In the

United States Court of Appeals

For the Seventh Circuit

No. 21-3397

ZENON MCHUGH,

Plaintiff-Appellant,

v.

ILLINOIS DEPARTMENT OF TRANSPORTATION, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 17-cv-8658 — **Charles P. Kocoras**, *Judge*.

ARGUED OCTOBER 24, 2022 — DECIDED DECEMBER 14, 2022

Before HAMILTON, ST. EVE, and KIRSCH, *Circuit Judges*.

ST. EVE, *Circuit Judge*. After the Illinois Department of Transportation ("IDOT") terminated Zenon McHugh's employment, he sued seven individuals under federal law and sued IDOT under an Illinois statute. IDOT defended on the ground that sovereign immunity under the Eleventh Amendment barred the suit. The district court held that McHugh's claim against IDOT could proceed in state court but not

federal court, and it entered judgment on the merits. Entering a final judgment on this count was an error. If a defendant enjoys Eleventh Amendment immunity from a claim and invokes that immunity, it deprives a federal court of jurisdiction over the claim. Thus, we modify the district court's judgment on the state law claim to a dismissal for lack of jurisdiction.

I. Background

McHugh began working for IDOT's Emergency Traffic Patrol ("ETP") unit in 2001, and in 2012 he attained a management position in which he trained and ensured that subordinates performed their jobs properly. An internal investigation conducted by the Office of the Executive Inspector General ("OEIG") revealed that some ETP employees had failed to perform their duties and submitted falsified records and that some managers—including McHugh—had failed to adequately supervise the employees who worked under them. OEIG recommended that McHugh be terminated, and after disciplinary procedures, IDOT terminated McHugh on September 14, 2016. McHugh filed a grievance related to his termination, but his union declined to arbitrate it.

McHugh then filed this lawsuit. His operative complaint asserted 15 causes of action: one claim each for procedural and substantive due process violations against seven individuals involved in his termination and one claim against IDOT under an Illinois statute, the State Officials and Employees Ethics Act (the "Ethics Act"), 5 ILCS 430. The district court had jurisdiction over the federal claims under 28 U.S.C. § 1343, and McHugh asserted that the court had supplemental jurisdiction over the Ethics Act claim under 28 U.S.C. § 1367. IDOT argued that the court lacked jurisdiction due to its Eleventh Amendment sovereign immunity.

After discovery, the defendants moved for summary judgment, and the district court granted their motion. The court held that the due process claims against the individual defendants failed on the merits. Although the district court had decided to enter judgment on all of McHugh's federal claims, it did not consider whether to relinquish supplemental jurisdiction over the Ethics Act claim. *See* 28 U.S.C. § 1367(c). Instead, the court found that IDOT was immune under the Eleventh Amendment and that Illinois had waived its immunity to suits under the Ethics Act only in state court, not federal court. *See* 5 ILCS 430/15-25 ("The circuit courts of this State shall have jurisdiction to hear cases brought under [the Ethics Act]."). Thus, the district court held that the Eleventh Amendment barred McHugh's Ethics Act claim. It entered summary judgment—that is, judgment on the merits—on the claim.

McHugh moved to alter or amend the judgment under Federal Rule of Civil Procedure 59(e), arguing that the district court should have declined to exercise supplemental jurisdiction over his Ethics Act claim. McHugh asked the court to modify its judgment on this claim to a dismissal without prejudice for lack of jurisdiction, to allow him to pursue the claim in state court. The district court denied the motion, noting that it was not required to relinquish supplemental jurisdiction and finding that "the balance of factors weighed heavily in favor of addressing McHugh's claims in one forum."

McHugh appealed, but he does not contest the entry of summary judgment on his federal claims or the district court's finding that IDOT is immune under the Eleventh Amendment. He challenges only the district court's refusal to relinquish supplemental jurisdiction over his Ethics Act claim, relying on the general rule that "when all federal claims

are dismissed before trial, the district court should relinquish jurisdiction over pendent state-law claims rather than resolving them on the merits." *Lalowski v. City of Des Plaines*, 789 F.3d 784, 794 (7th Cir. 2015) (quoting *Wright v. Associated Ins. Cos. Inc.*, 29 F.3d 1244, 1251 (7th Cir. 1994)). He argues that no special circumstances favored resolving all claims in one forum, *see Burritt v. Ditlefsen*, 807 F.3d 239, 252 (7th Cir. 2015), and therefore the district court abused its discretion by retaining supplemental jurisdiction over his Ethics Act claim.

We do not reach the issue of the district court's discretion, however, because we start and end with subject-matter jurisdiction. When it applies, the Eleventh Amendment deprives federal courts of jurisdiction over claims against immune defendants. The district court therefore lacked the power to enter summary judgment on McHugh's Ethics Act claim.

II. Discussion

The Supreme Court's observation that "jurisdiction is a word of many, too many meanings," *Biden v. Texas*, 142 S. Ct. 2528, 2540 (2022) (internal alterations omitted) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998)), rings especially true about the Eleventh Amendment. The parties agree that IDOT enjoys sovereign immunity from McHugh's Ethics Act claim, but they are unsure about the effect of that immunity. Their uncertainty is understandable. Because "jurisdictional" has more than one meaning, we can accurately say both that the Eleventh Amendment is jurisdictional and that it is non-jurisdictional, and we have done just that in past opinions.

A. Eleventh Amendment Framework

The Eleventh Amendment speaks in terms of jurisdiction. It provides that "[t]he Judicial power of the United States shall not be construed to extend" to suits by individuals against states.[1] The Supreme Court has confirmed that "the Eleventh Amendment is jurisdictional in the sense that it is a limitation on [a] federal court's judicial power …." *Calderon v. Ashmus*, 523 U.S. 740, 745 n.2 (1998) (citations omitted). To assert Eleventh Amendment immunity is to "deny[] that the 'Judicial power of the United States'"—that is, federal courts' subject-matter jurisdiction—"extends to the case at hand." *Lapides v. Bd. of Regents of the Univ. Sys. of Ga.*, 535 U.S. 613, 624 (2002) (quoting U.S. Const. amend. XI). Because it limits federal courts' jurisdiction, Eleventh Amendment immunity "can be raised at any stage of the proceedings," *Calderon*, 523 U.S. at 745 n.2, and the failure to raise the immunity as a defense in the district court does not constitute waiver. *See Patsy v. Bd. of Regents of the State of Fla.*, 457 U.S. 496, 515 n.19 (1982).

But while Eleventh Amendment immunity shares some characteristics with Article III's limitations on federal courts' subject-matter jurisdiction, it also has important differences. *See Calderon*, 523 U.S. at 745 n.2 (The Eleventh Amendment "is not coextensive with the limitations on judicial power in Article III." (citations omitted)). Unlike a question bearing on

[1] "While the Amendment by its terms does not bar suits against a State by its own citizens, th[e Supreme] Court has consistently held that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State." *Edelman v. Jordan*, 415 U.S. 651, 662–63 (1974) (citations omitted).

subject-matter jurisdiction, a court may consider some issues before deciding whether sovereign immunity applies:

> Questions of jurisdiction, of course, should be given priority—since if there is no jurisdiction there is no authority to sit in judgment of anything else. … We nonetheless have routinely addressed *before* the question whether the Eleventh Amendment forbids a particular statutory cause of action to be asserted against States, the question whether the statute itself *permits* the cause of action it creates to be asserted against States ….

Vt. Agency of Nat. Res. v. United States ex rel. Stevens, 529 U.S. 765, 798–99 (2000) (citations omitted). And while subject-matter jurisdiction can never be waived, *e.g.*, *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012), a state may waive its sovereign immunity by, for example, consenting to the removal of a case from state to federal court. *Lapides*, 535 U.S. at 618, 624.

These cases demonstrate that the Eleventh Amendment is not "jurisdictional" in the same way as Article III's case-or-controversy requirement. *See, e.g.*, *FEC v. Cruz*, 142 S. Ct. 1638, 1646 (2022). But the Eleventh Amendment is "jurisdictional" in the sense that a defendant invoking its sovereign immunity deprives a federal court of jurisdiction over the claims against that defendant. *E.g.*, *Alabama v. Pugh*, 438 U.S. 781, 782 (1978) (per curiam). With the different meanings of "jurisdictional" in mind, we turn to our Eleventh Amendment caselaw.

B. Seventh Circuit Caselaw

Our cases referring to the Eleventh Amendment as "jurisdictional" explain that the Amendment deprives federal courts of jurisdiction when its immunity applies. In *Feldman v. Ho*, we called sovereign immunity a "jurisdictional

defense"—an argument that the present action was "a suit against the state, and thus foreclosed in federal court by the eleventh amendment." 171 F.3d 494, 498 (7th Cir. 1999); *see also Ruehman v. Sheahan*, 34 F.3d 525, 527 (7th Cir. 1994) (calling the Amendment "a restriction on the jurisdiction of the federal courts"). We reiterated that we lack jurisdiction over claims against immune defendants in *Sorrentino v. Godinez*, where the district court recognized that sovereign immunity barred the plaintiffs' claims but erred by dismissing those claims with prejudice. 777 F.3d 410, 415 (7th Cir. 2015). Because "[a] court that lacks subject matter jurisdiction cannot dismiss a case with prejudice," *Murray v. Conseco, Inc.*, 467 F.3d 602, 605 (7th Cir. 2006) (citation omitted), we held that the dismissal based on Eleventh Amendment immunity "should have been without prejudice." *Sorrentino*, 777 F.3d at 415 (citing *Murray*, 467 F.3d at 605).

Conversely, our references to the Eleventh Amendment as "non-jurisdictional" reflect that it is not a true limitation on federal courts' subject-matter jurisdiction. In *Kennedy v. National Juvenile Detention Association*, we stated that "[s]ince the immunity granted by the Eleventh Amendment may be waived and matters of subject matter jurisdiction may not, the Eleventh Amendment immunity is not jurisdictional." 187 F.3d 690, 696 (7th Cir. 1999); *see also Floyd v. Thompson*, 227 F.3d 1029, 1035 (7th Cir. 2000) (canvassing ways in which the Amendment does not act as a strict subject-matter jurisdiction limitation); *Endres v. Ind. State Police*, 349 F.3d 922, 924–25 (7th Cir. 2003) (analyzing whether a statutory cause of action exists before considering Eleventh Amendment immunity, as permitted by *Vermont Agency*). Likewise, when we called Eleventh Amendment immunity a "non-jurisdictional defense," we used "non-jurisdictional" as a synonym for "waivable."

See Ind. Prot. & Advoc. Servs. v. Ind. Fam. & Soc. Servs. Admin. ("*IPAS*"), 603 F.3d 365, 370–71 (7th Cir. 2010) (en banc). While rehearing *IPAS* en banc, we noted that the panel had raised the issue of sovereign immunity for the first time, then stated:

> The Eleventh Amendment is unusual in that it does not strictly involve subject matter jurisdiction and is thus waivable, but a court may raise the issue itself. If the panel had not chosen to raise the Eleventh Amendment issue, this non-jurisdictional defense would have been forfeited. Because the panel opened the door, however, we address the defense.

Id. (citations omitted). We analyzed the defendants' immunity, concluded that two were immune, and "modif[ied] the judgment to remove the[m] … as named defendants." *Id.* at 372. Although we called the immunity "non-jurisdictional," our full discussion of the Eleventh Amendment in *IPAS* shows that we lack jurisdiction over immune defendants.[2]

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[2] Some of the confusion relating to the jurisdictional status of Eleventh Amendment immunity arises out of two nonprecedential orders that misread *IPAS*'s statement that the Eleventh Amendment is a "non-jurisdictional defense" to mean that a federal court has the power to enter judgment on the merits on a claim against an immune defendant. *See Mutter v. Rodriguez*, 700 F. App'x 528, 531 (7th Cir. 2017) (per curiam) ("In dismissing this suit as barred by the Eleventh Amendment, the district court treated the dismissal as jurisdictional. But a dismissal based on that amendment is on the merits and therefore with prejudice."); *Cooper v. Ill. Dep't of Hum. Servs.*, 758 F. App'x 553, 554 (7th Cir. 2019) (per curiam) ("[B]ecause the Eleventh Amendment does not curtail subject-matter jurisdiction, we modify the district court's judgment to reflect a dismissal for failure to state a claim with prejudice …."). As we have explained, this understanding is incorrect. A federal court cannot enter judgment on the merits when Eleventh Amendment immunity applies. *See Sorrentino*, 777

C. Application

We now turn to the effect of IDOT's immunity on McHugh's Ethics Act claim. The parties agree that IDOT is immune from suit in federal court under the Ethics Act, IDOT has invoked its immunity throughout the litigation, and the district court found that IDOT was immune. Once the court made that finding, it was obligated to dismiss IDOT as a defendant for lack of jurisdiction. *See Sorrentino*, 777 F.3d at 415. Instead, the district court erred by entering judgment on the merits on the Ethics Act claim. We correct that error by modifying the judgment to a dismissal without prejudice for lack of jurisdiction.

IDOT argues that we can affirm the district court's entry of summary judgment based on res judicata. IDOT contends that an Illinois court applying *See v. Illinois Gaming Board*, 170 N.E.3d 195 (Ill. App. Ct. 2020), would hold that McHugh's Ethics Act claim is barred in state court because he initially attempted to bring it in federal court. But even if we had jurisdiction over the Ethics Act claim, we would not predict what another court might decide about res judicata because "the court rendering the first judgment does not get to determine that judgment's effect; the second court is entitled to make its own decision …." *Midway Motor Lodge of Elk Grove v. Innkeepers' Telemanagement & Equip. Corp.*, 54 F.3d 406, 409 (7th Cir. 1995).

We recognize that IDOT would prefer we resolve this case on the merits now, but more is at stake here than the parties'

F.3d at 415. *Mutter* and *Cooper* were therefore wrong to modify these judgments to dismissals with prejudice.

interests. A federal court acting without subject-matter jurisdiction violates federalism and separation-of-powers principles underlying our constitutional system. "Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co.*, 523 U.S. at 94 (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868)). That is what we must do here.

III. Conclusion

Because IDOT enjoys Eleventh Amendment sovereign immunity from suit in federal court under the Ethics Act and it invoked its immunity, the district court lacked jurisdiction over that claim. Therefore, we modify the district court's entry of judgment on McHugh's Ethics Act claim to a dismissal without prejudice for lack of jurisdiction.