Nos. 15-1044, 15-1045

In the Supreme Court of the United States

PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY,
Petitioner,

v.

LEE PELE,
Respondent.

PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY,
Petitioner,

v.

UNITED STATES OF AMERICA *EX REL*. JON H. OBERG,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF RELATORS DR. CHRISTIAN KREIPKE AND MICHAEL WILLETTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

In 2012, on behalf of the United States, Dr. Christian Kreipke initiated a relator lawsuit against Wayne State University ("WSU") alleging violations of the False Claims Act ("FCA"), 31 U.S.C. § 3729 *et seq*. After the district court granted WSU's motion to dismiss, Dr. Kreipke appealed. The Sixth Circuit held that WSU was not a "person" subject to liability under the FCA, but, instead, was an arm of the state. *See Kreipke v. Wayne State Univ.*, 807 F.3d 768 (6th Cir. 2015).

In 2013, also on behalf of the United States, Michael Willette initiated, in part, a similar relator lawsuit against the University of Massachusetts Medical School ("UMMS"). Like Dr. Kreipke's case, the district court granted UMMS's motion to dismiss; on appeal, the First Circuit held that UMMS was not a "person" subject to liability under the FCA, but an arm of the state. *See U.S. ex rel. Willette v. Univ. of Massachusetts, Worcester*, 812 F.3d 35 (1st Cir. 2016).

In the cases of Dr. Kreipke and Mr. Willette (collectively "Relators"), each circuit, following the guidance of this Court's opinion in *Vermont Agency of*

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[1] Pursuant to this Court's Rule 37.6, *amici* affirms that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amici* and their counsel made such a monetary contribution. Pursuant to this Court's Rule 37.2, counsel of record for petitioner and respondents were timely notified of *amici*'s intent to file this brief. Counsel for petitioner and each respondent filed blanket consents with this Court.

Nat. Res. v. U.S. ex rel. Stevens, 529 U.S. 765 (2000), held that to determine if an entity was a "person" under the FCA, the respective arm-of-the-state test for that circuit was the applicable analysis to be employed. *See Kreipke*, 807 F.3d at 775; *Willette*, 812 F.3d at 39. In cases of first impression, the First and Sixth Circuits joined those circuits who have addressed this issue in holding that the arm-of-the-state test was the applicable framework for determining whether an entity was a "person" who could be held liable under the FCA, or whether the entity was a State or state agency who could not. *See Kreipke*, 807 F.3d at 775 and *Willette*, 812 F.3d at 39 (joining the Fourth, Fifth, Ninth, Tenth, and Eleventh Circuits).

Although these courts are unified in the manner in which this question is addressed under the FCA, that is where the similarities between the circuit courts end. The Relators' cases are but two examples of a greater problem running errant throughout the federal judicial system—a lack of guidance and uniformity in the structure and application of the arm-of-the-state doctrine. Another example lies with the petitions pending before this Court on behalf of Petitioner.

In Petitioner, Dr. Kreipke, and Mr. Willette's cases, three circuits approached the arm-of-the-state issue in the same way, yet applied three very different tests, producing divergent results. And these circuit tests differ from the nine other circuit courts that comprise our federal judicial system, and each of those tests differs from the next. Petitioner, Dr. Kreipke, and Mr. Willette's cases expose and exemplify that the circuits are hopelessly split in their views, rationales, and methods of resolving the arm-of-the-state inquiry. This

split is a direct result of a lack of guidance on this important doctrine, and the unclear or often mixed messages sent by this Court's precedent.

Petitioner, being the first of the three to exhaust its remedial measures within its circuit, filed its petitions with this Court, seeking, in principal, this Court's review in order to resolve the circuit split and obtain clear guidance on the method of applying the arm-of-the-state doctrine. To this end, Relators support Petitioner.

On February 19, 2016, the Sixth Circuit denied Dr. Kreipke's petition for rehearing en banc. App. 1-2. Likewise, on February 26, 2016, the First Circuit denied Mr. Willette's petition for rehearing en banc. App. 3-4. Pursuant to this Court's Rule 13.1, Relators will be filing their petitions for a writ of certiorari to this Court by May 19 and 26, 2016, respectively. In their forthcoming petitions, Relators will, in whole or in part, assert the same issue Petitioner has brought in its petitions: this Court's review is necessary to resolve the split amongst the circuits and to provide clear guidance on how to resolve the arm-of-the-state inquiry.

Given the ties binding Petitioner, Dr. Kreipke, and Mr. Willette's cases, the petitions the Relators intend to file, and the issue seeking review in each case, the Relators have a strong interest in this Court's review of Petitioner's cases. In particular, these cases afford the Court an opportunity to resolve the circuit split and provide guidance that has been lacking for this critical doctrine for almost 40 years.

Amici respectfully request this Court grant the petitions to review this issue.

SUMMARY OF ARGUMENT

As one commentator summarized, since the advent of the arm-of-the-state doctrine in 1977, the following has resulted:

> 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; twelve very different circuit court tests, each with their own twists, measuring a litany of factors that vary by circuit; and scores of lower court precedents classifying a limitless variety of entities as arms of their respective states shielded with their state's sovereign immunity, or else not, with outcomes varying not only circuit by circuit but state by state within a given 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).

This summary of the current status of the arm-of-the-state doctrine not only reflects the reality of what the Relators, Petitioner, and other litigants and courts are burdened with, but it strenuously emphasizes reasons underlying the support of the instant petitions. The circuit courts have quite literally gone twelve different directions on how to determine if an entity is an arm of the state. 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 and its critical implications that necessitates this Court's review.

The arm-of-the-state doctrine is crucial in many areas of statutory and constitutional law. Yet it currently flounders about without any structure. Indeed, this Court's precedent sends unclear and mixed messages as to what is considered, what considerations are preeminent, and the meaning of other critical inquiries. The haziness of this Court's precedent has led to the development of the circuit split, which in turn, has led to a lack of uniformity, producing different results between the circuits.

The need of this Court's guidance on this issue is immensely important for purposes of Eleventh Amendment sovereign immunity and how to determine if an entity can be sued under the FCA. A set structure is also important for public colleges and universities, who given their unique character and treatment under state law, necessitate a multi-factor analysis to determine whether they share their State's sovereignty or not.

The arm-of-the-state doctrine has its influence in a wide array of legal fields, but the state of disarray it currently occupies only harms the areas it reaches. The petitions should be granted in order to address and resolve the issues associated with the arm-of-the-state doctrine.

REASONS FOR GRANTING THE PETITION

I. The Courts Of Appeal Unanimously Hold That To Determine If An Entity Is A "Person" Under The FCA, Courts Invoke The Arm-Of-The-State Analysis.

Understanding how the arm-of-the-state doctrine and the FCA intersect is an important preface for why Petitioner and the Relators cases share a common ground and why the petitions should be granted.

1. The FCA subjects liability to "any person" who violates one or more of its fraud-related prohibitions. 31 U.S.C. § 3729(a)(1)(A) to (G). Although the FCA "does not define the term 'person,'" *Cook Cnty., Ill. v. U.S. ex rel. Chandler*, 538 U.S. 119, 125 (2003), this Court holds that it "does not subject a State (or state agency) to liability in such actions." *Stevens*, 529 U.S. 765, 788 (2000). In so holding, the *Stevens* Court did not specify how future courts could determine if an entity was a State or state agency and, therefore, could not be sued under the FCA. But, the Court did recognize the "virtual coincidence of scope" between that inquiry and Eleventh Amendment sovereign immunity. *Id.* at 780.

As a result of that guidance, "[t]he 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." *Kreipke*, 807 F.3d at 775; *see also Willette*, 812 F.3d at 39 (citing and joining the Fourth, Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits).

Accordingly, the circuit courts agree that the respective arm-of-the-state test in a given circuit is the framework used to determine whether an entity can be sued under the FCA. But with the exception of that understanding, the circuits agree on very little else that is relevant to answer that question.

II. The Circuit Conflict Results From This Court's Lack Of Guidance And Has Produced Widely Divergent Tests That Have Outcome-Altering Effects And That Undermine The Doctrine's Integrity.

1. Between 1977 and 1997, this Court substantively addressed the arm-of-the-state doctrine it at least five opinions. In the last 20 years, however, the circuit courts have been left on their own to follow what this Court has provided. However, this Court's precedent is unclear, sends mixed signals, and has directly resulted in a drastic circuit court split.

As set forth in detail in the *Oberg* petition, *see* Pet. pp. 22-26, the modern "arm of the State" jurisprudence began with this Court's 1977 opinion in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). Although the *Mt. Healthy* decision "articulated the general methodology for arm-of-the-state inquiries," the decision failed to provide "the relative weight of each factor" it considered, or whether the list of factors evaluated was exhaustive. 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).

Two years later the Court again visited the arm-of-the-state issue in *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391 (1979). However, again, "the Court highlighted several traits of the entity in question, but the Court failed to indicate whether these traits constituted formal factors, whether its list of factors was exhaustive, or what such factors were intended to measure." Bilsborrow, *Keeping the Arms in Touch*, 64 EMORY L.J. at 827.

The clarity this Court's precedent had been lacking was given more direction—though not fully—when the Court came back to the arm-of-the-state doctrine in *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994). *Hess* has been called "the Court's most substantial arm-of-the-state case to date[.]" Bilsborrow, *Keeping the Arms in Touch* , 64 EMORY L.J. at 827. But, *Hess* is not without its shortcomings.

In *Hess*, following *Lake Country*, the Court evaluated seven distinct "[i]ndicators of immunity" to determine if the bi-state entity was an arm of the state or not. *Hess*, 513 U.S. at 44-46. The Court found these indicators did not "all point the same way." *Id.* at 44. Thus, "[w]hen indicators of immunity point in different directions, the Eleventh Amendment's twin reasons for being remain our prime guide[]"—those being the state treasury and state dignity. *Id.* at 47.

Although *Hess* did address the dignity rationale and how it applied in that case, *see, id.*, the Court held that "the impetus for the Eleventh Amendment . . . [is] the prevention of federal-court judgments that must be paid out of a State's treasury." *Id.* at 47-48. In observing the decisions of various lower circuit courts, *Hess* then stated that "the vulnerability of the State's

purse [w]as the most salient factor in Eleventh Amendment determinations." *Id.* at 48. *Hess* also explained that a state's "financial responsibility" and the state's potential "legal liability" are distinct concepts, and that the state-treasury factor concerned the latter. *Id.* at 45-46, 51.

Despite the greater clarity *Hess* provided to the arm of the state doctrine—an evaluation of several factors, followed by tie-breaker-like rationales—*Hess* still left matters unexplained, such as what many of its "indicators of immunity" actually meant or how the "twin reasons" worked. It is for reasons such as these that have led commentators to note that while aspects of the Court's opinion furthered the doctrine's progress, "unfortunately, *Hess* raised more questions than it answered." Bilsborrow, *Keeping the Arms in Touch*, 64 EMORY L.J. at 827. However, whatever inkling of clarity *Hess* provided to the arm of the state doctrine, subsequent opinions from this Court have again clouded the fray.

In *Auer v. Robbins*, 519 U.S. 452 (1997), the Court briefly considered the arm of the state status of a single-state entity, a board of police commissioners. *Id.* at 456 n. 1. In finding that the board did not share in its state's sovereignty—relying on *Hess* and *Lake Country*—the Court considered three factors. *Id.* Although the *Auer* Court relied on *Hess*, it did not evaluate all of *Hess*'s factors. *Id.* Further, the factors the Court did consider pointed in different directions, but the Court did not mention the "twin reasons" or how they applied. *Id.*

On the same day *Auer* was decided, the Court decided *Regents of the Univ. of California v. Doe*, 519

U.S. 425 (1997). In principal, the *Doe* Court focused on the legal liability factor. *Id.* at 430-31. From the outset, the Court seemed to take a step back from *Hess*'s pronouncement that "legal liability" was the "impetus" of the Eleventh Amendment, *see Hess*, 513 U.S. at 47-48; instead, the Court noted that this factor was simply "of considerable importance". *Id.* at 430. Nevertheless, the Court rejected the respondent's attempts "to convert the inquiry into a formalistic question of ultimate financial liability." *Id.* at 430-31. The Court asserted that "it is the entity's potential legal liability" that was the key focus. *Id.* at 431. But what was left unexplained is how *Hess*'s formulation of the "legal liability" inquiry differed, if at all, from *Doe*'s "potential legal liability" articulation.

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 impetus of the Eleventh Amendment: "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. Indeed, the Court stated directly that "the 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.

2. This Court's history of addressing the arm-of-the-state doctrine has provided little clarity to guide lower courts and litigants. The absence of a specific test or framework to be employed—combined with mixed signals about what factors are to be considered and what factors are given greater weight than others—has

caused a ripple effect in how the arm-of-the-state analysis has developed in the lower courts.

Although placing the sole blame on the *Hess* decision for what has resulted in the lower courts may be undeserved, the general lack of guidance from this Court means "lower courts have been left to their own devices to fashion their arms tests not simply in the years since *Hess*—rather, they have been on their own since the Court's first arms cases in the late 1970s." Bilsborrow, *Keeping the Arms in Touch*, 64 EMORY L.J. at 829. As a result, "it is no surprise the lower courts' tests are so widely divergent." *Id; see also* Joseph Beckham, *The Eleventh Amendment Revisited: Implications of Recent Supreme Court Interpretations on the Immunity of Public Colleges and Universities*, 27 STETSON L. REV. 141, 148 (1997) (noting that the "limited decisions of the United States Supreme Court with regard to 'arm of the state' determinations have resulted in a confusing array of tests in lower federal courts.").

However the arm-of-the-state doctrine is classified, it is without doubt that the circuit courts are desperately split in their adoption and application of whatever test they choose. But the circuit split transcends simply what factors are employed by the courts and how many factors there are. Instead, the circuits are helplessly split on what factors are given preeminence and what this Court's precedent dictates the courts consider.

3. As the *Oberg* petition accurately states, "Courts and commentators" agree that the arm-of-the-state doctrine is, in a kind light, "confused" and is "quite inconsistent." Pet. p. 14 (citations omitted). However,

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, *Keeping the Arms in Touch*, 64 EMORY L.J. at 829.

Although the *Oberg* petition is correct in stating that "the circuits have adopted two-, three-, four-, five-, and six-factor tests[,]" Pet. p. 14, the split goes far beyond the number of factors employed: some circuits have designated one factor as controlling, others have not; to those circuits that agree on the preeminence of a single factor, those circuits disagree on what the factor means; and some circuits are internally split, having multiple tests in existence at the same time. Calling the split amongst the circuits "confused" is indeed generous.

4. The *Oberg* petition details the intercircuit split that exists regarding various arm-of-the-state tests the circuits employ. *See* Pet. pp. 14-18. But it is also the presence of substantial intracircuit splits that undermines the arm-of-the-state doctrine.

To begin with, the Second Circuit applies either a two-factor test, *see Clissuras v. City Univ. of New York*, 359 F.3d 79, 82 (2d Cir. 2004), or a six-factor test. *Mancuso v. New York State Thruway Auth.*, 86 F.3d 289, 293 (2d Cir. 1996). But, courts within the Second Circuit apply both tests; "[h]ence, there is a lack of clarity as to whether the *Mancuso* six-part or the *Clissuras* two-part test governs, or whether both can serve simultaneously as useful guides." *Leitner v. Westchester Cmty. Coll.*, 779 F.3d 130, 136 (2d Cir. 2015). The *Leitner* Court simply applied both. *Id.* at 137.

The Seventh Circuit also has two competing tests on its books. The first is a two-factor test, wherein the first factor is comprised of five subparts. *Peirick v. Indiana Univ.-Purdue Univ. Indianapolis Athletics Dep't*, 510 F.3d 681, 695-96 (7th Cir. 2007). The other test applies two or three factors. *See Crosetto v. State Bar of Wisconsin*, 12 F.3d 1396, 1402 (7th Cir. 1993); *see also Takle v. Univ. of Wisconsin Hosp. & Clinics Auth.*, 402 F.3d 768, 772 (7th Cir. 2005).

The First Circuit also has intracircuit issues. In 2003, the First Circuit reshaped its arm-of-the-state test into "two key questions, with many factors instructive on each[.]" *Fresenius v. Puerto Rico & Caribbean Cardiovascular Ctr. Corp.*, 322 F.3d 56, 68 (1st Cir. 2003). The first question is "[h]as the state clearly structured the entity to share its sovereignty?" *Id.* "This evaluation is undertaken in light of the different factors described in *Hess, Lake Country*, and *Metcalf & Eddy*[]" the latter being the First Circuit's prior precedent. *Id.* The *Fresenius* Court outlined the various factors in these three cases*, see id.* at 62-65 nn. 5-7; which, when redundancies are eliminated, comes to 10 factors. *See, id.* Upon evaluating this first question and these 10 factors, and only "[i]f the factors assessed in analyzing the structure point in different directions, then the dispositive question concerns the risk that the damages will be paid from the public treasury." *Id.* at 68. At this stage, the *Fresenius* Court provided that three additional factors should be considered. *Id.* at 65 & n. 8.

However, in Mr. Willette's case, the First Circuit sidestepped *Fresenius*. There, the *Willette* Court acknowledged the two-stage inquiry. *U.S. ex rel.*

Willette v. Univ. of Massachusetts, Worcester, 812 F.3d 35, 39 (1st Cir. 2016). In citing a litany of precedent from this Court and the First Circuit, the *Willette* Court noted, unlike *Fresenius*, that the arm-of-the-state inquiry "is not controlled by a mechanical checklist of pertinent factors"; instead, "the case law offers important clues." *Id.* at 39-40. In other words, instead of following *Fresenius*, the *Willette* Court likened its approach to a scavenger hunt for what it considered relevant.

Ultimately, the *Willette* Court, after "[s]ynthesizing these clues," chose five factors from *Fresenius*. *Id.* at 40. In essence, the *Willette* Court abandoned the two-stage framework and the 13 factors for a single analysis built upon either the five most important factors, or the five that it wanted to consider. Either way, *Willette* represents a new approach in the First Circuit.

Notwithstanding the above circuits, the Sixth Circuit is in a league of its own. The Sixth Circuit has not one, not two, not three, but four tests in good standing, ranging from four to nine factors. The first four-factor test comes from *S.J. v. Hamilton Cty., Ohio*, 374 F.3d 416, 420 (6th Cir. 2004). Separate from *S.J.*, the next test considers between four and six factors. *See Ernst v. Rising*, 427 F.3d 351, 359 (6th Cir. 2005) (en banc). As one district court observed, *Ernst* "[s]omewhat confusingly" cited favorably to *S.J.*, keeping it intact, while creating a new test from scratch. *Dolan v. City of Ann Arbor*, 666 F. Supp. 2d 754, 757 n. 2 (E.D. Mich. 2009). Recently, although relying on *Ernst* and its four to six factors, another opinion—penned by the same author as *Ernst* no

less—asserted a new six-factor test. *See Crabbs v. Scott*, 786 F.3d 426, 429 (6th Cir. 2015).

Finally, in an earlier opinion regarding the status of public colleges and universities, the Sixth Circuit recognized that "[e]ach state university exists in a unique governmental context, and each must be considered on the basis of its own peculiar circumstances." *Hall v. Med. Coll. of Ohio at Toledo*, 742 F.2d 299, 302 (6th Cir. 1984). The *Hall* Court found that a "more specific nine-point analysis . . . is the better approach for examining the 'peculiar circumstances' of different colleges and universities." *Id.* Accordingly, the *Hall* Court adopted and applied a nine-factor test. *Id.* at 302-07. *See also* 17A JAMES WM. MOORE ET AL., Moore's Federal PRACTICE § 123.23[4][b][iv][D.1] (3d ed. 2013) (same).

5. The inter- and intracircuit splits are not the only substantive differences undermining the arm-of-the-state doctrine. The circuits are also split on whether a factor is preeminent or not, what factor is preeminent, and what the foremost, preeminent factor evaluates.

Most of the circuits hold that no one factor is preeminent and that the various factors employed in the circuit's respective tests are equally balanced. *See, e.g.*, *Mancuso v. New York State Thruway Auth.*, 86 F.3d 289, 293 (2d Cir. 1996); *U.S. ex rel. Oberg v. Pennsylvania Higher Educ. Assistance Agency ("Oberg II")*, 745 F.3d 131, 137 (4th Cir. 2014); *Thiel v. State Bar of Wisconsin*, 94 F.3d 399, 401 (7th Cir. 1996) (overruled on other grounds); *Cooper v. Se. PA Transp. Auth.*, 548 F.3d 296, 301 (3d Cir. 2008); *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). As the Third Circuit explained, "[i]n light of *Doe* and *[Federal Maritime Commission*], we held that 'we can no longer ascribe primacy to the [state-treasury] factor' in our sovereign immunity analysis." *Cooper*, 548 F.3d at 301.

Conversely, other circuits hold that the state-treasury factor is still the most important and given more deference. *See, e.g.*, *Clissuras v. City Univ. of New York*, 359 F.3d 79, 82 (2d Cir. 2004); *Vogt v. Bd. of Comm'rs of Orleans Levee Dist.*, 294 F.3d 684, 689 (5th Cir. 2002); *Ernst v. Rising*, 427 F.3d 351, 359 (6th Cir. 2005); *Pub. Sch. Ret. Sys. of Missouri v. State St. Bank & Trust Co.*, 640 F.3d 821, 827-30 (8th Cir. 2011).

The First Circuit holds that whether the state has clearly structured the entity as sharing in its sovereignty is the most important. *See Fresenius v. Puerto Rico & Caribbean Cardiovascular Ctr. Corp.*, 322 F.3d 56, 68 (1st Cir. 2003). While 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).

Regardless of what factor is given greater weight than another, the truth remains that in those circuits that have a preeminent factor, the outcome of a case will more than likely shift on that factor, while the same case with the same facts in another circuit may not. That outcome-altering reality is a cry that this doctrine must be reviewed by this Court.

To go further, the state-treasury factor has problems of its own. As one commentator observed, "the courts' approaches to weighing the factors and interpreting Supreme Court precedent vary—particularly in their treatment of the state treasury risk factor." Analisa Dillingham, *Reaching for Immunity: The Third Circuit's Approach to the Extension of Eleventh Amendment Immunity to Instrumentalities as Arms of the State in* Benn v. First Judicial District of Pennsylvania, 51 VILL. L. REV. 999, 1012 (2006). *See also* Hector G. Bladuell, *Twins or Triplets: Protecting the Eleventh Amendment Through a Three-Prong Arm-of-the-State Test*, 105 MICH. L. REV. 837, 842-43 & n. 38 (2007) (noting the split in the circuits on whether the state-treasury factor concerns the state's legal liability for an adverse judgment or if judgment has a "practical effect" on the state treasury).

Some circuits, relying on the *Doe* Court's opinion, hold that "the crux of the state-treasury criterion [is] whether the state treasury is legally responsible for the payment of a judgment against the [entity]." *Cooper v. Se. PA Transp. Auth.*, 548 F.3d 296, 303 (3d Cir. 2008) (alterations in original). Also relying on *Doe*, other circuits hold that "legal liability" and "practical effect" are equally considered. *U.S. ex rel. Oberg v. Pennsylvania Higher Educ. Assistance Agency ("Oberg III")*, 804 F.3d 646, 651 (4th Cir. 2015).

Still others, also purportedly following *Doe*, hold that the inquiry is whether "hypothetically speaking, the state treasury would be subject to 'potential legal liability' *if* the [entity] did not have the money to cover the judgment." *Ernst v. Rising*, 427 F.3d 351, 362 (6th Cir. 2005). While some circuits say legal and practical

liability is the focus, including any "potential benefit" to the State. *Pub. Sch. Ret. Sys. of Missouri v. State St. Bank & Trust Co.*, 640 F.3d 821, 830 (8th Cir. 2011).

6. The circuit split that dominates the arm-of-the-state doctrine is no ordinary conflict. The foregoing highlights the extensive, substantive, outcome-altering differences between the circuits. The lack of guidance on the arm-of-the-state doctrine from this Court, unfortunately, is the root cause: "because the Supreme Court has failed to give adequate direction, the lower courts adopted their own derivations causing non-uniform results in Eleventh Amendment immunity cases." Jennifer A. Winking, *Eleventh Amendment: A Move Towards Simplicity in the Test for Immunity*, 60 MO. L. REV. 953, 962 (1995). Stated otherwise, the lack of guidance and structure "has made possible the contradiction where a type of entity can be an arm of the state in one instance but not be an arm of the state in another instance, depending upon both the circuit test used and the applicable state laws governing the defendant entity." Bilsborrow, *Keeping the Arms in Touch*, 64 EMORY L.J. at 826-27.

The doctrinal vagueness and lack of direction from this Court has given the lower courts problems from the outset, resulting in those courts altering the test "in a way to reach a result they found acceptable." Winking, *A Move Towards Simplicity*, 60 MO. L. REV. at 968. Further, "[t]he lack of uniformity does not promote predictability in judgments and allows judicial fishing expeditions for factors or criteria that support a particular result." Bladuell, *Twins or Triplets*, 105 MICH. L. REV. at 846.

The lack of uniformity is clearly an issue for litigants, but it is also troublesome for the states themselves. As one circuit observed, "[i]t would be every bit as much an affront to the state's dignity and fiscal interests were a federal court to find erroneously that an entity was an arm of the state, when the state did not structure the entity to share its sovereignty. The consequences of an arm-of-the-state finding are considerable." *Fresenius v. Puerto Rico & Caribbean Cardiovascular Ctr. Corp.*, 322 F.3d 56, 63 (1st Cir. 2003).

Simply put: "The arm-of-the-state test needs clarification." Bladuell, *Twins or Triplets*, 105 MICH. L. REV. at 842. The circuit split must be mended and the arm-of-the-state doctrine must be reevaluated. Not only is the integrity of the doctrine itself at threat given the nature of its contemporary jurisprudence, but the integrity of our court system is also at stake. At present, there is no solid guidance from this Court, only vagueness and mixed messages. The lower courts are free to do as they please, when they please, and how they please regarding what test they apply, what factors they consult, and how they resolve critically important questions of statutory and constitutional law.

The petitions before this Court provide the proper opportunity to address the foregoing. This Court's review is necessary and the petitions should be granted to resolve the foregoing issues.

III. The Importance Of Resolving The Circuit Split And Providing Guidance On The Arm-Of-The-State Doctrine Is Of The Utmost Importance Regarding Public Colleges And Universities.

Dr. Kreipke and Mr. Willette's additional interest in this Court resolving the instant circuit split and reexamining the arm-of-the-state doctrine pertains to the treatment of public colleges and universities under this doctrine. Specifically, public colleges and universities must be evaluated under a consistent, multi-factor analysis that does not change on a whim.

"Since state universities and colleges will often vary in the nature of their origins, finance, and governance structure, the applications of the Eleventh Amendment immunity has remained a case-by-case determination." Beckham, *The Eleventh Amendment Revisited*, 27 STETSON L. REV. at 149; *see also* David B. Cosgrove et al., *Shannon v. Bepko: Public Colleges and Universities as State Agencies: Standards for Eleventh Amendment Protection*, 16 J.C. & U.C. 151, 157 (1989) (same).

Like the foregoing scholars, courts agree that "[e]ach state university exists in a unique governmental context, and each must be considered on the basis of its own peculiar circumstances." *Hall v. Med. Coll. of Ohio at Toledo*, 742 F.2d 299, 302 (6th Cir. 1984). *See also Kashani v. Purdue Univ.*, 813 F.2d 843, 845 (7th Cir. 1987); *Maryland Stadium Auth. v. Ellerbe Becket Inc.*, 407 F.3d 255, 263 (4th Cir. 2005); *Irizarry-Mora v. Univ. of Puerto Rico*, 647 F.3d 9, 14 (1st Cir. 2011).

Given the unique character each public college or university has, a case-by-case review under the arm-of-the-state doctrine is necessary. However, uniformity in the application of that test is also paramount. It is not a foregone conclusion that every public college or university is an arm of the state. Indeed, many such institutions have been found to not share in their respective state's sovereignty and are not arms of the state. *See, e.g.*, *Kovats v. Rutgers, The State Univ.*, 822 F.2d 1303, 1312 (3d Cir. 1987) (Rutgers University); *Univ. of Rhode Island v. A.W. Chesterton Co.*, 2 F.3d 1200, 1217 (1st Cir. 1993) (University of Rhode Island).

Moreover, given the change in times and realities states face, whatever erroneous perceptions exist concerning the sovereignty of public colleges and universities, such views should be given a second thought: "Clearly, given the nationwide trend of shrinking state financial support to state-aided institutions, as well as the sheer complexity of the relationship, virtually any federal court could decide that a university no longer deserves protection from suit under the Eleventh Amendment." Frank A. Julian, *The Promise and Perils of Eleventh Amendment Immunity in Suits Against Public Colleges and Universities*, 36 S. TEX. L. REV. 85, 107 (1995).

The arm-of-the-state doctrine is not only a critical legal principal, but it has a significant impact on public colleges and universities nationwide. Likewise, clarifying this doctrine and resolving the instant circuit split is of national significance. This Court's review is necessary and the petitions should be granted.

IV. The Arm-Of-The-State Doctrine's Current State Has A Detrimental Impact On Litigation Under The FCA.

The ambiguity the arm-of-the-state doctrine presents also has an adverse impact on suits under the FCA.

Although when the FCA was enacted in 1863, "war profiteering" was the primary concern, *see Cook Cnty., Ill. v. U.S. ex rel. Chandler,* 538. U.S. 119, 128-129 (2003), this Court holds that in "no way" limited "the fact that Congress wrote expansively, meaning 'to reach all types of fraud, without qualification, that might result in financial loss to the Government.'" *Id.* at 129.

In today's reality, the amount of federal funds flowing to the states and entities within those states is immense—from matters concerning health care, research grants, and everywhere in between. The FCA is a vital statutory tool for the government to ensure that the funds that it provides are not obtained fraudulently and that the federal treasury is protected from opportunists who seek to use the volume of funds and recipients as a cloak for their fraudulent behavior.

But FCA plaintiffs—those given the ability to remedy such fraudulent conduct—are at a great disadvantage given where the arm-of-the-state doctrine sits today. FCA suits consume considerable public and private resources, they are time consuming and complex, and are generally active in the federal judicial system for years (as shown by Petitioner, Dr. Kreipke, and Mr. Willette's cases).

At present, however, FCA plaintiffs are simply taking their best guess as to whether an entity who has allegedly defrauded the federal government can be prosecuted civilly under the FCA. In doing so, cases are being pursued and sitting for years in the federal system—not to resolve the merits of the fraud alleged—but to resolve whether an entity can be sued under the FCA in the first place. This not only has a detrimental impact on the courts themselves, but it frustrates and hampers the ability of those meant to root out and protect the federal treasury.

Civil litigation under the FCA is of great public importance in protecting the federal treasury. But the uncertainty provided by the arm-of-the-state doctrine has a trickle-down effect on the future of such lawsuits. FCA plaintiffs need guidance from this Court and a uniform approach in order to better assess whether to pursue FCA claims. As a result, this will conserve resources—private, public, and judicial alike—and will better FCA litigation in the future.

Accordingly, this Court's review is necessary and the petitions should be granted.

CONCLUSION

For the reasons stated above, the petitions for writs of certiorari should be granted.

Respectfully submitted,

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March 21, 2016

APPENDIX

APPENDIX

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APPENDIX A

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.	)
	)

O R D E R

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

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

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

was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/_____
Deborah S. Hunt, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 15-1239

[Filed February 26, 2016]

MICHAEL A. WILLETTE, ex rel United States, Commonwealth of Massachusetts,

Plaintiff - Appellant,

v.

UNIVERSITY OF MASSACHUSETTS, Worcester, a/k/a University of Massachusetts Medical School,

Defendant - Appellee,

THE ESTATE OF LEO VILLANI; JOHN DOES,

Defendants.

Howard, Chief Judge,
Souter, Associate Justice,[*]
Torruella, Selya, Lynch, Thompson,
Kayatta and Barron, Circuit Judges.

[*] Hon. David H. Souter, Associate Justice (ret.) of the Supreme Court of the United States, sitting by designation.

ORDER OF COURT

Entered: February 26, 2016

The petition for rehearing en banc having been submitted to the active judges of this court, and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be DENIED.

By the Court:

/s/ Margaret Carter, Clerk