No. 17-1089

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

REPLY OF PETITIONER MICHAEL LESLIE LAKE

NAVEEN RAMACHANDRAPPA
Counsel of Record
BONDURANT, MIXSON & ELMORE, LLP
1201 W Peachtree St. NW, Ste. 3900
Atlanta, GA 30309
404-881-4151
ramachandrappa@bmelaw.com

GERALD WEBER
LAW OFFICES OF GERRY WEBER, LLC
PO Box 5391
Atlanta, GA 31107

CYNTHIA L. COUNTS
DUANE MORRIS LLP
1075 Peachtree St. NE, Ste. 2000
Atlanta, GA 30309

Counsel for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

SUMMARY OF ARGUMENT 1

ARGUMENT 4

1. Skelton's Attempt To Create New Issues To Defeat Lake's Petition For Certiorari Fails 4

2. 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." 7

3. The Eleventh Circuit Majority Opinion Conflicts With This Court's Precedent, Creates Intra-Circuit And Inter-Circuit Splits, And Has Substantial Impact On Tens Of Thousands Of Pre-Trial Detainees 10

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Abusaid v. Hillsborough Cty. Bd. of Cty. Comm'rs, 405 F.3d 1298 (11th Cir. 2005).....10, 11

DeGenova v. Sheriff of DuPage Cty., 209 F.3d 973 (7th Cir. 2000).....3, 9

Duignan v. United States, 274 U.S. 195 (1927).....5

Franklin v. Zaruba, 150 F.3d 682 (7th Cir. 1998) 3, 10, 11, 12

Hess v. Port Authority Trans-Hudson Corp., 513 U.S. 30 (1994) 10

Lake v. Skelton, 840 F.3d 1334 (11th Cir. 2016)....1, 11, 13

Lake v. Skelton, 871 F.3d 1340 (11th Cir. 2017).....1, 2

Lightfoot v. Henry Cty. Sch. Dist., 771 F.3d 764 (11th Cir. 2014).....9

Manders v. Lee, 338 F.3d 1304 (11th Cir. 2003) 4, 6, 7, 9, 11, 12

Massengale v. Hill, No. 1:05-CV-189, 2005 WL 8155185 (N.D. Ga. July 25, 2005) 7, 12

Palmer v. Correct Care Sols., LLC, No. 4:17-CV-102, 2017 WL 6028467 (M.D. Ga. Dec. 4, 2017) 13

Savage v. Glendale Union High Sch. Dist. No. 205, Maricopa Cty., 343 F.3d 1036 (9th Cir. 2003).....9

Swint v. Chambers Cty. Comm'n, 514 U.S. 35 (1995).....4

Teasley v. Freeman, 699 S.E.2d 39 (Ga. Ct. App. 2010) 2

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES

RLUIPA.....5

GEORGIA STATUTES

O.C.G.A. § 42-4-32(a) 8

OTHER

Harvard Law Review, *Eleventh Circuit Holds That Georgia County Sheriffs Are Arms of the State*, 117 Harv. L. Rev. 980 (2004).....2

SUMMARY OF ARGUMENT

In his Brief in Opposition, Respondent Michael Skelton says that:

> In our case, we should ask whether the Cobb County **Board of Commissioners** can tell the sheriff how to respond to a request . . . for a religious accommodation in the service of food to a prisoner.

Br. in Opp'n at 25 (bolding added).

Petitioner Michael Lake agrees that this is the question the Eleventh Circuit majority opinion did ask. *See Lake v. Skelton*, 840 F.3d 1334, 1341 (11th Cir. 2016) ("[T]he sheriff holds a constitutional office independent of Cobb County and its **governing body**[.]"); *Lake v. Skelton*, 871 F.3d 1340, 1353 (11th Cir. 2017) (Martin, J., dissenting) ("The *Lake* panel repeatedly emphasizes as weighing in favor of arm-of-the-state status that the sheriff is 'independent from [t]he **[c]ounty [commission]**.'") (bolding added in both).

But this is precisely the wrong question to ask, and by asking the wrong question, the Eleventh Circuit majority reached the wrong result, and so too will district courts that must now apply the majority opinion.

That the Cobb County Board may lack certain control over the Cobb County Sheriff does not mean that the Sheriff acts as an arm of the State. It just means that the Cobb County Sheriff, "an executive officer of the county," has independence from the Cobb County

Board, "the county's legislative body" – without changing the fact that the Sheriff remains a county officer. *Lake*, 871 F.3d at 1354.

As Georgia courts explain:

> [C]ertain cases make a distinction between the sheriff and the county for certain purposes, but those cases do not conflict with our conclusion that **a sheriff is part of the county**. . . . The cases deal with questions of whether a county commission controls the sheriff's execution of his duties (it does not), or whether the county, as opposed to the sheriff, is responsible for the acts of a sheriff's deputy (it is not). . . . [T]he holdings are entirely consistent with the notion that a sheriff is the employer of his deputies, and they are not fatal to our conclusion that **a sheriff, as an elected county officer, is nevertheless a part of the county. . . . In essence, a sheriff is separate from the county for purposes of directing the work of his deputies, but this does not change the fact that sheriffs are *county* officers**.

Teasley v. Freeman, 699 S.E.2d 39, 42 (Ga. Ct. App. 2010) (bolding added and cites omitted).

Making matters worse, the Eleventh Circuit majority opinion also conflicts with the precedents of other Circuits. "Other circuits have correctly understood the ramifications of overlapping authority between the sheriff and the county commission." Harvard Law Review, *Eleventh Circuit Holds That*

Georgia County Sheriffs Are Arms of the State, 117 Harv. L. Rev. 980, 987 (2004).

Specifically, the Seventh Circuit has repeatedly held that Illinois county sheriffs do not act as an arm of the State, despite being "separate from the county boards to such a degree that the county boards cannot be held liable for their actions." *Franklin v. Zaruba*, 150 F.3d 682, 686 (7th Cir. 1998).

As the Seventh Circuit explains:

> According to the defendant, if sheriffs in Illinois are not agents of the county for purposes of holding the county liable *under respondeat superior*, 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**.

Id. at 685-86 (bolding added); *see also DeGenova v. Sheriff of DuPage Cty.*, 209 F.3d 973, 976-77 (7th Cir. 2000) ("We rejected this argument in *Franklin*, and do so again today. . . . [H]e is not a state employee or officer, and thus is not protected by the Eleventh Amendment.").

For those reasons and as set forth in more detail below, this Court should grant a writ of certiorari to review the Eleventh Circuit majority opinion.

ARGUMENT

1. Skelton's Attempt To Create New Issues To Defeat Lake's Petition For Certiorari Fails.

Faced with the prospect of defending the Eleventh Circuit majority opinion before this Court, Skelton leads off his Brief in Opposition with two arguments that do not even try to defend the majority opinion. Rather, Skelton tries to create new issues with the hope of resuscitating the fatally flawed reasoning of the majority opinion. Both of Skelton's new issues can be easily rejected.

First, Skelton argues that, "[a]lthough the sincerity of Lake's 'religious' belief was not before the Eleventh Circuit, it was raised in the District Court and can be weighed in this Court's consideration of the petition for writ of certiorari." Br. in Opp'n at 11 (formatting altered).

But the reason that the sincerity of Lake's religious beliefs was not before the Eleventh Circuit is because it lacked **appellate jurisdiction** to even consider this or any other merits argument. Skelton filed an interlocutory appeal from the denial of his motion for summary judgment solely under the collateral order doctrine, which applies only to his Eleventh Amendment defense and not to any other issue. *See Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 49 (1995); *Manders v. Lee*, 338 F.3d 1304, 1308 n.6 (11th Cir. 2003).

As a result, this Court should not and cannot consider Skelton's merits argument that Lake's religious beliefs were insincere as a matter of law. And nothing in the cases cited by Skelton suggest otherwise. Those are all cases where appellate jurisdiction did exist to consider additional grounds, but such grounds were not reached. None of those cases suggests that this Court can reach questions where no appellate jurisdiction existed. And even where appellate jurisdiction does exist, this Court reaches issues not addressed by the appellate courts only in "exceptional cases." *Duignan v. United States*, 274 U.S. 195, 200 (1927).

Of course, even a cursory review of Skelton's arguments made in the District Court on the sincerity of Lake's religious beliefs would show that his arguments lack merit and present no reason to deny certiorari. *See, e.g.*, App. at 105 ("[Lake's] vow, although idiosyncratic, is not so bizarre as to preclude this case from proceeding forward to a fact finder's resolution. . . ."). Indeed, Skelton did not even properly raise this issue in the District Court. App. at 65 ("Defendant's failure to assert any challenge to the merits of the RLUIPA claim in their initial brief **waives the issue** for purposes of summary judgment. . . . [Moreover], the Court finds that genuine issues of material fact exist as to whether Plaintiff harbored a sincere, religious belief. . . . This also would dispose of the **conclusory** attack Defendant Skelton belatedly asserts to the merits. . . .") (emphasis added).

Second, Skelton argues that, "for the first time in the long history of this case, Lake explicitly urges this Court to overturn *Manders*." Br. in Opp'n at 16.

Yet, Skelton simply misunderstands Lake's arguments. Skelton says that, "[a]ccording to Lake, the Eleventh Circuit's consideration in this case of the independence of a Georgia sheriff from the local county is an 'error from *Manders*.'" *Id.*

In making this claim, Skelton fails to appreciate that the error is from ***dictum*** in *Manders*, not the holding. As the Eleventh Circuit explained in *Manders*:

> It has been suggested that the sheriff's office is an independent, constitutional, elected office that is neither the State nor the county. Throughout this litigation the parties have briefed and framed the legal issue in this case solely as whether Sheriff Peterson in his official capacity acts on behalf of the State or Clinch County in the context of the Eleventh Amendment. **Thus, we decide that controversy. No other issue is before us.**

338 F.3d at 1328 n.54 (bolding added and cites omitted). And Lake expressly made this same point about the *Manders dictum* in his Eleventh Circuit brief. *See Lake v. Skelton*, 2015 WL 7873450, at *31 n.4.

Moreover, in his Petition to this Court, Lake does not ask the Court to overturn *Manders*. After all, because *Manders* did not decide the issue, district courts were free to and did in fact disregard the non-binding *dictum* from *Manders*:

> The *Manders* court declined to address the issue of whether the sheriff is neither the state nor the county because the parties did not raise the argument. But, **the court left open the possibility** that a constitutionally created office, like the sheriff's, could be independent from both governmental entities when performing particular functions. . . . Thus, the Court considers . . . whether . . . the factors weigh more heavily in favor of the state or the sheriff's office, **as an independent entity**.

Massengale v. Hill, No. 1:05-CV-189, 2005 WL 8155185, at *4-*5 (N.D. Ga. July 25, 2005) (bolding added and cites omitted). Rather than ask this Court to overturn *Manders*, Lake asks this Court to overturn the majority opinion **in this case** because it is the binding precedent that now reverses district court opinions like *Massengale* and has created a split with other Circuits' precedents.

2. 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."

In his opening Petition to this Court, Lake has explained why the Eleventh Circuit majority opinion is incorrect and why each of the four factors shows that Skelton did not satisfy his burden of establishing Eleventh Amendment immunity. In his Brief in Opposition, Skelton tries to rebut Lake's Petition and show why each of the factors does support his Eleventh

Amendment immunity. Because Lake's opening Petition, the *Amicus Curiae* Brief of the SCHR and SPLC, and the two separate dissenting opinions all thoroughly explain why the majority opinion's and Skelton's analysis of the four factors is wrong, Lake will not address each of the four factors separately in this Reply.

Rather, Lake will make one broad point about the arguments made by Skelton and relied upon by the majority opinion. In addition to failing to appreciate that the sheriff may be independent from the county board but remain a county officer, Skelton and the majority opinion rely entirely on **indirect, general regulation** by the State to justify their finding that the Cobb County Sheriff acts as an arm of the State when providing food to pre-trial detainees at the Cobb County Adult Detention Center.

For example, Skelton and the majority opinion say that Georgia Code Section 42-4-32 demonstrates the State's control over the Cobb County Sheriff because it provides that "[a]ll aspects of food preparation and food service shall conform to the applicable standards of the [Georgia] Department of Public Health." O.C.G.A. § 42-4-32(a).

But Georgia Code Section 42-4-32 is not a regulation of sheriffs specifically; it is merely a law of general application that establishes minimum standards for **all penal institutions**, regardless of whether they are run by sheriffs or anyone else. Similarly, the Department of Public Health regulations are not even specific

to penal institutions; they apply to **all food service in Georgia**. *Compare Manders*, 338 F.3d at 1315, 1321 ("These state court and bond-related duties do not stem from laws of general application, but from statutes whereby the State requires sheriffs to perform specific tasks. . . . These statutes are not mere general regulatory control. . . . Again, these rules are not laws of general application. . . .").

And when the Eleventh Circuit had previously addressed similar laws of general application, it had held that "[e]stablishing minimum requirements is not sufficient to demonstrate control," and "these laws do not establish the requisite control for Eleventh Amendment purposes." *Lightfoot v. Henry Cty. Sch. Dist.*, 771 F.3d 764, 773 (11th Cir. 2014); *see also Manders*, 338 F.3d at 1315, 1321.

Yet, when it came to this case, the majority opinion disregarded its prior precedent, and making matters worse, it has created yet another split with the precedents of other Circuits. *Compare Savage v. Glendale Union High Sch. Dist. No. 205, Maricopa Cty.*, 343 F.3d 1036, 1045 (9th Cir. 2003) (rejecting immunity where "the amici . . . point out that the State Board of Education sets statewide standards that the local school boards must implement, arguing that this demonstrates state governmental control"); *DeGenova*, 209 F.3d at 976 ("The Sheriff cites provisions that require sheriffs to participate in annual training. . . . But these provisions merely authorize the State to regulate sheriffs in a very tenuous and indirect manner[.]").

3. The Eleventh Circuit Majority Opinion Conflicts With This Court's Precedent, Creates Intra-Circuit And Inter-Circuit Splits, And Has Substantial Impact On Tens Of Thousands Of Pre-Trial Detainees.

In his opening Petition to this Court, Lake has explained why the Eleventh Circuit majority opinion conflicts with this Court's precedent, specifically *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994); the Eleventh Circuit's own prior precedent, specifically *Abusaid v. Hillsborough Cty. Bd. of Cty. Comm'rs*, 405 F.3d 1298 (11th Cir. 2005); other Circuits' precedents, specifically the Seventh Circuit's opinion in *Franklin*; and has substantial impact on tens of thousands of pre-trial detainees.

In response to each of these compelling reasons for why this case demands certiorari review, Skelton raises immaterial arguments that do not remotely address the actual reasoning of *Hess*, *Abusaid*, and *Franklin*, and finally Skelton drastically downplays the effect that the majority opinion is already having.

As to *Hess*, Skelton says there is no conflict because *Hess* "involve[d] a bistate entity." Br. in Opp'n at 18. To be sure, *Hess* does involve different facts, but that misses the point entirely. In *Hess*, this Court established a clear **legal rule** 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. Yet, the majority opinion **rejects** this rule, perhaps incorrectly attributing that

rule from a dissenting opinion from *Manders*, when in fact it derives from this Court's precedent. "To 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*, not the dissent." *Lake*, 840 F.3d at 1344 (cites omitted).

As to *Abusaid*, Skelton says there is no conflict because "[t]he *Abusaid* court also recognized that Florida counties can be liable for judgments against local sheriffs" and "[i]n Georgia, on the other hand, counties are not liable for judgments against sheriffs." Br. in Opp'n at 31. But that was not the basis of the holding in *Abusaid*. Indeed, the Eleventh Circuit in *Abusaid* said that, "as we observed in *Hufford*, **even if the county ultimately may not be held liable** for the judgment against the sheriff, **the fact that the state is not liable either weighs heavily** against extending the state's Eleventh Amendment immunity to the challenged conduct by the sheriff." *Abusaid*, 405 F.3d at 1313 (bolding added); *see also id.* ("[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[.]' ").

And as to *Franklin*, Skelton says there is no conflict because *Franklin* "predated *Manders* by five years" and "[t]he en banc Eleventh Circuit [in *Manders*] was aware of *Franklin*, which was in fact cited in a dissenting opinion, but appropriately did not consider it pertinent." Br. in Opp'n at 31-2. But, as set

forth above, the majority opinion in *Manders* chose not to address *Franklin* because the parties did not raise the issue. And, indeed, before the majority opinion in this case, district courts did choose to follow *Franklin*. *See, e.g.*, *Massengale*, 2005 WL 8155185, at *4-*5 (expressly following the dissent in *Manders* and "*Franklin v. Zaruba*, 105 F.3d 682, 685 (7th Cir. 1998)").

Finally, Skelton accuses Lake of "mock alarm" and suggests that "this Pandora's Box is not nearly so frightening as Lake portrays." Br. in Opp'n at 32.

Lake obviously disagrees with these characterizations, and perhaps the best way to demonstrate that his fears are more than justified is to consider a recent opinion from a district court judge unconnected to this case:

> Determining whether a *county* sheriff is a *state* official would seem to be a rather straightforward inquiry. But we have learned that it is not enough that the sheriff is the "Sheriff of Muscogee *County*" or that his law enforcement responsibilities are restricted primarily to the geographic boundaries of the *county* which he serves. It appears to matter little that he is in charge of the *county* jail and that this jail is funded by the *county* taxpayers. In fact, recent precedent suggests that it is not terribly important that the *county* sheriff's budget is funded by the taxpayers who reside within the *county* in which the sheriff serves and who elect the *county* sheriff. Such facts are brushed aside as the product of superficial analysis that must yield, of course, to one

> of those "sophisticated" multipart balancing tests loved by law professors and appellate judges.

Palmer v. Correct Care Sols., LLC, No. 4:17-CV-102, 2017 WL 6028467, at *3 (M.D. Ga. Dec. 4, 2017); *see also id.* at *4 (holding that, "with reservations" and "[b]ound by the holding in *Lake I* and constrained by its rationale, this Court can find no distinction . . . between a county sheriff feeding county detainees in a county jail and a county sheriff taking care of [their] medical needs. . . .").

In fact, rather than a blip on the radar, "the federal reporters are filling up with cases explaining who can be liable when a county jail detainee's federal constitutional rights are violated because of a failure to provide the detainee with essential needs such as food and medical care." *Id.* at *1. Before it becomes too late and the damage too great, this Court should grant Lake's petition, so that these cases correctly decide who is responsible "when a county jail detainee's federal constitutional rights are violated." *Id.*

CONCLUSION

For those reasons, this Court should grant Lake's Petition. Lake submits this reply on January 31, 2018.

Respectfully submitted,

NAVEEN RAMACHANDRAPPA
Counsel of Record
Supreme Court No. 294131
BONDURANT, MIXSON & ELMORE, LLP
1201 W Peachtree St NW Ste 3900
Atlanta, GA 30309
404-881-4151
ramachandrappa@bmelaw.com

GERALD WEBER
LAW OFFICES OF GERRY WEBER, LLC
PO Box 5391
Atlanta, GA 31107
404-522-0507
wgerryweber@gmail.com

CYNTHIA L. COUNTS
DUANE MORRIS LLP
1075 Peachtree St NE Ste 2000
Atlanta, GA 30309
ccounts@lawcounts.com

Counsel for Petitioner Michael Lake