

No. 08-1085

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SUPREME COURT OF THE UNITED STATES

In The
Supreme Court of the United States

SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION AUTHORITY,

Petitioner,

v.

ALLISON COOPER, ET AL.,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit**

BRIEF IN OPPOSITION

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QUESTION ACTUALLY PRESENTED

The question actually presented by this case is whether the 3rd Circuit Court of Appeals correctly found that SEPTA had failed to satisfy its burden of proof in making its claim that it is an “arm of the state” of Pennsylvania and thus entitled to sovereign immunity protection under the Eleventh Amendment of the United States Constitution.

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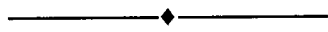
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CONSTITUTIONAL PROVISION INVOLVED

The Eleventh Amendment to the United States Constitution provides:

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.¹

This Court has taken a broad view of sovereign immunity, interpreting the Eleventh Amendment to bar suits not only against a state but against an entity that acts as an arm or alter ego of a state.² Thus, SEPTA raised this constitutional defense of sovereign immunity in response to a claim brought by one of its drivers that SEPTA was violating the Fair Labor Standards Act.³



INTRODUCTION

“Only States and arms of the State” possess sovereign immunity under the Eleventh Amendment.⁴ In determining whether an entity is an “arm of the

¹ U.S. Const., amend. XI.

² *E.g.*, *Regents of the University of California v. Doe*, 519 U.S. 425, 429 (1997); *In re Ayers*, 123 U.S. 443, 487 (1887).

³ 29 U.S.C. §§ 201-219.

⁴ *Northern Ins. Co. of N.Y. v. Chatham County*, 547 U.S. 189, 193 (2006).

state” or whether it is “more like a county or city” not entitled to immunity,⁵ this Court considers multiple “indicators of immunity or the absence thereof,”⁶ including how much control the state has over the entity, whether its implementing legislation considers it a state agency, and whether the state would be liable for a judgment against the entity.⁷ The decision below followed this Court’s guidance and properly used a multi-factor analysis to conclude that the Southeastern Pennsylvania Transportation Authority (SEPTA) is not an arm of Pennsylvania for Eleventh Amendment purposes.

It is no tautology to observe that a state’s interest in Eleventh Amendment immunity cannot be affronted when – as here – the entity is not an arm of the state. This Court has traditionally viewed that issue – to whom sovereign immunity should apply – as fact-based, and weighed factors that were relevant to the entity at issue. The 3rd Circuit conducted the proper analysis. Though SEPTA quarrels with the result, fact-based disputes generally do not justify a grant of certiorari.⁸

⁵ *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977).

⁶ *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994).

⁷ *Id.* at 44-48.

⁸ Sup. Ct. R. 10 (“A petition for writ of certiorari is rarely granted when the asserted error consists of . . . misapplication of a properly stated rule of law.”)

To be sure, SEPTA does not concede that its petition is fact-based. Instead, it manufactures a circuit split where none exists. It also argues for a radical departure of the arm-of-the-state law, urging this Court to treat as dispositive a state's characterization of the entity seeking immunity. This Court has rejected a parallel argument in *Howlett v. Rose*,⁹ and its logic cannot be, and is not, distinguished here.



COUNTER-STATEMENT OF THE CASE

A. Facts

This is an “off the clock” overtime case. Plaintiff/respondent Allison Cooper is an adult residing and working within the Eastern District of Pennsylvania judicial district and, during the relevant time period, drove a SEPTA bus. At various times within the 3 years leading up to the commencement of this case, Cooper drove a 40-hour-a-week “swing run,” which consists of a morning and an afternoon shift, with a break in between.

SEPTA requires that drivers commence each shift – morning and evening – with a pre-trip inspection. Drivers are required to examine about 20 distinct items, ranging from checking the tire pressure to testing the bus's public address system. These inspections take between 10 to 30 minutes to complete.

⁹ 496 U.S. 356 (1990).

In the morning, SEPTA sets aside time for drivers to conduct these inspections, and pays them for this work. In the afternoon, however, SEPTA requires that drivers conduct their pre-trip inspections on their own time. Drivers are “on the clock” the moment their bus leaves the terminal, which means their required afternoon pre-trip inspection is performed “off the clock.”

B. Proceedings Below

On Feb. 28, 2006, Cooper sued SEPTA in the Eastern District of Pennsylvania, alleging violations of § 207(a) of the Fair Labor Standards Act, which requires that employees be paid at a rate of time and a half for work in excess of 40 hours per week. Cooper’s claim fits easily within conventional FLSA precedent.¹⁰ SEPTA responded by filing a motion to dismiss under Fed. R. Civ. P. 12, asserting it was immune from liability because it was an arm of the state and thus entitled to sovereign immunity

¹⁰ *E.g.*, *United Transportation Union Local 1745 v. City of Albuquerque*, 178 F.3d 1109, 1118-20 (10th Cir. 1999) (“We therefore hold that the district court, on the undisputed facts of this case, properly granted summary judgment to the drivers on their claim for compensation for time spent traveling on City shuttles to and from relief points at the beginning and end of their split shift periods.”); *Hiner v. Penn-Harris-Madison School Corp.*, 256 F. Supp.2d 854, 865 (N.D. Ind. 2003) (“[T]his Court holds that the time spent by Plaintiffs conducting pre and post route bus inspections constitutes working time for purposes of overtime compensation under the FLSA.”).

protection. Both SEPTA's opening brief and its reply brief included affidavits containing facts outside the Rule 12 record. Accordingly, after briefing was complete, the District Court granted Cooper's request to conduct limited discovery on the fact issues raised by SEPTA. The District Court further permitted both parties to supplement their briefs and treated SEPTA's motion as one brought under Fed. R. Civ. P. 56.

On Feb. 12, 2007, the District Court denied SEPTA's motion.¹¹ The starting point for the District Court's analysis was *Bolden v. SEPTA*,¹² the *en banc* 3rd Circuit decision written by then-Judge Alito that held that SEPTA was not an arm of the state and thus ineligible for federal sovereign immunity protection. The District Court rejected SEPTA's principal arguments here: that a change in law and/or a change in its financial condition compelled a different result, holding that "SEPTA has failed to show that it is an arm of the state and therefore subject to immunity under the Eleventh Amendment."¹³

SEPTA appealed. Its argument was heard March 4, 2008, and on November 26, 2008, the 3rd Circuit affirmed. Chief Judge Scirica, writing for a unanimous panel, re-examined SEPTA's status, taking into

¹¹ *Cooper v. SEPTA*, 474 F. Supp.2d 720 (E.D. Pa. 2007).

¹² 953 F.2d 807 (3rd Cir. 1991), *en banc*, *cert. denied*, 504 U.S. 943 (1992).

¹³ *Cooper*, 474 F. Supp.2d at 727.

consideration the changes in Supreme Court analysis. “Since our decision in *Bolden*, the Supreme Court has refined its Eleventh Amendment jurisprudence. We have followed suit.”¹⁴ The 3rd Circuit carefully examined the evolved law, accounting for *Hess v. Port Authority Trans-Hudson Corp.*,¹⁵ *Regents of the University of California v. Doe*,¹⁶ and *Federal Maritime Commission v. South Carolina State Ports Authority*¹⁷ – the same body of law SEPTA now contends required reversal by the 3rd Circuit. And the court got it right, analyzing the facts before it with the twin objectives of protecting the state fisc *and* the state dignity as its guidepost, which exactly conforms with this Court’s holdings:

As set forth in these post-*Bolden* cases, our inquiry into sovereign immunity is not merely a “formalistic question of ultimate financial liability.” *Doe*, 519 U.S. at 431.[] . . . It has not been reduced to a “non-factor,” nor has the status factor become independently “dispositive” of our sovereign immunity inquiry. . . . Our approach is consistent with Supreme Court precedent following *Bolden*. As noted, the Court has stressed the centrality of state dignity to the Eleventh Amendment. But state dignity does not preclude consideration of an entity’s financial

¹⁴ *Cooper v. SEPTA*, 548 F.3d 296, 298-99 (3rd Cir. 2008).

¹⁵ 513 U.S. 30 (1994).

¹⁶ 519 U.S. 425 (1997).

¹⁷ 535 U.S. 743 (2002).

relationship with the state and its degree of autonomy. *See, e.g., Fed. Maritime Comm'n*, 535 U.S. at 765 [] (recognizing that “accord[ing] the States the respect owed them as joint sovereigns” is the “central purpose” of Eleventh Amendment immunity, and that “shielding state treasuries and thus preserving the States’ ability to govern in accordance with the will of their citizens” is an “important function” served by that doctrine.[]) *State dignity encompasses all three factors – we give them equal consideration, and how heavily each factor ultimately weighs in our analysis depends on the facts of the given case.*¹⁸

The first factor considered by the 3rd Circuit was “[w]hether the money that would pay the judgment would come from the state.”¹⁹ The second factor considered SEPTA’s status under state law²⁰ and the third factor considered was SEPTA’s autonomy.²¹ Finally, the 3rd Circuit balanced the factors and concluded that SEPTA had not demonstrated that it was entitled to Eleventh Amendment immunity protection.²²

¹⁸ *Cooper*, 548 F.3d at 302 (emphasis supplied).

¹⁹ *Id.* at 302.

²⁰ *Id.* at 306.

²¹ *Id.* at 308.

²² *Id.* at 311.

SEPTA complains that this analysis is both “mechanical[]”²³ and “formalistic”²⁴ though it is anything but. The 3rd Circuit followed this Court’s teachings by the numbers. SEPTA was given every chance to carry its burden, and it failed.



REASONS FOR DENYING THE PETITION

A. The Petition Should Be Denied Because It Is Premised Upon Misstatements And Exaggerations

The rules of this Court require that petitions for certiorari be brief, clear and accurate, and failure to comply with that standard, alone, is sufficient basis to deny the petition.²⁵ Respondents, in turn, are “admonished” to point out such inaccuracies to the Court in their opposition to the petition, and not later, or risk the possibility that objections to the inaccuracies are waived.²⁶

Here, SEPTA has taken liberties with the nature of the decision below, its own financial status, the state of 3rd Circuit law, its financial autonomy, and the holding upon which its petition relies. These failings justify denial of the petition.

²³ SEPTA Petition at 9.

²⁴ SEPTA Petition at 12, 17, 18 and 26.

²⁵ Sup. Ct. R. 14.4.

²⁶ *Id.* at 15.2.

1. SEPTA misstates the nature of the 3rd Circuit's holding

SEPTA's misstatements begin on the petition's first page, with its 69-word "question presented." SEPTA's offered question does not concede the fact that 3rd Circuit had before it a denial of a motion for summary judgment. SEPTA's essential failure, according to the 3rd Circuit,²⁷ was its inability to meet its evidentiary requirements, a problem that should be – but is not – reflected both in SEPTA's presented question and in its petition.

The 3rd Circuit's calibration of the question of whether an entity is an "arm of the state" entitled to Eleventh Amendment immunity – that it is a fact issue on which the entity claiming immunity has the

²⁷ *Cooper*, 548 F.3d at 311 ("[I]t is SEPTA's burden to show it is entitled to sovereign immunity. Based on the evidence presented, the Commonwealth's control over SEPTA falls short . . .") (citation omitted).

burden – is the consensus approach among the circuit courts that have addressed the issue.²⁸

2. SEPTA misstates its financial status

In arguing that enough has changed since the *Bolden v. SEPTA*²⁹ decision to require a different result, SEPTA represents that “the percentage of funding SEPTA received from the Commonwealth had increased from approximately 27% to 52% since 1991.”³⁰ This is neither an accurate comparison nor a meaningful one. As the 3rd Circuit recognized, the

²⁸ *R.A. Woods v. Rondout Valley Central School District Bd. of Educ.*, 466 F.3d 232, 237 (2nd Cir. 2006) (“We now join these sister courts in holding that the governmental entity invoking the Eleventh Amendment bears the burden of demonstrating that it qualifies as an arm of the state entitled to share in its immunity.”); *Skelton v. Camp*, 234 F.3d 292, 297 (5th Cir. 2000) (holding that the state entity “bear[s] the burden of proof in demonstrating that [it] is an arm of the state entitled to Eleventh Amendment immunity.”); *Gragg v. Kentucky Cabinet for Workforce Development*, 289 F.3d 958, 963 (6th Cir. 2002) (“[T]he entity asserting Eleventh Amendment immunity has the burden to show that it is entitled to immunity.”); *Baxter v. Vigo County School Corp.*, 26 F.3d 728, 734 n.5 (7th Cir. 1994), *superseded in other part by statute*; (“Even if we were to reach the merits of this Eleventh Amendment assertion, we would have to conclude that the [entity] has not begun to meet its burden of persuasion.”); *ITSI TV Products, Inc. v. Agricultural Associations*, 3 F.3d 1289, 1292 (9th Cir. 1993) (“[T]he public entity ought to bear the burden of proving the facts that establish its immunity under the Eleventh Amendment.”).

²⁹ 953 F.2d 807 (3rd Cir. 1991) *en banc*, cert. denied, 504 U.S. 943 (1992).

³⁰ SEPTA Petition at 7.

percentage of the funding is no longer critical. “Since [*Regents of the University of California v. Doe*, we have recognized 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].’”³¹

Moreover, a fair “apples-to-apples” comparison shows that Pennsylvania’s contribution has increased from 27% to 35%, once all of SEPTA’s budget reshuffling is accounted for.³² Thus, SEPTA’s complaint that the change in state funding was unaccounted for by the 3rd Circuit is, at best, a red herring.

3. SEPTA misstates the 3rd Circuit’s acceptance of Supreme Court precedent

The 3rd Circuit’s recognition of evolved sovereign immunity law – as reflected in that court’s comments above that the percentage of funding is no longer critical – leads to SEPTA’s next misstatement. In discussing the evolved U.S. Supreme Court law concerning sovereign immunity, SEPTA adverts that “[t]he Third Circuit’s sovereign immunity jurisprudence has not evolved with similar alacrity.”³³ But SEPTA cannot square this critique with the 3rd Circuit’s decision in *Benn v. First Judicial District of*

³¹ *Id.* at 303 (quoting *Febres v. Camden Bd. of Educ.*, 445 F.3d 227, 233 (3rd Cir. 2006)).

³² *See Cooper*, 548 F.3d at 303 n.7.

³³ SEPTA Petition at 17.

Pennsylvania,³⁴ a case unmentioned in SEPTA's petition. In *Benn*, the 3rd Circuit, acknowledging the Supreme Court's holdings in *Doe* and *Federal Maritime*, recalibrated the 3rd Circuit's "arm-of-the-state" test to emphasize the state's dignity interest.³⁵ The 3rd Circuit concluded that each of the three factors it considers – (1) the source of money that would pay the judgment, (2) the status of the entity under state law, and (3) the degree of autonomy the entity has – must now be considered "co-equals":

The relegation of financial liability to the status of one factor co-equal with others in the immunity analysis does not mean that it is to be ignored. Like the other two factors . . . it is simply to be considered as an indicator of the relationship between the State and the entity at issue.³⁶

Tellingly, SEPTA's complaints concerning 3rd Circuit jurisprudence conflict with its own characterization in its brief to the 3rd Circuit, where it conceded that "[t]he Third Circuit also has recognized this [U.S. Supreme Court] change in emphasis."³⁷

³⁴ 426 F.3d 233 (3rd Cir. 2005).

³⁵ *Id.* at 239.

³⁶ *Id.* at 240.

³⁷ SEPTA App. Br. at 20.

4. SEPTA misstates the degree of its own autonomy

SEPTA also misrepresents its own autonomy where it declares that it was “structured from the start to require governmental subsidiaries to meet its operating deficits.”³⁸ (Cooper assumes that “subsidiaries” is intended to be “subsidies.”) SEPTA’s own budget destroys this contention. In it, SEPTA makes it clear it has alternatives to state subsidies:

If this fails, SEPTA will be forced to consider steep fare increases and significant service reductions in order to fund projected budget deficits of nearly \$325 million by Fiscal Year 2011.³⁹

Cooper has no doubt that this is not SEPTA’s preferred solution. But it is a solution, notwithstanding SEPTA’s representation here that it cannot solve its operating deficit on its own. In his deposition, SEPTA designee Richard Burnfield confirmed that SEPTA controlled its own fate:

Answer [by Burnfield]: “The action plan could consist of service reductions or fare increases or employee layoffs sometime mid fiscal year.”

Question [by plaintiff’s counsel]: “So there are alternative ways to close the \$50.3

³⁸ SEPTA Petition at 18.

³⁹ APP. 00211.

million projected structural operating deficit?”

A: “There are different ways it could be handled, yes.”

Q: “That’s true every year, isn’t it?”

A: “Yes.”⁴⁰

5. SEPTA misstates the 3rd Circuit’s *Cooper* analysis

And finally, SEPTA fairly dramatically attempts to recast the whole of the 3rd Circuit’s *Cooper* analysis, asserting that “the Third Circuit essentially concluded that ultimate legal liability was all that mattered.”⁴¹ That is not close to a fair reading of the 3rd Circuit’s *Cooper* decision, which considered SEPTA’s separate corporate existence,⁴² its power to sue and be sued,⁴³ its power to enter into contracts and make purchases on its own behalf,⁴⁴ its enabling statute,⁴⁵ its power of eminent domain,⁴⁶ its general immunity from state taxation,⁴⁷ its status under state

⁴⁰ APP. 00408.

⁴¹ SEPTA Petition at 18.

⁴² *Cooper*, 548 F.3d at 307.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

law,⁴⁸ its organizational structure,⁴⁹ and the effect of two recent Pennsylvania transportation acts.⁵⁰

All of these elements were analyzed under the 3rd Circuit's three-factor arm-of-the-state test, and all were considered against the goal of preserving a state's dignity. The 3rd Circuit explained: "State dignity encompasses all three factors – we give them equal consideration, and how heavily each factor ultimately weighs in our analysis depends on the facts of the given case."⁵¹

Ultimately, SEPTA's petition is premised on exaggerations and misrepresentations, which is reason enough to deny it.

B. The Petition Should Be Denied Because It Seeks To Radically Change Arm-Of-The-State Analysis

Though it hedges its bet by occasionally qualifying its position, SEPTA's petition seeks not a clarification of "arm-of-the-state" analysis but to radically change the analysis. Relying on such authorities as *Bush v. Gore*⁵² (which does not even mention "arm of the state" or "sovereign immunity," much less analyze

⁴⁸ *Id.*

⁴⁹ *Id.* at 308-09.

⁵⁰ *Id.* at 310.

⁵¹ *Id.* at 302.

⁵² 531 U.S. 98 (2000).

the doctrines) and three Pennsylvania state court decisions interpreting *state law*,⁵³ SEPTA argues that “the pronouncements of Pennsylvania’s highest court should have been treated as definitive.”⁵⁴ The 3rd Circuit’s failure to simply defer to Pennsylvania state courts’ view of SEPTA status *under state law*, argues SEPTA, “undermin[ed] fundamental principles of sovereignty”⁵⁵ and violated the “fundamental teachings” of this Court’s jurisprudence that – SEPTA argues – holds the dignity of the sovereign “preeminent.”⁵⁶

There are, at minimum, three problems with SEPTA’s argument.

⁵³ *Jones v. SEPTA*, 565 Pa. 211, 227, 772 A.2d 435, 444 (Pa. 2001) (In personal injury action, complaint “does not satisfy the terms of 42 Pa.C.S. § 8522(b)(4), the Sovereign Immunity Act’s real estate exception, and . . . SEPTA is immune from Jones’ suit under 42 Pa.C.S. § 8521.”); *Tulewicz v. SEPTA*, 529 Pa. 588, 595-96, 606 A.2d 427, 430 (Pa. 1982) (In wrongful death action, “SEPTA is entitled to rely on the limitation of damages cap to the same extent as would the Commonwealth.”); *Feingold v. SEPTA*, 512 Pa. 567, 581, 517 A.2d 1270, 1281 (Pa. 1986) (In a wrongful death case, “we conclude that it would be inappropriate to assess punitive damages against SEPTA given its status as a Commonwealth agency.”).

⁵⁴ SEPTA Petition at 19.

⁵⁵ *Id.*

⁵⁶ *Id.* at 21.

1. This case is about federal law, not state law

The question of whether a particular state agency is an arm of the state “and therefore ‘one of the United States’ within the meaning of the Eleventh Amendment is a question of federal law.”⁵⁷ Thus, SEPTA’s reliance on its immune status as against state law personal injury claims does little more than beg the question. It does not advance its cause here.

Moreover, Pennsylvania’s sovereign immunity statute is not coextensive with the Eleventh Amendment. The Pennsylvania statute covers entities that were not immune under common law.⁵⁸ In contrast, the Eleventh Amendment does not expand common law immunity, but instead protects those entities that were immune from private suit before the ratification of the Constitution.⁵⁹ In other words, the protections afforded by the Pennsylvania immunity statute and the Eleventh Amendment are not identical.

So too, Pennsylvania courts recognize that an “agency may be a Commonwealth agency for one purpose and not for another.”⁶⁰ Where Pennsylvania law recognizes that an entity may be a state agency

⁵⁷ *Regents of the University of California v. Doe*, 519 U.S. 425, 430 n.5 (1997).

⁵⁸ *See Toombs v. Manning*, 835 F.2d 453, 459 (3rd Cir. 1987).

⁵⁹ *Alden v. Maine*, 527 U.S. 706, 713 (1999).

⁶⁰ *James J. Gory Mechanical Contracting, Inc. v. Philadelphia Housing Authority*, 855 A.2d 669, 672 (Pa. 2004).

for some purposes but not all purposes under state law, surely there is no conflict in finding an entity is a state agency for some purposes under state law but not for other purposes under federal law.

2. SEPTA's argument – which asks for a recasting of arm-of-the-state law – has been rejected by this Court

Though SEPTA fails to concede it, this argument, which seeks not to clarify existing law but to change it so that the state's characterization is dispositive – is contrary to law. SEPTA made the same argument to the 3rd Circuit 18 years ago in *Bolden*, which involved wrongful dismissal claims by a former custodian who alleged that his failed drug test that resulted in his termination was unconstitutional. Writing for the majority, then-Judge Alito made hash of the contention:

SEPTA's position is that the Pennsylvania Sovereign Immunity Act conferred Eleventh Amendment protection upon SEPTA. . . . If this reasoning were accepted, each state legislature apparently could confer Eleventh Amendment protection on any entity it wished, including counties and cities, by enacting a statute clothing these entities with "sovereign immunity" from suit on state claims.⁶¹

⁶¹ *Bolden*, 953 F.2d at 817.

In rejecting SEPTA's argument, then-Judge Alito cited this Court's *Howlett v. Rose*⁶² decision, which held:

If we were to uphold the immunity claim in this case, every State would have the same opportunity to extend the mantle of sovereign immunity to "persons" who would otherwise be subject to § 1983 liability. States would then be free to nullify for their own people the legislative decisions that Congress made on behalf of all the People.⁶³

Howlett's logic cannot be distinguished here, and – notably – SEPTA does not even try.

3. SEPTA's argument is premised on a misrepresentation of arm-of-the-state law

SEPTA ties its argument that the state's characterization should be dispositive to its claimed distillation of Supreme Court's sovereign immunity law, which – SEPTA contends, citing *Federal Maritime Commission v. South Carolina State Ports Authority*⁶⁴ – has concluded that "the dignity of the sovereign . . . is preeminent."⁶⁵ But *Federal Maritime* made clear that vindicating the state dignity interest does not preclude consideration of an entity's

⁶² 496 U.S. 356 (1990).

⁶³ *Id.* at 383.

⁶⁴ 535 U.S. 743 (2002).

⁶⁵ SEPTA Petition at 21.

financial relationship with the state, as it acknowledged that “state sovereign immunity serves the important function of shielding state treasuries and thus preserving the States’ ability to govern in accordance with the will of their citizens.”⁶⁶

C. The Petition Should Be Denied Because There Is No Real Division Among The Circuit Courts

Eleventh Amendment immunity has been sought on behalf of entities as diverse as:

- sheriffs,⁶⁷
- a university,⁶⁸
- a hospital,⁶⁹
- a public broadcasting company,⁷⁰

⁶⁶ *Federal Maritime*, 535 U.S. at 765 (internal quote marks and citation omitted).

⁶⁷ *Franklin v. Zaruba*, 150 F.3d 682, 684-86 (7th Cir. 1998), *cert. denied*, 525 U.S. 1141 (1999).

⁶⁸ *Clay v. Texas Women’s University*, 728 F.2d 714, 716 (5th Cir. 1984).

⁶⁹ *Fresenius Med. Care Cardiovascular Res., Inc. v. Puerto Rico & the Caribbean Cardiovascular Ctr. Corp.*, 322 F.3d 56, 61-68 (1st Cir.), *cert. denied*, 540 U.S. 878 (2003).

⁷⁰ *Pastrana-Torres v. Corporacion De Puerto Rico*, 460 F.3d 124, 126-28 (1st Cir. 2006).

- a local school board,⁷¹
- an eye bank,⁷²
- a regional jail authority,⁷³
- judges,⁷⁴
- a non-profit corporation operating a student union,⁷⁵
- a levee district,⁷⁶
- a regional planning agency,⁷⁷
- a district attorney's office,⁷⁸ and
- a transit authority.⁷⁹

⁷¹ *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 279-81 (1977).

⁷² *Brotherton v. Cleveland*, 173 F.3d 552, 560-61 (6th Cir. 1999).

⁷³ *Kitchen v. Upshaw*, 286 F.3d 179, 184-85 (4th Cir. 2002).

⁷⁴ *Hyland v. Wonder*, 117 F.3d 405, 413-14 (9th Cir. 1997), *cert. denied*, 522 U.S. 1148 (1998).

⁷⁵ *Teichgraeber v. Memorial Union Corp. of Emporia State University*, 946 F. Supp. 900, 904-05 (D. Kan. 1996).

⁷⁶ *Vogt v. Bd. of Comm'rs*, 294 F.3d 684, 692-96 (5th Cir.), *cert. denied*, 537 U.S. 1088 (2002).

⁷⁷ *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 400-01 (1979).

⁷⁸ *Carter v. City of Philadelphia*, 181 F.3d 339, 348-53 (3rd Cir.), *cert. denied*, 528 U.S. 1005 (1999).

⁷⁹ *Jones v. Washington Metro. Area Transit Auth.*, 205 F.3d 428, 432 (D.C. Cir. 2000).

Given the breadth of entities seeking protection as an arm of the state under the Eleventh Amendment, this Court’s approach makes sense. Rather than attempt to manufacture a “one size fits all” exhaustive list or precise rule for determining arm-of-the-state status, the Court has applied a balancing test that considers factors that are relevant in light of the nature of the entity at issue. Thus, in *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*,⁸⁰ this Court concluded that, “[o]n balance, the record before us indicates that a local school board such as petitioner is more like a county or city than it is like an arm of the state.”⁸¹ This approach – fact-based and focused on issues relevant to the entity seeking immunity – is exactly how the 3rd Circuit considered the issue: “State dignity encompasses all three factors – we give them equal consideration, and how heavily each factor ultimately weighs in our analysis depends on the facts of the given case.”⁸²

This is not to say that the circuits are left to their own devices. In fact, despite SEPTA’s grouching, the overarching inquiry in every circuit is the same: Is the relationship between the state and the entity such that a suit against the entity is effectively an action against the state itself. Indeed, not one of the cases cited by SEPTA suggests that the circuits are

⁸⁰ 429 U.S. 274 (1977).

⁸¹ *Id.* at 280.

⁸² *Cooper*, 548 F.3d at 302.

having any difficulty applying this Court's arm-of-the-state analysis.

Cooper has prepared a table demonstrating the uniformity of approach to this issue circuit-by-circuit; it is found in the Appendix. It makes it clear that whatever differences exist among the circuits are not material.

The factors used by *all* the circuits can be broken down into four areas: state control/entity autonomy; structure/status under state law; "governmental" or statewide function; and state funding/financial responsibility/liability. Cooper will discuss (briefly) each of these.

1. State control/entity autonomy

The control of the state over the entity claiming immunity and the entity's autonomy are two sides of the same coin. They are, literally, two ways of saying the same thing. Of the 11 circuits, only the 9th has not explicitly considered this factor.

2. Structure/status under state law

The appendix shows that, of the 11 circuits, only the 7th does not expressly consider the structure/status under state law.

3. “Governmental” or statewide function

Seven of the 11 circuits expressly consider whether the entity performs a “governmental” or statewide function. But the fact that four circuits do not expressly articulate such a factor is, again, an issue of semantics, a point well illustrated by the 3rd Circuit’s *Cooper* decision. The 3rd Circuit is one of the four circuits that does not expressly identify this factor in its arm-of-the-state analysis, a point seized upon by SEPTA.⁸³ But rather than separately consider this factor, the 3rd Circuit included it under its “Structure/status under state law” rubric, citing two Pennsylvania cases for their views that SEPTA “is a local agency and not a Commonwealth agency”⁸⁴ whose operations “are not statewide.”⁸⁵

4. State funding/financial responsibility/liability

All 11 circuits expressly consider the issue of state funding/financial responsibility/liability.

⁸³ SEPTA Petition at 28-29 (“For example, [some circuits] examine whether the entity’s function is primarily local or more central to the state while the Third Circuit does not even consider that factor relevant.”) (footnote omitted).

⁸⁴ *Fraternal Order of Transit Police v. SEPTA*, 668 A.2d 270, 272 (Pa. Commw. Ct. 1995).

⁸⁵ *SEPTA v. Union Switch & Signal, Inc.*, 161 Pa. Cmwlth. 400, 410, 637 A.2d 662, 668 (1994).

Finally, the 5th Circuit and 9th Circuit break out the questions of whether the entity can sue or own property, factors that other circuits consider under the structure/status under state law label.

Without a real conflict, or anything close, to point to, SEPTA's arguments overreach. SEPTA's purported conflict, in the end, is supported by two student publications, one of which is 17 years old, which gave the circuits plenty of time to notice an actual split if one existed. Similarly, it argues that the 3rd Circuit fell out of step with this Court in 2002, with the *Federal Maritime* case, where this Court explicitly recognized that "the preeminent purpose of sovereign immunity is to accord the States the dignity they are entitled to as sovereign."⁸⁶ There are two problems with this thesis. First, *Federal Maritime* did not break new ground. More than 100 years earlier, in 1887, this Court observed that "[t]he very object and purpose of the eleventh amendment [was] to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties."⁸⁷ And second, recognizing the purpose of Eleventh Amendment protection does not address the

⁸⁶ SEPTA Petition at 16.

⁸⁷ *In re Ayres*, 123 U.S. 443, 505 (1887). *Cf.*, *R.A. Woods v. Rondout Valley Central School District Bd. of Educ.*, 466 F.3d 232, 241-42 (2nd Cir. 2006) ("[W]hen the Supreme Court stated in [*Federal Maritime*] that state sovereign immunity's 'central purpose is to accord the States the respect owed as joint sovereigns,' it was merely reiterating a long-established and non-controversial principle.").

question of what entity is entitled to claim that protection.

D. The Petition Should Be Denied Because The 3rd Circuit Got It Right

At bottom, SEPTA's quarrel is not with the 3rd Circuit's approach, but with its conclusion, a complaint that does not warrant this Court's review.⁸⁸ But even here, SEPTA's petition fails, as the 3rd Circuit got it right, weighing SEPTA's presentation of evidence against a multi-factor test as set forth by this Court in *Hess*.

There is no question but that the evidence supporting SEPTA's argument was mixed, at best. For example, SEPTA stresses here that its enabling legislation refers to it as a state agency. And yet SEPTA's corporate structure is separate from Pennsylvania.⁸⁹ SEPTA can "sue and be sued."⁹⁰ SEPTA has the power to enter into contracts and make purchases on its own behalf.⁹¹ SEPTA employees are not employees of Pennsylvania and are not entitled to state employee benefits.⁹² SEPTA executives cannot

⁸⁸ Sup. Ct. R. 10.

⁸⁹ 74 Pa. Cons. Stat. § 1711.

⁹⁰ *Id.* at § 1741(a)(2) and (3).

⁹¹ *Id.* at § 1741(a)(8), (9), (12), (18), (20), (21), (22), (24) and (25).

⁹² *Id.* at § 1712.

be employed by the state of Pennsylvania.⁹³ SEPTA's funds are its own, and the state may not withdraw SEPTA funds for other uses.⁹⁴ And unlike traditional state agencies, in certain circumstances SEPTA can be taxed.⁹⁵

“Indicators of local governance”⁹⁶ also weigh against characterizing SEPTA as an arm of the state. Two-thirds of SEPTA's 15 board members are appointed by county governments. Of the remainder, four are appointed by the majority and minority leaders of the Pennsylvania state house and senate. Only one is appointed by the governor.⁹⁷

SEPTA's board operates with significant autonomy. It initiates all SEPTA actions and sets all SEPTA policy. The governor cannot veto SEPTA board decisions.⁹⁸ The board makes its own by-laws, and only it may modify or repeal them.⁹⁹ SEPTA sets its own fares, without state control.¹⁰⁰

⁹³ *Id.*

⁹⁴ *Id.* at § 1761(a).

⁹⁵ *SEPTA v. Philadelphia Bd. of Revision of Taxes*, 514 Pa. 707, 833 A.2d 710 (Pa. 2003).

⁹⁶ *Hess*, 513 U.S. at 44.

⁹⁷ 74 Pa. Cons. Stat. § 1712.

⁹⁸ *Id.* at §§ 1712-14.

⁹⁹ *Id.* at § 1741(a)(5).

¹⁰⁰ *Id.* at § 1741(a)(15).

And finally, it is crystal clear that Pennsylvania cannot be held legally liable for SEPTA's obligations. SEPTA's incorporating statute provides:

The authority [has] no power, at any time or in any manner, to pledge the credit or taxing power of the Commonwealth or any other government agency, nor shall any of the authority's obligations be deemed to be obligations of the Commonwealth or of any other government agency, nor shall the Commonwealth or any government agency be liable for the payment of principal or interest on such obligations.¹⁰¹

In sum, then, SEPTA is not structured such that it is entitled "to enjoy the special constitutional protection of the States themselves."¹⁰² Both the Trial Court and the 3rd Circuit correctly found that SEPTA was not entitled to Eleventh Amendment immunity.



¹⁰¹ *Id.* at § 1741(c).

¹⁰² *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979).

CONCLUSION

The burden was on SEPTA to show that it was entitled to immunity under the Eleventh Amendment, and it failed to satisfy that burden. The rulings below are well in-line with this Court's precedent, and there is no evidence that either the 3rd Circuit – or any other court – has had any difficulty applying that precedent. SEPTA's petition should be denied.

Respectfully submitted,

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