No. 15-1419

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Petitioner Dr. Christian Kreipke has presented any compelling reason to grant his Petition for *certiorari* regarding the Sixth Circuit's decision that Respondent Wayne State University is an "arm of the state" of Michigan under the Eleventh Amendment, and thus is not a "person" subject to suit under the False Claims Act (FCA), where: (1) the Sixth Circuit properly applied this Court's Eleventh Amendment caselaw on the issue, (2) there is no conflict among the circuits over the considerations for determining if an entity is an "arm of the state," and (3) the Sixth Circuit applied the "arm of the state" test that Petitioner advocated, and Petitioner failed to advance, either in the Sixth Circuit or his Petition, any other test or rule that he believes this Court should adopt.

2. Whether Petitioner has presented any compelling reason to grant his Petition by his assertion that Wayne State's Board of Governors is a "body corporate," and therefore a "person" under the FCA, where: (1) Petitioner cites no authority, either in the Sixth Circuit or his Petition, to support that assertion, (2) there is no conflict among the circuits on that issue, and (3) each circuit that has addressed it has held that a state-created body corporate is not a "person" if it is an arm of the state for purposes of the Eleventh Amendment.

CORPORATE DISCLOSURE STATEMENT

Because Respondent Wayne State University is not a nongovernmental corporation, no corporate disclosure statement is required under Supreme Court Rule 29.6.

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INTRODUCTION

As Petitioner recognized in its own complaint, Respondent Wayne State University "is a *State funded university* that was founded in 1868."[1] Wayne State was created as a state university by legislation, and it was given status as a Constitutional Body Corporate in the Michigan Constitution of 1963. MICH. CONST. ART. 8, §5 ("the governors of Wayne State University and their successors in office shall constitute a body corporate"). MICH. CONST. ART. 8, §4 requires the Michigan "legislature [to] appropriate monies *to maintain* . . . Wayne State University . . .". In MICH. COMP. LAWS §390.641, the Michigan legislature "established a *state institution* of higher education" known as Wayne State University, and commanded that "[t]he institution *shall be maintained by the state* of Michigan." MICH. COMP. LAWS §390.648 expressly provides that Wayne State's "board shall be deemed a *state agency*," and MICH. COMP. LAWS §691.1401 provides that the term "state includes a public university and college of this state, whether established as a constitutional corporation or otherwise." Moreover, under MICH. COMP. LAWS §600.6095 the State of Michigan is liable for judgments against Wayne State because that statute requires that any judgment against its Board of Governors (the only entity with the capacity to sue and be sued) "shall be included and collected in the state tax and paid to the person entitled thereto." Furthermore, Wayne State's Board of Governors is elected through a statewide

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[1] First Amended Complaint, Civil Action No. 12-14836, Doc. 19, ¶12.

general election, and vacancies are appointed by the governor.

Not surprisingly, in this case the United States Court of Appeals for the Sixth Circuit affirmed the district court's unremarkable conclusion that Wayne *State* University is an arm of the State of Michigan,[2] and therefore not a "person" that can be sued under the False Claims Act ("FCA"), 31 U.S.C. §§3729 *et seq*. In doing so, the Sixth Circuit joined all other circuits that "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" when deciding if the entity

[2] That conclusion was unremarkable given that over the past three decades, federal courts have unanimously concluded that Wayne State, as well as its board of governors, is an arm of the State of Michigan for purposes of the Eleventh Amendment. *See, e.g., Komanicky v. Teacher's Ins. & Annuity Ass'n*, 230 F.3d 1358 (6th Cir. 2000) (unpub.) ("Wayne State University's Board of Governors is clearly a state agency"); *Johnson-Brown v. Wayne State Univ.*, 173 F.3d 855 (6th Cir. 1999) (unpub.) (Wayne State "considered to be the 'state'" under Eleventh Amendment); *Coleman v. Wayne State Univ.*, 664 F. Supp. 1082, 1085 (E.D. Mich. 1987) ("Defendant Wayne State University is a state instrumentality and therefore qualifies for state immunity under the Eleventh Amendment," because its "origins are in the Michigan State Constitution, and its Board of Governors is a constitutional body"); *Johnson v. Wayne State Univ.*, 2006 WL 3446237, at *3 (E.D. Mich., Nov. 26, 2006) ("Wayne State University is an 'arm of the state' entitled to Eleventh Amendment immunity"); *Simmons v. Napier*, No. 11-13403 (E.D. Mich., June 28, 2013) ("the Court finds that WSU is an arm of the state"); *Rainey v. Wayne State Univ.*, 26 F. Supp.2d 973, 976 (E.D. Mich. 1998) (Wayne State is "arm or alter ego" of the state because judgment for plaintiff "would require payments from the State's coffers").

is a "person" subject to suit under the FCA. App. 10. All of those circuits (the First, Fourth, Fifth, Ninth, Tenth, Eleventh, and now the Sixth) uniformly and consistently use, pursuant to *Vermont Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765 (2000), 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." App. 11.

Petitioner does not contest the Sixth Circuit's holding that the appropriate test for determining whether an entity is a "person" subject to suit under the FCA is the same test for determining whether that entity is an "arm of the state" for purposes of the Eleventh Amendment. Instead, Petitioner asserts a new argument that it never made in the lower courts: that there is not sufficient clarity regarding the appropriate test to use under the Eleventh Amendment to determine if an entity is an arm of the state. To the contrary, the Sixth Circuit applied the very arm of the state test that Petitioner advocated (*Ernst v. Rising*, 427 F.3d 351 (6th Cir. 2005) (en banc)). (Appellant's Brief on Appeal, Doc. 17 at 14, 21). Petitioner, dissatisfied with result the Sixth Circuit reached under that test, now seeks this Court's review to upset that decision, but *never articulates what test the lower court should have applied* or what test, in his view, this Court should adopt.

Petitioner attempts to create the illusion of a conflict among the circuit courts of appeals by claiming that this Court's Eleventh Amendment jurisprudence has somehow sent "mixed signals" and has given "lack of definition" (Petition at 17) such that circuits have

formulated various multi-factor tests to determine whether an entity is an "arm of the state" under the Eleventh Amendment. Petitioner asserts that because circuits have enumerated this Court's Eleventh Amendment principles in different ways, the circuits are somehow in "disarray," requiring this Court's intervention.

But the circuits are not split or in "disarray" over how they apply this Court's Eleventh Amendment arm-of-the-state decisions, and those decisions have not caused "confusion" or provided "lack of guidance" to lower courts. Despite nominal differences in how circuits have formulated this Court's well-established principles for determining whether an entity is an arm of the state, as demonstrated *infra* in Section II, the formulations are in substance the same and all circuits faithfully incorporate this Court's Eleventh Amendment jurisprudence, presenting no need for this Court to grant *certiorari*.

Indeed, apparently recognizing both the clarity of its prior cases and the absence of any actual conflict among the circuits, this Court has repeatedly, and recently, denied *certiorari* in several cases in which petitioners have asserted the same grounds for *certiorari* that Petitioner asserts in this case. For example, in *U.S. ex rel. King v. University of Texas Health Science Center – Houston*, 134 S.Ct. 1767 (2014), this Court denied *certiorari* to the Fifth Circuit where the petitioner asserted the "Circuits do not consistently apply uniform criteria for determining whether a given [entity] is an 'arm of the state'" under the FCA, that "[n]o two courts of appeals use the same formulation for deciding whether" an entity "is an 'arm of the state'

for sovereign immunity purposes," and that "[t]his Court has . . . never provided an authoritative set of criteria" for doing so. Petition for Writ of Certiorari, *King*, 2014 WL 411565 at *i and 17-18 (No. 13-927).

In *Lesinski v. South Florida Water Management Dist.*, 134 S.Ct. 2312 (2014), this Court denied *certiorari* to the Eleventh Circuit where the petitioner claimed that "six different circuit courts of appeal have devised six distinct tests for when an entity is a 'state actor' or a 'person' under the Federal False Claims Act, creating a Circuit Split that has led to the inconsistent application of Federal law across the Circuits." Petition for Writ of Certiorari, *Lesinski*, 2014 WL 1348932 at *ii (No. 13-1207).

In *Southeastern Transp. Authority v. Cooper*, 129 S.Ct. 2736 (2009), this Court denied *certiorari* to the Third Circuit where the petitioner asserted, among other things, that there is "a conflict among the circuits in their approach to determining whether an entity is an arm of the state entitled to Eleventh Amendment immunity." Petition for Writ of Certiorari, *Southeastern Transp. Authority*, 2009 WL 507766 at *2 (No. 08-1085).

And in *Int'l Shipping Agency, Inc. v. Puerto Rico Port Authority*, 129 S.Ct. 1312 (2009), this Court denied *certiorari* to the D.C. Circuit where the petitioner asserted, among other things, that "circuit courts have struggled to apply the factors enumerated in *Mt. Healthy*, *Lake Country Estates*, and *Hess*," which the petitioner claimed has "created . . . confusion in the lower courts" requiring Supreme Court review. Petition for Writ of Certiorari, *Int'l Shipping Agency, Inc.*, 2008 WL 4525349 at *18 (No. 08-457).

This case presents no greater reason for granting *certiorari* than the cases for which this Court has previously denied the writ. Given that there is no circuit split, the Petition seeks to have this Court provide a solution in the absence of a problem.

STATEMENT OF THE CASE

On October 31, 2012, Petitioner filed a *qui tam* complaint against Respondent Wayne State University alleging five claims under the False Claims Act and two under Michigan law for retaliatory discharge and defamation. The United States declined to intervene in the case. Wayne State moved to dismiss all claims for failure to state a claim under Fed. R. Civ. P. 12(b)(6), arguing (1) that Petitioner's FCA claim was barred because Wayne State is not a "person" that can be sued under the Act, (2) that Petitioner failed to plead an FCA claim with sufficient particularity under Fed. R. Civ. P. 9(b), (3) that Petitioner's retaliation claim was barred by the Michigan Governmental Tort Liability Act, and (4) that all of Petitioner's claims against Wayne State were barred by sovereign immunity under the Eleventh Amendment. In response, Petitioner indicated his desire to file an amended complaint that sought to add Wayne State's Board of Governors and President as defendants, and to plead further his FCA claim with greater specificity.

The district court granted Wayne State's motion to dismiss on November 13, 2014, and denied Petitioner's motion for reconsideration, which claimed he should have been given leave to amend, on January 28, 2015.

On appeal to the Sixth Circuit, Petitioner argued that whether Wayne State is an arm of the state should

be judged under *Ernst v. Rising*, 427 F.3d 351 (6th Cir. 2005) (en banc) (Appellant's Brief on Appeal, Doc. 17 at 15). Synthesizing this Court's precedents, *Ernst* held:

> In deciding whether an entity is an "arm of the state" . . . the Supreme Court has considered several factors: (1) the State's potential liability for a judgment against the entity. *Hess*, 513 U.S. 51, 115 S.Ct. 394; (2) the language by which the state statutes, *id.* at 44, 115 S.Ct. 394, refer to the entity and the degree of state control and veto power over the entity's actions, *id.* at 44, 115 S.Ct. 394; (3) whether state or local officials appoint the board members of the entity, *id.*; and (4) whether the entity's functions fall within the traditional purview of state or local government, *id.* at 45, 115 S.Ct. 394. . . . [T]he Court has emphasized that the first factor – the liability of the State for a judgment – is the foremost factor, *id.* at 51, S.Ct. 394, and that 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, see *Doe*, 519 U.S. at 431, 117 S.Ct. 900.

427 F.3d at 359. Petitioner did not argue that *Ernst* failed to incorporate accurately this Court's Eleventh Amendment arm-of-the-state jurisprudence, did not argue that a different test should be used, and did not argue that this Court's precedent was unclear, confusing, or that a different test or set of factors should be considered.

The Sixth Circuit correctly applied the test Petitioner advocated and held that "[a]ll four factors to

be considered under the *Ernst* test weigh in favor of finding that WSU is an arm of the State of Michigan" and, "[a]ccordingly, 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." App. 23.

The Sixth Circuit did not consider Wayne State's argument on appeal that Petitioner failed to plead adequately a claim under the FCA as an alternative ground for affirming. (Appellee's Brief on Appeal, Doc. 18 at 38-44). App. 24. The Sixth Circuit also affirmed the district court's denial of leave to amend to add Wayne State's Board of Governors and President as defendants, and to plead its FCA claim with greater specificity. *Id.*

REASONS FOR DENYING THE WRIT

I. THIS COURT'S ELEVENTH AMENDMENT ARM-OF-THE-STATE PRECEDENTS ARE UNAMBIGUOUS AND REQUIRE NO CLARIFICATION

Far from sending "mixed signals" or providing "lack of definition" (Petition at 17) to lower courts for deciding whether an entity is an arm of the state under the Eleventh Amendment, this Court has made clear in a series of decisions that the "answer depends" on number of factors, including "the nature of the entity created by state law," *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977), whether Eleventh Amendment immunity is necessary "in order to protect the state treasury from liability that would have had essentially the same practical consequence as a judgment against the state itself," *Lake Country*

Estates, Inc. v Tahoe Regional Planning Agency, 440 U.S. 391, 400-401 (1979), whether the "governing members of [the entity] are appointed" by the state, *id.* at 401, whether "[f]unding [of the entity] must be provided by" the state, *id.* at 401-402, whether the "state treasury [is] directly responsible for judgments against" the entity, *id.* at 402, whether the entity's activities are "traditionally a function performed by local governments," *id.* at 402, and whether the entity's "authority to make rules within its jurisdiction is not subject to veto at the state level." *Id.* at 390.

In *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994), this Court applied the same factors in concluding that the bi-state Port Authority Trans-Hudson Corporation was not an arm of the state entitled to Eleventh Amendment immunity. Factors pointing toward the entity being an arm of the state were that "[a]ll commissioners are state appointees," that "each State through its Governor may block Port Authority measures," and that each state's legislature could "enlarge the Port Authority's powers and add to its responsibilities." The Court also noted that the Port Authority's "compact and implementing legislation do not type the Authority as a state agency," although state courts "repeatedly have typed the Port Authority an agency of the State . . . ." 513 U.S. at 44-45.

The factors *Hess* considered "[p]ointing away from Eleventh Amendment immunity" were that "the States lacked financial responsibility for the Port Authority," that it "generates its own revenues, and for decades has received no money from the States," and "[t]he States . . . bear no legal liability for Port Authority

debts" because "they are not responsible for the payment of judgments against" it. *Id.* at 45-46.

Hess recognized that "the impetus for the Eleventh Amendment" was "the prevention of federal-court judgments that must be paid out of a State's treasury," and furthermore observed that, acting in accord with one another, the "Courts of Appeals have recognized the vulnerability of the State's purse as the most salient factor in Eleventh Amendment determinations." *Id.* at 48-49 (citing numerous cases).

Because the factors *Hess* applied to the facts of that case did not all point in the same direction, *Hess* held that in such cases "the Eleventh Amendment's two reasons for being remain our primary guide." *Id.* at 47. In deciding that the entity was not an arm of the state, *Hess* concluded that "the Port Authority is financially self-sufficient; it generates its own revenues, and pays its own debts," and "[r]equiring the Port Authority to answer in federal court to injured railroad workers . . . does not touch the concerns – the State's solvency and dignity – that underpin the Eleventh Amendment." *Id.*

In *Regents of the Univ. of Calif. v. Doe*, 519 U.S. 425 (1997), this Court again summarized the factors that determine whether an entity – in that case, the University of California – is an arm of the state:

> When deciding whether a state instrumentality may invoke the State's immunity, our cases have inquired into the relationship between the State and the entity in question. In making this inquiry, we have sometimes examined "the essential nature and effect of the proceeding," . . . and sometimes focused on the "nature of the

> entity created by state law" [ ] to determine whether it should "be treated as an arm of the State."

Id. at 429-30 (citations and footnote omitted). This Court held that "it is the entity's *potential* legal liability . . . that is relevant." *Id.* at 431.

Federal Maritime Comm's v. S. Carolina State Ports Auth., 535 U.S. 743 (2002), emphasized that the Eleventh Amendment's main purpose is to "afford the States the dignity and respect due sovereign entities." *Id.* at 769.[3]

These decisions make clear exactly what factors and concerns lower courts must consider in deciding if an entity is an arm of the state under the Eleventh Amendment. There is no lack of clarity that requires further explanation from this Court and, as set out *infra*, the lower courts have had no trouble faithfully applying the principles this Court has already articulated. Any perceived differences in outcomes

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[3] Petitioner's statement that *Federal Maritime* "seemingly upended *Hess*'s holding that the state-treasury rationale was the key purpose" of the Eleventh Amendment (Petition at 19) is neither correct nor meaningful. This Court has recognized both rationales (i.e., state solvency and state dignity) as the Eleventh Amendment's "two reasons for being." *Hess*, *supra*, 513 U.S. at 47. Whether one or the other is "the key" purpose makes little difference, and they are merely opposite sides of the same coin. *Fed. Maritime Comm'n*, *supra*, 535 U.S. at 765 ("accord[ing] the States the respect owed them as joint sovereigns" is the "central purpose" of the Eleventh Amendment, and "shielding state treasuries and thus preserving the States' ability to govern in accordance with the will of their citizens" is an "important function" of the Eleventh Amendment).

from applying this Court's Eleventh Amendment caselaw are the result of differences stemming from the "nature of the entity created by state law," *Mt. Healthy*, *supra*, 429 U.S. at 280, not differences attributable to any purported "ambiguity" in this Court's precedents.

II. THERE IS NO CONFLICT OF AUTHORITY AMONG THE CIRCUITS

Certiorari should be denied where there is no direct conflict among circuit courts. *See Singleton v. CIR*, 439 U.S. 940, 945 (1978) ("the absence of any conflicts among the Circuits is plainly a sufficient reason for denying *certiorari*") (Stevens, Jr.); *Bunting v. Mellon*, 541 U.S. 1019, 1021 (2004) (a "reason justifying a denial of *certiorari* is the absence of a direct conflict among the circuits").

Relying on student-written law review commentary (Petition at 14, 17-18), Petitioner asserts that merely because circuits have formulated various "multi-factor tests" organized differently and containing different numbers of elements they are in conflict or disarray. However, Petitioner ignores that regardless of how each circuit may enumerate and subdivide a "test" into two, three, five or seven "factors," they all incorporate the same substantive considerations this Court has set out. Notably, the Petition fails to discuss the *substance* of each circuits' formulation, and doing so demonstrates that the circuits all consider the same factors regardless of how they group, organize or number them.

In the First Circuit, based on *Mt. Healthy*, *Lake Country Estates*, *Hess*, *Auer v. Robbins*, 519 U.S. 452 (1997), and *Federal Maritime*, the court considers

"(1) whether the agency has the funding power to enable it to satisfy judgments without direct state participation or guarantees; (2) whether the agency's function is governmental or proprietary; (3) whether the agency is separately incorporated; (4) whether the state exerts control over the agency, and if so, to what extent; (5) whether the agency has the power to sue, be sued, and enter contracts in its own name and right; (6) whether the agency's property is subject to state taxation; and (7) whether the state has immunized itself from responsibility for the agency's acts or omissions." *Frenenius Med. Care Card. Resources, Inc. Puerto Rico and the Caribbean Card. Center Corp.*, 322 F.3d 56, 62 n.6 (1st Cir. 2003). It also considers the "extent of state control through the appointment of board members" and its "power to veto board actions or enlarge the entity's responsibilities," how "the enabling and complementing legislation characterized the entity and how the state courts have viewed the entity," "whether the entity's functions are . . . state functions or local or non-governmental functions," and "whether the state bore legal liability for the entity's debts." *Id.* at 65 n.7.

More recently, in *Irizarey-Mora v. Univ. of Puerto Rico*, 647 F.3d 9 (1st Cir. 2011), the First Circuit "confirm[ed] that our precedent is in line with current law." *Id.* at 13. Far from Petitioner's accusation that circuits are "confused," "in disarray" and suffer from "lack of definition" and "mixed messages" from this Court, the First Circuit expressly said "we are comfortable that our longstanding precedent remains consistent with current Eleventh Amendment principles." *Id.* at 17.

The First Circuit's comfort in applying this Court's Eleventh Amendment arm-of-the-state jurisprudence is apparently shared by every other circuit, all of which uniformly apply the same principles, regardless of whether they vary in how they number or formulate their own "multi-part tests." That uniformity among circuits perhaps explains why "the vast majority of state universities . . . have been found to be 'arms' of the State." 647 F.3d at 14 (citing 13 Charles Alan Wright, Arthur R. Miller, Edward H. Cooper & Richard D. Freerer, *Federal Practices & Procedure* §3524.2 at 523-32 (2008) (noting that "state universities usually are considered arms of the state")). Universities have only been held not to be arms of the state based upon their unique underlying facts, rather than variations in the "test" applied. Indeed, Petitioner admitted in the lower court that "most courts have found public universities to be arms of the state." (Appellant's Brief on Appeal, Doc. 17 at 20).

Like the First Circuit, the Eighth Circuit similarly explained in *Public School Ret. Sys. of Mo. v. State Street Bank & Trust Co.*, 640 F.3d 821 (8th Cir. 2011), that its "arm-of-the-State test requires a close analysis of the [entity's] relationship with the State of Missouri," requiring a "detailed analysis of state law." *Id.* at 827 (citing *Doe*, 519 U.S. at 429 n.5). "First, we consider the [entity's] independence from the State," including the entity's "degree of autonomy and control over its own affairs" and its "powers and characteristics under state law." *Id.* Those considerations include the state's "ability to appoint an entity's leaders," which makes it "more likely the entity is an arm of the State." *Id.* at 828 (citing *Hess*, 513 U.S. at 44). The court also looked at whether state statutory and case law

"characterizes the [entity] the way we would expect it characterize an arm of the state," *id.* at 829, and whether the entity's operations were more typically "a function of state government rather than local." *Id.*

"Second, we consider how a money judgment in litigation including the [entity] could affect the State of Missouri's treasury." *Id.*

The Eight Circuit recognizes that "a money judgment's potential impact upon a State's treasury is of 'considerable importance'," *id.* at 830 (quoting *Doe*, 519 U.S. at 430-31), and the state's "role in financing an entity's operation can indicate whether a money judgment" can impact the state treasury. *Id.* It is "[t]herefore . . . appropriate to analyze the extent of the State['s] . . . responsibility to pay the [entity's] obligations." *Id.* at 831.

The Second Circuit uses a substantively-identical test, enumerating the factors to consider as "(1) how the entity is referred to in the documents that created it; (2) how the governing members of the entity are appointed; (3) how the entity is funded; (4) whether the entity's function is traditionally one of local or state government; (5) whether the state has veto power over the entity's actions; and (6) whether the entity's obligations are binding on the state." *Leitner v. Westchester Comm. College*, 779 F.3d 130, 135 (2d Cir. 2015).

The Third Circuit similarly applies the same considerations, looking at "[w]hether the money that would pay the judgment would come from the state," including "whether payment will come from the state's treasury." *Cooper v. Southeastern Penn. Transp.*

Authority, 548 F.3d 296, 301 (3d Cir. 2008). The Third Circuit also considers "[t]he status of the [entity] under state law," including "how state law treats the [entity] generally, whether the entity is separately incorporated, whether [it] can sue or be sued in its own right," *id.* at 306, "[w]hat degree of autonomy the [entity] has," *id.* at 308, and whether its decisions are "subject to gubernatorial veto," whether it "has the power to bring lawsuits." *Id.* at 309.

The Tenth Circuit formulates those same considerations by grouping them into three broad categories, holding in *Sikkenga v. Regence Blue Cross of Utah*, 472 F.3d 702 (10th Cir. 2006), that the courts must consider "(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." *Id.* at 718.

The D.C. Circuit similarly held in *Puerto Rico Port Authority v. Federal Maritime Comm's*, 531 F.3d 868 (D.C. Cir. 2008), that "[t]o determine whether an entity is an arm of the State, the Supreme Court and this Court have generally focused on the 'nature of the entity created by state law' and whether the State 'structured' the entity to enjoy immunity from suit." *Id.* at 873. Like its sister circuits, the D.C. Circuit examines "(1) the State's intent as to the status of the entity, including the functions performed by the entity; (2) the State's control over the entity; and (3) the entity's overall effects on the state treasury." *Id.* (citing *Mt. Healthy*, 429 U.S. at 280, *Hess*, 513 U.S. at

43-44, and *Lake Country Estates*, 440 U.S. at 40). Included within those three delineated factors, the court further looks to whether state "law expressly characterizes [the entity] as a governmental instrumentality," "whether [it] is treated as a governmental instrumentality for purposes of other [state] laws," *id.* at 874, "how the directors and officers of [the entity] are appointed," *id.* at 877, whether it is "financed out of the [state's] general revenues," *id.* at 879, whether the state "is legally liable for some of [the entity's] actions" or "has some significant financial responsibility for" it, *id.* at 880, and whether "payment for judgments in . . . suits [against the entity] comes out of the [state's] coffers." *Id.*

The Fourth Circuit similarly considers "whether any judgment against the entity as defendant will be paid by the State," the "entity's 'potential legal liability' [being] key." *Oberg v. Penn. Higher Educ. Asist. Agency*, 745 F.3d 131, 136-37 (4th Cir. 2014) (citing *Doe*, 519, U.S. at 431). Like the other circuits, the Fourth Circuit also considers "the degree of autonomy exercised by the entity, including such circumstances as who appoints the entity's directors or officers, who funds the entity, and whether the State retains veto over the entity's actions." *Id.* at 137. The Fourth Circuit also considers whether the entity's "board of directors is composed of gubernatorial appointees," *id.* at 139, whether the entity receives any "operational funding from" the state, *id.*, and "whether [the] entity has the ability to contract, sue and be sued, and purchase and sell property." *Id.* The Fourth Circuit also looks at "how the entity is treated under state law," *id.* at 138, including whether "state courts have

concluded that [the entity] is a state agency." *Id.* at 140.

The Eleventh Circuit looks to the same considerations, asking "(1) how state law defines the entity, (2) what degree of control the State maintains over the entity; (3) where the entity derives its funds; and (4) who is responsible for judgment against the entity." *Lesinski v. South Florida Water Management Dist.*, 739 F.3d 598, 602 (11th Cir.), *cert. denied* 134 S.Ct. 2312 (2014).[4]

Consistent with the other circuits, the Ninth Circuit asks "(1) whether a money judgment would be satisfied out of state funds, (2) whether the entity performs central governmental functions, (3) whether the entity may sue or be sued, (4) whether the entity has the power to take property in its own name or only the name of the state, and (5) the corporate status of the entity." *Beentjes v. Placer County Air Pollution Control Dist.*, 397 F.3d 775, 778 (9th Cir. 2005). Whether a "judgment would be satisfied out of state funds" is "the predominant factor" because "the impetus of the Eleventh Amendment is the prevention of federal-court judgments that must be paid out of a state's treasury." *Id.* Beyond, or embedded within, those five factors, the Ninth Circuit also looks to whether the matter is a "matter of statewide rather than local or municipal concern," *id.* at 782, whether the entity has "discretionary powers" or "substantial autonomy" in its duties, *id.* at 783, whether it is funded by the state or

[4] As noted *supra*, this Court denied *certiorari* in *Lesinski* on the petitioner's claim that circuits were in conflict over the appropriate arm-of-the-state test.

has "authority to raise independent revenue," *id.* at 780, and whether its board of directors are appointed by the state governor. *Id.* at 785.

The Fifth Circuit similarly looks at "(1) whether state statutes and case law characterize the agency as an arm of the state; (2) the source of funds for the entity; (3) the degree of autonomy the entity enjoys; (4) whether the entity is concerned primarily with local, as opposed to statewide, problems; (5) whether the entity has authority to sue or be used in its own name; and (6) whether the entity has the right to hold and use property." *Vogt v. Bd. of Comm'n of the Orleans Dist.*, 294 F.3d 684, 689 (5th Cir. 2002). In addition to those specifically-delineated six factors, the "most significant factor in assessing an entity's status is whether a judgment against it will be paid with state funds." *Id.* It also considers the governor's role in appointing the entity's board members. *Id.* at 695.

The Seventh Circuit likewise says the "most important factor is 'the extent of the entity's financial autonomy from the state'," looking at "(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 taxation; and (5) whether a judgment against the entity would result in an increase in its appropriations." *Peirick v. Indiana Univ.-Purdue Univ. Indianapolis Ath. Dep't*, 510 F.3d 681, 695-96 (7th Cir. 2007). Beyond those five enumerated factors, the Seventh Circuit, like its sibling circuits, also considers "the general legal status of the entity" under state law, *id.*, whether the entity "depends on the state's financial support," *id.* at 696, whether "the governor . . . has some control over the"

entity through appointment power, *id.*, and whether the entity "serves the entire state" rather than local interests. *Id.*

If the foregoing seems repetitive and redundant, it is because it is. All circuits apply the same substantive considerations to determine if an entity is an arm of the state, all of which come from *Mt. Healthy*, *Lake Country Estates*, *Hess* and *Doe*. There is no basis for Petitioner's melodramatic, if not histrionic, assertion that "this Court's precedent has resulted in the circuit courts going twelve very different directions." (Petition at 15). To the contrary, they all follow the same compass heading. As Petitioner conceded below, to the extent that cases reflect any variability, it arises out of fact-bound issues - - i.e., 'the peculiar circumstances" or "unique governmental context" of the entity. (Appellant's Brief on Appeal, Doc. 17 at 20). *See also Hess*, *supra*, 427 U.S. at 44 (court must review "all relevant considerations"). There is no conflict among the circuits that warrants *certiorari* in this case.[5]

[5] Petitioner's self-serving straw-man exercise of "demonstrating" that Wayne State would be deemed an arm of the state in some circuits but not in others (Petition at 24-26) shows nothing. After all, Petitioner vehemently maintained that Wayne State is not an arm of the state under *Ernst*, and he was wrong. Wayne State would be an arm of the state in any circuit, because all circuits apply the same considerations as confirmed by the litany of cases from all circuits holding that state universities like Wayne State are arms of the state. *See Federal Practices & Procedure*, *supra*, §3524.2.

III. THE SIXTH CIRCUIT PROPERLY APPLIED THIS COURT'S UNAMBIGUOUS PRECEDENT

A petition for writ of *certiorari* should not be granted to correct error. *Overton v. Ohio*, 534 U.S. 982, 985-86 (2001) ("we cannot act as a court of simple error correction") (Breyer, J., for Stevens, O'Connor, and Suter, J.J.); *Ross v. Moffitt*, 417 U.S. 600, 617-18 (1974) ("[t]his Court's review is discretionary and depends on numerous factors other than perceived correctness of the judgment we are asked to review"). The Sixth Circuit properly determined, based on this Court's precedent and Sixth Circuit caselaw incorporating that precedent, that Wayne State is an arm of the state.

First, the Sixth Circuit correctly held that "'any judgment against WSU will be paid out of the state's tax revenues' under MICH. COMP LAWS §600.6095." App. 13. It recognized that Michigan's legislature "established WSU as a 'state institution of higher education' that 'shall be maintained by the state of Michigan' in MICH. COMP LAWS §390.6041," and that the "Michigan Constitution provides that 'legislature should appropriate monies to . . . maintain . . . Wayne State University." ART. 8, §4. The Constitution further "establishes that 'the governors of Wayne State University' and their successors in office shall constitute a body corporate known as the Board of Governors'," MICH. CONST. ART. 8, §5, and that "[a]ppropriations to WSU are received from the state's general fund pursuant to MICH. COMP LAW §380.649." App. 13. The Sixth Circuit correctly noted that MICH. COMP LAWS §600.6095 provides that "[w]hen 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." App. 14.

The Sixth Circuit explained that under the statute establishing Wayne State and its Board of Governors, "only the Board of Governors has the capacity to sue and be sued. MICH. COMP LAWS §390.641." App. 15. Thus, the Michigan legislature did not specify that claims against Wayne State University (which does not have the capacity to sue or be sued) would be paid by the state, but instead provided that the state must pay any judgment against the Board of Governors, the only entity capable of being sued. App. 15.

Second, the Sixth Circuit correctly held that Michigan's statutes and caselaw clearly treat and refer to Wayne State as an arm of the state, and Petitioner conceded as much. App. 16. That Wayne State retained *educational* independence from the state does not alter that conclusion, given the Michigan Supreme Court's recognition of "the wisdom of establishing a separate governing body of" state universities "free from the political influences that are necessarily a part of a state legislature" because "such independence must be maintained in educational matters . . .." App. 17-18 (quoting *Branum v. Board of Regents of the University of Michigan*, 145 N.W.2d 860, 862 (Mich. Ct. App. 1966)). *Branum* held that "[i]n spite of its independence, the Board of Regents remains a part of the government of the state of Michigan," App. 18 (quoting *Branum*, 145 N.W.2d at 862), which the Sixth Circuit used to "explain[ ] why WSU's independence from the control of the Michigan state legislature

should not undermine its status as a state entity in this case." App. 18.

The Sixth Circuit further held that the Board of Governors is elected through statewide, not local, elections, and vacancies are appointed by the governor. App. 19. The state provided "$179 million to Wayne State from state appropriations in 2012" which, although comprising approximately 20% of its total funding, "can hardly be said to be only nominal state support for WSU." App. 22-23.

Consistent with decades of caselaw holding that Wayne State is an arm of the state, the Sixth Circuit correctly reached the same unremarkable conclusion in this case.

IV. THERE IS NO COMPELLING REASON TO GRANT *CERTIORARI* ON THE QUESTION WHETHER WAYNE STATE'S BOARD OF GOVERNORS IS A "PERSON" SUBJECT TO SUIT UNDER THE FCA

First, there is no split of authority on the question of whether, as Petitioner contends, all corporations are subject to liability under the FCA that warrants granting *certiorari* in this case.[6] (Petition at 26-31). The Sixth Circuit properly observed that Petitioner "fail[ed] to cite any authority for that proposition," and that 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, corporations that are arms of the state are excluded. *See Stevens*, 529 U.S. at 779 (a state must

[6] See Section II, *supra*.

clearly express an intent to permit causes of action against itself)." App. 27. The Sixth Circuit's conclusion is consistent with the only two cases Petitioner cites (Petition at 28), *Sikkenga*, *supra*, 472 F.3d at 716 (10th Cir. 2012) (rejecting claim that "because [an entity] is a corporation, it must be a person and therefore liable under the FCA," but instead requires applying Eleventh Amendment arm-of-the-state analysis) and *Oberg*, *surpa*, 745 F.3d at 135 (4th Cir. 2014) ("to determine if a *state-created* corporation is truly subject to sufficient state control to render [it] part of the state, and not a 'person' for FCA purposes . . . the appropriate legal framework . . . is the arm-of-the-state analysis used in the Eleventh Amendment context"). In short, being a corporation does not make an entity a "person" under the FCA if that entity is an arm of the state under the Eleventh Amendment, and there is no conflict among circuits on that issue. Wayne State's Board of Governors is, of course, an arm of the state under the Eleventh Amendment. *See infra* note 1.

Second, the district court did not allow Petitioner to add the Board of Governors because Petitioner failed to file a proper motion. App. 37-38. The Board of Governors is not party to this action, and petitioner does not now claim that the district court improperly denied its Fed. R. Civ. P. 59(e) motion in which Petitioner raised the issue.

V. THIS CASE IS AN IMPROPER PROCEDURAL VEHICLE TO RESOLVE ANY OF THE ISSUES PETITIONER RAISES

Assuming *arguendo* that Petitioner could somehow present a *certiorari*-worthy issue, various procedural anomalies require denying *certiorari* in this case.

A. By not advocating any arm-of-the-state test other than the one the lower court applied, Petitioner failed to preserve the issue.

In the lower courts, Petitioner advocated applying the *Ernst* test to decide if Wayne State is an arm of the state. (Appellant's Brief on Appeal, Doc. 17 at 20). Petitioner did not contend that a different test should apply. Moreover, Petitioner did not argue below that this Court's arm-of-the-state caselaw is unclear, or that the Sixth Circuit should have done anything any differently.

This Court does not consider issues that were not presented in the lower courts. *See Ford Motor Co. v. United States*, 134 S.Ct. 510 (2013) ("[t]his Court is one of final review, not of first review"); *Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212-13 (1998) ("[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will ordinarily not consider them"); *United States v. Ortiz*, 422 U.S. 891, 898 (1975) ("[w]e therefore decline to consider this issue, which was raised for the first time in the petitioner for certiorari"); *Tacom v. Arizona*, 410 U.S. 351, 352 (1973) ("[w]e cannot decide issues raised for the first time here").

Moreover, Petitioner does not say what "test" he believes this Court should adopt, for the simple reason that he never advocated any test in the lower court other than the one the Sixth Circuit applied. His case is an unsuitable vehicle for this Court to "clarify" its Eleventh Amendment arm-of-the-state jurisprudence because Petitioner has never said -- either below or in the present Petition -- *how* it should be clarified or *what test* this court should adopt. At bottom, Petitioner simply wants *certiorari* granted to avoid an unfavorable result, which is of course no reason to grant *certiorari*.

B. Petitioner's complaint failed to plead adequately a claim under the FCA.

This case is also a poor vehicle to consider any issue Petitioner has raised because Petitioner failed to plead adequately an FCA claim under Fed. R. Civ. P. 12(b)(6). Although the Sixth Circuit did not reach that issue because it held Wayne State is not a person under the FCA (App. 24), Wayne State argued that dismissal of Petitioner's "FCA claims can also be affirmed on the alterative ground that he did not plead any FCA claim with requisite particularity and plausibility." (Appellee's Brief on Appeal, Doc. 18 at 38-41). Affirming the Sixth Circuit's judgment based on pleading deficiencies would obviate both questions presented by Petitioner.

CONCLUSION

The petition for writ of *certiorari* should be denied.

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