No. 17-657

IN THE

Supreme Court of the United States

BI-STATE DEVELOPMENT AGENCY OF THE MISSOURI-ILLINOIS METROPOLITAN DISTRICT, DBA METRO,

Petitioner,

v.

UNITED STATES, EX REL. ERIC FIELDS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Bi-State has demonstrated any compelling reason to grant its petition.

II. Whether Bi-State's assertion that *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994) was superseded by *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743 (2002) constitutes a misstatement of the law within the meaning of this Court's Rule 15.

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STATEMENT OF THE CASE

In 2014, relator Eric Fields filed a complaint in the federal district court for the Eastern District of Missouri alleging, *inter alia*, that the Bi-State Development Agency of the Missouri-Illinois Metropolitan District ("Bi-State") had violated the False Claims Act, 31 U.S.C. § 3729 *et seq.* ("FCA"). Pet. App. 2a

Bi-State moved for summary judgment, contending that it is not a suable "person" for purposes of FCA liability. The district court conducted the required arm-of-the-state analysis, and concluded that Bi-State was *not* an arm of the state for FCA purposes. Pet. App. 3a

Bi-State appealed, arguing that it *is* an arm of the state and, as such, is entitled to sovereign immunity. The Eighth Circuit dismissed that appeal for lack of jurisdiction, since the immunity issue had not been raised or determined below. *Id.*

Back in the district court, Bi-State filed a repackaged motion for summary judgment, this time claiming immunity. The district court again conducted the arm-of-the-state analysis, and concluded that Bi-State is *not* an arm of the state for Eleventh Amendment immunity purposes. *Id.*

Bi-State appealed again. This time, the Eighth Circuit reached the merits, conducted a *de novo* review, and held that Bi-State is *not* an arm of the state for purposes of sovereign immunity. Pet. App. 18a

This petition for writ of certiorari followed.

REASONS FOR DENYING THE PETITION

I. Bi-State has demonstrated no compelling reason to grant its petition.

Supreme Court Rule 10 states that "review on a writ of certiorari is not a matter of right, but of judicial discretion." A petition will be granted only for "compelling reasons," such as when there is a conflict between circuit court decisions as to an important matter, or when a circuit court has decided an important federal question in a way that conflicts with relevant Supreme Court decisions. A petition will rarely be granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. S. Ct. R. 10.

A. There is no conflict as to the applicable law, as *Hess* applies directly to Compact Clause entities, while *Federal Maritime Comm'n* does not.

Bi-State claims that the Eighth Circuit decision, which relied on *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994), conflicts with this Court's opinion in *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743 (2002). Bi-State is wrong.

Hess explained that the Eleventh Amendment was adopted in response to the States' fears that "federal courts would force them to pay their Revolutionary War debts, leading to their financial ruin." *Hess*, 513 U.S. at 39 (citations omitted). Later, courts came to emphasize the dignity interest of the States. *Id.* Compact Clause entities, on the other hand, occupy a significantly different position

in our federal system than do the States themselves. While States *are* separate sovereigns, bistate entities are the *creation* of three separate sovereigns – two States and the federal government. *Id.* at 40. "Suit in federal court is not an affront to the dignity of a Compact Clause entity, for the federal court, in relation to such an enterprise, is hardly the instrument of a distant, disconnected sovereign; rather, the federal court is ordained by one of the entity's founders." *Id.* at 41. This is all the more true when the very claims at issue involve federal law (in *Hess*, the Federal Employers' Liability Act; in this case, the False Claims Act). *Id.* at 42. Therefore, there is good reason not to treat Compact Clause entities like States for sovereign immunity purposes. *Id.*, citing *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391 (1979). *Hess* then adopted the approach set out in *Lake Country*:

> We would presume the Compact Clause agency does not qualify for Eleventh Amendment immunity "[u]nless there is good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves, and that Congress concurred in that purpose."

Hess, 513 U.S. at 43-44, quoting *Lake Country*, 440 U.S. at 401.

In *Lake Country*, all the indicators of immunity pointed the same way; in *Hess*, they did not. *Hess*, 513 U.S. at 44. "When indicators of immunity point in different directions, the Eleventh Amendment's twin reasons for being remain our prime guide. … [F]ederal courts

are not alien to a bistate entity Congress participated in creating. Nor is it disrespectful to one State to call upon the Compact Clause entity to answer complaints in federal court." *Id.* at 47. Seeing no threat to the dignity of the compacting States in allowing plaintiff to pursue his federal claim in federal court, *Hess* then asked whether there was "good reason to believe" the States and Congress intended for the Port Authority to enjoy Eleventh Amendment immunity. *Id.*

The defendant in *Hess*, like Bi-State here, urged the Court to find good reason to classify it as a state agency for sovereign immunity purposes based on the control the States wielded over it. However, the Court held that "no one State alone can control the course of a Compact Clause entity. *Id.* "Moreover, rendering control dispositive does not home in on the impetus for the Eleventh Amendment: the prevention of federal-court judgments that must be paid out of a State's treasury." *Id.* at 48. In fact, "Courts of Appeals have recognized the vulnerability of the State's purse as the *most salient factor* in Eleventh Amendment determinations." *Id.*, citing, *inter alia*, *Barket, Levy & Fine, Inc. v. St. Louis Thermal Energy Corp.*, 948 F.2d 1084 (8th Cir. 1991)(Because Missouri and Illinois are not liable for judgments against Bi-State, there is no policy reason for extending the states' sovereign immunity to Bi-State). *Id.* at 48-49. In fact, *Hess* recognized that "the vast majority of Circuits have concluded that the *state treasury factor is the most important factor* to be considered and, in practice, have generally accorded this factor *dispositive* weight." *Id.* at 49 (citation omitted)(emphasis added).

For nearly a quarter-century, *Hess* has been, and remains, controlling law in determining whether a

Compact Clause entity is entitled to sovereign immunity. Contrary to Bi-State's claim, *Federal Maritime Comm'n* does not conflict with *Hess*; it did not "supersede" *Hess*. In *Federal Maritime Comm'n*, the Court did not discuss or even cite *Hess*, for the simple reason that *Federal Maritime Comm'n* did not deal with a Compact Clause entity.

The very argument that Bi-State makes now was made – and found to be without merit – in *Woods v. Rondout Valley Cent. Sch. Dist. Bd. of Educ.*, 466 F.3d 232 (2d Cir. 2006). In that case, the test for determining whether an entity was an arm of the state for immunity purposes was governed by *Mancuso v. New York State Thruway Auth.*, 86 F.3d 289 (2d Cir. 1996).[1] If the *Mancuso* factors point in different directions, the court focuses on the twin reasons for the Eleventh Amendment: (1) protecting the dignity of the state, and (2) preserving the state treasury. *Woods*, 466 F.3d at 240, citing *Mancuso*, 86 F. 3d at 293 and *Hess*, 513 U.S. at 39-40, 47. If the outcome is still in doubt, then whether a judgment would be paid out of the state treasury generally determines whether immunity applies, since the vulnerability of the State's purse is the most salient factor determining sovereign immunity. *Woods*, 466 F. 3d at 241, citing *Hess*, 513 U.S. at 48.

In *Woods*, the defendant Board of Education acknowledged that the *Mancuso* test controls, absent an intervening Supreme Court decision. It contended that *Federal Maritime Comm'n* constituted such an

1. The six-factor test set out by the Second Circuit in *Mancuso* is identical to that set out by the Eighth Circuit in *Barket*. See *Woods*, 466 F.3d at 240.

intervening decision. Specifically, the Board submitted that in *Federal Maritime Comm'n*, "the Supreme Court retreated from its identification of the vulnerability of the state treasury as the most salient factor in determining whether a governmental entity is an arm of the state, focusing instead on the respect owed to the states as joint sovereigns." *Woods*, 466 F. 3d at 241.

The Second Circuit rejected defendant's argument.

> Preliminarily, we observe that the Supreme Court has long identified the states' sovereign dignity as the primary concern of the Eleventh Amendment. In *In re Ayers*, 123 U.S. 443 (1887), a case decided more than a century before *FMC*, the Court observed that '[t]he very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties[.] … Thus, when the Supreme Court stated in *FMC* that state sovereign immunity's "central purpose is to accord the States the respect owed them as joint sovereigns," 535 U.S. at 765, it was merely reiterating a long-established and non-controversial principle. *It was not stating a new rule of law or casting doubt on intervening precedents such as Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30[.]

Id. at 241-42.

Moreover, the issue before the Court in *Federal Maritime Comm'n* was not whether that defendant was

an arm of the state. The Court assumed that it was, as the Fourth Circuit had so ruled, and neither party argued otherwise. *Id.* at 242. Rather, the issue was whether immunity could be invoked in administrative proceedings, as well as in federal courts. The fact that that question was answered in the affirmative "hardly suggests a sea change in the Court's jurisprudence for identifying those governmental entities qualifying as arms of the state for purposes of Eleventh Amendment immunity." *Id.* To the contrary, the two inquiries – (1) what entities are entitled to immunity, and (2) what protections are afforded to immune entities – are distinct. *Hess* and its progeny deal with the first question; *Federal Maritime Comm'n* and its progeny deal with the second. *Id.*

Woods noted that, consistent with its analysis, courts that had considered an entity's claim to be an arm of the state after *Federal Maritime Comm'n* was decided "have not read that decision as substantially modifying the analytic framework established by *Hess*." *Id.* In fact, since *Federal Maritime Comm'n* was decided in 2002, *Hess* has been cited in over 400 cases, including very recently by this Court. See, *Lewis v. Clarke*, 137 S.Ct. 1285 (2017) (protecting the States against liability is the concern that originally drove adoption of the Eleventh Amendment); see also, *Alabama v. North Carolina*, 560 U.S. 330 (2010) (Compact Clause entity is not entitled to sovereign immunity).

Here, Bi-State finds the only support for its position in the *Hess* dissent, where Justice O'Connor stated that "in [her] view, the proper question is whether the State possesses sufficient control over an entity performing governmental functions that the entity may properly be

called an extension of the State itself. Such control can exist even where the State assumes no liability for the entity's debts." Pet. 17. Bi-State argues that the Eighth Circuit erred by placing an undue emphasis on the fiscal factors rather than the control factors which "clearly" favor Bi-State. Pet. 18. The Eighth Circuit considered Bi-State's argument, and found it wanting.

The Eighth Circuit, on *de novo* review, balanced the six *Barket* factors as follows: (1) Evidence regarding the States' *characterization* of Bi-State pointed both in favor of and against finding Bi-State to be an arm of the state, so this factor was found to be neutral. Pet. App. 8a. (2) While evidence pointed in both directions, the parties agreed that the mechanism for appointing *commissioners* weighed in favor of Bi-State being an arm of the state. Pet. App. 9a. (3) Bi-State's *functions* are not readily classified as typically state or unquestionably local, so this factor did not advance the Eleventh Amendment inquiry. Pet. App. 10a. (4) Missouri and Illinois' ability to *veto* Bi-State's actions weighed in favor of finding Bi-State to be an arm of the state. Pet. App. 10a-11a. (5) Bi-State's sources of *funding* weighed in favor of finding that Bi-State is more like a local government entity. Pet. App. 13a. (6) Missouri and Illinois are not *responsible for Bi-State's debts*, which weighed in favor of finding that it is more like a local government entity. Pet. App. 15a. In sum, two factors were neutral, two favored an arm-of-the-state finding, and two (funding and responsibility for debts) favored a local-government finding.

The Eighth Circuit correctly reasoned that, since the *Barket* factors pointed in different directions, it must look to the Eleventh Amendment's twin reasons for being

(protection of a State's dignity and protection of its fisc) as its guide. Pet. App. 16a. Relying on *Hess*, the Eighth Circuit found that as a Compact Clause entity, suit in federal court is not an affront to the dignity of Bi-State, Missouri, or Illinois. Pet. App. 16a-17a.[2] Therefore, again relying on *Hess*, the Eighth Circuit presumed that Bi-State does not qualify for Eleventh Amendment immunity, unless there is good reason to believe that Missouri and Illinois intended it to enjoy such immunity. Pet. App. 17a. In determining whether good reason exists, the most important factor is whether a judgment against Bi-State could be satisfied out of a State's treasury. *Id*. Since both the funding and financial liability factors suggest that Bi-State is a local government entity, the Eighth Circuit correctly ruled that Bi-State is not entitled to Eleventh Amendment immunity.

Contrary to Bi-State's assertion, there is no conflict, or even inconsistency, between *Hess* and *Federal Maritime Comm'n*, since they deal with altogether different issues. Moreover, there is no conflict between the Eighth Circuit's decision below and the established precedent of *Hess* and *Barket*. Therefore, there is no compelling reason to grant Bi-State's petition for writ of certiorari.

B. The Eighth Circuit correctly applied the *Barket* arm-of-the-state test to the facts of this case.

Bi-State complains that the Eighth Circuit erred in finding that the *Barket* factors regarding financial liability and funding weighed against Bi-State being an arm of

2. The court expressly distinguished *Federal Maritime Comm'n*, which addressed immunity issues "where parties do not dispute that defendant is an arm of the state." Pet. App. 17a.

the state. According to Bi-State, the court "ignored clear evidence that Missouri's treasury could be impacted by an adverse outcome" since if Bi-State wanted to, it could get moneys from Missouri's State Legal Expense Fund (SLEF) to pay its judgments. Pet. 19. And, according to Bi-State, it is financially dependent on the funding it receives from Missouri and Illinois. Pet. 20.[3] Bi-State is wrong on both counts.

First, as to the States' liability for Bi-State's debts, the Eighth Circuit did not ignore any evidence. In considering Bi-State's SLEF argument, the court noted that, under Missouri law, SLEF funds are available to pay judgments against any "agency of the state" pursuant to Missouri's sovereign immunity statute, which provides that "public entities" (including Bi-State) retain such sovereign immunity as existed at common law. Pet. App. 14a. Bi-State basically argues that because it is a "public entity" under the immunity statute, it is necessarily an "agency of the state" under the SLEF statute. Pet. App. 14a-15a. The Eighth Circuit noted that Bi-State cited no support for this contention. More importantly, the court held that "any inquiry into whether Bi-State constitutes a state agency for purposes of the SLEF is distinct from whether Bi-State is an arm of the state for purposes of the Eleventh Amendment." Pet. App. 15a. Under settled federal-law principles, "the fact that a governmental entity has been given sovereign immunity in its own state courts by state law is not dispositive of" the arm-of-the-state-question. 13 Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 3524.2 (3d ed. 2008).

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3. Based on the fact that Bi-State devotes only two paragraphs of its petition to this claim, it seems that even Bi-State does not give this argument much credence.

Second, the Eighth Circuit also considered – and found to be without merit – Bi-State's claim that it is "financially dependent" on Missouri and Illinois. The court noted, based on an affidavit provided by Bi-State's Chief Financial Officer, that "only a 'notably modest' 1.3 percent of Bi-State's funding came from Missouri and Illinois[.]" Pet. App. 13a., citing *Hess*, 513 U.S. at 37-38 (agreement to pay for some of the entity's expenses did not weigh in favor of finding it to be an arm of the state because the States did not undertake to cover the bulk of its expenses); *Woods*, 466 F.3d at 245 (funding factor weighs against immunity when school district received 39.9 percent of its funding from the state); *Barket*, 948 F.2d at 1087 (possibility of voluntary appropriation of state funds does not trigger Eleventh Amendment immunity).

Contrary to Bi-State's assertion, the Eighth Circuit did not err in its application of the law to the facts of this case. Moreover, under Supreme Court Rule 10, review is not appropriate when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. Therefore, Bi-State's petition for writ of certiorari should be denied.

II. Bi-State has misstated the law and facts.

Supreme Court Rule 15 requires a brief in opposition to address any perceived misstatement of fact or law in the petition that bears on material issues. To that end, counsel for Mr. Fields points out that Bi-State made the following misstatements.

Bi-State misstated the law by contending that *Federal Maritime Comm'n* superseded *Hess*. As discussed at

length above, it did not. The same contention was made by the defendant in *Woods*, 466 F.3d at 241-42, and found to be meritless. *Woods* held without qualification that *Federal Maritime Comm'n* did not state a new rule of law or cast doubt on *Hess*. *Id*. The Eighth Circuit cited *Woods* in its opinion. Pet. App. 13a. Even a cursory reading of *Woods* should have put Bi-State on notice that its petition for certiorari is unsupported by the law. The fact that *Hess* has been cited in hundreds of cases since *Federal Maritime Comm'n* was decided – including over 20 times this year – should also have given Bi-State pause to consider that, perhaps, *Hess* is still good law.

Bi-State hedged its bets by claiming that, "even if *Hess* can stand, in light of the Court's clear pronouncement" in *Federal Maritime Comm'n*, the Eighth Circuit ignored facts or misapplied the law to Bi-State's detriment. Pet. 19. Again, that is not true.

First, Bi-State contends that the court ignored the "fact" that SLEF funds might be available to pay a judgment against Bi-State. *Id*. Actually, the court considered and thoroughly discussed this issue, and ruled against Bi-State.

Second, Bi-State contends that it is "financially dependent" on the funding it receives from Missouri and Illinois. Pet. 20. Again, the court considered and rejected this notion, finding that Bi-State receives only 1.3 percent of its funding from the States. Pet. App. 13a

The Eighth Circuit correctly found the facts and applied the controlling law. But even if it had not, this Court reviews only important matters for compelling

reasons; it does not serve to re-determine the facts or reapply the law.

CONCLUSION

Eric Fields respectfully requests that Bi-State's petition for writ of certiorari be denied.

Respectfully Submitted,

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