is sued in state court, or must answer for its alleged negligence through an administrative tribunal charged with hearing tort claims against state entities, the same substantive law will be applied: the federal general maritime law. This is the "reverse-*Erie*" principle. See *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222-223, (1986) ("Stated another way, the 'saving to suitors' clause allows state courts to entertain in personam maritime causes of action, but in such cases the extent to which state law may be used to remedy maritime injuries is constrained by a so-called 'reverse-*Erie*' doctrine which requires that the substantive remedies afforded by the States conform to governing federal maritime standards."); *Chelentis v. Luckenbach*, 247 U. S. 372

(1918) (held that under the general maritime law the seaman had no substantive right to recover; that this rule of substantive maritime law applied whether he sued in the state courts or in the court of admiralty).

b. One cannot credibly argue – as Petitioner and United States appear to – that because different results stand to come out of a rule that the rule disrupts the federal uniformity of maritime law. All rules generate different results based on the facts that are applied thereto. The uniformity of the federal general maritime law remains intact so long as one rule is applied uniformly. Indeed, there could be no hope for uniform results with any rule, maritime or otherwise. Respondent submits that the federal general admiralty law properly recognizes a more complete and accurate definition of sovereign immunity for counties defending *in personam* admiralty actions. Including that recognition in the admiralty jurisprudence does not stand to affect how uniformly admiralty law is applied in our interstate and international relations; it only stands to enhance admiralty law's substance while it is uniformly applied. See *Jensen*, 244 U.S. at 215 (discussing the purposes of a uniform body of federal admiralty law).

It is the uniform application and body of law that admiralty exclusivity is concerned with, not uniform results and outcomes. "[F]ederal admiralty law should be a system of law coextensive with, and *operating* uniformly in, the whole country." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 27 (1990) (quoting *The LOTTAWANNA*, 88 U.S. 558 (1875)) (internal quotation marks omitted). See also *Lindgren* v. *United States*, 281 U.S. 38, 44 (1930) ("[The Jones] Act is one of general *application* intended to bring about the uniformity in the *exercise* of admiralty jurisdiction required by the Constitution, and necessarily supersedes the *application* of the [] statutes of the several States.") (emphasis added). There is thus no risk

that extending Chatham County immunity in federal court for this bridge allision will result in a denial of justice for Petitioner, or the untoward application of state law.

c. And if all of this were not enough to quell Petitioner's and the United States' fears of the imminent collapse of maritime commerce, there is still more. Even if a direct action against Chatham County were not possible through a private suit brought by Petitioner, the United States could always enforce the applicable provisions of the 1899 Rivers and Harbors Appropriation Act and the 1984 Shipping Act against Chatham County. The United States concedes this. U.S. Br. 2, 25 (citing 46 U.S.C. App. § 1710(a)). It was also precisely the basis for this Court's holding in *Federal Maritime Comm'n*. See 535 U.S. at 756-59.

2. Granting Counties Sovereign Immunity in *In Personam* Admiralty Actions Will Not Rend the Fabric of this Court's Federalism Jurisprudence.

Petitioner argues that granting Chatham County sovereign immunity in this case would "profoundly alter the legal landscape by insulating every manner of political subdivision . . . from federal causes of action." Pet. Br. 20. This "Chicken Little" argument is also meritless; the sky will not fall if Respondent is granted the relief it seeks here. Rather, if Chatham County's position is rejected, it will result in untoward distortions of state administrative practices in regard to management of navigable waters.

Respondent contends that where the State has expressly delegated management of navigable waters (such as bridge maintenance) to a county, the county is entitled to the same immunity afforded the State in an admiralty action. A "navigable waters" exception to the otherwise ostensible rule of no sovereign immunity to counties and political subdivisions is

consistent with this Court's teachings regarding the special sovereignty interests for navigable waters. See *Coeur D'Alene Tribe*, 521 U.S. at 284, 287-88 ("The principle which underlies the equal footing doctrine and the strong presumption of state ownership is that navigable waters uniquely implicate sovereign interests.").

Any outcome other than the one counseled here by Respondent, would mean that those counties or political subdivisions that have accepted State delegations of authority over core State functions involving navigable waters will return those functions to the State, where they would unquestionably be accorded sovereign immunity. States will have no incentive to experiment with forms of management or regulation of navigable waters functions as delegations of State authority, under the terms Petitioner and United States propose.

Petitioner would have this Court adopt a bright-line rule of rejecting sovereign immunity for counties in all instances. Such a cut-and-dry rule sacrifices the delicate balance between constitutionally created federalism and the dignity interest of a sovereign state for the sake of an overly simplistic rule. In contrast, Respondent's submission here offers a more complete picture of State sovereignty that better acknowledges the interests of polities functioning apart from certain federal intrusions. This case provides an opportunity for the Court to craft a rule that could generate nearly as predictable results, and be applied equally uniformly, while at the same time taking into account a more complete and accurate definition of sovereignty.

Admiralty law achieves the uniform application of a singular body of rules, whereas it can only hope for uniform results. Respondent is not seeking to have some local law apply, which is what this Court's decisions identify as the potential source of disruption of the federal general maritime law. Respondent is simply asking that this Court recognize

what the general federal maritime law has held for centuries: that, based on historical precedent, the dignity interests of States, and the functional necessities of State management of navigable waters, counties enjoy sovereign immunity in *in personam* admiralty proceedings.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Eleventh Circuit should be affirmed.

Respectfully submitted,

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[7] Counsel acknowledges the assistance of Brian D. Boone, Charles H. Hooker, and Julie P. Bowling, all of the Emory University School of Law, in the preparation of this Brief.

Appendix

Relevant Federal Statutes and Georgia Constitutional and Statutory Provisions

33 U.S.C. § 491

When, after March 23, 1906, authority is granted by Congress to any persons to construct and maintain a bridge across or over any of the navigable waters of the United States, such bridge shall not be built or commenced until the plans and specifications for its construction, together with such drawings of the proposed construction and such map of the proposed location as may be required for a full understanding of the subject, have been submitted to the Secretary of Transportation for the Secretary's approval, nor until the Secretary shall have approved such plans and specifications and the location of such bridge and accessory works; and when the plans for any bridge to be constructed under the provisions of sections 491 to 498 of this title, have been approved by the Secretary it shall not be lawful to deviate from such plans, either before or after completion of the structure, unless the modification of such plans has previously been submitted to and received the approval of the Secretary. This section shall not apply to any bridge over waters which are not subject to the ebb and flow of the tide and which are not used and are not susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce.

Georgia Constitution Article 1, § 2, ¶ 9 (e)

Except as specifically provided in this Paragraph, sovereign immunity extends to the state and all of its departments and agencies. The sovereign immunity of the state and its departments and agencies can only be waived by an Act of the General Assembly which specifically provides that sovereign immunity is thereby waived and the extent of such waiver.

Georgia Constitution Article 7, § 1, ¶ 1

The state may not suspend or irrevocably give, grant, limit, or restrain the right of taxation and all laws, grants, contracts, and other acts to effect any of these purposes are null and void. Except as otherwise provided in this Constitution, the right of taxation shall always be under the complete control of the state.

Georgia Constitution Article 7, § 3, ¶ 1

No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, cult, or religious denomination or of any sectarian institution.

Georgia Constitution Article 9, § 2, ¶ 3 (a)(4)

(a) In addition to and supplementary of all powers possessed by or conferred upon any county, municipality, or any combination thereof, any county, municipality, or any combination thereof

may exercise the following powers and provide the following services:

. . . .

> (4) Street and road construction and maintenance, including curbs, sidewalks, street lights, and devices to control the flow of traffic on streets and roads constructed by counties and municipalities or any combination thereof.

Georgia Constitution Article 9, § 2, ¶ 3 (c) - (d)

(c) Nothing contained within this Paragraph shall operate to prohibit the General Assembly from enacting general laws relative to the subject matters listed in subparagraph (a) of this Paragraph or to prohibit the General Assembly by general law from regulating, restricting, or limiting the exercise of the powers listed therein; but it may not withdraw any such powers.

(d) Except as otherwise provided in subparagraph (b) of this Paragraph, the General Assembly shall act upon the subject matters listed in subparagraph (a) of this Paragraph only by general law.

Georgia Constitution Article 9, § 2, ¶ 9

The General Assembly may waive the immunity of counties, municipalities, and school districts by law.

O.C.G.A. § 52-1-2

The General Assembly finds and declares that the State of Georgia became the owner of the beds of all tidewaters within the jurisdiction of the State of Georgia as successor to the Crown of England and by the common law. The State of Georgia continues to hold title to the beds of all tidewaters within the state, except where title in a private party can be traced to a valid Crown or state grant which explicitly conveyed the beds of such tidewaters. The General Assembly further finds that the State of Georgia, as sovereign, is trustee of the rights of the people of the state to use and enjoy all tidewaters which are capable of use for fishing, passage, navigation, commerce, and transportation, pursuant to the common law public trust doctrine. Therefore, the General Assembly declares that the protection of tidewaters for use by the state and its citizens has more than local significance, is of equal importance to all citizens of the state, is of state-wide concern, and, consequently, is properly a matter for regulation under the police powers of the state. The General Assembly further finds and declares that structures located upon tidewaters which are used as places of habitation, dwelling, sojournment, or residence interfere with the state's proprietary interest or the public trust, or both, and must be removed to ensure the rights of the state and the people of the State of Georgia to the use and enjoyment of such tidewaters. It is declared to be a policy of this state and the intent of this article to protect the tidewaters of the state by authorizing the commissioner of natural resources to remove or require removal of certain structures from such tidewaters in accordance with the procedures and within the timetable set forth in this article.

O.C.G.A. § 52-3-1

It is the intent and purpose of this chapter to provide for the construction and maintenance by the United States government of the intracoastal waterway and its salt-water tributaries, hereinafter referred to as the intracoastal waterway, from the state boundary line in the Savannah River to the state boundary line in Cumberland Sound, as authorized by the Congress of the United States by the River and Harbor Act approved June 20, 1938, authorizing the construction of the intracoastal waterway to a depth of 12 feet from the Savannah River, Georgia, to Cumberland Sound, Georgia, in accordance with the project described in House Document No. 618, Seventy-fifth Congress, third session, and subject to the conditions set forth in said document, and by the River and Harbor Act approved August 26, 1937, authorizing the construction of a protected route as part of the intracoastal waterway, around St. Andrew Sound, Georgia, to a depth of seven feet in accordance with the project described in Senate Committee Print, Seventy-fourth Congress, first session, and subject to the conditions set forth in that document. The Governor and the Secretary of State are authorized to issue to the United States of America a grant or grants of a perpetual right and easement to enter upon, cut away, and remove any and all of the land, including submerged lands, composing a part of the channel rights of way, anchorage areas, and turning basins as may be required at any time for construction and maintenance of the intracoastal waterway and to maintain the portions excavated, thereby created as a part of the navigable waters of the United States. The Governor and the Secretary of State are authorized to issue to the United States of America a further perpetual right and easement to enter upon, occupy, and use any portion of the land, including submerged land, composing a part of the spoil disposal area not so cut away and converted into public navigable waters

described in this Code section, for the deposit of dredged material and for such other purposes as may be needed in the construction, maintenance, and improvement of the intracoastal waterway, insofar as such lands, including submerged lands, are subject to grant by the State of Georgia. The grant is to be issued upon a certificate showing the location and description of the rights of way and spoil disposal areas furnished to the Governor by the secretary of the army or by any authorized officer of the Corps of Engineers of the United States Army or by any other authorized official exercising control over the construction or maintenance of the projects.

O.C.G.A. § 52-3-12

Neither this chapter, nor any part thereof, nor any grant or deed made under the authority hereof shall operate to divest the State of Georgia of jurisdiction over any lands; and all civil and criminal process issued under the authority of any laws of this state may be executed in or on any part of the lands or premises devoted to the use of the intracoastal waterway or to any use incidental thereto, to the same effect as if this chapter had not been enacted and as if the grant or deed had not been executed.

O.C.G.A. § 36-14-1

The consent of the state is given to and authority is vested in the county governing authority to erect bridges across the navigable streams that lie wholly within the state, whenever in the judgment of the county governing authority the public interest may be subserved thereby, upon its compliance with the law of Congress requiring the approval of the secretary of transportation and the chief of engineers of the United States, as

embodied in the statutes of the United States passed by the Fifty-fifth Congress and approved March 3, 1899.

Georgia Laws 1984, p. 5050, Section 25 (6)

The board of commissioners [of Chatham County] shall have the power to fix and establish by appropriate resolution or ordinance entered on its minutes, policies, rules, and regulations governing all matters over which the board of commissioners has authority as the governing authority of Chatham County. Without limiting the generality of the foregoing, the following powers are vested in the board of commissioners:

. . . .

> (6) To establish, alter, or abolish public roads, private ways, bridges, and ferries, according to law.

O.C.G.A. § 32-3-1 (a)

Any property may be acquired in fee simple or in any lesser interest, including scenic easements, airspace, and rights of access, by a state agency or a county or municipality through gift, devise, exchange, purchase, prescription, dedication, eminent domain, or any other manner provided by law for present or future public road or other transportation purposes.

O.C.G.A. § 32-3-1 (b)

Public road purposes shall include rights of way; detours; bridges; bridge approaches; ferries; ferry landings; overpasses; underpasses; viaducts; tunnels; fringe parking facilities; borrow

pits; offices; shops; depots; storage yards; buildings and other necessary physical facilities of all types; roadside parks and recreational areas; the growth of trees and shrubbery along rights of way; scenic easements; construction for drainage, maintenance, safety, or esthetic purposes; the elimination of encroachments, private or public crossings, or intersections; the establishment of limited-access public roads; the relocation of utilities; and any and all other purposes which may be reasonably related to the development, growth, or enhancement of the public roads of Georgia.

O.C.G.A. § 32-4-42

The powers of a county with respect to its county road system, unless otherwise expressly limited by law, shall include but not be limited to the following:

(1) A county shall have the authority to negotiate, let, and enter into contracts with any person or any agency, county, or municipality of the state for the construction, maintenance, administration, or operation of any public road or activities incident thereto in such manner and subject to such express limitations as may be provided by Part 2 of this article or any other provision of law. A county shall also have the authority to perform such road work with its own forces or with a combination of its own forces and the work of a contractor, notwithstanding any contrary provisions of Chapter 91 of Title 36;

(2) A county shall have the authority to accept and use federal and state funds and to do all things necessary, proper, or expedient to achieve compliance with the provisions and requirements of all applicable federal-aid or state-aid acts and

programs in connection with the county's public roads. Nothing in this title is intended to conflict with any federal law and, in case of such conflict, such portion as may be in conflict with such federal law is declared of no effect to the extent of the conflict;

(3)(A) A county shall have the authority to acquire and dispose of real property or any interest therein for public road purposes, as provided in Article 1 of Chapter 3 of this title and in Chapter 7 of this title. In any action to condemn property or interests therein for such purposes, notice thereof shall be signed by the condemning county; and such notice shall be deemed to be the official action of the county in regard to the commencement of such condemnation proceedings. For good cause shown a county, at any time after commencement of condemnation proceedings and prior to final judgment therein, may dismiss its condemnation action, provided that (i) the condemnation proceedings have not been instituted under Article 1 of Chapter 3 of this title, and (ii) the condemnor has first paid to the condemnee all expenses and damages accrued to the condemnee up to the date of the filing of the motion for dismissal of the condemnation action.

(B) Pursuant to the requirements of Part 2 of this article, a county shall have the power to purchase, borrow, rent, lease, control, manage, receive, and make payment for all personal property, such as equipment, machinery, vehicles, supplies, material, and furniture, which may be needed in the operation of its county road system; to lease, rent, lend, or otherwise transfer temporarily county property used for road purposes, as authorized by law; to sell or otherwise dispose of all personal property owned by the county and used in the operation of the county road system which is unserviceable; and to execute such

instruments as may be necessary in connection with the exercise of the powers described in this subparagraph;

(4) A county and its authorized agents and employees may enter upon any lands in the county for the purpose of making such surveys, soundings, drillings, and examinations as the county may deem necessary or desirable to accomplish the purposes of this title; and such entry shall not be deemed a trespass nor shall it be deemed an entry which would constitute a taking in a condemnation proceeding, provided that reasonable notice of such entry shall be given the owner or occupant of such property, such entry shall be done in a reasonable manner with as little inconvenience as possible to the owner or occupant of the property, and the county shall make reimbursement for any actual damages resulting from such entry;

(5) A county shall have the authority to employ, discharge, promote, set and pay the salaries and compensation of its personnel, and determine the duties, qualifications, and working conditions for all persons whose services are needed in the construction, maintenance, administration, operation, and development of its county road system; to work inmates maintained in the county correctional institution or inmates hired from the Department of Corrections and maintained by the latter; and to employ or contract with such engineers, surveyors, attorneys, consultants, and all other employees as independent contractors whose services may be required, subject to the limitations of existing law;

(6) A county may grant permits and establish reasonable regulations for the installation, construction, maintenance, renewal, removal, and relocation of pipes, mains, conduits, cables, wires, poles, towers, traffic and other signals, and other equipment, facilities, or appliances of any utility in, on, along,

over, or under the public roads of the county which are a part of the county road system lying outside the corporate limits of a municipality. However, such regulations shall not be more restrictive with respect to utilities affected thereby than are equivalent regulations promulgated by the department with respect to utilities on the state highway system under authority of Code Section 32-6-174. As a condition precedent to the granting of such permits, the county may require application in writing specifically describing the nature, extent, and location of the portion of the utility affected and may also require the applicant to furnish an indemnity bond or other acceptable security conditioned to pay any damages to any part of the county road system or to any member of the public caused by work of the utility performed under authority of such permit. At all times it shall be the duty of the county to ensure that the normal operation of the utility does not interfere with the use of the county road system. The county may also order the removal or discontinuance of the utility, equipment, facility, or appliances where such removal and relocation are made necessary by the construction or maintenance of any part of the county road system lying outside the corporate limits of a municipality. In so ordering the removal and relocation of a utility or in performing such work itself, the county shall conform to the procedure set forth for the department in Code Sections 32-6-171 and 32-6-173, except that when the removal and relocation have been performed by the county, it shall certify the expenses thereof for collection to its county attorney;

(7) A county shall have the power to purchase supplies for county road system purposes through the state as authorized by Code Sections 50-5-100 through 50-5-102;

(8) In addition to any taxes authorized by Article 4 of Chapter 5 of Title 48 to be levied and collected for the construction and

maintenance of its county road system and activities incident thereto, a county is authorized to levy and collect any millage as may be necessary for such purposes;

(9) A county may provide for surveys, maps, specifications, and other things necessary in designating, supervising, locating, abandoning, relocating, improving, constructing, or maintaining the county road system, or any part thereof, or any activities incident thereto or necessary in doing such other work on public roads as the county may be given responsibility for or control of by law;

(10) In addition to the powers specifically delegated to it in this title and except as otherwise provided by Code Section 12-6-24, a county shall have the authority to adopt and enforce rules, regulations, or ordinances; to require permits; and to perform all other acts which are necessary, proper, or incidental to the efficient operation and development of the county road system; and this title shall be liberally construed to that end. Any power vested in or duty placed on a county but not implemented by specific provisions for the exercise thereof may be executed and carried out by a county in a reasonable manner subject to such limitations as may be provided by law; and

(11) In all counties of this state having a population of 550,000 or more according to the United States decennial census of 1970 or any future such census, the county governing authority shall be empowered by ordinance or resolution to assess against any property the cost of reopening, repairing, or cleaning up from any public way, street, road, right of way, or highway any debris, dirt, sediment, soil, trash, building materials, and other physical materials originating on such property as a result of any private construction activity carried on by any developer, contractor, subcontractor, or owner of such property. Any

assessment authorized under this paragraph, the interest thereon, and the expense of collection shall be a lien against the property so assessed coequal with the lien of other taxes and shall be enforced in the same manner as are state and county ad valorem property taxes by issuance of a fi. fa. and levy and sale as set forth in Title 48, known as the "Georgia Public Revenue Code."

O.C.G.A. § 32-1-3 (24)(B)

As used in this title, the term:

. . . .

> (24) "Public road" means a highway, road, street, avenue, toll road, tollway, drive, detour, or other way open to the public and intended or used for its enjoyment and for the passage of vehicles in any county or municipality of Georgia, including but not limited to the following public rights, structures, sidewalks, facilities, and appurtenances incidental to the construction, maintenance, and enjoyment of such rights of way:

. . . .

(B) Bridges. . . .

O.C.G.A. § 32-4-41

The duties of a county with respect to its county road system, unless otherwise expressly limited by law, shall include but not be limited to the following:

(1) A county shall plan, designate, improve, manage, control, construct, and maintain an adequate county road system and

shall have control of and responsibility for all construction, maintenance, or other work related to the county road system. Such work may be accomplished through the use of county forces, including inmate labor, by contract as authorized in paragraph (5) of Code Section 32-4-42, or otherwise as permitted by law. Nothing in this paragraph shall be construed to prevent a county from entering into a contract providing for a municipality to maintain an extension of the county road system within the municipal limits;

(2) A county shall control, administer, and account for funds received for the county road system and activities incident thereto from any source whatsoever, whether federal, state, county, municipal, or any other; and it shall expend such funds for and on behalf of the county in connection with the county road system and for any purpose in connection therewith which may be authorized in this title or by any other law;

(3) A county shall inspect and determine the maximum load, weight, and other vehicular dimensions which can be safely transported over each bridge on the county road system and shall post on each bridge and on each approach thereto on the county road a sign containing a legible notice showing such maximum safe limits, each such sign to conform to the department regulations promulgated under authority of Code Section 32-6-50. However, the department is authorized to give technical assistance to counties, when so requested, in carrying out this paragraph. It shall be unlawful for any person to haul, drive, or bring on any bridge any vehicle, load, or weight which in any manner exceeds the maximum limits so ascertained and posted on such bridge; and any person hauling, driving, or otherwise bringing on such bridge any load or weight exceeding the maximum limits so ascertained and posted shall do so at his

own risk; and the county shall not be liable for any damages to persons or property that may result therefrom;

(4) A county shall keep on file in the office of the county clerk, available for public inspection, the map of the county road system prepared by the department as provided for in subsection (a) of Code Section 32-4-2. In addition to keeping on file a map of the county road system, the county shall notify the department within three months after a county road is added to the local road or street system and shall further notify the department within three months after a local road or street has been abandoned. This notification shall be accompanied by a map or plat depicting the location of the new or abandoned road;

(5) A county shall procure the necessary rights of way for public roads of the state highway system within the county in compliance with subsection (e) of Code Section 32-3-3 and Code Section 32-5-25; and

(6) In acquiring property for rights of way for federal-aid highway projects on its county road system, the county shall comply with the requirements of the applicable provisions of the Uniform Relocation Assistance and Real Property Acquisition Policy Act of 1970, as amended by the Uniform Relocation Act Amendments of 1987, Title IV of Public Law 100-17, and in general shall be guided by the policies applicable to the department as set forth in Code Section 32-8-1.

O.C.G.A. § 48-5-220 (4)

County taxes may be levied and collected for the following public purposes:

. . . .

(4) To build and repair public buildings and bridges.

1895 Political Code § 341

A county is not liable to suit for any cause of action unless made so by statute.

Code § 23-1502

A county is not liable to suit for any cause of action unless made so by statute.

O.C.G.A. § 36-1-4

A county is not liable to suit for any cause of action unless made so by statute.

O.C.G.A. § 36-1-3

Every county is a body corporate, with power to sue or be sued in any court.

Code of 1863 § 463

Every county which has been, or may be, established, is a body corporate, with power to sue or be sued in any court.

Code of 1863 § 691

If the county authorities fail to take the bond required by section 671 of the Code, then the county shall be liable, in the place of the contractor. If injury be done to one by reason of the defective construction of such a bridge, he will be entitled to recover, as against the county whose authorities failed to take the bond referred to, provided his injuries occur within seven years from the date of the construction of the bridge.

O.C.G.A. § 32-4-71

(a) If the payment bond required by paragraph (2) of Code Section 32-4-69 is not taken, the county shall be liable to subcontractors, laborers, materialmen, and other persons, as provided in Part 4 of Article 3 of Chapter 91 of Title 36, for losses to them resulting from failure to take such bond.

(b) If the condition of bridge repair authorized by Code Section 32-4-70 to be added to the performance bond is not taken, the contracting county or counties shall be primarily liable for all injuries caused by reason of any defective bridge for damages occurring within seven years of the contractor's work on the bridge and its acceptance by the county or counties, provided that the county shall be discharged from all liability upon the inclusion in the performance bond of the aforesaid bridge repair condition.

(c) Nothing in this Code section shall be construed so as to impose personal liability on the county governing authority."

O.C.G.A. § 32-5-25

Whenever property is acquired under subsection (e) of Code Section 32-3-3, all expenses of the acquisition thereof, including the purchase price and all direct and consequential damages awarded in any proceeding brought to condemn any such right of way, shall be paid by the county in which such right of way or portion thereof is situated. When such right of way or portion thereof lies within the limits of a municipality, acquisition expenses shall be paid by such municipality unless the county concerned agrees to procure such right of way on behalf of the municipality. However, nothing contained in this Code section shall prevent the department from using the State Public Transportation Fund to acquire such right of way, to pay any damage awarded on account of the location of any road that is a part of the state highway system, or to assist a county or municipality in so doing. Furthermore, nothing in this Code section shall be construed to authorize an expenditure from the State Public Transportation Fund for the procurement of a right of way for a road to be constructed on a county road system or municipal street system except as otherwise provided by law or by agreement between the federal government and the department.

O.C.G.A. § 32-5-23

Notwithstanding Code Section 32-5-22 and except as expressly authorized elsewhere in this title, no funds from the State Public

Transportation Fund shall be expended for the construction or maintenance of:

(1) Private driveways, roads, or bridges; or

(2) Public roads that have since been abandoned.

O.C.G.A. § 36-17-1

It is declared to be the purpose and intent of the General Assembly that state funds be made available to the governing authorities of the counties of this state to be expended for any public purposes.

O.C.G.A. § 32-2-6 (a)

The department shall defend any action and be responsible for all damages awarded therein in any court of this state against any county under existing laws whenever the cause of action accrues on a public road which at the time of accrual had been designated by the department as a part of the state highway system; provided, however, that no action may be brought under this Code section until the construction of the public road on which the injury complained of occurred has been completed and such public road has been officially opened to traffic as provided in subsection (b) of this Code section. When any such action is brought against a county in any court of this state, it shall be the duty of the plaintiff to provide for service of notice of the pendency of such action against the county upon the department by providing for service of a second original process, issued from the court where the action is filed, upon the commissioner personally or by leaving a copy of the same in the

office of the commissioner in the Department of Transportation Building, Atlanta, Georgia. The service of process in such action upon the county shall not be perfected until such second original process has been served as provided in this Code section. The department shall also have the right and authority to defend, adjust, and settle in the name of such county and on its behalf any claim for damages for which the department ultimately may be liable under this Code section.