No. _____

In the Supreme Court of the United States

UNITED STATES OF AMERICA
ex rel. DR. CHRISTIAN KREIPKE,
Petitioner,

v.

WAYNE STATE UNIVERSITY,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Shereef H. Akeel
Counsel of Record
William R. Thomas
AKEEL & VALENTINE, PLC
888 W. Big Beaver Rd., Ste. 910
Troy, MI 48084
(248) 269-9595
shereef@akeelvalentine.com

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

1. A non-corporate entity is a "person" under the False Claims Act (FCA) when a balance of factors show it is akin to a political body independent of the State, rather than an executive state agency. Wayne State University (WSU) is a unique, autonomous institution, free from all relevant state control, who receives a minority share of its funding from the State, and who is responsible for its own debts. Is WSU a "person" under the FCA?

2. Corporations are "persons" under federal law and the FCA, regardless of their affiliation with a state. WSU's Board of Governors, although a creation of the State, is still a properly formed corporation in every respect. Is WSU's Board of Governors a person under the FCA?

PARTIES TO THE PROCEEDING

Petitioner Dr. Christian Kreipke, individually and on behalf of the United States of America, was the plaintiff in the district court and the appellant in the court of appeals.

Respondent Wayne State University is a public university and was the defendant in the district court and the appellee in the court of appeals.

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Wayne State University (WSU) traces its lineage to local roots. It began as a collection of city schools, was united by the Detroit Board of Education, and after 87 years of local control and influence, was rebranded as a public university. Nevertheless, in the realm of higher education, Michigan is an exception amongst its sister states. "Michigan is one of the few states to give independent constitutional status to its universities." *Regents of Univ. of Michigan v. State*, 235 N.W.2d 1, 11 (Mich. 1975). WSU manages and is responsible for its own direction, rendering the State an outside observer.

Given that basis, and since its inception, WSU has been and remains autonomous in all relevant respects from the State of Michigan. Its volunteer governing board is elected, not appointed by state officials; the State has no control over WSU's fiscal, educational, or institutional aspects; and the State retains no veto power. The State has no legal obligation to assume WSU's liabilities in the event a judgment is rendered against it, while WSU is solely responsible for its own debts. The State only shares in WSU's name and providing it a minority portion of its annual funding. Yet, Michigan's Constitution gives WSU's governing board absolute authority over the management of WSU's affairs, including its funds. In other words, the State's connection to WSU is purely *de minimis*.

Given these uncontested facts, it would seem clear that WSU is not an arm of Michigan entitled to the immunity conferred upon sovereigns in federal court. The Sixth Circuit, however, seemingly motivated by considerations far afield from the facts, concluded otherwise by applying *one* of its many multi-factor

balancing tests to the exclusion of facts and logic. Applying its chosen balancing test, analyzed seemingly as a matter of rote, the Sixth Circuit reached a result supported only by perception and bias—that being, any state university, notwithstanding its lack of any relevant connection to the state, is a state entity.

The decision below is glaringly wrong, is analytically untethered, and extends an unfounded status to WSU that immunes it from liability. The decision also exacerbates a deeply-entrenched circuit split over the proper test for identifying an arm of the state and emphasizes the need for this Court to provide guidance on how to determine if an entity is an arm of the state.

This Court's jurisprudence, however, suffers from mixed messages and lack of definition on how the arm-of-the-state inquiry is to be applied. As a result, the courts of appeal have been left to fashion balancing tests based on unclear direction, which has resulted in the circuits going twelve different directions employing disparate multi-factor balancing tests. The differences in those tests can be outcome-determinative—not only based on how many and what factors are considered, but primarily based on whether the circuit in question is one that gives preeminent consideration to one factor.

In other circuits, preeminent consideration would be given to and drawn against WSU based on the fact the State of Michigan is not legally obligated to pay WSU's judgments, while strong consideration would also be drawn against WSU based on the lack of control and veto power the State has over its operations and functions. But here, the Sixth Circuit's chosen test

disregards those considerations, and its opinion is conclusion-oriented, driven by unfounded perception and bias. What should have been a straight-forward case involving a public university that shares no relevant connection to the State—and that should properly be seen as akin to a political subdivision—instead became a nonsensical parade of fashioning a reason to fit a result.

While there are dispositive conflicts in the circuits over the means for determining arm-of-the-state status, the greater problem lies in the mixed messages and lack of definition the circuits have received from this Court. Clarification of what considerations govern and how they are employed is paramount. The great conflict and lack of direction emphasizes the need for this Court's review on this important issue.

Additionally, Petitioner attempted to sue WSU's Board of Governors. WSU's Board is a corporation. This Court has twice addressed the scope of who may be held liable under the False Claims Act (FCA): holding that states and their executive agencies are presumed not to be persons subject to liability under the FCA, *see Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765 (2000), while corporate entities, regardless of state affiliation, are presumed to be persons who could be held liable under the FCA. *See Cook Cty., Ill. v. U.S. ex rel. Chandler*, 538 U.S. 119 (2003).

Despite the presumption that corporations are persons, the Sixth Circuit disagreed. Instead, the court held that any corporation affiliated with the State fell within *Stevens*' holding that states are not persons and cannot be sued under the FCA. Regarding state-created corporations, other circuits have also confronted this

issue. Both the Fourth and Tenth Circuits recognize that corporations are presumed to be persons; however, these circuits assert that the countervailing presumption that states are not persons caution against finding state-created corporations as persons. Instead, both circuits ignore the former presumption and apply their respective arm-of-the-state tests instead.

The Sixth Circuit's opinion—in addition to being in direct conflict with this Court's precedent—seemingly exposes a gap in this Court's precedent lying between *Stevens* and *Chandler* concerning the treatment of state-created corporations and whether they are "persons" under the FCA. The decision below, compounded by the Fourth and Tenth Circuit's divergent approaches, highlights the need for this Court's guidance. Given the great national importance that follows issues concerning the scope of FCA liability—as is supported by this Court's two prior decisions on the subject—this Court's guidance on this important issue is also necessary.

OPINION BELOW

The Sixth Circuit's opinion is reported at 807 F.3d 768 (6th Cir. 2015). App.1-32. The district court's opinion granting the motion to dismiss is unreported, but reprinted at App.39-54, and the district court's opinion denying the motion to alter or amend judgment is unreported, but reprinted at App.34-38.

JURISDICTION

The Sixth Circuit issued its opinion on December 4, 2015. It denied Dr. Kreipke's petition for rehearing on

February 19, 2016. App.57-58. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment and pertinent provisions of the False Claims Act are reproduced in the appendix.

STATEMENT OF THE CASE

A. WSU's Creation, Structure, and its Board.

1. Between 1868 and 1933, the City of Detroit oversaw an affiliation of various independent colleges.[1] In 1933, this collection of city schools were united by the Detroit Board of Education and named the Colleges of the City of Detroit.[2] In 1934, this entity was renamed Wayne University as an homage to Wayne County, the county home to this university and the City of Detroit.[3] Wayne University remained under the control of the Detroit Board of Education until 1956[4] when, after 87 years of local affiliation or control, Michigan's Legislature rebranded this institution as Wayne State University. *See* P.A. No. 183 of 1956. In 1959,

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[1] *See* Wayne State University "History", *available at* https://wayne.edu/about/history/

[2] *Id.*

[3] *Id.*

[4] *Id.*

Michigan's electorate added WSU as a constitutional institution.[5]

2. Although WSU was rebranded as "a state institution of higher education", M.C.L. § 390.641, "[t]he conduct of its affairs and control of its property" were vested in its Board of Governors. *Id.* WSU's Board was established as "a body corporate . . . with the right as such of suing and being sued[.]" *Id.* The Board holds "general supervision of" WSU, as well as "the direction and control of all university funds[.]" M.C.L. § 390.644; *see also* MI CONST. Art. 8 § 5.

The governing framework created by Michigan for its public universities and their governing boards is exceptional compared to almost all other states: "Michigan is one of the few states to give independent constitutional status to its universities." *Regents of Univ. of Michigan v. State*, 235 N.W.2d 1, 11 (Mich. 1975); *see also Nat'l Pride At Work, Inc. v. Governor of Michigan*, 732 N.W.2d 139, 152 (Mich. App. 2007) (noting the "unique constitutional status" given to "Michigan's public universities and their governing boards."). Indeed, "[t]he governing boards' status is that of 'the highest form of juristic person known to the law, a constitutional corporation of independent authority[.]'" *Nat'l Pride At Work*, 732 N.W.2d at 152.

Michigan's Supreme Court has long affirmed the autonomy universities like WSU have from the State and the exclusive control the governing boards possess:

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[5] *See* Wayne State University "History", *available at* https://wayne.edu/about/history/

> '[T]he Legislature may not interfere with the management and control of' universities . . . The constitution grants the governing boards authority over 'the absolute management of the University, and the exclusive control of all funds received for its use.' . . . This Court has 'jealously guarded' these powers from legislative interference.

Federated Publications, Inc. v. Bd. of Trustees of Michigan State Univ., 594 N.W.2d 491, 497 (Mich. 1999) (internal citations omitted).

Meaning, universities like WSU were established to be "free from the political influences" of state government. *Branum v. State*, 145 N.W.2d 860, 862 (Mich. App. 1966). As such, "in educational matters", WSU maintains "independence" from the State. *Id.* Likewise, Michigan "courts have clearly interpreted the Constitution as conferring general fiscal autonomy on the university boards." *Regents of Univ. of Michigan v. State*, 419 N.W.2d 773, 777-78 (Mich. App. 1988). Universities are subject to regulation under "the Legislature's police power," as long as such regulations do "not invade the university's constitutional autonomy." *Nat'l Pride At Work*, 732 N.W.2d at 152.

3. As for WSU's eight-member Board of Governors, they are elected, not appointed by a public official or body. M.C.L. § 390.643. The governor may fill temporary vacancies by appointment until a successor is nominated and elected. MI CONST. Art. 8 § 5. But, neither WSU's implementing legislation nor Michigan's Constitution create any mechanism for the removal of Board members by any public official or body. *See* M.C.L. § 390.640 *et seq; see generally* MI CONST. Art. 8.

Regarding board members, WSU, the University of Michigan, and Michigan State University are distinct from Michigan's other universities. Whereas board members from the former three institutions are elected, every other university's governing boards are appointed by the governor and confirmed by the senate. *Compare* MI CONST. Art. 8, § 5 *with* Art. 8, § 6.

WSU's Board members also serve purely as unpaid volunteers. M.C.L. § 390.644. Consistent with that status, Michigan agrees to indemnify the Board if a judgment is obtained against it. M.C.L. § 600.6095. Michigan courts have also long recognized that a university's governing board "is a separate entity" from the universities themselves. *People v. Brooks*, 194 N.W. 602, 603 (Mich. 1923); *Branum*, 145 N.W.2d at 862.

4. Financially speaking, WSU is prohibited from borrowing money on its "general faith and credit[,]" M.C.L. § 390.646, unlike the State of Michigan who has such power to do so for itself. MI CONST. Art. 9 § 14.

Michigan's Constitution provides that "[t]he legislature shall appropriate money to maintain" WSU, but does not specify to what end or degree. MI CONST. Art. 8, § 4. WSU admits that the State's maintenance is limited: "In response to continuing economic challenges as well as cuts in state revenue appropriations, the university has made it a priority to seek greater diversification of [revenue] sources[.]"[6] As is shown by its 2014 revenue breakdown, WSU only receives 20% of its revenue from the State, while 38%

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[6] 2014-2015 WAYNE STATE UNIVERSITY FACT BOOK 61, *available at* http://wayne.edu/factbook/factbook2015.pdf.

comes from its students (via tuition and fees), and the remaining 41% from other sources.[7] Further, WSU has the ability to issue bonds, like the $83 Million it raised in 2013 to help finance certain construction projects.[8] Also, as reported in February 2014, WSU's cash reserves totaled $370 Million, while its investment income has steadily increased since 2011.[9] Further, WSU itself—not just its Board—enters into contracts with outside vendors.[10]

B. Procedural History.

1. In October 2012, Petitioner filed a *qui tam* action under the FCA against, *inter alia*, WSU. App.3-4. In March 2014, the United States declined to intervene. App.4. WSU moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). App.6. Petitioner opposed WSU's motion and requested leave to add WSU's Board of Governors as a defendant. App.6. Petitioner attached a proposed amended complaint to his response. App.6.

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[7] *Id.*

[8] Wayne State University Debt Financing and Management, *available at* http://idrm.wayne.edu/treasury/financing.php.

[9] Wayne State University Board of Governors Budget and Finance Committee Minutes (Feb. 7, 2014), *available at* http://bog.wayne.edu/meetings/old_files/210/Budget_and Finance_Committee_Minutes_7_Feb_14_.pdf.

[10] *See* Wayne State University Procurement & Strategic Sourcing, *available at* http://www.forms.procurement.wayne.edu/ Adv_bid/Adv_bid.html (providing, for example, "a copy of the Wayne State University Standard Agreement Between the University and Contractor for Construction Services").

The district court granted WSU's motion to dismiss. App.50-54. Following *Stevens*, 529 U.S. 765 (2000), the district court held that to determine if WSU was a "person" or a state entity, the arm-of-the-state inquiry governed. App.51-52. The district court relied on *one* of the Sixth Circuit's four-factor tests as proffered by *S.J. v. Hamilton County*, 374 F.3d 416 (6th Cir. 2004). App.52. Those factors are: "'(1) whether the state would be responsible for a judgment against the entity in question; (2) how state law defines the entity; (3) what degree of control the state maintains over the entity; and (4) the source of the entity's funding.'" App.52.

The district court found WSU was an arm of the state. App.52. "Most importantly," erroneously relying on M.C.L. § 600.6095—which applies only to a university's governing board, not universities like WSU—the district court held that "any judgment against WSU will be paid out of the state's tax revenues." App.52-53. Further, because the district court failed to rule on Petitioner's request to amend his complaint to add WSU's Board as a defendant, Petitioner filed a Motion to Alter or Amend Judgment. App.8. The district court denied Petitioner's motion as futile. App. 8-9. Petitioner appealed. App.3.

2. The Sixth Circuit held as a matter of first impression that the arm-of-the-state inquiry was the means to determine whether an entity was a person or a state entity for purposes of the FCA. App.10-11. The court held, however, that a different test and different factors than those used by the district court applied. App.11-12. In relying on *Ernst v. Rising*, 427 F.3d 351 (6th Cir. 2005), the following factors were examined:

> (1) the State's potential liability for a judgment against the entity; (2) the language by which state statutes and state courts refer to the entity and the degree of state control and veto power of the entity's action; (3) whether state or local officials appoint the board members of the entity; and (4) whether the entity's functions fall within the traditional purview of state or local government.

App.11 (quoting *Ernst*, 427 F.3d at 359). The Sixth Circuit observed that "the first factor . . . is 'the foremost factor' and 'it is the state treasury's *potential* legal liability for the judgment, not whether the state treasury will pay the judgment in *that* case, that controls the inquiry.'" App.12 (emphasis in original).

3. The court held the first factor, "[a]s the 'foremost factor,' . . . must be given substantial weight in our analysis." App.13. The court focused on Michigan's Constitution, which provides that Michigan is to "appropriate monies to maintain" WSU, App.13, even though Michigan law is silent on what "maintain" means and to what extent WSU is to be maintained by the State. Relying on *Ernst*, the court held that "'if a state's constitution and statutory law make the state responsible for funding' an entity, 'that reality makes the state potentially responsible for a judgment against it.'" App.13-14. Because the State was to vaguely "maintain" WSU, in the court's opinion that made "Michigan responsible for funding WSU." App.14.

Later in its opinion, the court observed that WSU only received 20% of its funding from the State. App.22. Meaning WSU was not predominantly funded or maintained by the State, merely nominally.

Nevertheless, the fact that any money flowed from the State to WSU "alone" was sufficient to find "that the State of Michigan is potentially liable for a judgment against WSU." App.14. As a result, "this factor weighs heavily in our analysis and creates a strong presumption that WSU is an arm of the state." App.15-16.

For the second factor, the Sixth Circuit noted that four sub-considerations are examined. App.16. Petitioner conceded the first two favored WSU as a state entity—that being how state statutes and courts refer to the entity. App.16. Regarding the latter two, "WSU concede[d] that the state does not have significant control over WSU or veto power over its actions." App.16. So the latter two pointed away from WSU as a state entity. To break the alleged tie, the Sixth Circuit held that the factors, as a whole, "are weighed and balanced against each other based on the unique circumstances of the case[,]" App.16-17, with the exception of the first factor which "gets special weight". App.17. The Sixth Circuit found that "WSU's independence from state control is consistent with its status as a state educational institution." App.17. In other words, the court found that WSU's independence from the State allegedly reflected how connected to the State it was. The second factor favored WSU. App.18.

For the third factor, the Sixth Circuit conceded that WSU's Board members are not appointed by state officials or bodies, but are elected. App.18-19. To the court, however, the fact the Board is elected "underscores its character as a state, not local, institution." App.19. The third factor favored WSU. App.19.

Regarding the fourth factor—that being whether a public university falls within the traditional purview of state or local government—this also favored WSU. App. 23. Although the court recognized WSU only received a minority portion of its funding from Michigan, that was "only marginally relevant, if at all," to whether WSU performed a traditional state function. App.23. Instead, the fourth factor asked "whether the state has a history of performing or providing the same function or service." App.23. Confusingly, the court found that the traditional purview inquiry *did* "include funding considerations" though "funding should not be dispositive." App.23. However, without any further discussion, justification, or support, the court concluded that "by providing higher education, WSU is performing a function traditionally within the purview of state government." App.23.

4. As for WSU's Board, Petitioner asserted that "the Board of Governors is a corporation and corporations are included within the definition of a 'person' under the FCA." App.26. The Sixth Circuit reiterated that under *Stevens*, 529 U.S. 765 (2000), this Court "noted that 'persons' are presumed to include corporations under 1 U.S.C. § 1, but there is no applicable statute declaring that 'person' should also include states." App.26.

To the court, *Stevens* "made this observation to support its construction of the statute to exclude states and state agencies, not to support a holding that all corporations, regardless of their affiliation with a state, are subject to liability under the FCA." App.26-27. Instead, the court found that "the only reasonable reading of . . . *Stevens* is that corporations are included

within the definition of 'person's under the FCA, but corporations that are arms of the state are excluded." App.27. Without any further discussion, the court concluded WSU's Board was an arm of the state and "Kreipke's assertion that the Board of Governors is liable as a 'corporation' under the FCA . . . is rejected." App.27.

REASONS FOR GRANTING THE PETITION

Both issues present topics that warrant this Court's guidance: an outcome-altering circuit split threatening the legitimacy of the arm-of-the-state doctrine, and an uncharted hole in this Court's precedent regarding the scope of liability under the FCA. Both issues present matters of national importance on the future of FCA litigation, and this Court's review is necessary.

One commentator recently summarized the status of the arm-of-the-state doctrine:

> four Supreme Court sample case analyses, none of which purport to offer a systematic arm-of-the-state test or a formalized list of factors; two competing Eleventh Amendment rationales intended to guide the factor analysis; [and] twelve very different circuit court tests, each with their own twists, measuring a litany of factors that vary by circuit[.]

Jameson B. Bilsborrow, *Keeping the Arms in Touch: Taking Political Accountability Seriously in the Eleventh Amendment Arm-of-the-State Doctrine*, 64 EMORY L.J. 819, 829-30 (2015).

The arm-of-the-state doctrine is crucial in many areas of statutory and constitutional law. Yet this

Court's precedent sends unclear and mixed messages as to what is to be considered, what considerations are preeminent, and the meaning of other critical inquiries. The haziness emanating from this Court's precedent has resulted in the circuit courts going twelve very different directions, which in turn has led to a lack of uniformity, producing different results between the circuits. The jurisprudential chasm that has formed between the circuits is one that frustrates litigants, confuses courts, and undermines an entire body of law. It is the nature of this circuit split—presented by Petitioner's case and others pending and expected before this Court[11]—and its critical implications that necessitates this Court's review.

As for the scope of liability under the FCA, this Court has addressed the matter twice before—exposing the extremes of the liability spectrum. Petitioner's case and others circuits expose a purported gap in the Court's precedent regarding state-created corporations and what end of the spectrum they lean towards. The circuits that have addressed this issue have been left to guess as to how this Court would resolve the matter, showing this Court's guidance is paramount. The next chapter on defining the scope of liability under the FCA is present and ripe for this Court's review.

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[11] This same issue is also present in another case seeking this Court's review. *See Pennsylvania Higher Education Assistance Agency v. U.S. ex rel. Jon H. Oberg*, No. 15-1045. Petitioner and Michael Willette—another *qui tam* relator whose case also presents the same arm-of-the-state issue, *see U.S. ex rel. Willette v. Univ. of Massachusetts, Worcester*, 812 F.3d 35 (1st Cir. 2016)—filed as *amici* in support of the former case regarding review of this issue. *See* Brief of Relators Dr. Christian Kreipke and Michael Willette as *Amici Curiae* In Support of Petitioner.

Both issues require this Court's guidance. The future of Eleventh Amendment sovereign immunity—as well as the scope of liability under the FCA—are directly implicated and hinge on the resolution of these issues. These issues also carry with them critical implications for the future of public colleges and universities, who given their unique character and treatment under state law, require direction on whether they share their State's sovereignty or not. This case is an ideal vehicle for addressing the questions presented, which are ripe and necessary for review by this Court.

I. This Court's Precedents Have Left The Circuits Conflicted Over the Proper Test For Determining Whether An Entity Is An Arm Of The State.

This Court's precedent regarding the arm-of-the-state doctrine[12] suffers from a lack of definition and mixed messages. These shortcomings have resulted in a drastic circuit split that hinders this critical doctrine's future.

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[12] This case does not directly involve Eleventh Amendment sovereign immunity, but whether WSU is a "person" under the FCA. Like the Sixth Circuit, "every circuit that has confronted the question" holds that the circuit's respective arm-of-the-state test is applied. *United States ex rel. Willette*, 812 F.3d at 39 (collecting cases). Just like an Eleventh Amendment case, the question is whether for purposes of federal law WSU is more akin to a political subdivision or a "person". *See Chandler*, 538 U.S. at 125-27.

A. The Circuit Conflict Largely Stems From This Court's Mixed Signals and Lack of Definition.

1. The modern arm-of-the-state doctrine began with this Court's opinion in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). Two years later the Court revisited the issue in *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391 (1979). Both decisions have been sharply criticized for giving no discernable guidance on how lower courts were to adapt and apply an arm-of-the-state analysis. *See, e.g.*, Alex E. Rogers, *Clothing State Governmental Entities with Sovereign Immunity: Disarray in the Eleventh Amendment Arm-of-the-State Doctrine*, 92 COLUM. L. REV. 1243, 1263 (1992) (discussing *Mt. Healthy*); Bilsborrow, *Keeping the Arms in Touch*, 64 EMORY L.J. at 827 (discussing *Lake County*).

The clarity this Court's precedent had been lacking was given some direction in *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994). *See* Bilsborrow, *Keeping the Arms in Touch*, 64 EMORY L.J. at 827. But, like its predecessors, *Hess* is not without its problems. *Hess* considered seven distinct factors or "[i]ndicators of immunity" to determine if a bi-state entity was an arm of the state: (1) who appoints the entity's governing board; (2) the degree of state control, including whether the state had veto power over the entity's actions; (3) how the implementing document referred to the entity (as either a state agency or not); (4) how state courts referred to the entity (as either a state agency or not); (5) whether the entity's functions are "readily classified as typically" state or local in nature; (6) whether the entity is "predominantly"

financed by the state or other, non-state means; and (7) whether the state bears "legal liability" for the entity's debts. 513 U.S. at 44-46. The Court found these indicators did not "all point the same way." *Id.* at 44. As a result, *Hess* directed that when such a situation is present, "the Eleventh Amendment's twin reasons for being remain our prime guide[]"—those being protecting the state treasury and state dignity. *Id.* at 47.

Hess did not discuss the dignity rationale. *See, id.* As for the state treasury, *Hess* opined that this rationale was "the impetus for the Eleventh Amendment" and "[w]as the most salient factor in Eleventh Amendment determinations." *Id.* at 47-48. To that end, the inquiry is whether the State is "obligated to bear and pay the . . . indebtedness of the enterprise? When the answer is 'No'—both legally and practically—then the Eleventh Amendment's core concern is not implicated." *Id.* at 51. In other words, the *Hess* Court rejected an interpretation of the "legal liability" consideration that advocated, "at best, indirect responsibility." Jennifer A. Winking, *Eleventh Amendment: A Move Towards Simplicity in the Test for Immunity*, 60 MO. L. REV. 953, 965 (1995).

Although *Hess* provided some guidance, it still left critical matters unexplained: such as what many of its "indicators of immunity" actually evaluate, how the indicators applied (if at all) to other types of entities, or how the "twin reasons" function. These issues, among others, are why certain commentators note that "*Hess* raised more questions than it answered." Bilsborrow, *Keeping the Arms in Touch*, 64 EMORY L.J. at 827. But whatever progress *Hess* made has been undone by

subsequent opinions from this Court that have only caused more disarray for lower courts to wade through.

In *Regents of the Univ. of California v. Doe*, 519 U.S. 425 (1997), the Court did not go through a formal arm-of-the-state analysis; instead it focused on the legal liability rationale. *Id.* at 430-31. *Doe* tended to take a step back from *Hess* on the importance of the legal liability rationale noting that it was "of considerable importance", *id.* at 430, as opposed to the "core concern" of the Eleventh Amendment. *Hess*, 513. U.S. at 51. Further, *Doe* explained that "it is the entity's *potential* legal liability . . . that is relevant." *Doe*, 519 U.S. at 431 What *Doe* left unexplained is what difference its articulation of the legal liability rationale differed from that of *Hess*.

In *Auer v. Robbins*, 519 U.S. 452 (1997), the Court found that a single-state entity, a board of police commissioners, was not an arm of the state. *Id.* at 456 n. 1. To reach that conclusion, *Auer* relied on *Hess*, but only considered three factors without explaining why only those three were chosen. *Id.* Moreover, the factors pointed in different directions, *id.*, but the Court did not mention the "twin reasons" from *Hess* or why they were not applied. *See, id.* Then, in *Federal Maritime Commission v. S. Carolina State Ports Auth.*, 535 U.S. 743 (2002), the Court seemingly upended *Hess*'s holding that the state-treasury rationale was the key purpose underlying the Eleventh Amendment: "[T]he primary function of sovereign immunity is not to protect state treasuries . . . but to afford the States the dignity and respect due sovereign entities." *Id.* at 769.

This Court's arm-of-the-state jurisprudence has provided more questions and confusion than answers

and guidance. Given this reality, "it is no surprise the lower courts' tests are so widely divergent." Bilsborrow, *Keeping the Arms in Touch*, 64 EMORY L.J. at 829.

B. The Circuits Apply Vastly Different Arm-of-the-State Tests That Are Outcome-Altering.

To some, "[c]alling the arm-of-the-state doctrine 'confused' is generous; one commentator has instead characterized the doctrine as being in a complete state of disarray." Bilsborrow, 64 EMORY L.J. at 829. The foundation for these observations is based on numerous considerations underlying the immediate circuit split: the circuits employ a disparate collection of multi-factor tests ranging from two to six factors; certain circuits are entrenched by intracircuit conflicts between tests; and most critically, certain circuits hold that a single factor is given preeminent consideration, while others do not. Individually or collectively, these issues cast a dark cloud over the arm-of-the-state doctrine, and emphasize the need for this Court's review.

1. The Eighth Circuit uses a two-factor test along with distinct subfactors. *Pub. Sch. Ret. Sys. of Missouri v. State St. Bank & Trust Co.*, 640 F.3d 821, 827 (8th Cir. 2011). The Second Circuit recently reshaped its test so that courts initially look to two factors (different from the Eighth Circuit); but, if they point in different directions, two additional factors may apply. *Leitner v. Westchester Cmty. Coll.*, 779 F.3d 130, 135-40 (2d Cir. 2015).

The Third, Tenth, and District of Columbia Circuits use different three-factor tests. *Compare Cooper v. Se.*

PA Transp. Auth., 548 F.3d 296, 299 (3d Cir. 2008) *with U.S. ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 718 (10th Cir. 2006) *and Puerto Rico Ports Auth. v. Fed. Mar. Comm'n*, 531 F.3d 868, 873 (D.C. Cir. 2008). The Fourth and Eleventh Circuits apply different four-factor tests. *Compare U.S. ex rel. Oberg v. Pennsylvania Higher Educ. Assistance Agency ("Oberg II")*, 745 F.3d 131, 136-38 (4th Cir. 2014) *with U.S. ex rel. Lesinski v. S. Florida Water Mgmt. Dist.*, 739 F.3d 598, 602 (11th Cir. 2014). Standing alone, the Ninth Circuit uses five factors, *Beentjes v. Placer Cty. Air Pollution Control Dist.*, 397 F.3d 775, 778 (9th Cir. 2005), while the Fifth Circuit uses six factors. *Vogt v. Bd. of Comm'rs of Orleans Levee Dist.*, 294 F.3d 684, 689 (5th Cir. 2002).

2. The remaining circuits are internally split. The Seventh Circuit has two tests: the first considers two factors with five subparts*, see Peirick v. Indiana Univ.-Purdue Univ. Indianapolis Athletics Dep't*, 510 F.3d 681, 695-96 (7th Cir. 2007), and the other considers two or three factors. *Crosetto v. State Bar of Wisconsin*, 12 F.3d 1396, 1402 (7th Cir. 1993); *Takle v. Univ. of Wisconsin Hosp. & Clinics Auth.*, 402 F.3d 768, 772 (7th Cir. 2005). Until recently, the First Circuit examined two questions that considered up to 13 factors. *See Fresenius Med. Care Cardiovascular Res., Inc. v. Puerto Rico & Caribbean Cardiovascular Ctr. Corp.*, 322 F.3d 56, 65-68 & nn. 5-8 (1st Cir. 2003). In *U.S. ex rel. Willette v. Univ. of Massachusetts, Worcester*, 812 F.3d 35 (1st Cir. 2016), the prior framework was ignored, without explanation, instead opting for five select factors. *Id.* at 39-40.

Then there is the Sixth Circuit. As discussed above, the district court used one of the circuit's four-factor tests, App.52; while the Sixth Circuit used a different four-factor test. App.11. The Sixth Circuit also recently created a six-factor test. *Crabbs v. Scott*, 786 F.3d 426, 429 (6th Cir. 2015). And, regarding public universities, the Sixth Circuit still has a nine-factor test in good standing. *See Hall v. Med. Coll. of Ohio at Toledo*, 742 F.2d 299, 302-07 (6th Cir. 1984); *see also* 17A JAMES WM. MOORE ET AL., Moore's Federal PRACTICE § 123.23[4][b][iv][D.1] (3d ed. 2013) (recognizing the same).

3. Although the inter- and intracircuit splits are troublesome and greatly undermine the future of this doctrine, the most threatening aspect of this issue concerns the split between the circuits regarding the treatment of a single factor as preeminent.

Some circuits hold that the state-treasury factor is still the most important and given more deference. *See, e.g.*, *Leitner v. Westchester Cmty. Coll.*, 779 F.3d 130, 137 (2d Cir. 2015); *Vogt v. Bd. of Comm'rs of Orleans Levee Dist.*, 294 F.3d 684, 689 (5th Cir. 2002); *Pub. Sch. Ret. Sys. of Missouri v. State St. Bank & Trust Co.*, 640 F.3d 821, 830 (8th Cir. 2011); *Beentjes v. Placer Cty. Air Pollution Control Dist.*, 397 F.3d 775, 778 (9th Cir. 2005). The Sixth Circuit goes so far as placing "substantial weight" on this factor so much so that it "creates a strong presumption" of personhood one way or the other. App.13, 16.

Other circuits hold no one factor is favored and that the factors are equally balanced. *See, e.g.*, *Thiel v. State Bar of Wisconsin*, 94 F.3d 399, 401 (7th Cir. 1996) (overruled on other grounds); *U.S. ex rel. Sikkenga v.*

Regence Bluecross Blueshield of Utah, 472 F.3d 702, 718-22 (10th Cir. 2006); *U.S. ex rel. Lesinski v. S. Florida Water Mgmt. Dist.*, 739 F.3d 598, 602-06 (11th Cir. 2014); *Puerto Rico Ports Auth. v. Fed. Mar. Comm'n*, 531 F.3d 868, 873-81 (D.C. Cir. 2008). The Third Circuit has actually reversed its position, declining to give preeminent consideration to the state-treasury factor in light of this Court's changing precedent. *Cooper v. Se. PA Transp. Auth.*, 548 F.3d 296, 301 (3d Cir. 2008).

Still differently, one line of precedent in the First Circuit holds that whether the state has clearly structured the entity as sharing its sovereignty is most important, *see Fresenius v. Puerto Rico & Caribbean Cardiovascular Ctr. Corp.*, 322 F.3d 56, 68 (1st Cir. 2003), while part of the Seventh Circuit holds that the entity's general fiscal autonomy is paramount. *See Peirick v. Indiana Univ.-Purdue Univ. Indianapolis Athletics Dep't*, 510 F.3d 681, 695-96 (7th Cir. 2007). And the Fourth Circuit seems confused: in *Oberg II*, the court held that the state legal liability factor "does not deserve dispositive preeminence" in light of this Court's changing precedent. 745 F.3d at 137 n.4. But in *Oberg III*, the court held that "[i]f the State treasury will be called upon to pay a judgment against a governmental entity, the [entity is an arm of its creating state], and consideration of any other factor becomes unnecessary." *U.S. ex rel. Oberg v. Pennsylvania Higher Educ. Assistance Agency ("Oberg III")*, 804 F.3d 646, 651 (4th Cir. 2015).

What the foregoing shows is that the split in the circuits is substantial and the lower courts are in desperate need of this Court's guidance.

C. Under Many Of The Circuits Disparate Tests, WSU Would Not Be An Arm Of The State.

To emphasize the outcome-altering effect the instant circuit split presents, in circuits that properly analyze a state's legal obligation for an entity's judgments, give proper consideration to the state's control over an entity, and practically consider the relationship a state has with an entity, WSU would not be deemed an arm of the state.

1. The Third Circuit considers three factors: "(1) whether the payment of the judgment would come from the state; (2) what status the entity has under state law; and (3) what degree of autonomy the entity has." *Bowers v. Nat'l Collegiate Athletic Ass'n*, 475 F.3d 524, 546 (3d Cir. 2007). Regarding the first factor—unlike the Sixth Circuit that considers the arbitrary, hypothetical, and potential responsibility for a judgment, App. 14—the Third Circuit asks "whether the State is *legally liable* to pay the judgment." *Bowers*, 475 F.3d at 546-47 (emphasis added). For WSU, Michigan law does not legally obligate the State to pay for WSU's judgments. *Accord* M.C.L. § 600.6095 (indemnifying governing boards). Indeed, State law holds WSU is responsible for its own debts. M.C.L. § 390.646. Further, the fact that Michigan partially funds WSU is unavailing. Though the Third Circuit may be swayed where the State is the "principal source" of an entity's funding, *see Cooper*, 548 F.3d at 303, it has found that 27% funding is unconvincing. *Id.* at 299. WSU only receives 20% of its funding from Michigan. App.22. Taken together, this factor weighs against WSU.

Likewise, the third factor—the degree of autonomy—would strongly cut against WSU because it is undisputed that "the state does not have significant control over WSU or veto power over its actions." App.16. Regardless of how the second factor is decided, "[w]ith two factors counseling against immunity," indeed strongly against immunity, the Third Circuit would likely hold, as it has multiple times before, that WSU "was not an arm of the state." *Cooper*, 548 F.3d at 302 (discussing cases). Moreover, if the University of Iowa were structured like WSU, it too would have been found to not be an arm of the state. *Cf. Bowers*, 475 F.3d at 549.

2. The Tenth Circuit also considers three factors: "(1) the state's legal liability for a judgment; (2) the degree of autonomy from the state—both as a matter of law and the amount of guidance and control exercised by the state; and (3) the extent of financing the agency receives independent of the state treasury and its ability to provide for its own financing." *U.S. ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 718 (10th Cir. 2006).

For the first factor, like the Third Circuit's approach, the Tenth Circuit "focus[es] on legal liability for a judgment, rather than on the practical, or indirect, impact a judgment would have on a state's treasury." *Id.* at 718. Again, Michigan is not legally obligated to pay for WSU's debts or judgments. Also like above, the second factor would weigh heavily against WSU because the State has no control or veto power over its actions and WSU is autonomous. The third factor would also weigh against WSU because 80% of its funding comes from sources other than the

State, and as provided above, WSU can raise capital and has large cash reserves at its disposal. *See, supra*, p. 9. WSU would likely fall short on each factor, showing that it is not an arm of the state. But even if, for example, the third factor weighed in favor of WSU, causing the factors to point different directions, the Eleventh Amendment's twin reasons would be the "prime guide." *Sikkenga*, 472 F.3d 702, 721 (10th Cir. 2006). Given that there is no logical threat to the State's treasury, the State is not responsible for WSU's liabilities, and there are no relevant connections between the State and WSU, neither interest is triggered. This affirms WSU is not an arm of the state.

What is clear, given the current state of the arm-of-the-state doctrine, is that not only can a case change based on which circuit decides a case, but in certain circuits the case may change based on the panel that is seated, what precedent is employed, or what year a case is decided. These types of outcome-altering variables threaten the stability and legitimacy of the arm-of-the-state doctrine and breed inconsistency between and within the circuits. The presence of such a reality implores intervention and resolution by this Court.

II. Subsequent Developments In The Courts Of Appeal Have Exposed A Purported Gap In This Court's Precedent On The Scope Of Liability Under The FCA, Leaving An Important Question Of National Importance Unanswered.

This Court's precedent shows that defining the scope of liability under the FCA is an issue of national importance. Although this Court has defined the

boundaries of who is and is not a "person" under the FCA, subsequent decisions from the circuit courts have exposed a purported hole regarding state-created corporations. This issue is one of national importance and the circuits are looking to this Court for guidance.

A. This Court's Precedent Seemingly Has Left Unanswered Whether State-Created Corporations Are "Persons" Under The FCA.

1. Under the FCA, only a "person" for purposes of federal law may be held liable. *See* 31 U.S.C. § 3729(a). In 2000, the Court first addressed the scope of liability under the FCA in *Stevens*. 529 U.S. 765 (2000). There, the Court recognized that under federal law "corporations . . . are presumptively *covered* by the term 'person[.]'" *Id.* at 782 (citing 1 U.S.C. § 1) (emphasis in original). On the other hand, this Court's "longstanding interpretive presumption [is] that 'person' does not include the sovereign." *Id.* at 780. After analyzing the FCA, the Court held that "a State (or state agency)" is not a "person" for purposes of the FCA. *Id.* at 788.

Three years later in *Chandler*, the Court held that municipal corporations are persons under the FCA. 538 U.S. 119, 125-27 (2003). The Court also noted that "'quasi corporations' such as counties," which are "unilateral creations of the State[,]" like traditional municipal corporations, "both were treated equally as legal 'persons[]'" at common law. *Id.* at 127 n. 7.

Stevens and *Chandler* have defined the bounds of liability under the FCA: to one end, State and state agencies presumptively cannot be held liable under the

FCA, while corporations (such as quasi and municipal corporations) presumptively can be held liable. What subsequent courts of appeal have exposed is the uncertainty or lack of clarity on how to resolve these competing presumptions when an entity purportedly straddles the line between them.

2. In *Sikkenga*, 472 F.3d 702 (10th Cir. 2006), the Tenth Circuit evaluated whether an incorporated laboratory owned by a university medical center was a "person" under the FCA. *Id.* at 716. Although the court did "recognize the ordinary presumption of 'personhood' that arises from ARUP's incorporation," the court was "tempered" by this Court's alleged "express instruction that under the FCA we must apply the longstanding interpretive presumption that the term person does not include a sovereign." *Id.* at 717. As a result, the Tenth Circuit deferred to its arm-of-the-state analysis for determining if the corporation was a "person" under the FCA. *Id.* at 717-18.

Likewise, in *Oberg II*, 745 F.3d 131 (4th Cir. 2014), the Fourth Circuit recognized the foregoing presumptions for and away from personhood. *Id.* at 135. There, the relator proffered that "all corporate entities—regardless of their affiliation with a state—must overcome a 'presumption of personhood.'" *Id.* at 135 n. 2. The court rejected that position because it allegedly "ignore[d] the Supreme Court's clear instruction that in the context of corporations created by and sponsored by a state, *competing* presumptions are at play." *Id.* (citing *Stevens*, 529 U.S. at 782) (emphasis in original). Based on the Fourth Circuit's reading of *Stevens*, it opined that "a court must walk a careful line between two competing presumptions to

determine if a *state-created* corporation is 'truly subject to sufficient state control to render [it] a part of the state, and not a 'person,' for FCA purposes." *Id.* at 135. Thus, the Fourth Circuit also opted to its arm-of-the-state test to resolve the matter. *Id.* at 135-36.

The Sixth Circuit, on the other hand, went a different route. It recognized that WSU's Board of Governors was a corporation. App. 13 (citing MI CONST. Art. 8 § 5). On that basis, Petitioner argued that the Board was a "person" under federal law. App.26. The Sixth Circuit disagreed because it found "the only reasonable reading of" *Stevens* was that "corporations that are arms of the state are excluded[]" from the definition of "person". App.27. Given the lack of analysis finding WSU's Board to be an arm of the state, the court's holding seems to proffer that state-created or state-affiliated corporations are subsumed within the presumption that states are not "persons" under the FCA.

3. What these opinions show is that for the circuits who have been confronted with the issue of how to characterize a state-created or state-affiliated corporation for liability purposes under the FCA, they all have deferred to the state presumption against personhood to the detriment of the corporation presumption in favor of personhood. At best, these opinions reflect that the circuits are guessing based on alleged, implicit suggestions by this Court; or, at worst, they are disregarding and directly in conflict with what this Court has explicitly decided.

Under either scenario, this Court has twice confronted the scope of liability under the FCA, confirming the issue is one of national importance. The

foregoing issue represents the next chapter for this critical issue and this Court's guidance is necessary.

B. WSU's Board Of Governors Can Be Held Liable Under The FCA.

Despite the foregoing, this Court's precedent is clear: even state-created corporations are persons under federal law. As such, WSU's Board of Governors is a "person" under the FCA.

1. As the relator in *Oberg II* asserted, *see* 745 F.3d 131, 135 n. 2 (4th Cir. 2014), and Petitioner argued as well, *see* App.27, this Court's precedent does not draw lines on the type of corporation at issue—corporations are persons under federal law.

This Court has long held that even state-created corporations are persons. In *Cowles v. Mercer Cty.*, 74 U.S. 118 (1868), the Court observed that the "board of supervisors" for Mercer County was "a corporation created by acts of the legislature of Illinois." *Id.* at 121. To the *Cowles* Court, much like should be apparent in the immediate context, the question of whether the corporate board was a person under federal law was a question that "presents but little difficulty." *Id.* The Mercer County Board was a person and not entitled to sovereign immunity. *Id.* at 121-22. Counties themselves are analyzed in the same manner—despite being created by the state and given powers by the state, they are still persons. *See Lincoln Cty. v. Luning*, 133 U.S. 529, 530 (1890); *see also Chandler*, 538 U.S. 119, 125-27.

This Court has explicitly stated that there is no differentiation given to state-created corporations: "But neither *public corporations* nor political subdivisions

are clothed with that immunity from suit which belongs to the state alone by virtue of its sovereignty." *Hopkins v. Clemson Agr. Coll. of S. Carolina*, 221 U.S. 636, 645, (1911) (emphasis added). Indeed, "[a] corporation *created by* and doing business in a particular state, is to be deemed *to all intents and purposes as a person*[.]." *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 687-88 (1978) (first emphasis added).

This Court's precedent is clear—whether state-created or privately created, a corporation is a corporation and they are equal persons under federal law. Ergo, it should be clear that WSU's Board of Governors is a person under the FCA. However, despite this seemingly clear guidance, the circuits that have been confronted with this issue believe more is at play, which cautions against finding state-created corporations are persons. This purported hole in the Court's FCA-liability jurisprudence—or, at a minimum, the purported confusion it presents—exposes an issue of great importance that necessitates this Court's review.

III. This Case Is a Clean Vehicle To Decide The Issues Presented.

The issues presented are not only ripe for this Court's review, but are in desperate need of its guidance. Both issues have been squarely presented before the district court and the Sixth Circuit, preserving them for review. But more importantly, as the foregoing shows, this case is the proper vehicle to review these issues.

WSU is not an arm of the state. WSU is a constitutionally-autonomous university, it is in complete control of its governance in every relevant respect, it is not financially dependent on the State, the State is not legally obligated to pay its debts, and it shares only *de minimis* connections to the State. Under any logical, unbiased approach, WSU is akin to an independent political subdivision, rather than a state entity.

WSU's Board of Governors can also be held liable under the FCA. Corporations are persons for purposes of federal law, and this Court's precedent has not drawn a line differentiating this understanding in cases concerning state-created or state-affiliated corporations. At every turn, a corporation is a corporation, regardless of the modifier that precedes it. WSU's Board of Governors is a "person" under the FCA.

This case presents a unique opportunity to address both issues squarely and cleanly. Furthermore, each issue is directly linked to the scope of liability under the FCA. As asserted by Petitioner as *amici* in support of the petition in *Pennsylvania Higher Education Assistance Agency v. U.S. ex rel. Jon H. Oberg*, No. 15-1045, matters concerning the scope of liability are of critical importance to not only colleges and universities, but for FCA litigants and courts alike. Kreipke & Willette Br., 20-23. To that end, the issues presented are of even greater importance, and this Court's review is necessary.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Shereef H. Akeel
Counsel of Record
William R. Thomas
AKEEL & VALENTINE, PLC
888 W. Big Beaver Rd., Ste. 910
Troy, MI 48084
(248) 269-9595
shereef@akeelvalentine.com

Counsel for Petitioner

May 19, 2016

APPENDIX

APPENDIX

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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 15a0285p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 15-1139

[Filed December 4, 2015]

CHRISTIAN KREIPKE, *Plaintiff-Appellant*,

v.

WAYNE STATE UNIVERSITY, *Defendant-Appellee*.

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 2:12-cv-14836—Avern Cohn, District Judge.

Argued: October 8, 2015

Decided and Filed: December 4, 2015

Before: ROGERS and DONALD, Circuit Judges; ROSE, District Judge.[*]

COUNSEL

ARGUED: William R. Thomas, AKEEL & VALENTINE, PLC, Troy, Michigan, for Appellant. Kenneth J. McIntyre, DICKINSON WRIGHT PLLC, Detroit, Michigan, for Appellee. **ON BRIEF:** William R. Thomas, Shereef H. Akeel, AKEEL & VALENTINE, PLC, Troy, Michigan, for Appellant. Kenneth J. McIntyre, K. Scott Hamilton, Kathryn S. Wood, Daniel J. Phillips, DICKINSON WRIGHT PLLC, Detroit, Michigan, for Appellee.

OPINION

ROSE, District Judge. This is a qui tam action brought by Dr. Christian Kreipke ("Kreipke"), a former Assistant Professor at Wayne State University ("WSU") in Detroit, Michigan, for alleged violations of the False Claims Act ("FCA"), 31 U.S.C. § 3729, *et seq*., and defamation under Michigan law. Kreipke alleges that WSU engaged in a fraudulent scheme to inflate the amount of funding that it received from the federal government for research grants and that he was fired in retaliation for complaining about the scheme to university officials and refusing to participate in it. The district court granted WSU's motion to dismiss all of the claims against it on the grounds that WSU was not

[*] The Honorable Judge Thomas M. Rose, District Judge for the Southern District of Ohio, sitting by designation.

a "person" under the FCA and was entitled to sovereign immunity as an "arm of the state" under the Eleventh Amendment. The district court denied Kreipke's request to amend his complaint because Kreipke failed to file a formal motion to amend and, in any event, the proposed amendment would have been futile.

On appeal, Kreipke challenges the district court's holding that WSU is not a "person" subject to liability under the FCA, its holding that WSU is entitled to Eleventh Amendment immunity, and its denial of Kreipke's request for leave to amend. For the reasons discussed below, we affirm the judgment of the district court.

I. BACKGROUND

A. Kreipke's First Amended Complaint

Appellant, Dr. Christian Kreipke, was an Assistant Professor at WSU from 2008 until his termination in 2012. R. 19 at PAGEID# 663. Kreipke personally began working on federal research grants in 2004. R. 19-1 at PAGEID# 691-92. In 2011, while employed at WSU, Kreipke was appointed to a committee responsible for auditing and investigating WSU's research grants. R. 19 at PAGEID# 662. As a result of his own work on research grants and involvement with WSU's audit committee, Kreipke discovered what he believed to be a fraudulent scheme used by WSU to artificially increase the funding that it receives from the government. R. 19 at PAGEID# 661-62. Kreipke claims that WSU terminated his employment in retaliation for his complaining about this scheme and refusing to participate in it. *Id.* at PAGEID# 679.

On October 31, 2012, Kreipke filed a qui tam complaint under the False Claims Act against WSU and University Physicians Group ("UPG"),[1] a physician practice serving WSU that, among other functions, manages the billing for WSU's hospitals. R. 1 at PAGEID# 1-23. On March 17, 2014, the United States provided notice that it would not be intervening in Kreipke's action under § 3730(b)(2) of the FCA. R. 17 at PAGEID# 653-57. On June 5, 2014, Kreipke filed the First Amended Complaint—the complaint at issue on this appeal. R. 19.

In the First Amended Complaint, Kreipke alleged that WSU engaged in a deliberate scheme to defraud the federal government in order to inflate the funding that WSU receives for various federal grants and contracts. R. 19. Among other allegations, Kreipke alleges that WSU inflated the costs associated with grants in WSU's budget requests, inflated researchers' salaries and the amount of time that personnel allocated to working on grants, misappropriated federal funds to purchase equipment, and inflated the costs for other services and supplies. R. 19 at 6-12. Kreipke claims that he notified WSU of these alleged fraudulent practices, but WSU did nothing to correct them. R. 19 at 18, ¶ 70.

In March 2014, after the United States declined to intervene, Kreipke's complaint was unsealed and its allegations became public. In response to media reports about WSU's alleged fraud, M. Roy Wilson, WSU's

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[1] The district court granted UPG's motion to dismiss all claims against it. (Doc. 49.) Kreipke did not appeal the dismissal of those claims.

President, authored a commentary in the Detroit Free Press. R. 19-5. Wilson wrote that, based on his review of the allegations reported in the media, he believed that Kreipke's claims were meritless. *Id.* Wilson added that Kreipke had been fired for his own research misconduct at WSU, and that the Federal Office of Research Oversight had conducted an earlier investigation into Kreipke's conduct that resulted in a 10-year ban on further grant funding to him by the Veterans Administration. *Id.* Kreipke alleges that Wilson's published comments were false and defamatory.

Based on the above allegations, Kreipke asserted five claims under the FCA (Counts 1–5), a state law claim for retaliatory discharge (Count 6), and a defamation claim (Count 7) against WSU. The specific counts alleged were:

(1) Presentation of false claims in violation of 31 U.S.C. § 3729(a)(1)(A) of the False Claims Act;

(2) Making or using a false record or statement in violation of 31 U.S.C. § 3729(a)(2) of the False Claims Act;

(3) Conspiracy to defraud under 31 U.S.C. § 3729(a)(3) of the False Claims Act;

(4) A "Reverse False Claims Act Claim" for failing or refusing to return overpayments to the United States Government in violation of 31 U.S.C. §3729(a)(7);

(5) Retaliation in violation of 31 U.S.C. § 3729(h) of the False Claims Act;

(6) Retaliatory discharge in violation of public policy under Michigan law; and

(7) Defamation under Mich. Comp. Laws § 600.2911, *et seq.*

R. 19 at 21-29.

WSU moved to dismiss all of the claims for failure to state a claim under Fed. R. Civ. P. 12(b)(6) and for lack of subject-matter jurisdiction under Fed. R. Civ. P. 12(b)(1). R. 28, PAGEID# 1445-77. Kreipke filed a response in opposition to WSU's motion to dismiss, which included a request for leave to file an amended complaint adding WSU's Board of Governors and President as defendants and, if necessary, greater specificity to his claims. R. 35, PAGEID 1598-1601. Kreipke attached his proposed amended complaint as Exhibit C to his response.

B. The District Court's Rulings

The district court granted WSU's Motion to Dismiss and denied Kreipke's request for leave to file an amended complaint. R. 49.

1. WSU's Motion to Dismiss

In its Motion to Dismiss, WSU made the following arguments for dismissal of Kreipke's claims:

(1) Kreipke's claims under the FCA are barred because WSU is not a "person" subject to liability under the Act;

(2) Kreipke's claims under the FCA fail for failure to plead fraud with particularity under Fed. R. Civ. P. 9(b);

(3) Kreipke's state law claims for retaliation are barred under the Michigan Governmental Tort Liability Act ("GTLA"); and

(4) All of Kreipke's claims against WSU are barred by the doctrine of sovereign immunity under the Eleventh Amendment.

Ruling in WSU's favor on all claims, the district court held that the question of whether an entity is a "person" subject to liability under the FCA is determined by applying the same analysis used to decide if an entity is an "arm of the state" entitled to Eleventh Amendment immunity. R. 49 at 10 (citing *Vermont Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765 (2000)). The district court considered the factors of the "arm of the state" analysis set forth in *S.J. v. Hamilton County*, 374 F.3d 416, 420 (6th Cir. 2004), specifically (1) whether the state would be responsible for a judgment against the entity, (2) how state law defines the entity, (3) what degree of control the state maintains over the entity, and (4) the source of the entity's funding. R. 49 at 12. The district court noted that WSU is a public university created by and accountable to the State of Michigan under Article VIII of the Michigan Constitution, is established and maintained under Mich. Comp. Laws § 390.641, and receives funds directly from the State's general fund under Mich. Comp. Laws § 390.649. *Id.* The district court also placed significant weight on its finding that "any judgment against WSU will be paid out of the state's tax revenues." *Id.* (citing M.C.L. § 600.6095). The district court determined that, based on these

factors, WSU is an arm of the State of Michigan entitled to Eleventh Amendment immunity, and therefore not a "person" subject to liability under the FCA.

The district court dismissed Kreipke's defamation claim on Eleventh Amendment immunity grounds based on the same analysis. *Id.* at 13. The district court did not consider the claim for retaliatory discharge in violation of public policy (Count VI) because Kreipke voluntarily dismissed that claim in response to WSU's motion to dismiss. R. 35 at 4, n. 3.

2. Kreipke's Request for Leave to Amend

Kreipke included a request for leave to amend in his response to WSU's Motion to Dismiss, but the district court did not rule on that request. Kreipke renewed his request by filing a Motion to Alter or Amend Judgment under Fed. R. Civ. P. 59(e), which asked the court to amend its judgment dismissing Kreipke's claims to grant him leave to file an amended complaint. R. 51.

The district court held that Kreipke was not entitled to relief under Rule 59(e), reasoning that such a motion is appropriate only where there has been (1) a clear error of law, (2) newly discovered evidence, (3) an intervening change in controlling law, or (4) a need to prevent manifest injustice. R. 54 at 3 (citing *Intera Corp. v. Henderson*, 428 F.3d 605, 620 (6th Cir. 2005)). The district court held that its "purported failure to rule" on Kreipke's request for leave to amend did not constitute an error of law or create a manifest injustice. *Id.* at 3-4. The district court reasoned that there was no error of law because Fed. R. Civ. P. 7(b)(1) requires a

party to file a motion to request a court order, which Kreipke did not do. *Id.* at 4. The district court reasoned that there was no manifest injustice because its dismissal of Kreipke's claims on the merits would have "effectively mooted" a properly filed motion for leave to amend, *i.e.*, a motion for leave to amend would have been futile. *Id.* at 4.

II. STANDARD OF REVIEW

This Court reviews "de novo a district court's dismissal of a plaintiff's complaint for failure to state a claim under Rule 12(b)(6)." *Lukas v. McPeak*, 730 F.3d 635, 637 (6th Cir. 2013). The complaint must "contain 'either direct or inferential allegations respecting all material elements necessary for recovery under a viable legal theory.'" *D'Ambrosio v. Marino*, 747 F.3d 378, 383 (6th Cir. 2014) (quoting *Phil. Indem. Ins. Co. v. Youth Alive, Inc.*, 732 F.3d 645, 649 (6th Cir. 2013)). In reviewing a motion to dismiss, the Court "may consider the [c]omplaint and any exhibits attached thereto, public records, items appearing in the record of the case and exhibits attached to defendant's motion to dismiss so long as they are referred to in the [c]omplaint and are central to the claims contained therein." *Basset v. NCAA*, 528 F.3d 426, 430 (6th Cir. 2008).

The Court "may affirm the district court's dismissal of Plaintiffs' claims on any grounds, including those not relied on by the district court." *Zalusky v. United America Healthcare Corp.*, 527 F.3d 564, 570 (6th Cir. 2008).

III. ANALYSIS

A. Test For Determining Whether An Entity Is A "Person" Under FCA

In reviewing the dismissal of Kreipke's claims, the first question is whether the district court applied the proper test to determine if WSU is subject to liability under the FCA. The FCA imposes liability on "any person" who violates its provisions, but does not define the term "person" for all purposes under the Act. *See* 31 U.S.C. § 3729(a)(1)(A)–(G); *Stevens*, 529 U.S. at 783–84 (noting that § 3733 of the FCA defines "person" strictly for purposes of identifying to whom the Attorney General may issue civil investigative demands). Nor has the Supreme Court defined the term, although it has held that a "person" under the FCA does not include a state or state agency. *Stevens*, 529 U.S. at 787-88. Thus, if WSU is a state agency, it is not a person subject to liability under the FCA.

Which test we should apply to determine whether WSU is a state agency and therefore not a "person" under the FCA is a matter of first impression in this Circuit. The circuits that have considered this issue have unanimously held that courts should apply the same test used to determine whether an entity is an "arm of the state" entitled to sovereign immunity under the Eleventh Amendment. *See U.S. ex rel. Lesinski v. S. Fla. Water Mgmt. Dist.*, 739 F.3d 598, 602 (11th Cir. 2014) (joining the Fourth, Fifth, Ninth, and Tenth Circuits in adopting the "arm of the state" analysis under the Eleventh Amendment for purposes of the FCA). These other circuits reached this conclusion based, in part, on the Supreme Court's observation in *Stevens* that the scope of the inquiry into whether an

entity is a "person" under the FCA is virtually identical to the sovereign immunity inquiry under the Eleventh Amendment. *Id.* at 601–02 (citing *Stevens*, 529 U.S. at 779–80).

Indeed, the Supreme Court has since underscored "the virtual coincidence of scope" between the two inquiries, *Stevens*, 529 U.S. at 780, by holding that, in contrast to states and state agencies, the term "person" under the FCA includes local governments and municipalities. *Cook Cnty. v. United States ex rel. Chandler*, 538 U.S. 119, 134 (2003). The definition of a "person" under the FCA therefore parallels the limitations on sovereign immunity under the Eleventh Amendment, as Eleventh Amendment immunity extends to state and state agencies, but not to local governments and municipalities. In light of this similarity and consistent with the Supreme Court's guidance in *Stevens*, we also adopt the arm-of-the-state analysis under the Eleventh Amendment to determine whether an entity is a state agency excluded from liability under the FCA.

In *Ernst v. Rising*, 427 F.3d 351 (6th Cir. 2005), we held that, to determine whether an entity is an "arm of the state," a court should consider the following factors:

> (1) the State's potential liability for a judgment against the entity; (2) the language by which state statutes and state courts refer to the entity and the degree of state control and veto power over the entity's actions; (3) whether state or local officials appoint the board members of the entity; and (4) whether the entity's functions fall within the traditional purview of state or local government.

Id. at 359 (internal citations omitted). The first factor (the state's potential liability for a judgment) is "the foremost factor" and "it is the state treasury's *potential* legal liability for the judgment, not whether the state treasury will pay for the judgment in *that* case, that controls the inquiry." *Id.* at 359 (emphasis in original) (citing *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 431 (1997)).

We conclude that the district court applied the proper test to determine if WSU is an arm of the state excluded from liability under the FCA.

B. Whether WSU Is A "Person" Under The FCA

We have also not yet ruled on the issue of whether a public university, such as WSU, is a "person" under the FCA. Applying the same arm-of-the-state analysis, however, we have held that the University of Michigan and WSU's Board of Governors are arms of the state of Michigan for purposes of Eleventh Amendment immunity. *See Estate of Ritter v. Univ. of Mich.*, 851 F.2d 846, 849 (6th Cir. 2000) (University of Michigan is an arm of the state); *Komanicky v. Teachers Ins. & Annuity Ass'n*, 230 F.3d 1358 (6th Cir. 2000) (unpublished) (WSU's Board of Governors is an arm of the state). In addition, district courts in this Circuit have held that WSU is an arm of the state entitled to Eleventh Amendment immunity. *Johnson v. Wayne State Univ.*, No. 06-13636, 2006 W.L. 3446237, at *3 (E.D. Mich. Nov. 27, 2006) (WSU is an arm of the state entitled to Eleventh Amendment immunity); *Coleman v. Wayne State Univ.*, 664 F. Supp. 1082, 1085 (E.D. Mich. 1987) (same).

As discussed below, applying the four factors in *Ernst*, WSU is an arm of the State of Michigan, and therefore not a "person" subject to liability under the FCA.

1. Factor 1 – The State's Potential Liability For A Judgment

As the "foremost factor," the state's potential liability for judgment must be given substantial weight in our analysis. *Ernst*, 427 F.3d at 359 (citing *Hess*, 513 U.S. at 51). The district court found that this factor strongly supported its determination that WSU was an arm of the state because "any judgment against WSU will be paid out of the state's tax revenues" under Mich. Comp. Laws § 600.6095. R. 49 at 12. On appeal, Kreipke argues that the district court incorrectly interpreted this Michigan statute.

The Michigan legislature established WSU as a "state institution of higher education" that "shall be maintained by the state of Michigan" in Mich. Comp. Laws § 390.641. The Michigan Constitution provides that the "legislature shall appropriate monies to maintain . . . Wayne State University," Art. 8, § 4, and establishes that "the governors of Wayne State University and their successors in office shall constitute a body corporate known as the Board of Governors of Wayne State University." Mich. Const. Art. 8, § 5. Appropriations to WSU are received from the state's general fund pursuant to Mich. Comp. Laws § 390.649.

In *Ernst*, we concluded that the Michigan state judiciary's retirement system was a state agency entitled to Eleventh Amendment immunity in large

part because the state was ultimately responsible for funding the retirement system, if for some reason the retirement system was unable to meet its obligations. 427 F.3d at 364. Summarizing our decision, we stated that "if a state's constitution and statutory law make the state responsible for funding" an entity, "that reality makes the state potentially responsible for a judgment against it." *Id.* at 351–52. Here, the constitution and statutory law make the state of Michigan responsible for funding WSU. Those facts alone support a finding that the State of Michigan is potentially liable for a judgment against WSU.

In addition, Mich. Comp. Laws § 600.6095 states: "When any judgment or decree is obtained against any corporate body, or unincorporated board, now or hereafter having charge or control of any state institution, the amount thereof shall be included and collected in the state tax and paid to the person entitled thereto." The district court held that this provision requires the State of Michigan to pay any judgment against WSU. Kreipke argues that the district court was incorrect because § 600.6095 applies only to WSU's Board of Governors. Appellant's Brief at 21–25 (citing, *inter alia*, *Driver v. Naini*, 802 N.W.2d 311, 316 (Mich. 2011) (when the language of a statute is "clear and ambiguous," it must be applied as written under Michigan law)). WSU counters that, for purposes of the statute, WSU and its Board of Governors are one and the same.

WSU's Board of Governors is the corporate body responsible for managing WSU's affairs and property. Mich. Comp. Laws § 390.641. The parties do not dispute that § 600.6095 requires the state to collect in

the state tax the amount of any judgment against the Board of Governors. Kreipke's argument that the state's payment obligation runs only to the Board of Governors, however, does not withstand scrutiny.

Under the statute establishing WSU and its Board of Governors, only the Board of Governors has the capacity to sue and be sued. Mich. Comp. Laws § 390.641. WSU argues that it is therefore not a proper defendant and any judgment in this case would effectively be against WSU's Board of Governors. Appellee's Brief at 18 n.5 (citing 14A C.J.S. § 51 (2008) (public universities cannot be sued absent express statutory authorization)). Based on the state law creating and governing WSU, it is reasonable to conclude that the state legislature did not include a provision stating that any judgment against WSU would be paid by the state—as the legislature did for WSU's Board of Governors—because the legislature did not endow WSU with the capacity to sue or be sued. In other words, there is no reason to pass legislation indemnifying a state institution against judgment, when that state institution is not susceptible to judgment. The statutory framework contemplates that any suit against WSU will be brought against the corporate body responsible for its management: WSU's Board of Governors. Consequently, the state legislature provided that any judgment against the Board of Governors will be collected in (and paid out of) the state tax under Mich. Comp. Laws § 600.6095.

The State of Michigan is potentially liable for a judgment against WSU in this action. As required under *Ernst*, this factor weighs heavily in our analysis

and creates a strong presumption that WSU is an arm of the state.

2. Factor 2 – How State Statutes and State Courts Refer to the Entity

Under *Ernst*, the second factor includes four considerations: (1) how state statutes refer to the entity; (2) how state courts refer to the entity; (3) the degree of state control over the entity; and (4) the state's veto power over the entity's actions. 427 F.3d at 359.

Kreipke concedes that the first two considerations favor a finding that WSU is an arm of the State of Michigan. As discussed above, the state laws creating and governing WSU refer to it and treat it as a "state institution." Mich. Comp. Laws § 390.641. The caselaw also refers to WSU as a state entity. *See, e.g.*, *Littsey v. Bd. of Governors of WSU*, 310 N.W.2d 399, 402 (Mich. Ct. App. 1981) ("The Court of Claims has exclusive jurisdiction over claims against the state . . . [and] [t]his includes claims against a state university.").

As for the last two considerations, WSU concedes that the state does not have significant control over WSU or veto power over its actions. Kreipke argues that because the state lacks such control, the second factor requires a finding that WSU is not an arm of the state. In other words, Kreipke's position is that all four considerations under *Ernst* must be satisfied in order for the second factor to weigh in favor of finding WSU an arm of the state. This argument is not persuasive. The caselaw analyzing Eleventh Amendment immunity has not treated the *Ernst* factors, or the considerations relevant to any one of them, as a checklist that must be

satisfied to establish immunity. Rather, the *Ernst* factors are weighed and balanced against each other based on the unique circumstances of the case. *See Perry v. Se. Boll Weevil Eradication Found., Inc.*, 154 F. App'x 467, 472 (6th Cir. 2005) (describing the *Ernst* factors as a "balancing test"); *Town of Smyrna, Tenn. v. Mun. Gas Auth. of Ga.*, 723 F.3d 640, 650–51 (6th Cir. 2013) (describing the *Ernst* factors as a "non-exhaustive list of factors to determine whether a particular entity is owed sovereign immunity"). The only factor that gets special weight is the state's potential liability for judgment, which as we discussed earlier, creates a strong presumption that WSU is a state actor. *See Perry*, 154 F. App'x at 472.

Moreover, WSU's independence from state control is consistent with its status as a state educational institution. In *Branum v. Board of Regents of University of Michigan,* the Michigan court of appeals considered whether the state of Michigan's waiver of governmental immunity for torts also acted as a waiver of the same governmental immunity for the Board of Regents of the University of Michigan. 145 N.W.2d 860, 862 (Mich. Ct. App. 1966). The Board of Regents argued that it was not subject to the legislature's control, and therefore that the legislature's waiver on behalf of the state should not apply to it. *Id.* The court of appeals disagreed because the Board of Regents' independence was necessary to further the state's goals:

> This Court recognizes the wisdom of establishing a separate governing body of the University of Michigan, free from the political influences that are necessarily a part of a state legislature. This

> Court recognizes that such independence must be maintained in educational matters in order to provide the highest quality education for the students of Michigan, and in order to maintain the outstanding national reputation of the University. . . . In spite of its independence, the Board of Regents remains a part of the government of the state of Michigan.

Id. The same rationale explains why WSU's independence from the control of the Michigan state legislature should not undermine its status as a state entity in this case. The second factor thus also weighs in favor of finding WSU an arm of the State of Michigan.

3. Factor 3 - Whether State or Local Officials Appoint Board Members

The third factor asks whether state or local officials appoint the members of WSU's Board of Governors. If state officials have appointment power, then this factor weighs in favor of finding that the entity is an arm of the state; whereas, if local officials have appointment power, then this factor weighs against an arm-of-the-state finding. *Cf. Ernst*, 427 F.3d at 360-61 (finding that the third factor supported finding that judicial retirements system was arm of the state where three of five board members were appointed by the state governor and the other two were state officials), and *Lowe v. Hamilton Cnty. Dep't of Job & Family Servs.*, 610 F.3d 321, 331 (6th Cir. 2010) (finding third factor "weighs against a finding that [defendant] is an arm of the state" because its "officials are appointed at the local level").

Here, WSU's Board of Governors is elected through a statewide general election, with vacancies appointed by the Governor until a successor is nominated and elected. *See* Mich. Const. Art. 8, § 5; Mich. Comp. Laws § 390.692. Kreipke argues that the Governor's "limited" appointment power weighs against a finding that WSU is an arm of the state, while WSU argues that the fact that no local officials are involved in appointments supports an opposite finding.

This factor supports a finding that WSU is an arm of the state. The fact that WSU's Board of Governors is elected through a statewide election underscores its character as a state, not local, institution. The Governor's appointment power, even if limited, further supports a finding that WSU is an arm of the State of Michigan.

4. Factor 4 - Whether the Entity's Functions Fall Within the Traditional Purview of State or Local Government

Kreipke contends that WSU's function as a public university does not fall within the traditional purview of state government because WSU "began as a collection of city schools that were united by the Detroit Board of Education in 1933 as the 'Colleges of the City of Detroit.'" Appellant's Brief at 33 (citing Doc. 35 at PAGEID# 1588). Kreipke argues that WSU's history makes this case analogous to *Kovats v. Rutgers*, 822 F.2d 1303 (3d Cir. 1987), where the Third Circuit held that Rutgers was not an arm of the state of New Jersey entitled to Eleventh Amendment immunity.

Kreipke's argument fails because there were other factors that weighed heavily against recognizing Rutgers as an arm of the state that are not present in this case, and all of the cases that we have reviewed hold that higher education is a function within the traditional purview of state government. *See Hutsell v. Sayre*, 5 F.3d 996, 1002 (6th Cir. 1993)[2] (education is a "long-recognized governmental function"); *Hall v. Med. Coll. of Ohio at Toledo*, 742 F.2d 299, 305 (6th Cir. 1984) ("Providing facilities and opportunities for the pursuit of higher education is a long-recognized governmental function."); *Ranyard v. Bd. of Regents*, 708 F.2d 1235, 1239 (7th Cir. 1983) (noting that "few would dispute that stewardship over higher education performs an essential governmental function").

In *Rutgers*, two groups of faculty members brought an action under 42 U.S.C. § 1983 against Rutgers, its Board of Governors, and certain Rutgers officials relating to their employment at the university. 708 F.2d at 1306. The district court denied Rutgers' motion for summary judgment on the basis of Eleventh Amendment immunity, but certified its order for interlocutory appeal. *Id.* On appeal, the Third Circuit considered essentially the same factors that are before the Court in this case: the law and decisions defining

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[2] Kreipke attempts to distinguish our decision in *Hutsell* because "its reliance for this position [that higher education is a governmental function] was founded entirely on other courts['] like positions, but which were focused entirely on individual states." Appellant's Brief at 32. Kreipke has not come forward with any authority, however, suggesting that Michigan's relationship to higher education is any different than the relationships between higher education and the states (Ohio and Illinois) referenced in the caselaw cited in *Hutsell*.

the status and nature of the university in relation to the state; whether payment of a judgment against the university would be made out of the state treasury; whether the university was performing a governmental or proprietary function; the degree of autonomy that the university had over its operations; whether the university had the power to sue and be sued and enter into contracts; whether its property was immune from state taxation; and whether the state had immunized itself from responsibility for the agency's operations. *Id.* at 1307 (quoting *Urbano v. Bd. of Managers of the New Jersey State Prison*, 415 F.2d 247, 250–51 (3d Cir. 1969)). The Third Circuit recognized that "perhaps the most important" factor was the state's potential liability for a judgment against Rutgers. *Id.*

Regarding that "most important" factor, the Third Circuit found that "in the statute governing Rutgers, New Jersey has twice explicitly insulated itself from any liability on obligations running against Rutgers. . . . [Therefore,] [a]ny increase in Rutgers' state appropriation as a result of a judgment against Rutgers will be entirely the result of discretionary action by the state." *Id.* at 1309 (citing NJSA 18A:65-8, 65-25(e)). Regarding whether or not the university was performing a traditional state function, the Third Circuit found that Rutgers was distinguishable from entities that perform only proprietary functions because "[p]roviding education has long been recognized as a function of state government." *Id.* at 1310. Although the Third Circuit noted that Rutgers was once a private entity, its former status had an impact on its corporate character, rather than the issue of whether it was performing a traditional state function. *Id.* Rutgers, for example, retained the right to

sue and be sued, as well as much of the autonomy that it had as a private university. *Id.* at 1311.

The Third Circuit held that the combination of the state's insulation from liability for a judgment against Rutgers (the "most important" factor), Rutgers' independent corporate status and retention of the right to sue and be sued, and Rutgers' autonomy outweighed its status as state entity under state law. *Id.* at 1312. As a result, Rutgers was not an arm of the State of New Jersey entitled to Eleventh Amendment immunity. *Id.*

There are significant differences between the Third Circuit's decision in *Rutgers* and the facts present in this case. Here, the state has not insulated itself from liability for judgments against WSU. As discussed above, the constitutional authority and statutes creating WSU did not endow it with the capacity to sue or be sued. WSU's Board of Governors is therefore the proper defendant in a lawsuit against WSU, and the state has expressly stated that a judgment against the Board of Governors will be paid from state tax revenue. *See* M.C.L. § 600.6095. Similar to Rutgers, WSU is largely independent from state control, but that factor alone does not compel a finding that WSU is not entitled to Eleventh Amendment immunity.

Kreipke also argues that WSU is not performing a traditional state function because only 20% of its funding comes from state appropriations. Appellant's Brief at 33-34. First, 20% of total funding can hardly be said to be only nominal state support for WSU. The materials cited by Kreipke for this number state that WSU's total "current funds revenue" for fiscal year 2012 was $895 million. R. 35-1 at PAGEID# 1665.

Thus, the state of Michigan provided approximately $179 million to WSU from state appropriations for fiscal year 2012—no small sum, even if only 20% of its total funding. In any event, the level of funding received from the state is only marginally relevant, if at all, to the issue of whether WSU is performing a traditional state function. The question of whether a function is within the state's traditional purview is determined by analyzing whether the state has a history of performing or providing the same function or service. While this analysis may include funding considerations, the level of state funding should not be dispositive. In sum, by providing higher education, WSU is performing a function traditionally within the purview of state government.

All four of the factors to be considered under the *Ernst* test weigh in favor of finding that WSU is an arm of the State of Michigan. Accordingly, the district court correctly held that WSU is an arm of the State of Michigan and therefore not a "person" subject to liability under the FCA.

C. Kreipke's Claim for Defamation Against WSU

Kreipke asserted a claim for defamation against WSU in Count VII of the First Amended Complaint. After dismissing Kreipke's FCA claims, the district court dismissed the defamation claim on Eleventh Amendment immunity grounds. R. 49 at 13 (citing *VIBO Corp. v. Conway*, 669 F.3d 675, 691 (6th Cir. 2012) ("The Eleventh Amendment to the U.S. Constitution grants immunity to states from litigation on state law claims in federal court.")). As the dismissal of Kreipke's FCA claims was proper based on the same

analysis that entitles WSU to Eleventh Amendment immunity, the district court was also correct in dismissing Kreipke's defamation claim as barred by the Eleventh Amendment.

D. Whether Kreipke Met the Standard For Pleading Fraud Under the FCA

Having affirmed the dismissal of all of the claims against WSU on immunity grounds under the FCA and the Eleventh Amendment, we will not consider WSU's argument that Kreipke failed to plead his conspiracy and "Reverse False Claim Act" claims with particularity under Fed. R. Civ. P. 9(b).

E. Whether WSU Is Subject To Liability As An "Employer" Under the FCA

For the first time on appeal, Kreipke argues that his retaliation claim under the FCA should not have been dismissed because, while WSU may not be a "person" under the FCA, WSU is an "employer" under the FCA that may still be sued for retaliation. Appellant's Brief at 42–44. As a general rule in this Circuit, arguments raised for the first time on appeal are forfeited. *Armstrong v. City of Melvindale*, 432 F.3d 695, 700 (6th Cir. 2006). While we do have limited discretion to consider a forfeited argument, it is rarely exercised and Kreipke has not presented a compelling reason for us to do so here.

F. Whether The District Court Abused Its Discretion By Denying Leave To Amend

In response to WSU's motion to dismiss, Kreipke requested leave to amend his complaint to add WSU's Board of Governors and its President as defendants,

and, if required, to add specificity to his claims. R. 35 at PAGEID# 1598-1600. Because the district court did not rule on that request when it dismissed his complaint, Kreipke filed a motion to alter or amend the district court's judgment under Fed. R. Civ. P. 59(e) to permit him leave to amend. The district court denied the Rule 59(e) motion on two grounds: (1) Kreipke failed to file a formal motion requesting leave to amend; and (2) the proposed amendments were futile in light of its holding that WSU was not a "person" under the FCA and was entitled to immunity under the Eleventh Amendment.

A district court's denial of leave to amend and denial of a Rule 59(e) motion are both reviewed for abuse of discretion. *See Leary v. Daeschner*, 349 F.3d 888, 904 (6th Cir. 2003) (denial of leave to amend reviewed for abuse of discretion); *Heil Co. v. Evanston Ins. Co.*, 690 F.3d 722, 727–28 (6th Cir. 2012) (denial of motion to alter or amend judgment under Rule 59(e) reviewed for abuse of discretion). As Kreipke's proposed amendment would have been futile, this Court need not decide whether the district court abused its discretion in denying leave to amend based on Kreipke's failure to file a formal motion.

A proposed amendment is futile where it would not withstand a motion to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. *Rose v. Hartford Underwriters Ins. Co.*, 203 F.3d 417, 420 (6th Cir. 2000) (citing *Thiokol Corp. v. Dep't of Treasury, State of Mich., Revenue Div.*, 987 F.2d 376, 382–83 (6th Cir. 1993)). To survive a Rule 12(b)(6) motion to dismiss, a complaint must contain "sufficient factual matter, accepted as true, to 'state a claim that is plausible on

its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). However, "when a written instrument contradicts allegations in the complaint to which it is attached, the exhibit trumps the allegations." *Williams v. CitiMortgage, Inc.*, 498 F. App'x 532, 536 (6th Cir. 2012) (quoting *N. Ind. Gun & Outdoor Shows, Inc. v. City of S. Bend*, 163 F.3d 449, 454 (7th Cir. 1998)).

Kreipke argues that his proposed amendment would not have been futile because it alleges viable causes of action against WSU's Board of Governors and its President. In the proposed amended complaint, Kreipke asserts the same FCA claims against WSU's Board of Governors that he asserted against WSU in the First Amended Complaint. Kreipke asserts only one claim against WSU's President: a claim for defamation under Michigan law. For the reasons discussed below, none of Kreipke's claims against WSU's Board of Governors and its President would survive a Rule 12(b)(6) motion to dismiss.

Kreipke argues that his proposed FCA claims against WSU's Board of Governors are not futile because, unlike WSU, the Board of Governors is a corporation and corporations are included within the definition of a "person" under the FCA. Appellant's Brief at 49–51 (citing *Stevens*, 529 U.S. at 782). In *Stevens*, the Supreme Court held that states and state agencies are excluded from the definition of a "person" under the FCA. 529 U.S. at 788. In making that determination, the Supreme Court noted that "persons" are presumed to include corporations under 1 U.S.C. § 1, but there is no applicable statute declaring that "persons" should also include states. *Id.* at 782. The

Supreme Court made this observation to support its construction of the statute to exclude states and state agencies, not to support a holding that all corporations, regardless of their affiliation with a state, are subject to liability under the FCA.

Nonetheless, Kreipke asserts that the Supreme Court's statement regarding corporations should be read expansively to mean that all corporations are subject to liability under the FCA, regardless of their affiliation with a sovereign state. Kreipke fails to cite any authority for that proposition. Indeed, the only reasonable reading of the Supreme Court's holding in *Stevens* is that corporations are included within the definition of "persons" under the FCA, but corporations that are arms of the state are excluded. *See Stevens*, 529 U.S. at 779 (a state must clearly express an intent to permit causes of action against itself). Kreipke's assertion that the Board of Governors is liable as a "corporation" under the FCA, despite its status as an arm of the state, is rejected.

Kreipke argues that his proposed defamation claim against WSU's President would be viable because the President is not entitled to immunity under Michigan law. Appellant's Brief at 53-54. Kreipke asserts that his defamation claim alleges an intentional tort, and that, under Michigan's Government Tort Liability Act ("GTLA"), WSU's President is not immune from liability for intentional torts because he is not "a judge, a legislator, or the highest-ranking appointed executive official at any level of government." *Id.* at 53 (quoting *Odom v. Wayne Cnty.*, 760 N.W.2d 217, 228 (Mich. 2008)).

In *Odom*, the Michigan Supreme Court interpreted the GTLA and specifically the subsections providing individual governmental actors with immunity from tort liability. It held that the GTLA confers "absolute immunity to high ranking officials" under Mich. Comp. Laws § 691.1407(5), which states:

> A judge, a legislator, and the elective or highest appointive executive official of all levels of government are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority.

760 N.W.2d at 222. Kreipke is correct that WSU's President is not entitled to immunity under this subsection, as he is not a judge or legislator and was neither elected nor appointed by a governmental body.

Lower-level governmental actors, however, are provided qualified immunity from tort liability under Subsection 2 of the GTLA, which states:

> (2) Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a

> governmental agency if all of the following are met:
>
> (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

Mich. Comp. Laws § 691.1407(2). In *Odom*, the Michigan Supreme Court held that the immunity provided in this subsection "encompasses only *negligent* tort liability" because the GTLA expressly preserves "the law of *intentional* torts as it existed before July 7, 1986." 760 N.W.2d at 222 (emphasis added) (quoting Mich. Comp. Laws § 691.1407(3)). As previously noted, Kreipke alleges the intentional tort of defamation against WSU's President; consequently, WSU's President is not entitled to immunity under this subsection of the GTLA, which protects governmental actors against only negligent tort liability.

The test for determining governmental actors' liability for intentional torts, as it existed under Michigan law before July 7, 1986, is set forth in *Ross v. Consumers Power Co.*, 363 N.W.2d 641 (Mich. 1984). *See Odom*, 760 N.W.2d at 224. Under that test, a governmental actor establishes immunity by showing:

> (1) The acts were undertaken during the course of employment and the employee was acting, or

> reasonably believed that he was acting, within the scope of his authority,
>
> (2) the acts were undertaken in good faith, or were not undertaken with malice, and
>
> (3) the acts were discretionary, as opposed to ministerial.

Id. at 228. The Michigan Supreme Court defined a lack of good faith, under the second element, as "malicious intent, capricious action or corrupt conduct" or "willful and corrupt misconduct." *Id.* (quoting *Veldman v. Grand Rapids*, 265 N.W. 790, 794 (Mich. 1936); *Amperse v. Winslow*, 42 N.W. 823, 827 (Mich. 1889)). "Willful and wanton misconduct is made out only if the conduct alleged shows an intent to harm or, if not that, such indifference to whether harm will result as to be the equivalent of a willingness that it does." *Id.* (quoting *Burnett v. City of Adrian*, 326 N.W.2d 810, 812 (Mich. 1982)). Under the third element, whether the acts were discretionary or ministerial, the Michigan Supreme Court stated that ministerial acts "constitute merely an obedience to orders or the performance of a duty in which the individual has little or no choice." *Id.* at 226 (quoting *Ross*, 363 N.W.2d at 668). Discretionary acts, on the other hand, "require personal deliberation, decision and judgment." *Id.* (quoting *Ross*, 363 N.W.2d at 668).

Entitlement to immunity under the *Ross* test is an affirmative defense that must be proven by the governmental actor. *Id.* at 228. Where an affirmative defense appears "clearly on the face of the complaint," however, a court may dismiss a complaint under Rule 12(b)(6) for failure to state a claim. *Cincinnati Gas &*

Elec. Co. v. Gen. Elec. Co., 656 F. Supp. 49, 73 (S.D. Ohio 1986) (citing *McNally v. Am. States Ins. Co.,* 382 F.2d 748 (6th Cir. 1967)).

Applying the *Ross* test to the allegations in Kreipke's proposed amended complaint, WSU's President is entitled to immunity. As to the first element, WSU's President was acting within the scope of his employment when he authored the allegedly defamatory commentary published in the Detroit Free Press. In the commentary, he is clearly speaking on behalf of WSU, as he addresses Kreipke's claims against WSU and repeatedly uses the pronoun "we" to refer to WSU. R. 19-5 at PAGEID# 1389. As to the second element, there are no facts alleged in the proposed amended complaint from which it could be inferred that WSU's President acted with a malicious intent to harm Kreipke. *16630 Southfield Ltd. P'ship v. Flagstar Bank, F.S.B.*, 727 F.3d 502, 506 (6th Cir. 2013) ("'[N]aked assertions devoid of further factual enhancement' contribute nothing to the sufficiency of the complaint.") (quoting *Iqbal*, 556 U.S. at 678). As to the third element, nothing in the proposed amended complaint suggests that WSU's President was performing a ministerial act. To the contrary, authoring the article required "personal deliberation, decision and judgment" consistent with a discretionary act. *Odom*, 326 N.W.2d at 226. As all three elements of the *Ross* test are satisfied, WSU's President was entitled to immunity from Kreipke's defamation claim under Michigan law.

We conclude that the district court properly denied Kreipke's request to amend the complaint as futile.

IV. CONCLUSION

The judgment of the district court is **AFFIRMED**.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 15-1139

[Filed December 4, 2015]

CHRISTIAN KREIPKE,	)
Plaintiff - Appellant,	)
	)
v.	)
	)
WAYNE STATE UNIVERSITY,	)
Defendant - Appellee.	)
	)

Before: ROGERS and DONALD, Circuit Judges;
ROSE, District Judge.

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 12-14836

[Filed January 28, 2015]

UNITED STATES OF AMERICA ex rel. Christian Kreipke, and CHRISTIAN KREIPKE, an individual,	)
Plaintiffs,	)
v.	)
WAYNE STATE UNIVERSITY, and UNIVERSITY PHYSICIAN GROUP,	)
Defendants.	)

HON. AVERN COHN

ORDER DENYING PLAINTIFF'S MOTION TO ALTER OR AMEND JUDGMENT (Doc. 51)

This is a False Claims Act (FCA) case. Relator Christian Kreipke (Plaintiff) claims that Defendants Wayne State University (WSU) and University Physician Group (UPG) were involved in a conspiracy whereby false claims and false documents were presented to the United States Government in violation

of the FCA, 31 U.S.C. §§ 3729, et seq. Under state law, Plaintiff claims that WSU improperly terminated him in retaliation for his refusal to violate the law, and that the President of WSU, M. Roy Wilson, publicly defamed him. Neither President Wilson nor the Board of Governors of WSU is named as defendant.

On November 13, 2014, the Court entered a Memorandum and Order (the Order) (Doc. 49) granting in part and denying in part WSU's Motion to Dismiss (Doc. 28) and UPG's Motion to Dismiss (Doc. 29) and dismissing the case. Now before the Court is Plaintiff's Motion to Alter or Amend Judgment (Doc. 51). For the reasons that follow, Plaintiff's Motion is DENIED.

II. BACKGROUND

A.

The history of this case is detailed in the Court's prior Order (Doc. 49) and is not repeated here. The motion before the Court deals with Plaintiff's motion to alter or amend the judgment, the details of which are explained below.

B.

In July 2014, Defendant WSU filed a Motion to Dismiss (Doc. 28) arguing, *inter alia*, that Plaintiff's claims against WSU must be barred because WSU is an "arm of the state" enjoying Eleventh Amendment immunity.

In his Response (Doc. 35), in addition to arguing that WSU is not an "arm of the state," Plaintiff argued in the alternative that he should be allowed to amend the First Amended Complaint (Doc. 19) in order to add

two parties: WSU's Board of Governors and President Wilson. Plaintiff filed no formal motion for leave to amend the First Amended Complaint.

In the November 13, 2014, Order, the Court agreed with WSU and held, *inter alia*, that Plaintiff's claims were barred because WSU is an "arm of the state." The Court did not address Plaintiff's informal request to amend the First Amended Complaint. In the instant action, Plaintiff argues that, pursuant to Fed. R. Civ. P. 59(e), the judgment must be altered or amended because the Court made no ruling on his request.

III. STANDARD OF REVIEW

Fed. R. Civ. P. 59(e) may be used by a litigant seeking reconsideration of any prior ruling of the court. "A court may grant a Rule 59(e) motion to alter or amend if there is: (1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice." *Intera Corp. v. Henderson*, 428 F.3d 605, 620 (6th Cir. 2005) (citing *GenCorp, Inc. v. Am. Int'l Underwriters*, 178 F.3d 804, 834 (6th Cir. 1999)). "The purpose of Rule 59(e) is 'to allow the district court to correct its own errors, sparing the parties and appellate courts the burden of unnecessary appellate proceedings.' " *Howard v. United States*, 533 F.3d 472, 475 (6th Cir. 2008) (citation omitted). "A motion to alter or reconsider a judgment is an extraordinary remedy and should be granted sparingly because of the interests in finality and conservation of scarce judicial resources" *United States v. Limited, Inc.*, 179 F.R.D. 541, 547 (S.D. Ohio 1998) (citation omitted).

IV. DISCUSSION

Plaintiff argues that the Court's prior Order must be amended because the Court erred by failing to rule on his "motion" to amend. (See Doc. 51 at 3) Plaintiff's argument lacks merit.

Here, Plaintiff never properly filed a motion for leave to amend. Instead, as part of his response to WSU's Motion to Dismiss, he requested "in the alternative, if the Court finds for any reason that Plaintiff has insufficiently pled claims against Defendant based on a lack of specificity, then Plaintiff should be given his opportunity to amend his complaint in response to a motion to dismiss under Rule 9(b)." (Doc. 35 at 46). Therefore, the only contended "error" or "manifest injustice" is the Court's purported failure to rule on Plaintiff's request—not motion—for leave to further amend the First Amended Complaint.

In the Sixth Circuit, courts have repeatedly held that an informal request for leave to amend raised only in response to a motion to dismiss is procedurally improper, and must be denied. *See, e.g.*, *Grier v. Wayne Co. Circuit Court*, No. 06-14992, 2007 WL 1106143, at *3 (E.D. Mich. Apr. 12, 2007) (Cox, J.) (denying Plaintiff's request for leave to amend made in response to Defendant's motion to dismiss, and holding that "Plaintiff must file a separate motion for leave that includes the proposed amended complaint[]"); *New London Tobacco Mkt., Inc. v. Burley Stabilization Corp.*, No. 3:13-CV-122, 2013 WL 2112290, at *3 (E.D. Tenn. May 15, 2013) ("Plaintiff has not properly moved to amend its complaint by filing an actual motion. It is unacceptable for a litigant to bury a motion inside a brief. A motion must be filed as a separate,

freestanding document. For that reason alone, the court will deny leave to amend.").

Here, Plaintiff failed to properly file a motion for leave to amend the First Amended Complaint. Rather, he merely "requested" to amend as an argument presented in the alternative within his response to WSU's Motion to Dismiss. The Court has no duty to rule on requests not presented in accordance with the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 7(b)(1) (requiring that "[a] request for a court order must be made by motion"). In addition, assuming a motion for leave to amend had been properly filed and was pending before the Court at the time of the Order, the dismissal of the case on its merits would have effectively mooted the motion. Therefore, there is no "clear error of law" or "manifest injustice" that can be remedied by Plaintiff's motion.

V. CONCLUSION

For the above reasons, Plaintiff's Motion to Alter or Amend Judgment has been denied.

SO ORDERED.

s/Avern Cohn
AVERN COHN
UNITED STATES DISTRICT JUDGE

Dated: January 22, 2015

I hereby certify that a copy of the foregoing document was mailed to the attorneys of record on this date, January 22, 2015, by electronic and/or ordinary mail.

s/Sakne Chami
Case Manager, (313) 234-5160

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 12-14836

[Filed November 13, 2014]

UNITED STATES OF AMERICA ex rel. Christian Kreipke, and CHRISTIAN KREIPKE, an individual,	)
Plaintiffs,	)
v.	)
WAYNE STATE UNIVERSITY, and UNIVERSITY PHYSICIAN GROUP,	)
Defendants.	)

Hon: AVERN COHN

MEMORANDUM AND ORDER

GRANTING IN PART AND DENYING IN PART WAYNE STATE UNIVERSITY'S MOTION TO DISMISS AND FOR COSTS AND ATTORNEYS FEES (Doc. 28)

AND GRANTING
UNIVERSITY PHYSICIAN GROUP'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT (Doc. 29)

AND DISMISSING CASE

I. INTRODUCTION

This is a False Claims Act (FCA) case, with additional retaliatory discharge and defamation claims under state law. Relator Christian Kreipke (Plaintiff) claims that Defendants Wayne State University (WSU) and University Physician Group (UPG) were involved in a conspiracy whereby false claims and false documents were presented to the United States Government in order to receive payment for government sponsored reserach, in violation of the FCA, 31 U.S.C. §§ 3729, et seq. Under state law, Plaintiff claims that WSU improperly terminated him in retaliation for his refusal to violate the law, and that the President of WSU publicly defamed him. The President is not a named defendant.

The Amended Complaint is in seven counts: five under the FCA, and two under Michigan law. Counts I-III are against both WSU and UPG[1]:

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[1] In Plaintiff's Amended Complaint, Plaintiff brought all seven charges against both UPG and WSU. However, Plaintiff's now states that he will no longer pursue Counts IV to VII against UPG (Doc. 36 at 3), and voluntarily dismisses Count VI, Retaliatory Discharge in Violation of Public Policy (Doc. 35 at 4).

Count I: False Claims Act: Presentation of False Claims, 31 U.S.C. § 3729(a)(1)(A)[2]

Count II: False Claims Act: Making or Using a False Record or Statement, 31 U.S.C. § 3729(a)(1)(B)

Count III: False Claims Act: Conspiracy to Defraud, 31 U.S.C. § 3729(a)(1)(C)

Counts IV, V, and VII are against WSU only:

Count IV: False Claims Act: Reverse False Claims Act, 31 U.S.C. § 3729(a)(1)(G)

Count V: False Claims Act: Retaliation, 31 U.S.C. § 3730(h)

Count VII: Defamation as to WSU under MCL 600.2911, et seq.

As relief, Plaintiff seeks treble damages and civil penalties under the FCA, reasonable attorneys fees, costs, and expenses, injunctive relief to prevent further FCA violations, and that Defendant be ordered to take steps to restore Plaintiff's reputation in the scientific community.

Now before the Court is WSU's Motion to Dismiss and for Costs and Attorneys Fees (Doc. 28), and UPG's Motion to Dismiss Plaintiff's First Amended Complaint (Doc. 29). For the reasons that follow, WSU's Motion is

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[2] In Plaintiff's Amended Complaint, Plaintiff relied on outdated citations to the FCA. For example, Plaintiff cites to 31 U.S.C. § 3729(a)(1) for its allegations relating to the presentation of false claims. However, the FCA was amended in 2009, and the new provision is properly cited at § 3729(a)(1)(A).

GRANTED IN PART AND DENIED IN PART and UPG's Motion is GRANTED.

II. BACKGROUND

A.

Because the Court addresses Plaintiff's claims in response to Defendants' motions to dismiss, the facts as alleged in the Amended Complaint (Doc. 19) are accepted as true and summarized below.

B.

Plaintiff is a citizen of the United States and a resident of the State of Michigan. WSU is a state-funded university, whose School of Medicine is a major recipient of National Institutes of Health (NIH) funds in the form of federal grants and contracts, and receives substantial research funding from the United States government. UPG, a domestic non-profit corporation, is a closed-group physician practice serving WSU that, among other functions, attends to the billing for WSU's hospitals. Plaintiff was an Assistant Professor at WSU from 2008 until his termination in 2012. In 2010, Plaintiff was selected to serve on a committee responsible for auditing and investigating research grant procurement by WSU. (Doc. 19, ¶ 7, 9)

C.

With regard to WSU, Plaintiff claims that WSU has engaged in systemic fraud, taking part in a number of schemes in order to maximize reimbursement from the United States government for various federal grants

and contracts. The various schemes are summarized below:

- Inflating costs associated with particular grants in initial budget requests
- Inflating the percent of effort spent by personnel on particular grants, and allowing "Ghost Employees" to draw salaries from grants on which they were not working
- Inflating researchers' salaries in grant applications and disregarding government-mandated salary caps
- Omitting the time WSU researchers spent performing clinical, teaching, and service duties from grant application and reporting materials
- Wrongfully using federal funds to purchase equipment without reporting it to the United States government or refunding the government for wrongfully paid equipment purchases
- Inflating costs for animal care, surgical and histological supplies, and equipment maintenance

While serving on WSU's internal audit/investigation committee, Plaintiff found these abuses to be prevalent in WSU's research culture. Plaintiff claims that, despite being aware of the problem, WSU did nothing to correct it.

D.

With regard to UPG, Plaintiff claims that UPG was also engaged in systemic fraud. Specifically, Plaintiff says that WSU advised its employees that they were not required to report "UPG time and income" associated with a particular grant. In addition, Plaintiff

says that UPG submitted bills to Medicare for services rendered by Plaintiff's research, despite the fact that Plaintiff's grants did not involve human subjects.

E.

In March 2014, the United States declined to intervene in the case and the Complaint was unsealed and made public. (Doc. 17, 18) In response to this, the President of WSU authored a commentary that was published in the Detroit Free Press in April 2014. In the article, the President of WSU publicly addressed Plaintiff's case, stating that it was without merit and noting that Plaintiff had himself been investigated by the Federal Office of Research Oversight. Plaintiff demanded that WSU retract the disparaging statements; no retraction was issued. Plaintiff says that he has suffered severe economic and noneconomic damages as a result of the President's public statements.

F.

Following the unsealing of the Complaint, Plaintiff filed an Amended Complaint (Doc. 19), to which UPG and WSU filed the Motions to Dismiss.

III. LEGAL STANDARDS

A. Pleading Standard Under Rule 12(b)(6)

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) tests the sufficiency of a complaint. To survive a Rule 12(b)(6) motion to dismiss, the complaint's "factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the allegations in the complaint are true." *Bell*

Atlantic Corp. v. Twombly, 550 U.S. 544, 545 (2007). *See also Ass'n of Cleveland Fire Fighters v. City of Cleveland, Ohio,* 502 F.3d 545, 548 (6th Cir. 2007). The Court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks and citation omitted).

Moreover, "[o]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Id.* at 679. Thus, "a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Id.* "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.* In sum, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face." *Id.* at 678 (internal quotation marks and citation omitted).

B. Elements of a *Qui Tam* Claim

The FCA is an anti-fraud statute prohibiting the knowing submission of false or fraudulent claims to the federal government. Under the FCA, liability may be imposed when

> (1) a person presents, or causes to be presented, a claim for payment or approval; (2) the claim is false or fraudulent; and (3) the person's acts are undertaken "knowingly," i.e., with actual

> knowledge of the information, or with deliberate ignorance or reckless disregard for the truth or falsity of the claim.

U.S. ex rel. Bledsoe v. Cmty. Health Sys., Inc., 342 F.3d 634, 643 (6th Cir. 2003) (*Bledsoe I*) (citing § 3729(a)(1), (b)). Liability is also imposed for conspiracy to defraud the Government. § 3729(a)(1)(C). In addition, there is liability for a "reverse false claim," where a person knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government. § 3729(a)(1)(G)*; Chesbrough v. VPA, P.C.*, 655 F.3d 461, 466 (6th Cir. 2011).

C. Pleading Standard Under Rule 9(b)

"Because the basis for a *qui tam* action is *fraud* in the filing of claims against the government, we have held, as have other circuit courts in FCA cases, that allegations in the complaint must comply with the particularity requirements of Federal Rule of Civil Procedure 9(b)." *Sanderson v. HCA-The Healthcare Co.*, 447 F.3d 873, 876-77 (6th Cir. 2006); *see also Chesbrough*, 655 F.3d at 466 ("Complaints alleging FCA violations must comply with Rule 9(b)'s requirement that fraud be pled with particularity because 'defendants accused of defrauding the federal government have the same protections as defendants sued for fraud in other contexts.'") (quoting *Yuhasz v. Brush Wellman, Inc.*, 341 F.3d 559, 563 (6th Cir. 2003)).

The purpose of Rule 9(b) is "to alert defendants 'as to the particulars of their alleged misconduct' so that

they may respond." *Chesbrough*, 655 F.3d at 466 (quoting *United States ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 501 F.3d 493, 503 (6th Cir. 2007) (*Bledsoe II*). "To plead fraud with particularity, the plaintiff must allege (1) 'the time, place, and content of the alleged misrepresentation,' (2) 'the fraudulent scheme,' (3) the defendant's fraudulent intent, and (4) the resulting injury." *Id.* at 467 (quoting *Bledsoe II*, 501 F.3d at 504). The *qui tam* complaint must therefore "identify specific parties, contracts, or fraudulent acts," and "may not rely upon blanket references to acts or omissions by all of the 'defendants,'" *Bledsoe I,* 342 F.3d at 643 (citing *Yuhasz*, 341 F.3d at 564). Although "fraud may be pled on information and belief when the facts relating to the alleged fraud are peculiarly within the perpetrator's knowledge, the plaintiff must still set forth the factual basis for his belief." *Bledsoe II*, 501 F.3d at 512 (quoting *United States ex rel. Williams v. Bell Helicopter Textron Inc.*, 417 F.3d 450, 454 (5th Cir. 2005)). Thus, Rule 9(b) imposes a heightened pleading standard, "designed to prevent 'fishing expeditions,' to protect defendants' reputations from allegations of fraud, and to narrow potentially wide-ranging discovery to relevant matters." *Id. at 467* (citing *Bledsoe II*, 501 F.3d at 503 n.11; *United States ex rel. SNAPP, Inc. v. Ford Motor Company*, 532 F.3d 496, 504 (6th Cir. 2008)).

IV. DISCUSSION

A. UPG's Motion to Dismiss

Generally, UPG argues that the Amended Complaint fails to plead any claim with the specificity required under Rule 9(b). UPG says that Plaintiff has failed to identify the time, place, and content of even a single alleged misrepresentation by UPG. UPG further

notes that the most specific allegation of fraud by UPG is based on Plaintiff's "information and belief"; however, the Amended Complaint provides no information upon which this belief is based. In addition, not a single page of Plaintiff's 739-page attached exhibits mentions UPG; nor does Plaintiff allege that UPG submitted any false claim with the intent required under the FCA.

1. FCA Counts I and II

Counts I and II of the Amended Complaint assert the presentation of false claims, § 3729(a)(1)(A), and the making or using of a false record or statement, § 3729(a)(1)(B), respectively. In essence, Plaintiff alleges that UPG has engaged in systemic misrepresentation in order to secure payment for false or fraudulent claims from the Government.

As noted, pleading under the FCA must meet stringent particularity requirements. Here, Plaintiff has not alleged that UPG presented any false claim to the government. Throughout the Amended Complaint, Plaintiff alleges very generally that the "Defendants" engaged in fraudulent activity. Such blanket references are insufficient under Rule 9(b). *Bledsoe I,* 342 F.3d at 643.

Plaintiff's most specific claim with respect to UPG alleges that UPG submitted bills to Medicare for MRI tests that did not involve human subjects. However, this was based only upon Plaintiff's "information and belief," and Plaintiff provides no factual basis for this belief. Plaintiff attaches exhibits that supposedly show evidence of "grossly inflated" MRI costs as examples of UPG's misconduct (Doc. 19 at 13-14). However, none of

these exhibits refer to UPG or otherwise indicate that these costs were billed to Medicare. (Doc. 19, Ex. I; Ex. J at 5, 10). Accordingly, Counts I and II fail the particularity requirements of Rule 9(b).

2. FCA Count III

In Count III, brought under § 3729(a)(1)(C), Plaintiff claims that UPG conspired with WSU to defraud the government of funds for specific grants and research. Here too, Plaintiff cannot succeed.

As with Plaintiff's other claims under the FCA, Plaintiff must plead with particularity that UPG conspired to commit a violation of the FCA. To establish conspiracy under the FCA, a plaintiff must show that "(1) there was a single plan to get a false claim paid, (2) the alleged coconspirators shared in the general conspiratorial objective to get a false claim paid, and (3) one or more conspirators performed an overt act in furtherance of the conspiracy to get a false claim paid." *U.S. ex rel. Howard v. Lockheed Martin Corp.*, 499 F. Supp. 2d 972, 980 (S.D. Ohio 2007); *see also United States v. Murphy*, 937 F.2d 1032, 1039 (6th Cir. 1991) (applying these criteria from the civil conspiracy context to the FCA).

Plaintiff fails to allege that UPG conspired with sufficient particularity. In the Amended Complaint, Plaintiff pleads no specific facts showing the existence of an agreement or plan between UPG and WSU to defraud the government. Nor are there any purported facts supporting the existence of any shared objective, nor any specific act in furtherance. Plaintiff offers no support, other than generalized statements that the "Defendants" conspired with one another. Plaintiff's

allegation of conspiracy therefore fails to state a claim under the FCA.

3.

With respect to UPG, Plaintiff's Amended Complaint fails to state a claim for relief sufficient to survive a motion to dismiss under Rule 12(b)(6), and further fails the particularity requirements of Rule 9(b). UPG's motion has therefore been granted.

B. WSU's Motion to Dismiss

WSU argues several reasons for dismissal. First, WSU says that Plaintiff's claims under the FCA are barred because WSU is not a "person" under the Act. Second, WSU says that, even if it is subject to liability under the FCA, Plaintiff's claims fail for lack of particularity under Rule 9(b). Third, WSU says that Plaintiff's state law claims are barred under the Michigan Governmental Tort Liability Act (GTLA). Finally, WSU says that all of Plaintiff's claims are barred by Eleventh Amendment Immunity.

WSU's reasons for dismissal are persuasive. Because the analysis of whether WSU is a "person" under the FCA is coextensive with the Eleventh Amendment "arm of the state" analysis, and because Eleventh Amendment immunity bars all Plaintiff's claims against WSU, Plaintiff cannot prevail.

1. FCA Counts I - V

The FCA imposes civil liability upon "any *person*" who, *inter alia*, "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval" to the United States Government. 31 U.S.C.

§ 3729(a)(1)(A) (emphasis added). For Plaintiff to plead a cause of action under the FCA, he must establish that WSU is a "person" under the statute.

In *Vermont Agency of Natural Res. v. U.S. ex rel. Stevens*, the United States Supreme Court held that under the FCA, a state or a state agency is not a "person" subject to liability. 529 U.S. 765, 787-88 (2000), *id.* at 780 ("We must apply to this text our longstanding interpretive presumption that 'person' does not include the sovereign."). The Supreme Court came to this conclusion as a matter of statutory interpretation, construing the statute "to avoid difficult constitutional questions" of Eleventh Amendment sovereign immunity. *Id.* at 787. Although the Supreme Court did not reach the question of "whether an action in federal court by a *qui tam* relator against a State would run afoul of the *Eleventh Amendment*," *id.* at 787 (emphasis added), the Supreme Court noted the "virtual coincidence of scope" between a sovereign's liability under the FCA and the Eleventh Amendment. *Id.* at 780. Thus, whether a state or state agency is subject to liability under the FCA is coextensive with—albeit separate from—whether the agency enjoys sovereign immunity under the Eleventh Amendment.

Based on *Stevens*, federal courts across the country have dismissed FCA claims against state colleges and universities and their governing bodies, or affirmed such dismissal, reasoning that they are "arms of the state" and therefore not "persons" under the FCA. *See, e.g.*, *United States v. Solinger*, 457 F. Supp. 2d 743, 755 (W.D. Ky. 2006) (holding that "the University of Louisville is a Kentucky state agency to which sovereign immunity applies" and is therefore not a

"person" under the FCA); *U.S. ex rel. Adrian v. Regents of Univ. of California*, 363 F.3d 398, 402 (5th Cir. 2004) (affirming dismissal of FCA claims against the University of California Board of Regents because it is a state agency and "the FCA does not provide a cause of action against state agencies").

In the Sixth Circuit, "[t]o determine whether an entity is an arm of the state, courts have traditionally looked to several factors, including: (1) whether the state would be responsible for a judgment against the entity in question; (2) how state law defines the entity; (3) what degree of control the state maintains over the entity; and (4) the source of the entity's funding." *S.J. v. Hamilton County*, 374 F.3d 416, 420 (6th Cir. 2004). With respect to universities, courts have also looked to factors such as "whether payment of judgment would be out of state funds, whether the institution was created by statute or state constitution, to what extent the institution is supported by state funds, and what degree of independence the officers of the institution have." *Williams v. Michigan State Univ.*, 1:93-CV-72, 1994 WL 617272 (W.D. Mich. Jan. 3, 1994) (citing *Estate of Ritter v. University of Mich.*, 851 F.2d 846 (6th Cir. 1988)).

Under this analysis, WSU is properly considered an "arm of the state." WSU is a public university created by the Michigan Constitution. Mich. Const. art. VIII, § 5. It receives funding from the State and is accountable to the State for income and expenditures. *Id.* at § 4. WSU is established and maintained under State law, M.C.L. § 390.641, and it receives funds directly from the State's general fund. M.C.L. § 390.649. Most importantly, any judgment against

WSU will be paid out of the state's tax revenues. M.C.L. § 600.6095; *cf. U.S. ex rel. Moore v. Univ. of Michigan*, 860 F. Supp. 400, 403 (E.D. Mich. 1994) (noting that under § 600.6095, "any judgment against the University will be paid out of the State's tax revenues"). In addition, federal courts in the Sixth Circuit have consistently held that WSU is an "arm of the state" under an Eleventh Amendment analysis. *See, e.g.*, *Johnson v. Wayne State Univ.*, 06-13636, 2006 WL 3446237, at *3 (E.D. Mich. Nov. 27, 2006) (holding that because WSU is a state university, it is "an 'arm of the state' entitled to Eleventh Amendment immunity"); *Rainey v. Wayne State Univ.*, 26 F. Supp. 2d 973, 976 (E.D. Mich. 1998) (holding that WSU is an "arm or alter ego" of the state because the plaintiff's claims "would require payments from the State's coffers").

Because WSU is an "arm of the state," it cannot be a "person" under the FCA. Counts I - V therefore fail to state a plausible claim for relief.

2. Count VII, Defamation Under State Law

Plaintiff conflates the President of WSU with WSU itself. Assuming WSU is somehow liable for the President's statement, the Court will consider Plaintiff's claim of defamation as to WSU.

However, because WSU is an "arm of the state," its immunity extends to claims under state law as well. *See VIBO Corp. v. Conway*, 669 F.3d 675, 691 (6th Cir. 2012) ("The Eleventh Amendment to the U.S. Constitution grants immunity to states from litigation on state law claims in federal court."). Thus, Plaintiff's defamation claim against WSU cannot prevail.

V. CONCLUSION

For the above reasons, WSU's Motion to Dismiss and for Costs and Attorneys Fees has been granted in part and denied in part,[3] and UPG's Motion to Dismiss Plaintiff's First Amended Complaint has been granted. This case is DISMISSED.

SO ORDERED.

S/Avern Cohn
AVERN COHN
UNITED STATES DISTRICT JUDGE

Dated: November 13, 2014

I hereby certify that a copy of the foregoing document was mailed to the attorneys of record on this date, November 13, 2014, by electronic and/or ordinary mail.

S/Sakne Chami
Case Manager, (313) 234-5160

[3] WSU's Motion to Dismiss (Doc. 28) additionally asks for costs and attorneys fees; however, it provides no arguments in support. This request is therefore DENIED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 12-14836

[Filed November 13, 2014]

UNITED STATES OF AMERICA ex rel. Christian Kreipke, and CHRISTIAN KREIPKE, an individual,	)
Plaintiff,	)
v.	)
WAYNE STATE UNIVERSITY, and UNIVERSITY PHYSICIAN GROUP,	)
Defendant.	)

HONORABLE AVERN COHN

JUDGMENT

For the reasons stated in the Memorandum and Order entered on November 13, 2014 judgment is entered in favor of defendants and against plaintiff and the case is DISMISSED.

DAVID WEAVER

By: s/Sakne Chami
Depty Clerk

Dated: November 13, 2014

I hereby certify that a copy of the foregoing document was mailed to the attorneys of record on this date, November 13, 2014, by electronic and/or ordinary mail.

s/Sakne Chami
Case Manager, (313) 234-5160

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 15-1139

[Filed February 19, 2016]

CHRISTIAN KREIPKE, Plaintiff-Appellant,	)
v.	)
WAYNE STATE UNIVERSITY, Defendant-Appellee.	)

BEFORE: ROGERS and DONALD, Circuit Judges; ROSE, District Judge.[*]

O R D E R

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

[*] The Honorable Thomas M. Rose, United States District Judge for the Southern District of Ohio, sitting by designation.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX E

Constitutional and Statutory Provisions

U.S. Const. amend. XI

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.

31 U.S.C. § 3729 - False claims

(a) Liability for Certain Acts.—

(1) In general.—Subject to paragraph (2), any person who—

(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

(C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);

(D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;

(E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or

(G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990, plus 3 times the amount of damages which the Government sustains because of the act of that person.

(2) Reduced damages.—If the court finds that—

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after

the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation,

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of that person.

(3) Costs of civil actions.—

A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Definitions.—For purposes of this section—

(1) the terms "knowing" and "knowingly"—

(A) mean that a person, with respect to information—

(i) has actual knowledge of the information;

(ii) acts in deliberate ignorance of the truth or falsity of the information; or

(iii) acts in reckless disregard of the truth or falsity of the information; and

(B) require no proof of specific intent to defraud;

(2) the term "claim"—

(A) means any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that—

(i) is presented to an officer, employee, or agent of the United States; or

(ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest, and if the United States Government—

(I) provides or has provided any portion of the money or property requested or demanded; or

(II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded; and

(B) does not include requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or as an income subsidy with no restrictions on that individual's use of the money or property;

(3) the term "obligation" means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment; and

(4) the term "material" means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

(c) Exemption From Disclosure.—

Any information furnished pursuant to subsection (a)(2) shall be exempt from disclosure under section 552 of title 5.

(d) Exclusion.—

This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.