No. _____

In The
Supreme Court of the United States

MICHAEL LESLIE LAKE,

Petitioner,

v.

MICHAEL SKELTON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Eleventh Amendment to the United States Constitution provides States with immunity from being sued in federal court, but this immunity does not extend to cities, counties, or other municipal governments, unless they demonstrate that they acted as "an arm of the State" with respect to the conduct at issue. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977).

In this action, Petitioner Michael Lake sued Respondent Michael Skelton, in his official capacity as a deputy of the Cobb County Sheriff. The question presented, then, is whether county sheriffs in Georgia function as an arm of the State, and are thus entitled to Eleventh Amendment immunity, when they feed (or fail to properly feed) people detained in the county jail. *See* App. at 120.

PARTIES TO THE PROCEEDING

The parties to the proceeding are *Michael Leslie Lake*, who is the Plaintiff, Appellee in the Eleventh Circuit, and Petitioner in this Court; and *Michael Skelton*, who is the Defendant, in his official capacity as a deputy of the Cobb County Sheriff, Appellant in the Eleventh Circuit, and Respondent in this Court.

David Howell was an additional Defendant in the action Lake filed in the District Court, but Howell was not a party in the Eleventh Circuit and is not a party to the proceeding in this Court, having been dismissed by the District Court and with Lake declining to appeal such dismissal.

CORPORATE DISCLOSURE STATEMENT

None of the parties is a nongovernmental corporation.

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The opinion, reversing the District Court's order, from the United States Court of Appeals for the Eleventh Circuit is reported at *Lake v. Skelton*, 840 F.3d 1334 (11th Cir. 2016), and is found starting at Appendix at 1. The order and opinion, denying Petitioner Michael Lake's petition for rehearing *en banc*, with dissenting opinion, from the Eleventh Circuit is reported at *Lake v. Skelton*, 871 F.3d 1340 (11th Cir. 2017), and is found starting at Appendix at 110.

The underlying order and final report and recommendation, denying Respondent Michael Skelton's motion for summary judgment on Eleventh Amendment immunity, from the Magistrate Judge, United States District Court for the Northern District of Georgia is reported at *Lake v. Howell*, No. 1:12-CV-02018-MHC-JSA, 2015 WL 13260402 (N.D. Ga. May 27, 2015), and is found starting at Appendix at 36. And the underlying order, denying Skelton's motion for summary judgment, from the District Judge, Northern District of Georgia, is reported at *Lake v. Howell*, No. 1:12-CV-02018-MHC-JSA, 2015 WL 13358339 (N.D. Ga. June 30, 2015).

JURISDICTION

Lake seeks review of the judgment from the Eleventh Circuit entered on November 3, 2016. Lake filed a timely petition for rehearing *en banc*, which the Eleventh Circuit denied on September 28, 2017. Lake

sought and obtained an extension of time from this Court in which to file this petition for a writ of certiorari. Therefore, this Court has jurisdiction pursuant to Title 28, Code Section 1254(1) to review this petition for a writ of certiorari. *See* 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Lake has asserted claims against Skelton, in his official capacity as a deputy of the Cobb County Sheriff, pursuant to the Religious Land Use and Institutionalized Persons Act of 2000 and the Civil Rights Act of 1871 for violations of the Free Exercise Clause of the First Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The part of RLUIPA relevant to this action provides that:

> (a) Cause of action
>
> A person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under Article III of the Constitution.

(b) Burden of persuasion

If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2000cc of this title, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.

(c) Full faith and credit

Adjudication of a claim of a violation of section 2000cc of this title in a non-Federal forum shall not be entitled to full faith and credit in a Federal court unless the claimant had a full and fair adjudication of that claim in the non-Federal forum.

(d) Omitted

(e) Prisoners

Nothing in this chapter shall be construed to amend or repeal the Prison Litigation Reform Act of 1995 (including provisions of law amended by that Act).

(f) Authority of United States to enforce this chapter

The United States may bring an action for injunctive or declaratory relief to enforce compliance with this chapter. Nothing in this subsection shall be construed to deny, impair,

> or otherwise affect any right or authority of the Attorney General, the United States, or any agency, officer, or employee of the United States, acting under any law other than this subsection, to institute or intervene in any proceeding.
>
> (g) Limitation
>
> If the only jurisdictional basis for applying a provision of this chapter is a claim that a substantial burden by a government on religious exercise affects, or that removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, the provision shall not apply if the government demonstrates that all substantial burdens on, or the removal of all substantial burdens from, similar religious exercise throughout the Nation would not lead in the aggregate to a substantial effect on commerce with foreign nations, among the several States, or with Indian tribes.

42 U.S.C. § 2000cc-2.

The part of the Civil Rights Act of 1871 relevant to this action provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable

> to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

The First Amendment to the United States Constitution contains the Free Exercise Clause and provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const., Amend. I.

Section One of the Fourteenth Amendment to the United States Constitution contains the Due Process Clause relevant to this action and provides that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

> United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const., Amend. XIV.

In response to Lake's claims against him in his official capacity as a deputy of the Cobb County Sheriff, Skelton has raised immunity under the Eleventh Amendment to the United States Constitution as a bar to being sued in federal court. The Eleventh Amendment provides that:

> 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.

U.S. Const., Amend. XI.

STATEMENT OF THE CASE

On November 28, 2011, Michael Lake was arrested in Georgia by Cobb County Police on charges of stalking. *See* App. at 2, 36. Lake was then taken to the Cobb County Adult Detention Center, which is a jail owned by Cobb County, operated by the Cobb County Sheriff, and located in Marietta, Georgia. *See id.* at 2-3, 36; O.C.G.A. § 36-9-5(a). While detained, Lake repeatedly asked for release on bail, but the Cobb County

District Attorney opposed each request. *See* App. 2-3. Instead, after nearly a year of detention, in October 2012, Lake was offered a deal to avoid trial. But the Cobb County DA would require Lake to plead guilty to a crime Lake believes he did not commit, and so he refused. Lake then spent another six months in detention. Lake was finally released on July 15, 2013, after all charges were dismissed. *See id.* at 3.

Lake filed a separate civil rights action against certain Cobb County officials who brought charges against him, and so the underlying action at issue in this petition for a writ of certiorari does not involve those claims. *Compare Lake v. Ray*, No. 17-7179 (docketed in this Court, Dec. 20, 2017).

Rather, the underlying action at issue in this petition for a writ of certiorari involves claims Lake has made against the Cobb County Sheriff for violating Lake's civil rights during his detention. While being detained against his will at the Cobb County jail, the Cobb County Sheriff had the duty and responsibility to provide Lake with food, shelter, and clothing. However, by refusing to accept Lake's requests for dietary accommodations to allow him to maintain his religious beliefs, the Cobb County Sheriff violated Lake's rights under RLUIPA and the United States Constitution. *See* App. at 36.

Lake is a vegetarian and has not knowingly eaten meat since the fall of 1997. *See id.* at 38, 123. Lake does not eat meat because, in his own words, "I am a Christian who has taken a religious vow not to be

responsible for the death of any animals." *Id.* at 42. Yet, in clear disregard of Lake's sincerely held religious beliefs, the Cobb County Sheriff chose to deny Lake a vegetarian diet for a full year of his detention, November 28, 2011 until November 29, 2012. *Id.* at 36.

The Cobb County Sheriff made this choice even though Lake repeatedly requested a vegetarian diet based on his religious beliefs; Lake became so underweight that he "was placed on suicide watch due to his weight loss"; and Lake "was taken to Georgia Regional Hospital for observation" for a roughly two-month period where doctors promptly ordered that Lake receive "a vegetarian diet" and Lake "received a vegetarian diet." *Id.* at 39. On his return to the Cobb County jail, the Cobb County Sheriff still refused to provide Lake with a vegetarian diet, despite the fact that doctors had deemed it necessary. And the Cobb County Sheriff could have provided Lake a vegetarian diet at no additional cost; the Cobb County Sheriff simply refused. *See id.* at 40.

Finally, on November 29, 2012, the Cobb County Sheriff relented and provided Lake a vegetarian diet from then and through Lake's release on July 15, 2013. *See id.* at 39. The Cobb County Sheriff accommodated Lake's religious beliefs by writing down eight words: "No Meat on tray/Give extra fruit/vegetables." So easy, yet it took Lake nearly starving to death, before the Cobb County Sheriff wrote down those eight words.

Because he almost starved to death and suffered related physical and mental injuries, Lake filed a civil

rights action against Michael Skelton and others on June 11, 2012. *See id.* at 36, 94. Lake asserts claims under RLUIPA and Code Section 1983 for violation of his rights under the Free Exercise Clause and Due Process Clause. *See id.* at 36, 94. Lake named Skelton as a defendant because Skelton was a deputy sheriff and personally involved in the denial of Lake's requests for a vegetarian diet. *See id.* at 2-3, 36, 94.

At the end of discovery, on February 11, 2015, Skelton moved for summary judgment, arguing among other things that Lake could not identify any genuine issue of material fact that would preclude judgment in favor of Skelton; and claims against Skelton in his official capacity as a deputy sheriff were claims against the Cobb County Sheriff, which was entitled to immunity from suit in federal court under the Eleventh Amendment. *See id.* at 37. On May 27, 2015, the Magistrate Judge recommended denying the motion as to the official capacity claims, finding that there were genuine issues of material fact and the Eleventh Amendment did not apply because the Cobb County Sheriff was not acting as an arm of the State of Georgia. *See id.* at 93. On June 30, 2015, the District Court adopted the recommendation and set the action for trial in September 2015. *See id.* at 107-08.

However, on July 10, 2015, Skelton appealed from the District Court's ruling that the Cobb County Sheriff is not entitled to immunity under the Eleventh Amendment. *See id.* at 3. On November 3, 2016, the Eleventh Circuit issued a published opinion, which reversed and remanded for judgment as matter of law in

favor of Skelton. *See id.* at 1-2. Judge William Pryor wrote a majority opinion, with Judge Susan Black joining and Judge Barrington Parker, a judge from the Second Circuit sitting by designation. *See id.* at 21.

Agreeing with Judge Parker's assessment that the majority opinion "significantly expands the reach of sovereign immunity" and "is neither correct as a matter of law nor wise," and after obtaining an extension of time to file, on November 30, 2016, Lake filed a petition for rehearing *en banc*. *See id.* at 22, 110. A member of the Eleventh Circuit agreed with Lake's request and "requested a poll on whether this case should be reheard by the Court sitting en banc." *Id.* at 110-11.

Lake's petition for rehearing remained pending for nearly one year, until September 28, 2017, when the Eleventh Circuit issued a published opinion, which ordered that "this case will not be reheard en banc." *Id.* at 111. Judge William Pryor, again joined by Judge Susan Black, wrote an opinion "respecting the denial of rehearing en banc" and Judge Beverly B. Martin wrote an opinion "dissenting from the denial of rehearing en banc." *Id.* at 111, 119.

Agreeing with Judge Martin's assessment that "the *Lake* panel opinion is a dramatic expansion of what had until now been a narrow reach of sovereign immunity," "the consequences of the panel's holding are large," and there is a "more fundamental flaw that runs throughout the panel opinion, and that flawed reasoning seems to have begun in the *Manders*

opinion" and "this mistaken premise [has now] become a permanent fixture of this Circuit's arm-of-the-state jurisprudence," Lake now files this petition for a writ of certiorari from this Court to the Eleventh Circuit, having previously obtained an extension of time in which to file this petition. App. at 122-23, 140.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

1. The Eleventh Circuit Majority Opinion Incorrectly Found That, In Providing Food To Pre-Trial Detainees, The Cobb County Sheriff Acted As An "Arm Of The State."

The Eleventh Circuit uses "four factors to determine whether an entity is an 'arm of the State' in carrying out a particular function: (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 judgments against the entity." *Manders v. Lee*, 338 F.3d 1304, 1309 (11th Cir. 2003).

Applying those four factors, the Eleventh Circuit should have found that, in in its provision of food to pre-trial detainees, the Cobb County Sheriff did not act as an arm of the State. The fact that the Eleventh Circuit majority opinion did not reach that conclusion demonstrates why the Eleventh Circuit's current precedent is flawed, why courts continue to reach inconsistent results unrelated to the purpose of Eleventh

Amendment immunity, and why this Court should grant Lake's petition for a writ of certiorari to review the Eleventh Circuit's judgment.

A. Georgia Law Does Not Define The Cobb County Sheriff's Provision Of Food To Inmates As A State Function.

Lake was detained at the Cobb County Adult Detention Center, and Georgia Code Section 42-5-2(a) establishes that "it shall be the responsibility of the governmental unit, subdivision, or agency having the physical custody of an inmate to maintain the inmate, furnishing him food, clothing, and any needed medical and hospital attention." O.C.G.A. § 42-5-2(a). Thus, it was the responsibility of Cobb County to provide Lake with food, not the State, and when the Cobb County Sheriff decided what food to provide Lake, the Sheriff acted on behalf of Cobb County, not the State.

There should be no dispute as to how Georgia law defines the provision of food to inmates. After all, Georgia courts have expressly held that Georgia Code Section 42-5-2 imposes on counties the duty and cost of providing food, clothing, and medical care for inmates. *See, e.g.*, *Lawson v. Lincoln County*, 664 S.E.2d 900, 902 (Ga. Ct. App. 2008) ("A county . . . has the duty . . . 'to maintain the inmate, furnishing him food, clothing, and any needed medical [care].' ").

Similarly, both Skelton and the Georgia Sheriffs have conceded that Georgia Code Section 42-5-2 imposes on counties the duty and cost of providing food

and other necessities to inmates and the Sheriff satisfies this duty on behalf of the county. *See* App. at 129 n.6 (quoting briefs from Skelton and amicus in support of Skelton) ("'Skelton and Howell agree that Cobb County has a duty under O.C.G.A. §§ 42-4-32, 42-5-2 to provide food to prisoners – including Lake when he was confined in its jail.'"), ("'The State of Georgia imposes the responsibility on its counties to maintain and furnish the jail and maintain the inmate. This fiscal responsibility is discharged by the county through the Office of Sheriff.'").

Even the Eleventh Circuit has previously and expressly said that Georgia Code Section 42-5-2 imposes on counties the duty and cost of providing food, clothing, and medical care for inmates. *See, e.g.*, *Manders*, 338 F.3d at 1319 ("[T]his case is not a case of feeding, clothing, or providing medical care to inmates[.]"), at 1322 ("While Georgia counties have obligations involving the jail structure and inmates' food, clothing, and medical necessities, such duties involve wholly separate and distinct matters from the sheriff's force policy[.]"), at 1323 n.43 ("We stress that this case does not involve medical care, which counties have a statutory obligation to provide[.]").

B. The State Of Georgia Does Not Control The Cobb County Sheriff's Provision Of Food To Inmates.

The absence of state control is best illustrated by the contract with ARAMARK Correctional Services,

which is the same contract that provided for vegetarian diets at no additional cost. Among other things, the contract confirms that any changes require approval of Cobb County and when the Sheriff did seek a modification, he wrote a memo "[t]o obtain Board of Commissioners approval"; Cobb County has the right to remove Aramark employees from "the premises of the County"; the insurance lists "Cobb County and its officials, including the Cobb County Sheriff . . . as additional insured's"; and Cobb County has the right to terminate under statutory "provisions applicable to counties." The State of Georgia has none of those rights under the contract – only Cobb County does.

The Eleventh Circuit majority does not dispute the contract, but instead claims that "these contracts do not affect our analysis of where state *law* vests control." App. at 17. Yet, "[t]he Supreme Court has cautioned that, when Eleventh Amendment concerns are at stake, form should not be exalted over substance." *Hudson Sav. Bank v. Austin*, 479 F.3d 102, 106 (1st Cir. 2007). "[A] court's appraisal of . . . immunity must focus on the 'practical effect' of the suit as opposed to its abstract posture." *Id.* at 106-07. In refusing to even consider the contracts, the majority has done just that – exalt form over substance.

C. The State Of Georgia Does Not Fund The Cobb County Sheriff's Provision Of Food To Inmates.

Like with the first factor, there should be no dispute that the State of Georgia does not fund the Cobb County Sheriff's provision of food to inmates. Even Skelton concedes "a county purchases food and clothing for the sheriff's office to provide prisoners."

Nonetheless, the Eleventh Circuit majority says that, although the State of Georgia does not pay for a county sheriff's provision of food to inmates, the "[t]he state [of Georgia] pays for some of the [other] operations of the sheriff's office," and "[w]e concluded in *Manders* that . . . [therefore], this factor 'tilt[s] . . . toward immunity.' " App. at 18.

However, as Judge Parker explained in his dissenting opinion, the Eleventh Circuit majority disregards both the rule and the facts of *Manders*:

> Under the majority's formulation, it is hard to imagine when this factor would not favor immunity, as the State always pays for some of a sheriff's operations. The *Manders* court took a more nuanced approach, focusing on the involvement of state funds in the particular functions relating to force policy . . . [including] the State's contributions to annual training, disciplinary procedure, and the housing of certain state offenders. . . .

App. at 29-30. "Here, the State, through § 42-5-2, has expressly delegated to the counties the responsibility

[of] providing – by paying for – food to inmates. The absence of state funds for the particular function disfavors immunity." *Id.* at 30.

D. The State Of Georgia Is Not Liable For An Adverse Judgment Against The Sheriff.

Lastly, as with the first and third factors, there should be no dispute that the State of Georgia is not liable for an adverse judgment against the Cobb County Sheriff. Indeed, the State of Georgia has itself said that there is "not one decision, state or federal, holding that the State can be held monetarily liable for the acts or omissions of a county sheriff" and that "the State's purse is not implicated" by claims against a sheriff. *Fitzgerald v. State*, No. 4:13-CV-00258-HLM (N.D. Ga. Feb. 18, 2014), Doc. 20 at 3-4, 3 n.1 (brief by the State of Georgia in litigation against the State by another inmate held in a county jail).

Yet, the Eleventh Circuit majority still claims that an adverse judgment "'implicates' 'both county and state funds.'" App. at 19 (quoting *Manders*). But the full language from *Manders* is that, "[i]f a significant adverse judgment occurs, both county and state funds are implicated because Sheriff Peterson would need to seek . . . a greater daily rate from the State for felony offenders serving their state sentences in the county jail." *Manders*, 338 F.3d at 1327.

Neither has been shown. There is no evidence that any adverse judgment would be significant enough to

require the Cobb County Sheriff to seek more funds. And there is no evidence that the Cobb County Sheriff would seek a greater daily rate from the State. Indeed, the State of Georgia has explained why the Cobb County Sheriff would not do so:

> The *Manders* decision fails to notice the likely response to such bills, which is that the State would move those prisoners to a less expensive county jail. And indeed, the purported fact that the Sheriff may bill the State for housing these prisoners is itself an indication that he is a separate entity from the State.

Fitzgerald, No. 4:13-CV-00258-HLM, Doc. 20 at 3 n.1.

2. The Question Presented Has Great Importance To The Parties, The State, Georgia's 159 Counties, And The 50,000 Pre-Trial Detainees In Georgia County Jails, And The Interests Of Equality And Federalism.

A. The Eleventh Circuit Majority Opinion Conflicts With This Court's Precedent.

The Eleventh Circuit majority opinion conflicts with this Court's precedent in *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 47 (1994). In fact, the Eleventh Circuit majority expressly recognized that its opinion and interpretation of the circuit precedent meant that it could not follow this Court's precedent.

As Judge Pyror writing for the majority explained, "[t]o the extent that our dissenting colleague suggests that this appeal should be decided based on 'the

Eleventh Amendment's twin reasons for being,' we can only say that we are bound by the test of the en banc majority in *Manders*." App. at 20 (citations omitted). That statement is in direct conflict with this Court's precedent that, "[w]hen indicators of immunity point in different directions, the Eleventh Amendment's twin reasons for being remain our prime guide." *Hess*, 513 U.S. at 47.

The Eleventh Circuit is not the only circuit to decline to follow this Court's precedent in *Hess*. Other circuits have similarly declined to follow *Hess*, creating conflicts both with this Court's precedent and among the various circuits:

> [T]he Third, Seventh, Eighth, and Ninth Circuits did not alter their arm-of-the-state tests at all in response to *Hess*. Other circuits, however, have slightly adjusted their tests. The Tenth Circuit has not followed a consistent approach, sometimes applying its pre-*Hess* test and sometimes applying a modified test. The different factors the circuits consider, and the inconsistency with which some circuits conduct their tests, hamper the uniform examination of this issue.

Hector Bladuell, *Twins or Triplets?: Protecting the Eleventh Amendment Through A Three-Prong Arm-of-the-State Test*, 105 Mich. L. Rev. 837, 844-45 (2007).

B. The Eleventh Circuit Majority Opinion Conflicts With Its Own Precedent, Creating An Intra-Circuit Split.

The Eleventh Circuit majority opinion is contrary to its own prior precedent. Among other things, the majority claims that an adverse judgment would have an indirect effect on " 'both county and state funds.' " App. at 19 (quoting *Manders*). But, as Judge Parker notes, "[s]ince *Manders*, however, the [Eleventh Circuit] has twice rejected the theory that an indirect impact on the State treasury favors immunity." App. at 31; *Abusaid v. Hillsborough Cty. Bd. of Cty. Comm'rs*, 405 F.3d 1298, 1312-13 (11th Cir. 2005) ("[T]he Eleventh Amendment's historical concern is much more precise – it is with 'judgments that must be paid out of a State's treasury,' *Hess*, 513 U.S. at 48, not with any judgment that may indirectly affect a state's finances[.]").

Again, the Eleventh Circuit is not the only circuit to have these types of problems. "The jurisprudence over how to apply the arm-of-the-state doctrine is, at best, confused." *Mancuso v. New York State Thruway Auth.*, 86 F.3d 289, 293 (2d Cir. 1996). The "factors, the layers of factors, subfactors, and considerations that inform those subfactors . . . make an analysis seem dense, if not impenetrable." *Maliandi v. Montclair State Univ.*, 845 F.3d 77, 84 (3d Cir. 2016). In fact, district courts in the same circuit often disagree over how to apply just one of these tests to the same entity. *See, e.g.*, *id.* at 86 ("That question has bedeviled district judges in our Circuit, who are divided in their application of the *Fitchik* test to MSU.").

C. The Eleventh Circuit Majority Opinion Disregards That The State Of Georgia Itself Does Not Consider County Sheriffs To Be An Arm Of The State.

The Eleventh Circuit majority opinion disregards compelling evidence from the State of Georgia and Georgia courts. As the State of Georgia has itself explained, "[w]henever the courts of Georgia have had an opportunity to address the issue, in any area of law, they have always reached the same conclusion." *Fitzgerald*, No. 4:13-CV-00258-HLM, Doc. 20 at 4. "Georgia's courts have consistently held that sheriffs are county – not State – officers." *Id.* Yet, despite this clear evidence, the majority still claims that "the sheriff [is] a constitutional officer of the state." App. at 10.

By disregarding this important evidence from the State of Georgia itself, the Eleventh Circuit majority opinion undermined a key purpose of the Eleventh Amendment and federalism. It is "every bit as much an affront to the state's dignity and fiscal interests were a federal court to find erroneously that an entity was an arm of the state, when the state did not structure the entity to share its sovereignty." *Fresenius Med. Care Cardiovascular Res., Inc. v. Puerto Rico & Caribbean Cardiovascular Ctr. Corp.*, 322 F.3d 56, 63 (1st Cir. 2003).

D. The Eleventh Circuit Majority Opinion Has Substantial Impact On Georgia's 159 Counties And The 50,000 Pre-Trial Detainees In Georgia County Jails.

The Eleventh Circuit majority opinion will impact more than just the parties in this case. As Judge Parker explained in his dissenting opinion, "[the] decision . . . significantly expands the reach of sovereign immunity and will leave Georgia counties unanswerable for constitutional violations." App. at 22-23. And because of Georgia's uniquely large number of counties and inmate population, the decision is an abruptly negative change in the law for nearly 50,000 county jail inmates state-wide.

As Judge Martin further explained in her dissenting opinion:

> When *Manders* granted Georgia sheriffs Eleventh Amendment immunity for claims arising out of use-of-force policies in county jails, [the Eleventh Circuit] was careful to narrowly cabin the scope of that immunity. The words [the Eleventh Circuit] used in *Manders* reflected an understanding of what a serious thing it is to expand a doctrine that blocks a whole class of people from vindicating their federal rights in federal court. Every time we expand the list of sheriff's functions that are immune from suit, we impact tens of thousands of people who are detained in county jails across the state of Georgia. Most of these people have not yet been convicted of any crime and are presumed innocent. Yet even in

> the face of [the Eleventh Circuit's] express admonitions in *Manders*, the *Lake* panel opinion bars suit against sheriffs for virtually any way they violate a jail inmate's rights – from the use of force to the denial of medical care.

App. at 142-43.

E. The Eleventh Circuit Majority Opinion Reflects The Problems With The Current Arm-Of-The-State Analysis, And The Intra-Circuit and Inter-Circuit Splits That Have Developed.

The Eleventh Circuit majority opinion, unfortunately, reflects the serious problems that exist with the current arm-of-the-state analysis.

As an initial matter, as Judge Martin explains in her dissenting opinion, the Eleventh Circuit's precedent was already incorrect before this case. Under prior precedent, the Eleventh Circuit incorrectly held that, if a county sheriff is independent from "the county," it must be an arm of the state:

> [B]eyond what is wrong with the panel's analysis of each of the four *Manders* factors, there is another, more fundamental flaw that runs throughout the panel opinion, and that flawed reasoning seems to have begun in the *Manders* opinion. I had therefore hoped that, if this Court undertook to consider Mr. Lake's case en banc, we could have also addressed this flawed logic that first appeared in *Manders*.

> The *Lake* panel repeatedly emphasizes as weighing in favor of arm-of-the-state status that the sheriff is "independent from [the] [c]ounty." The argument goes like this: because the sheriff is independent from the county, the sheriff must be an arm of the state. This mistaken premise, which (again) first appeared in *Manders*, took hold in the *Lake* panel decision. I had hoped that this mistaken premise would not become a permanent fixture of this Circuit's arm-of-the-state jurisprudence.
>
> It is true that the sheriff, as an "elective county office[r]," occupies a constitutional office that is largely independent from other county governing authority. But the county governing authority – which is the county's legislative body and is known as the board of county commissioners – is "not the only institution that acts for the county." Not unlike the federal government's separation of powers among coequal branches, Georgia law creates a separation of powers at the county level: the sheriff is an executive officer of the county, and his authority is largely independent of the county's legislative body. "Thus, the sheriff's independence from the county commission should be interpreted not as independence from the county, but rather as independent authority to act for the county with respect to the functions entrusted his office."

App. at 140-41 (citations and emphasis omitted).

Having reinforced that error from *Manders*, the Eleventh Circuit majority opinion has further deepened a split with other circuits, like the Seventh Circuit which follows the exact analysis set forth by Judge Martin in her dissent:

> According to the defendant, if sheriffs in Illinois are not agents of the county . . . , then sheriffs must therefore be agents of the state. This argument overlooks a crucial third possibility that we have found to be dispositive in other cases – namely, that the sheriff is an agent of the county sheriff's department, an independently-elected office that is not subject to the control of the county in most respects.

Franklin v. Zaruba, 150 F.3d 682, 685 (7th Cir. 1998).

This type of split between and among circuits present in this case and on this issue is all too common in arm-of-the-state cases. As one commentator explains, the Eleventh Circuit's cases in particular have conflicted with the First and Seventh Circuits' cases, although there are numerous other conflicts as well:

> Circuits not only consider a variety of factors, they also evaluate the factors differently. In examining the status of the entity under state law, the First Circuit considered: (1) the entity's enabling act; (2) other statutes; (3) state court decisions; (4) the entity's functions; and (5) the control the state exercised over it. In contrast, the Eleventh Circuit exclusively considered that state law treated the entity as part of the county instead of the state. To

> assess the state's control over the entity, the First Circuit considered how many of the entity's board members the governor appointed and whether the governor had the power to remove board members or veto the entity's decisions. Courts in other circuits, however, did not take the state's veto power into consideration. In addition, although the Tenth and Third Circuits considered whether the entity can sue and be sued under the control factor, enter into contracts in its own name, and take, hold, and handle real and personal property, other circuits did not. Moreover, what constitutes a factor in one circuit is an element in another used to evaluate whether a factor is met.
>
> The circuits also afford varying weight to the elements and factors. Although the First Circuit did not give much weight to the enabling statute's indication that the entity was not a political subdivision, the Eleventh Circuit focused exclusively on whether a sheriff was part of a political subdivision to determine if the state had structured the entity as an arm of the state. Furthermore, although some circuits afford the state treasury factor a disproportionate weight, the Seventh Circuit called it the least important factor, and held that an entity can be an arm of the state even if the state treasury remains untouched.

Bladuell, *supra*, at 845-46.

CONCLUSION

Given that the question presented by this petition is one of great importance for the parties involved, the State of Georgia, its 159 county governments, and 50,000 pre-trial detainees in county jails, and national interests of equality and federalism, this Court should grant Lake's petition. As Judge Martin explains in her dissenting opinion:

> If a faithful application of [the Eleventh Circuit] and the Supreme Court's precedents required this result, I would accept it and move on. But because neither [the Eleventh] [C]ircuit's precedent nor that of the Supreme Court supports this broad grant of immunity to Georgia county sheriffs, I [cannot].

App. at 143.

Petitioner Michael Lake submits this petition on January 31, 2018.

Respectfully submitted,

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