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No. ~~08~~ OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION AUTHORITY,
Petitioner,

v.

ALLISON COOPER, *et al.*,
Respondents.

**Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit**

PETITION FOR A WRIT OF CERTIORARI

CATHERINE E. STETSON
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5491

THOMAS S. BIEMER*
JOSEPH H. JACOVINI
DILWORTH PAXSON LLP
1500 Market Street
Suite 3500E
Philadelphia, PA 19102
(215) 575-7000

*Counsel of Record

Counsel for Petitioner

QUESTION PRESENTED

Whether an entity created by a State enjoys sovereign immunity under the Eleventh Amendment where the entity (i) is authorized by State statute to “exercise the public powers” of the State “as an agency and instrumentality thereof,” (ii) is recognized by its enabling act and the State Supreme Court as enjoying sovereign immunity under State law, and (iii) is receiving substantial annual subsidies from the State to fund the entity’s public mission?

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the Court whose judgment is the subject of this petition is as follows:

Defendant-Appellant and Petitioner: Southeastern Pennsylvania Transportation Authority.

Plaintiff-Appellee and Respondent: Allison Cooper, on behalf of herself and all others similarly situated.

RULE 29.6 STATEMENT

Petitioner states that it has no parent companies and no publicly held company that owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Southeastern Pennsylvania Transportation Authority (“SEPTA”) respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on November 26, 2008.

OPINIONS BELOW

The opinion of the Third Circuit is reported at 548 F.3d 296, and appears in the Appendix hereto at

pages 1a-34a. The District Court's opinion is reported at 474 F. Supp. 2d 720 (E.D. Pa. 2007), and appears in the Appendix hereto at pages 35a-50a.

JURISDICTION

The Court of Appeals issued its judgment on November 26, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Eleventh Amendment to the United States Constitution provides: "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."

INTRODUCTION

The issue presented in this case is what deference federal law should accord a sovereign State in structuring and characterizing elements of state government. Where a sovereign State explicitly designates an agency it creates as a state agency entitled to sovereign immunity, provides substantial annual funding to the agency and exercises significant control over its affairs, a federal court should accord that designation substantial deference if federalism is to maintain its relevance. Yet the Third Circuit denied Eleventh Amendment immunity to just such an agency.

SEPTA's challenge to the Third Circuit's decision is particularly timely. Modern state governments are

besieged by the twin forces of increased demand for services and dwindling resources. States need the flexibility to create and structure state entities that will render government services more efficiently. And when they do so, States should have some degree of certainty that an express intent to cloak some of those entities in its own sovereignty will be honored. Unfortunately, the current state of Eleventh Amendment jurisprudence among the circuit courts provides little certainty. Even more troubling is the wide divergence of tests utilized by the circuits that make some States more sovereign than others. Thus, this case presents an ideal vehicle to provide guidance and uniformity with respect to a confusing yet fundamental aspect of sovereign immunity.

STATEMENT OF THE CASE

A. Facts

SEPTA is a Metropolitan Transportation Authority created by statute to operate a mass transit system within Philadelphia and its four contiguous counties. 74 Pa. C.S. §§ 1701-1785. SEPTA's enabling act provides that SEPTA "shall exercise the public powers of the Commonwealth as an agency and instrumentality thereof." *Id.* at § 1711(a). SEPTA's enabling act also explicitly provides that SEPTA is entitled to sovereign immunity. *Id.* at § 1711(c)(3).

SEPTA is not, and was not intended to be, self sufficient. It was purposefully structured by the Commonwealth so that its fare revenues would not cover its costs. When it was created, half of SEPTA's operating costs were to be funded by Commonwealth

and other governmental sources, with the other half generated by operating revenue. *See* Ct. App. J.A. 413.¹ The annual funding provided by the Commonwealth is not insignificant: SEPTA was scheduled to receive more than \$625 million from Pennsylvania in fiscal year 2006 alone. Ct. App. J.A. 30.

Despite significant state subsidies, SEPTA's structural operating budget deficits have continued to increase. As a consequence, in the past several years, the Commonwealth has been forced three times to close SEPTA's budget gap through additional funding. Ct. App. J.A. 27, 28.

Increased Commonwealth funding has also led to increased Commonwealth control. *See* 74 Pa. C.S. § 1301, *et seq.* These controls include accounting and audit rights over SEPTA's operating and capital budgets together with periodic reviews by the Commonwealth of SEPTA's programs and services. *Id.* at §§ 1303, 1310-1315.² The Commonwealth also

¹ "Ct. App. J.A." refers to the Appendix filed with the Court of Appeals.

² After briefing in the Third Circuit but before oral argument, Pennsylvania enacted Act 44, 74 Pa. Cons. Stat. §§ 1501-1520. Act 44 replaced the provisions contained in Chapter 13 of Title 74 (§§ 1301-1315) ("Act 26"). Under the repealed Act 26, Pennsylvania had determined the level of distribution for entities such as SEPTA. Under the new Act 44, Pennsylvania set a base amount to be distributed to such entities (in SEPTA's case \$250 million) subject to increase upon request. The Circuit Court observed that Act 26 and Act 44 had increased Pennsylvania's "level of oversight" since Act 26's initial enactment in 1991. Pet. App. 29a.

severely limits SEPTA's ability to manage any operating deficit or to fund an adverse judgment. For example, SEPTA cannot generally raise fares or cut service without complying with a lengthy and costly public notice and hearing process. *Id.* at § 1741(a)(15).

B. Proceedings Below

1. Respondent Allison Cooper initiated this action seeking to represent two classes of SEPTA bus drivers whom she alleged had been denied overtime in violation of the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* ("FLSA").³ The jurisdiction of the District Court was invoked under 28 U.S.C. § 1331.

SEPTA moved to dismiss the complaint on the ground that Cooper's FLSA claim was barred because SEPTA is an arm of the state entitled to sovereign immunity under the Eleventh Amendment. SEPTA's assertion of sovereign immunity was based, in large part, on the dignity interest of the Commonwealth of Pennsylvania. As SEPTA explained, sovereignty entails the States' right to govern themselves and to order their own affairs, including their ability to create, structure and characterize their own agencies. SEPTA contended that it would offend the Commonwealth's dignity interest to ignore an explicit designation that SEPTA is a state entity cloaked with the Commonwealth's sovereign immunity. SEPTA also

³ Plaintiff also asserted, but later abandoned, several state law causes of action.

pointed to the practical ramifications of a judgment. While the Commonwealth does not have legal liability for SEPTA's debts, SEPTA's structure, and recent history, demonstrate that the Commonwealth treasury would, as a practical matter, be impacted by an adverse judgment.

2. Because the Third Circuit had held in 1991 that SEPTA was not an arm of the state in *Bolden v. SEPTA*, 953 F.2d 807 (3rd Cir. 1991) (en banc), *cert. denied*, 504 U.S. 943 (1992), SEPTA explained how later precedents called that decision into serious question. The *Bolden* Court applied a three-part balancing test set forth in a previous opinion, *Fitchik v. New Jersey Transit Rail Operations*, 873 F.2d 655 (3d Cir.) (en banc), *cert. denied*, 493 U.S. 850 (1989). The three *Fitchik* factors were (1) state treasury (*i.e.*, how much funding came from the state); (2) status under state law (*i.e.*, how did the State itself treat the entity); and (3) autonomy (*i.e.*, how much independence from the State did the entity possess). The *Bolden* court, like *Fitchik*, declared that the state-treasury factor was "the 'most important'" of the three. *Bolden*, 953 F.2d at 818 (quoting *Fitchik*, 873 F.2d at 659). With that thumb on the scale, and because just over a quarter of SEPTA's funding came from the Commonwealth at that time, the *Bolden* court concluded that SEPTA was not entitled to sovereign immunity. 953 F.2d at 821. Two judges dissented and would have held that SEPTA was entitled to Eleventh Amendment immunity. *Id.* at 831-832 (Greenberg, J., dissenting, joined by Hutchinson, J.). Of particular importance to the

dissenters was SEPTA's unambiguous status under state law as a Commonwealth agency. *Id.* at 832.⁴

Eleventh Amendment jurisprudence has changed significantly since the split decision in *Bolden*. See *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743 (2002); *Regents of Univ. of Cal. v. Doe*, 519 U.S. 425 (1997); *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994). This Court's subsequent opinions had made clear that the "preeminent purpose" of sovereign immunity is to protect the States' dignity interest as sovereigns. *Federal Maritime Comm'n*, 535 U.S. at 760. Further, *Hess* instructed that the critical first question in respecting the States' dignity is whether there was "good reason to believe" that the agency had been structured by the State to enjoy the State's sovereign immunity. *Hess*, 513 U.S. at 43-47 (quoting *Lake County Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979)). Here, the answer to that critical question was clear.

Material facts with respect to SEPTA had changed in the intervening years since *Bolden* as well. For example, the percentage of funding SEPTA received from the Commonwealth had increased from approximately 27% to 52% since 1991. In addition, the Commonwealth had been forced in the last three years to provide additional funding to close SEPTA's structural operating budget deficit. Finally, the

⁴ In *Fitchik* the Court of Appeals held that New Jersey Transit was not entitled to sovereign immunity. Five judges dissented and would have recognized sovereign immunity.

Commonwealth has increased its supervision over SEPTA since the decision in *Bolden*.

The District Court denied SEPTA's motion to dismiss utilizing the three factors developed in *Fitchik* and applied in *Bolden*. The District Court recognized that the Commonwealth treats SEPTA as a Commonwealth agency entitled to sovereign immunity. Nevertheless, the lower court found that because SEPTA also has a separate corporate existence and SEPTA can sue and be sued its status under state law only weighed "slightly" in favor of immunity. The District Court then mechanically applied the other two factors, concluding that SEPTA was not entitled to be treated as an arm of the state for purposes of Eleventh Amendment immunity. In doing so, the lower court relied primarily on the fact that the Commonwealth is not legally obligated to pay SEPTA's debts and that the Commonwealth appoints only a minority of SEPTA's directors.

SEPTA appealed the District Court's adverse immunity ruling to the U.S. Court of Appeals for the Third Circuit. SEPTA's interlocutory appeal was taken pursuant to 28 U.S.C. § 1291 and *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144-145 (1993) (order denying Eleventh Amendment immunity is immediately appealable under the collateral order doctrine). The Third Circuit affirmed. While the Third Circuit recognized that this Court's jurisprudence no longer permitted primary importance to be accorded the treasury factor, and that since 1991 SEPTA received a greater proportion of its funding from the Commonwealth and that the Commonwealth had

increased its control over SEPTA's operations, the Circuit Court, applying the same three *Fitchik* factors in substantially the same manner as the District Court, nevertheless concluded that SEPTA was not entitled to Eleventh Amendment immunity.

SEPTA petitions this Court for review of the Third Circuit's decision holding that an entity specifically structured as a state agency intended by the State to be cloaked with sovereign immunity and requiring substantial annual subsidies from the State to survive is not entitled to be treated as an arm of the state for purposes of Eleventh Amendment immunity.

REASONS FOR GRANTING THE WRIT

As this Court has recognized, core principles of federalism mandate that States be accorded the dignity inherent in their status as sovereigns. Fundamental to that status is the ability of the States to structure and order their own affairs. Indeed, our dual system wisely preserves the States' ability to govern as they deem fit, allowing the States to serve as "laborator[ies]" where they "remould, through experimentation, * * * economic practices and institutions to meet changing social and economic needs." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting); see also *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 607-608 (1991). These tenets are reflected in the Eleventh Amendment and this Court's decisions thereunder.

The Third Circuit's holding is directly contrary to these fundamental principles. By mechanically

applying a multi-factor test, the Circuit Court improperly marginalized the specific intent of the sovereign in ordering its own affairs. Where, as here, a State explicitly structures an entity to be a state agency intended to be cloaked with the State's sovereign immunity, that structure should be accorded a high degree of deference if the State's dignity as a sovereign is to be respected.

Further, where the State has structured the entity so that it will require substantial annual subsidies from the State in order to survive, the Eleventh Amendment's purpose of protecting the state treasury is also implicated. The Circuit Court's narrow focus on ultimate legal liability improperly ignores the common sense reality of a judgment on an entity such as SEPTA.

The Third Circuit's holding is also directly at odds with multiple decisions of the Pennsylvania Supreme Court recognizing that SEPTA is a Commonwealth agency entitled to sovereign immunity. This Court has consistently recognized that cooperative judicial federalism requires that decisions of a State's highest court on issues of state law be treated with deference and represent the will of the sovereign. *See Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974); *Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C. J., concurring).

The Circuit Court's ruling underscores a more widespread problem among the circuits. In an effort to separate arms of the state entitled to Eleventh Amendment immunity from local political subdivisions which are not, the circuit courts have

adopted tests employing a number of factors which vary from circuit to circuit. See generally 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 (1992). The factors do overlap to some extent, however, the circuits are split as to which, if any, of the factors are entitled to more weight. Indeed, Justice O'Connor noted the problem in her dissent in *Hess*:

The Court wisely recognizes that the six-factor test set forth in *Lake County*, *supra*, ostensibly a balancing scheme, provides meager guidance for lower courts when the factors point in different directions. Without any indication from this Court as to the weight to ascribe particular criteria, the Courts of Appeals have struggled, variously adding factors * * * distilling factors * * *, and deeming certain factors dispositive. [513 U.S. at 59 (O'Connor, J., dissenting) (internal citations omitted)].

Even though *Hess* attempted to provide some guidance,⁵ the circuit court tests continue to vary widely. See Hector G. Blaudell, *Twins or Triplets?: Protecting The Eleventh Amendment Through A*

⁵ *Id.* at 47 (noting that when the factors point in different directions the inquiry should focus on the twin reasons for sovereign immunity: protecting the dignity and treasury of the State).

Three-Prong Arm-of-the-State Test, 105 Mich. L. Rev. 837, 844-845, 864 (2007) (outlining continued disarray among the circuits after *Hess*) (hereinafter “*Twins or Triplets*”). As a consequence, the application of the Eleventh Amendment differs from circuit to circuit.

This Court should grant certiorari to address the pivotal role of the States in structuring, construing and cloaking their own entities with their sovereign immunity and to provide needed uniformity in the application of the Eleventh Amendment.

I. THE THIRD CIRCUIT’S FORMALISTIC APPLICATION OF A MULTI-FACTOR TEST CONFLICTS WITH THE DECISIONS OF THIS COURT.

A. The Court’s Modern Eleventh Amendment Jurisprudence Emphasizes The Dignity Of The State As Sovereign While Not Ignoring The Practical Impact On The State Treasury Of A Judgment.

“Dual sovereignty is a defining feature of our Nation’s constitutional blueprint.” *Federal Maritime Comm’n*, 535 U.S. at 751. This federalist principle, “requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation.” *Alden v. Maine*, 527 U.S. 706, 748 (1999). Consequently, States retain “a residuary and inviolable sovereignty” and are “not relegated to the role of mere provinces or political corporations, but

retain the dignity, though not the full authority, of sovereignty.” *Id.* at 715 (internal citation omitted).

An integral component of the States’ “residuary and inviolable sovereignty * * * is their immunity from private suits.” *Federal Maritime Comm’n*, 535 U.S. at 751-752 (citations omitted). Indeed, this Court has explicitly recognized that “the preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities.” *Id.* at 760.

A State’s immunity from suit is reflected, in part, in the Eleventh Amendment. Sovereign immunity under the Eleventh Amendment also extends to “certain actions against state agents and state instrumentalities” as well as to the States themselves. *Doe*, 519 U.S. at 429.⁶ On the other hand, this Court “has consistently refused to construe the [Eleventh] Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a ‘slice of state power.’” *Lake County Estates*, 440 U.S. at 401 (citing *Mt. Healthy City Sch. Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274 (1977)).

The Court’s modern jurisprudence under the Eleventh Amendment starts with the *Mt. Healthy* case. *Mt. Healthy* involved a local school board. Noting that the Eleventh Amendment does not extend to municipal corporations or other political

⁶ This Court has expressly held that a State’s sovereign immunity under the Eleventh Amendment precludes an action under the FLSA. *Alden*, 527 U.S. at 759.

subdivisions, this Court necessarily focused first on the “nature of the entity created by state law.” 429 U.S. at 280. Concluding that state law rendered the school board in questions more like a county or city than an arm of the state, this Court held the Eleventh Amendment did not apply.⁷ *Id.* at 280-281.

Two years later, in *Lake County Estates*, this Court considered whether an agency formed through a bi-state compact between California and Nevada was entitled to sovereign immunity. Focusing first on the sovereign’s intent, this Court noted that “[u]nless there is good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves, and that Congress concurred in that purpose,” there would be no justification to extending sovereign immunity to that agency. 440 U.S. at 401. Significantly, both States disclaimed any intent to confer immunity. *Id.*

Additionally, certain non-exclusive factors germane to the arm-of-the-state analysis were identified, including how the agency is characterized under state law, the level of control exercised by the State, the entity’s relationship to the public treasury—both the size of the State’s subsidy and whether the State is legally liable for the entity’s debts—and whether the entity performs a state function. *Id.* at 401-402. Given the intention of the founding States, together with the terms of the

⁷ A number of additional factors were considered, such as the level of guidance and funding from the State and whether the school board had revenue raising power. *Id.*

compact and the actual operations of the agency, this Court concluded that Eleventh Amendment immunity did not apply. *Id.* at 402.

In 1994, the Court again addressed the application of the Eleventh Amendment to a bi-state agency in *Hess*.⁸ After noting that the initial adoption of the Eleventh Amendment was in response to the States' fear that federal courts would force them to pay their Revolutionary War debts, this Court observed that "[m]ore pervasively, current Eleventh Amendment jurisprudence emphasizes the integrity retained by each State in our federal system * * *." 513 U.S. at 39 (internal citations omitted). In order to respect that integrity, the Court asked the question posed earlier in *Lake Country Estates*: whether there was "good reason to believe" that the agency had been structured by the States "to enjoy Eleventh Amendment immunity." *Id.* at 47.

As to the potential financial impact of a judgment on the States, *Hess* observed that the authority was entirely self sufficient and financially independent of its founding States. In fact, this Court specifically contrasted the situation in *Hess* with that of "an interstate transit system whose revenue shortfall Congress and the cooperating States anticipated from the start, an enterprise constantly dependent on funds from the participating governments to meet its sizable operating deficits." *Id.* at 49-50.

⁸ The logic and teachings of *Hess* were not available to the Third Circuit when it decided *Bolden* in 1991.

In sum, while looking to a number of factors in making the arm-of-the-state determination in *Hess*, the Court was guided by the twin reasons for the Eleventh Amendment: protecting against threats to the States' dignity interest as well as the effect of a judgment on the state treasury. *Id.* at 47.

Cases after *Hess* have further clarified the application of the Eleventh Amendment. For example, in 1997, this Court acknowledged that sovereign immunity may be found even when the judgment has no potential impact on the state treasury. *Doe*, 519 U.S. at 429. In *Doe*, any potential judgment would have been paid out of federal funds, however, this Court reiterated that the proper focus on the arm of the state inquiry is "the relationship between the State and the entity in question * * * and the 'nature of the entity created by state law.'" *Id.* (emphasis added and internal citations omitted).

Finally, in 2002, this Court explicitly recognized that the preeminent purpose of sovereign immunity is to accord the States the dignity they are entitled to as sovereign. *Federal Maritime Comm'n*, 535 U.S. at 760; *see also id.* at 765 ("While state sovereign immunity serves the important function of shielding state treasuries and thus preserving 'the States' ability to govern in accordance with the will of the citizens' * * *, the doctrine's central purpose is to accord the States the respect owed them as joint sovereigns.") (internal quotation marks and citations omitted). Thus, this Court's recent arm of the state cases have stressed the importance of protecting a State's dignity interest while also shielding the

State's treasury from the practical impact of a judgment. While a number of factors in determining ambiguous cases are utilized, these factors were never intended to be divorced from the twin purposes of the Eleventh Amendment.

The Third Circuit's sovereign-immunity jurisprudence has not evolved with similar alacrity. In denying SEPTA sovereign immunity under the Eleventh Amendment, the Third Circuit largely focused on a formalistic inquiry into financial liability. Its focus runs afoul of the reasoning and logic employed in *Hess* and the later cases from this Court described above.

Hess applied the "state treasury" factor to a bi-state transit agency. But in doing so, *Hess* did not focus solely on legal liability. Rather, the Court focused on the importance of both the practical and the legal effects of a potential judgment on the state treasuries. 513 U.S. at 51. *See also Doe*, 519 U.S. at 430. More specifically, *Hess* found it highly significant that the bi-state authority was, and always had been, financially independent from its founding states. Indeed, *Hess* specifically contrasted that situation with a transit agency entitled to Eleventh Amendment immunity because its "revenue shortfall Congress and the cooperating States anticipated from the start, an enterprise constantly dependent on funds from the participating governments to meet its sizable operating deficits." *Id.* at 49-50.

Just so here. SEPTA was structured from the start to require massive governmental subsidiaries to

meet its operating deficits. The Commonwealth also has had to continually provide significant additional funding to close SEPTA's structural deficit. Yet the Third Circuit essentially concluded that ultimate legal liability was all that mattered. Pet. App. 18a. In electing to focus on that issue essentially to the exclusion of the broader question of the Commonwealth's intent, the Court of Appeals, as a practical matter, has exposed the Commonwealth's treasury to a judgment against the express will of the sovereign.

The Third Circuit's formalistic application of a list of factors ignores this Court's teachings. As *Hess* recognized, the crucial initial question is whether the sovereign structured the entity with the expectation that immunity applied. Here, the answer to that question is crystal clear. The Third Circuit's approach, however, improperly marginalizes the sovereign's stated relationship with its own agency. Further, by focusing on ultimate legal liability, the Third Circuit improperly ignores the practical reality of a judgment against SEPTA on the Commonwealth's treasury. In short, the Third Circuit's approach demonstrates the danger of conducting an arm-of-the-state analysis divorced from the twin purposes of the Eleventh Amendment.

B. The Third Circuit's Approach Conflicts With The Decisions Of The Pennsylvania Supreme Court, Further Undermining Fundamental Principles Of Sovereignty.

Multiple decisions of the Pennsylvania Supreme Court recognize SEPTA's status as a Commonwealth agency entitled to sovereign immunity. See *Jones v. SEPTA*, 772 A.2d 435 (Pa. 2001); *Tulewicz v. SEPTA*, 606 A.2d 427 (Pa. 1992); *Feingold v. SEPTA*, 517 A.2d 1270 (Pa. 1986). As explained in *Doe*, the arm-of-the-state inquiry should focus on "the relationship between the State and the entity in question * * * and the nature of the entity created by state law." 519 U.S. at 429. Here, the pronouncements of Pennsylvania's highest court should have been treated as definitive.

This Court has long emphasized the importance of respecting state courts on issues of state law. In fact, "[i]n most cases, comity and respect for federalism compel [the Court] to defer to the decisions of state courts on issues of state law. That practice reflects [the Court's] understanding that decisions of state courts are definitive pronouncements of the will of the States as sovereigns." *Bush v. Gore*, 531 U.S. at 112 (Rehnquist, C. J., concurring). As Justice Ginsburg explained in dissent: "This principle reflects the core of federalism, on which we all agree. 'The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other.'" *Id.* at

142 (*quoting Saenz v. Roe*, 526 U.S. 489, 504 n.17 (1999)).

These principles are not abandoned simply because the application of the Eleventh Amendment is an issue of federal law. As an initial matter, although Eleventh Amendment immunity is a question of federal law, “that federal question can be answered only after considering the provisions of state law that define the agency’s character.” *Doe*, 519 U.S. at 429 n.5. Moreover, as explained in *Bush*:

No doubt there are cases in which the proper application of federal law may hinge on interpretations of state law. Unavoidably, this Court must sometimes examine state law in order to protect federal rights. But we have dealt with such cases ever mindful of the full measure of respect we owe to interpretations of state law by a State’s highest court. [531 U.S. at 137 (Ginsburg, J., dissenting)].

By deferring to state courts on issues of state law, the Court reinforces its “commitment to ‘build[ing] cooperative judicial federalism.’” *Id.* at 139 (*quoting Lehman Brothers*, 416 U.S. at 391).

More fundamentally, “[h]ow power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself.” *Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612 (1937). Indeed, “[t]hrough the structure of its government, and the character of those who exercise government authority, a State

defines itself as a sovereign.” *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Here, Pennsylvania has structured itself so that SEPTA is an agency of the Commonwealth entitled to sovereign immunity. This structure is part of how Pennsylvania defines itself as a sovereign. Under this Court’s Eleventh Amendment jurisprudence, the dignity of the sovereign—including its prerogative to distribute power among its own governmental organs—is preeminent. *Federal Maritime Comm’n*, 535 U.S. at 760. The Third Circuit’s conclusion that the sovereign’s explicit characterization that SEPTA is a Commonwealth agency entitled to sovereign immunity only weighs “slightly” in favor of Eleventh Amendment immunity clearly violates these fundamental teachings.⁹

⁹ The fatal flaw in the Third Circuit’s approach is apparent when the situation is examined from the converse. For example, if a State were to explicitly declare that a particular entity created by the State was not intended to share sovereign immunity and that declaration was affirmed multiple times by the State’s highest court, could a federal court nevertheless declare that the entity was an arm of the state entitled to Eleventh Amendment immunity? *See Fresenius Med. Care Cardiovascular Res., Inc. v. Puerto Rico & Caribbean Cardiovascular Ctr. Corp.*, 322 F.3d 56, 63 (1st Cir.), *cert. denied*, 540 U.S. 858 (2003) (“Not all entities created by states are meant to share state sovereignty. * * * A state may not have intended for example, that the employees of the entity may be unable to privately enforce the Fair Labor Standards Act. * * * An erroneous arm-of-the-state decision may frustrate, not advance, a state’s dignity and its interests.”).

II. THE THIRD CIRCUIT'S RULING UNDERSCORES A CONFLICT AMONG THE CIRCUITS IN THEIR APPROACH TO DETERMINING WHETHER AN ENTITY IS AN ARM OF THE STATE ENTITLED TO ELEVENTH AMENDMENT IMMUNITY.

The courts of appeals regularly are called upon to determine if a particular entity is an arm of the state entitled to Eleventh Amendment immunity. But the approach each court of appeals takes in that analysis has historically been anything but uniform. As Justice O'Connor noted in *Hess*, "the Courts of Appeals have struggled" with the sovereign-immunity inquiry, "variously adding factors * * *, distilling factors * * *, and deeming certain factors dispositive." 513 U.S. at 59 (O'Connor, J., dissenting) (internal citations omitted). While *Hess* attempted to provide some guidance on the issue, the courts of appeals continue to struggle with the test, its formulation, and its application, such that results of an Eleventh Amendment inquiry are likely to differ from circuit to circuit. See *Twins or Triplets*, 105 Mich. L. Rev. at 844-845. The courts of appeal use a number of different tests, employ a variety of different factors, and disagree as to which, if any, of the factors should be weighed most heavily in the inquiry—all of which makes for a muddled set of precedents. *Id.*

First, the factors themselves vary in number and type. The First Circuit utilizes a two-step analysis,¹⁰

¹⁰ See *Fresenius Med.*, 322 F.3d at 68 (two key questions with many factors instructive on each).

the Third, Eighth and Eleventh Circuits employ three factors,¹¹ the Fourth, Sixth and Tenth Circuits look to four factors,¹² the Ninth Circuit examines five factors¹³ and the Second, Fifth and Seventh Circuits review six factors.¹⁴ These factors do overlap to some extent, but the tests vary to a substantial degree. For example, the Second, Fourth, Fifth, Ninth and Tenth Circuits all examine whether the entity's function is primarily local or more central to the

¹¹ The Third Circuit applied three factors in this case. *See also Thomas v. St. Louis Bd. of Police Comm'rs*, 447 F.3d 1082, 1084 (8th Cir. 2006) (looking at three factors); *Vierling v. Celebrity Cruises, Inc.*, 339 F.3d 1309, 1314 (11th Cir. 2003) (recognizing three factor test).

¹² *See Cash v. Granville Cnty Bd. of Ed.*, 242 F.3d 219, 223-224 (4th Cir. 2001) (noting Fourth Circuit has developed a four-part test); *S.J. v. Hamilton Cnty., Ohio*, 374 F.3d 416, 420 (6th Cir. 2004) (noting four general factors); *Steadfast Ins. Co. v. Agricultural Ins. Co.*, 507 F.3d 1250, 1253 (10th Cir. 2007) (looking to four primary factors).

¹³ *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1040 (9th Cir. 2003) (identifying five factors).

¹⁴ *See Woods v. Rondout Valley Cent. Sch.*, 466 F.3d 232, 240-241, 243 (2d Cir. 2006) (noting Court initially considers six factors and if all point in one direction inquiry complete; if not Court focuses on twin reasons for Eleventh Amendment); *Black v. North Panola Sch. Dist.*, 461 F.3d 584, 596 (5th Cir. 2006) (noting that Court should examine six factors); *Keri v. Bd. of Trustees of Purdue Univ.*, 458 F.3d 620, 641 (7th Cir. 2006) (identifying six factors), *cert. denied*, 549 U.S. 1210 (2007). The Seventh Circuit's approach could also be characterized as a two-part test with the first inquiry consisting of five subparts. *See Peirick v. Indiana Univ.-Purdue Univ./Indianapolis Athletics Dep't*, 510 F.3d 681, 695 (7th Cir. 2007).

state¹⁵ while the Third Circuit does not even consider that factor relevant. Had this factor been included, the calculus may well have been altered: SEPTA's enabling act explicitly provides that SEPTA "shall in no way be deemed to be an instrumentality of any city or county or other municipality or engaged in the performance of a municipal function, but shall exercise the public powers of the Commonwealth as an agency and instrumentality thereof." 74 Pa. C.S. at § 1711(a).

Perhaps more importantly, the circuits differ over the relevant *weight* to be accorded the various factors. For example, the First Circuit follows the teaching of this Court in *Hess*, asking first whether the State clearly structured the entity to share its sovereignty. *Fresenius Med.*, 322 F.3d at 68. As the First Circuit recognizes, this initial inquiry pays deference to the State's dignity interest, but if the answer to the inquiry is ambiguous, then the dispositive question is whether damages will be paid from the state treasury. *Id.* at 65-68. The Second Circuit utilizes a similar—albeit more complicated—tiered test. *See Woods*, 466 F.3d at 240-41. The approach followed by the First Circuit would likely have led to different result here. Both the

¹⁵ *See Woods*, 466 F.3d at 245-246 (looking to whether the entity's function is traditionally one of local or state concern); *Cash*, 242 F.3d at 226 (examining whether the scope of the agency's concern is local or statewide); *Black*, 461 F.3d at 597 (same); *Savage*, 343 F.3d at 1044-45 (determining whether the entity performs central government function); *Steadfast Ins.*, 507 F.3d at 1255-56 (asking whether entity in question is concerned primarily with local or state affairs).

Pennsylvania Legislature and the Pennsylvania Supreme Court have made clear that SEPTA was structured by the Commonwealth to share its sovereign immunity.

Other Circuits, however, still place primary emphasis on the state treasury factor. This is the approach taken by the Fourth, Fifth, Sixth, Seventh and Ninth Circuits.¹⁶ Even these Circuits, however, differ in the details. For example, the Seventh Circuit places considerable emphasis on the practical impact on the state treasury of a judgment whereas the Third Circuit focused here on actual legal liability. Compare *Peirick*, 510 F.3d at 695-696 (noting the entity's financial autonomy from the state is determined using a five-part test: "(1) the extent of state funding; (2) the State's oversight and control of the entity's fiscal affairs; (3) the entity's ability to raise funds; (4) whether the entity is subject to state taxation; and (5) whether a judgment against the entity would result in an increase in its

¹⁶ See *Cash*, 242 F.3d at 223 (assigning primary importance to state treasury factor); *Black*, 461 F.3d at 596 ("In light of the fundamental purpose of the Eleventh Amendment—protecting state treasuries—the source of the entity's funding is given the most weight."); *Perry v. Southeastern Boll Weevil Eradication Found., Inc.*, 154 Fed. Appx. 467, 472 (6th Cir. 2005) (noting that the State's obligation to pay the judgment is the most important factor in its balancing test); *Peirick*, 510 F.3d at 695 (holding that "[i]n deciding whether an entity is an agency of the state, the most important factor is the extent of the entity's financial autonomy from the state.") (internal quotation and citations omitted); *Savage*, 343 F.3d at 1040-41 (whether a money judgment would be satisfied out of state funds is most important factor).

appropriations”) *with* Pet. App. 17a (“the key factor in our assessment of the state treasury prong is the potential legal liability of the Commonwealth for SEPTA’s debts”) (internal citations omitted).

The Seventh Circuit’s pragmatic approach plainly would favor SEPTA far more than the Third Circuit’s formalistic one did. SEPTA receives hundreds of millions of dollars from the Commonwealth, the Commonwealth has substantial control over SEPTA’s affairs—including its ability to raise fares or cut services—SEPTA is not generally subject to state taxation and the Commonwealth has had to increase SEPTA’s appropriation in each of the last three years to close SEPTA’s structural operating deficit. Under the Seventh Circuit’s approach, SEPTA likely would have been deemed a state entity. Under the Third Circuit’s, SEPTA was not.

The Third Circuit has essentially established its own unique approach to sovereign immunity jurisprudence. That approach examines three factors in what amounts to a formalistic balancing inquiry. The first two factors—the state treasury and status under state law—are given the same weight as the third factor—autonomy—despite the fact that *Hess* instructs that the first two factors should be the Court’s primary guide and *Federal Maritime Commission* explains that the preeminent purpose of sovereign immunity is to respect the dignity of the States. Further, in analyzing the state treasury factor, the Third Circuit minimizes the practical impact of a judgment on the state treasury by focusing almost exclusively on legal liability. Finally, with respect to the entity’s status under

state law, the Third Circuit improperly marginalizes the sovereign's explicit intent in structuring its own agencies by relying on a number of subfactors rather than multiple decisions of the Pennsylvania Supreme Court and SEPTA's enabling act which designate SEPTA as a Commonwealth agency entitled to sovereign immunity.

When SEPTA's characteristics are run through the various Circuit Court tests, its status as an arm of the state is sure to vary. Dual sovereignty, however, is a defining feature of our government. The ability of Massachusetts to structure its own entities and cloak them with its sovereign immunity should be no greater or lesser than Pennsylvania. The practical impact on a State's treasury of a judgment against a state created entity should not matter more in Illinois than in Pennsylvania. A more principled and uniform approach than this is required.

III. THE CASE PRESENTS AN IDEAL VEHICLE TO ADDRESS AN IMPORTANT AND RECURRING QUESTION.

This case squarely presents a fundamental issue that goes to the core of our federalist system and the States' ability to govern. The issue was fully briefed, argued and resolved by the lower courts on a straightforward factual record and is ripe for this Court's review. Moreover, the question is recurring. Modern demands on state government make resolution of the issue timely. As States attempt to more efficiently govern in an era of increased demand and shrinking resources, the need to create hybrid state entities that are partially self-sufficient

and cloak those entities with sovereign immunity will only increase. Consequently, resolution of the issue by this Court will provide guidance and needed uniformity to the lower courts that such a fundamental right deserves. *See Twins or Triplets*, 105 Mich. L. Rev. at 863-864 (noting the need for guidance and uniformity in deciding Eleventh Amendment immunity).

In the years since Justice O'Connor observed that the courts of appeals have "struggled" with the issue of sovereign immunity, *Hess*, 513 U.S. at 59 (O'Connor, J., dissenting), other commentators similarly have observed that the lower court's sovereign immunity jurisprudence is hopelessly confused. *See Twins or Triplets*, 105 Mich. L. Rev. at 844 ("Even after *Hess*, the arm-of-the-state doctrine is confusing and difficult to apply."); *Mancuso v. N.Y. State Thruway Auth.*, 86 F.3d 289, 293 (2d Cir. 1996) ("The jurisprudence over how to apply the arm-of-the-state doctrine is, at best, confused."); *Gray v. Laws*, 51 F.3d 426, 431 (4th Cir. 1995) (characterizing *Hess* as "an opinion that is certain to generate confusion"). Because this case presents an ideal opportunity to resolve an important immunity issue for the benefit not only of SEPTA, but state-created entities across the Nation, this Court should grant the Writ.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

CATHERINE E. STETSON
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5491

THOMAS S. BIEMER*
JOSEPH H. JACOVINI
DILWORTH PAXSON LLP
1500 Market Street
Suite 3500E
Philadelphia, PA 19102
(215) 575-7000

*Counsel of Record

Counsel for Petitioner