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

REPLY BRIEF FOR PETITIONER

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The only aspect of Respondent's Opposition that is persuasive is its silence. Respondent has no answer to contest the lack of clarity and mixed messages provided by this Court's arm-of-the-state precedent; it has no response to dispute the corresponding split amongst the circuits; it cannot explain away the outcome-altering effects the circuit split has; it does not dispute that the scope of the FCA is an issue of national importance; and it has no position against this Court's precedent that state-created corporations are "persons" under federal law.

Respondent's "opposition" is nothing of the sort. It is an affirmation for why this Court's review is necessary regarding the issues presented, why Petitioner's case is the proper vehicle to decide these issues, and why the petition should be granted.

I. The Circuits Are In Conflict.

1. The circuits are hopelessly split in their application of the arm-of-the-state inquiry, and that is a direct result of the lack of clarity and mixed messages provided by this Court's precedent.[1] Respondent professes that "no lack of clarity" exists, Opp. 11, and that "this Court has made clear in a series of decisions that" the arm-of-the-state inquiry depends "on [a]

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[1] Indeed, Petitioner's case is one of three (all from different circuits) currently seeking *certiorari* on the issue of the circuit split over the arm-of-the-state inquiry. *See Pennsylvania Higher Education Assistance Agency v. U.S. ex rel. Jon H. Oberg*, No. 15-1045; *U.S. ex rel. Michael A. Willette v. University of Massachusetts, Worcester*, No. 15-1437.

number of factors[.]" Opp. 8. But what Respondent leaves to the imagination is what these alleged factors are, what they mean to evaluate, or how they apply to different entities. *See* Opp. 8-12. Instead, Respondent's numerous case briefs only reinforce Petitioner's stance that this Court's precedent is unclear and confusing, which necessitates this Court's review.

Beginning with *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), Respondent provides its two cents on what factors *it believes* were provided by the Court. Opp. 8-9. But *Lake Country* provided no such specificity on any enumerated factors; instead, it discussed *facts* it found relevant to the bi-state entity in question. 440 U.S. at 401-402.

Moreover, the factors Respondent drew from *Lake Country*, *see* Opp. 9, differ from the factors one circuit court observed, *see Fresenius Med. Care Cardiovascular Res., Inc. v. Puerto Rico & Caribbean Cardiovascular Ctr. Corp.*, 322 F.3d 56, 62 n. 5 (1st Cir. 2003), and those differ from what commentators have observed. *See, e.g.*, Jennifer A. Winking, *Eleventh Amendment: A Move Towards Simplicity in the Test for Immunity*, 60 MO. L. REV. 953, 959 n. 50, 964 n. 89 (1995). More importantly, all of those opinions conflict with this Court's views. *See Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994) (discussing *Lake Country*). Respondent's Opposition has emphasized Petitioner's exact point: this Court's precedent is anything but clear.

As for Respondent's discussion of *Hess*, that too exposes the same reality. Respondent found *Hess* considered certain factors, *see* Opp. 9; but that conflicts

with the factors Petitioner found *Hess* provided, *see* Pet. 17-18; and both of those readings conflict, *inter alia*, with how the Sixth Circuit read *Hess*. App. 11 (quoting *Ernst v. Rising*, 427 F.3d 351, 359 (6th Cir. 2005)).

What Respondent has shown is that litigants, courts, and commentators alike look at the same precedent and draw vastly-different positions as to what it provides. This is the epitome of precedent lacking clarity and coherent guidance. For if the inverse was true, such widely-disparate views would not exist. Further, the trickle-down effect from this Court's precedent is the principal reason why the circuits are so deeply split. That effect and the lack of clarity is exactly why this Court's review is necessary.

Respondent rounds out its review of this Court's precedent[2] with more unconvincing conclusions. Contrary to Respondent's position that *Regents of the Univ. of California v. Doe*, 519 U.S. 425 (1997), "summarized the factors that determine whether an entity . . . is an arm of the state[,]" Opp. 10, *Doe* did no such thing. *See* 519 U.S. at 429-30. Instead, this Court discussed two broad principles that it "sometimes examined" or "sometimes focused on". *Id.* at 429. However, *Doe* provided no further instruction on when that sometime should be, let alone discussed any factors for future courts to follow. *Id.*

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[2] Notably absent from Respondent's Opposition is any discussion of *Auer v. Robbins*, 519 U.S. 452 (1997). *See* Opp. 8-12. Respondent opted to ignore what it cannot dispute: *Auer* relies on parts of *Hess*, but not others; it offers no guidance for its divergent approach; and it casts another question mark on the arm-of-the-state inquiry. Pet. 19.

Respondent also brazenly asserts that the holding in *Fed. Mar. Comm'n v. S. Carolina State Ports Auth.*, 535 U.S. 743 (2002), is of no consequence, calling Petitioner's view of *Federal Maritime*'s impact on this Court's precedent "neither correct nor meaningful." Opp. 11 n. 3. But the only inaccuracy is Respondent's misplaced nonchalance. *Hess* held that the "impetus" of the Eleventh Amendment was protecting a state's treasury. 513 U.S. at 47-48. *Federal Maritime* directly contradicted that: "As we have previously noted, however, the primary function of sovereign immunity *is not to protect state treasuries*, . . . but to afford the States the dignity and respect due sovereign entities." 535 U.S. at 769 (emphasis added). However, *Federal Maritime* left *Hess*'s position in place, sending to lower courts a highly-relevant mixed message as to what is the primary consideration for sovereign immunity, in turn causing the circuits to split.

Since *Federal Maritime* was handed down, some circuits have remained with *Hess* holding that a state's treasury is the foremost consideration and that it deserves preeminent weight. *See, e.g.*, *Ernst v. Rising*, 427 F.3d 351, 359 (6th Cir. 2005); *Savage v. Glendale Union High Sch., Dist. No. 205, Maricopa Cty.*, 343 F.3d 1036, 1041 (9th Cir. 2003). To other circuits, in light of *Federal Maritime*'s stance, the state-treasury factor is no longer afforded preeminence. *See, e.g.*, *Cooper v. Se. PA Transp. Auth.*, 548 F.3d 296, 301 (3d Cir. 2008); *U.S. ex rel. Oberg v. Kentucky Higher Educ. Student Loan Corp. ("Oberg I")*, 681 F.3d 575, 580 n. 3 (4th Cir. 2012).

The foregoing split is but one example of the circuits being split over the preeminence of a single factor. Pet.

22-23. This outcome-altering disparity between the circuits is precisely why this Court's review is so important and why the petition should be granted. And as for the circuit split, Respondent again shows why this Court's review is warranted.

2. To Respondent, the circuits present only "nominal differences" in their approaches to the arm-of-the-state inquiry. Opp. 4. However, in presenting its view of each circuit's arm-of-the-state test, Respondent merely shows what is patently true: the circuit's divergent views speak for themselves and show the substantive disparity that exists. Opp. 12-20. Nevertheless, Respondent still professes that the circuits "all follow the same compass heading." Opp. 20. What Respondent fails to grasp, however, is that the compass that is this Court's precedent is balanced atop a magnet, splitting the lower courts by sending them in every which direction trying to unravel what is the proper path. Pet. 14-20.[3]

Moreover, to show the actual, outcome-altering effect the circuit split presents—in addition to showing why his is a proper case to address these issues—Petitioner showed that under different circuit tests, Respondent would not be deemed an arm of the state. Pet. 24-26. Respondent *does not dispute* this reality. Opp. 20 n. 5. Respondent simply believes that

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[3] Additionally, some circuits blatantly ignore this Court's precedent. For example, the Fifth Circuit openly admits that it "has largely ignored *Lake Country Estates*", opting for a test adjudging diversity jurisdiction. *Vogt v. Bd. of Comm'rs of Orleans Levee Dist.*, 294 F.3d 684, 689 n. 2 (5th Cir. 2002). The Fifth Circuit also believes "that *Lake Country Estates* and *Hess* are not applicable" against single-state entities. *Id.*

this disparity "shows nothing." *Id.* Wrong. The fact that Respondent can be found to be an arm of the state in one circuit (although erroneous, *see* Pet. 1-2, 5-9), and not in other circuits, shows how substantive and significant the circuit split is. That is why this Court's intervention is so paramount and why this case is the proper vehicle to address this and other issues.

Additionally, Petitioner highlighted that "the most threatening aspect" of the circuit split is "the split between the circuits regarding the treatment of a single factor as preeminent." Pet. 22-23. Respondent ignores this reality completely. *See* Opp. 12-20. Respondent does not contest that this issue is present, and that this issue is a central reason why this Court's review is necessary.

3. One issue Respondent tucks into its discussion on the instant circuit split is the treatment of public universities by the various circuits. Opp. 14. Respondent attempts to take its unfounded conclusion that the circuits are "uniform[]" in their arm-of-the-state tests to "perhaps explain why 'the vast majority of state universities . . . have been found to be 'arms' of the State.'" Opp. 14 (quoting *Irizarry-Mora v. Univ. of Puerto Rico*, 647 F.3d 9, 14 (1st Cir. 2011)). There are two problems with Respondent's illogical leap.

For starters, Respondent's speculative, over generalization is a logical fallacy in and of itself. *See McClendon v. City of Albuquerque*, 630 F.3d 1288, 1292-93 (10th Cir. 2011) (noting that an over generalization "run[s] afoul of the logical fallacy of accident."). Further, Respondent leaves out the subsequent caution added by the First Circuit: "Each state university nonetheless 'must be evaluated in light

of its unique characteristics.'" *Irizarry-Mora*, 647 F.3d at 14.

Indeed, one of the few relevant matters at hand the circuits actually agree upon is 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). Commentators agree. *See, e.g.*, 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, 149 (1997). Moreover, given the changing realities states face, the erroneous perceptions concerning the sovereignty of public colleges and universities 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).

As Petitioner showed, this case, the State of Michigan, and Respondent's history and character exemplify that it is a unique institution that is not an arm of the state. *See* Pet. 1-2, 5-9, 24-26.

II. The Scope Of The FCA Is Of National Importance.

This Court's precedent shows that defining the scope of liability under the FCA is an issue of national importance. For certain unpersuasive[4] reasons, Respondent disagrees.

1. Respondent asserts that no circuit split exists as to whether state-created corporations are persons under the FCA. Opp. 23-24. What Respondent misses is that not only do the Fourth, Sixth, and Tenth Circuits approach this issue in different ways, *see* Pet. 28-29, but more importantly, each way conflicts with this Court's precedent. Pet. 30-31. Again, to that latter point, Respondent provides no discussion whatsoever. Indeed, this Court has long held that even state-created corporations are persons under federal law. Pet. 30-31. As such, Wayne State's Board of Governors is a person under federal law, and the arm-of-the-state analysis is unnecessary to determine whether it can be held liable under the FCA.

As Petitioner provided, this Court's past precedent shows that an issue concerning the scope of the FCA is of national importance, *see* Pet. 26-31, and presents a *certiorari*-worthy issue. *See Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 770 (2000) (granting *certiorari* without a circuit split).

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[4] One of those reasons is procedural regarding the district court's denial of Petitioner's attempt to amend his complaint to sue Respondent's Board of Governors. Opp. 24. This is a non-issue because the Sixth Circuit denied Petitioner's request on substantive grounds, finding no procedural abnormality. *See* App. 25.

III. This Case Is a Clean Vehicle.

1. The petition should be granted—not only given the appropriateness and necessity of the issues presented—but because the issues have been preserved for review and this case is an optimal vehicle for addressing these issues. Respondent's unconvincing arguments to the contrary fail to deter this reality.

Contrary to Respondent's view, *see* Opp. 25-26, the issues presented in the petition were properly brought to this Court and are ripe for consideration. *See, e.g.*, Rule 14.1(a); *Pasquantino v. United States*, 544 U.S. 349, 372 n. 14 (2005). Also, the issue of whether the FCA claims in Petitioner's complaint were properly pled is a non-issue. Respondent admits that the adequacy of Petitioner's complaint was not addressed by the Sixth Circuit, *see* Opp. 8, 26, nor was it addressed by the district court. App. 50-53.

Finally, Respondent asserts the Sixth Circuit did not err and properly applied this Court's arm-of-the-state precedent. Opp. 21-23.[5] To begin with, as Petitioner has shown, there is no clear precedent from this Court for any circuit to follow. Instead, the Sixth Circuit applied *one* of its multi-factor tests—that prior

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[5] Respondent also tries to sneak in its misguided belief that it has no capacity to sue or be sued. Opp. 1, 22. Not only did the Sixth Circuit not buy this argument, *see* App. 15-16 (observing and ignoring Respondent's argument), but Respondent is routinely sued under various legal theories without any issue of its capacity being present. *See, e.g.*, *Richardson v. Wayne State Univ.*, 587 F. App'x 284 (6th Cir. 2014); *Contract Design Grp., Inc. v. Wayne State Univ.*, 635 F. App'x 222 (6th Cir. 2015); *Varlesi v. Wayne State Univ.*, --- F. App'x ---, *available at* 2016 WL 860326 (6th Cir. Mar. 7, 2016).

and subsequent Sixth Circuit cases conflict with, *see* Pet. 22—and which also conflicts with the how other circuits approach the same inquiry. Pet. 20-22.

Respondent's desperate cling to what Michigan law allegedly provides and what the Sixth Circuit held ignores the reality of who Respondent *actually* is. *See* Pet. 1-2, 5-9. Both before and after its rebranding as a Michigan public university, Respondent has been and remains autonomous from the State; its volunteer governing board is elected, not appointed by state officials; the State has no control over its fiscal, educational, or institutional aspects; and the State retains no veto power. The State has no legal obligation to assume Respondent's liabilities in the event a judgment is rendered against it, and Respondent is solely responsible for its own debts.

The only relevant connection between Respondent and the State is a single noun in its formal name, and the receipt of a minority portion of its budget from the State. Further, the minor, monetary connection to the State is even less persuasive given that Michigan "courts have clearly interpreted the Constitution as conferring general fiscal autonomy on the university boards[,]" *Regents of Univ. of Michigan v. State*, 419 N.W.2d 773, 777-78 (Mich. App. 1988), and State regulation of appropriations are constitutionally barred from "invad[ing] the university's constitutional autonomy." *Nat'l Pride At Work, Inc. v. Governor of Michigan*, 732 N.W.2d 139, 152 (Mich. App. 2007).

In other words, *if* the arm-of-the-state inquiry is meant to examine "the relationship between the State and the entity in question[,]" *Regents of the Univ. of California v. Doe*, 519 U.S. 425, 429 (1997), then

Respondent's reality unquestionably shows that it is not an arm of the state. Meaning, Respondent's lackluster arguments and the Sixth Circuit's biased and illogical opinion hold no weight.

2. Finally, Respondent also tries to use prior cases allegedly adjudging its sovereign status to try and show that it is an arm of the state. Opp. 2 n. 2; 23. But Respondent's supposed "decades of caselaw", Opp. 23, is wholly unhelpful. Many reasons undercut the usefulness of these cases, such as they are largely unpublished and conclusory in nature. *See* Opp. 2. n. 2. But the key reason why they are irrelevant is that none of these cases, *not a single one*, applies any version of any arm-of-the-state test in existence. *See, id*. Despite having a dozen or so different tests to choose from between the circuit courts—including more than a few within the Sixth Circuit itself—none of these cases even *mention* the arm-of-the-state inquiry. Instead, these cases simply show that an errant problem exists in the Sixth Circuit's arm-of-the-state jurisprudence: courts assume without justification that public universities are arms of the state, notwithstanding anything else. A problem exemplified by this case. *See* Pet. 1-2, 5-9, 24-26.

The petition and Respondent's "opposition" show that the issues presented are properly before this Court for review, they are issues of great national importance, and Petitioner's case provides a unique opportunity to address both issues directly and completely.

CONCLUSION

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

Respectfully submitted,

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