No. _____

In the Supreme Court of the United States

FLUID DYNAMICS, LLC,

Petitioner,

v.

JEA (f/k/a JACKSONVILLE ELECTRIC AUTHORITY),

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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QUESTIONS PRESENTED

This case involves the granting of summary judgment as a matter of Florida law by the United States District Court for the Middle District of Florida (the "District Court") finding that Appellee JEA (f/k/a Jacksonville Electric Authority) ("JEA") was protected by the principle of sovereign immunity under a Florida statute (Fla. Stat §768.28), the affirmance of that decision by the United States Court of Appeals for the Eleventh Circuit (the "Eleventh Circuit") and the refusal by the Eleventh Circuit to certify to the Florida Supreme Court the question whether applicable Florida case law required a factual inquiry whether sovereign immunity applied in this case.

The Questions Presented are:

1. Whether the District Court and the Circuit Court erred in applying a case dating from 1981 from a lower Florida Court to hold that JEA was entitled to sovereign immunity as a matter of law, when the Florida Supreme Court had subsequently held that such a determination is fact specific, requiring discovery, thereby violating the Tenth Amendment to the United States Constitution and the holding in *Erie v. Tomkins,* 304 U.S. 64 (1938), and its progeny.

2. Whether the Circuit Court erred in refusing to certify the issue whether JEA was entitled to sovereign immunity as a matter of law to the Florida Supreme Court, which is the final decider of issues of interpretation of Florida law.

PARTIES TO THE PROCEEDING

Petitioner, Fluid Dynamics, LLC, was plaintiff-appellant below.

Respondent, JEA (f/k/a Jacksonville Electrical Authority), was defendant-appellee below.

City of Jacksonville was defendant-appellee below.

RULE 29.6 STATEMENT

Fluid Dynamics, LLC, is a privately-owned Delaware limited liability company.

JEA is a Florida statutorily created non-stock entity.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

STATUTES AND RULES

Petitioner, **Fluid Dynamics, LLC ("Fluid")**, respectfully asks that a writ of certiorari issue to review the judgment and opinion of the United States Circuit Court of Appeals for the Eleventh Circuit (the "Eleventh Circuit"), entered on **November 5, 2018,** affirming the Order of the United States District Court for the Middle District of Florida (the "District Court") entered on August 29, 2017 and the Final Judgment of the District Court entered on February 20, 2018, granting summary judgment as a matter of law to Respondent **JEA (f/k/a Jacksonville Electric Authority)("JEA")**.

OPINIONS BELOW

The opinion of the Eleventh Circuit, which was unpublished, was issued on November 5, 2018, and is attached as Appendix A. The Eleventh Circuit's one-page order dated December 13, 2018, denying rehearing is attached as Appendix D. The Order and Decision of the District Court dated August 29, 2017, is attached as Appendix C. The Final Judgment of the District Court dated February 20, 2018, is attached as Appendix B.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The decision of the Eleventh Circuit for which petitioner seeks review was issued on November 5, 2018. The Eleventh Circuit's denial of Petitioner's Motion for Rehearing was entered on December 13, 2018. This petition is filed within 90 days of the Eleventh Circuit's denial of Petitioner's Motion for Rehearing.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

United States Constitution, Amendment 10 provides that:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

The Florida statutory provision that is relevant to this Petition, Fla. Stat §768.28, is reprinted in Appendix E.

Florida Rule of Appellate Procedure 9.150(a) is reprinted in Appendix E.

STATEMENT OF CASE

This case presents the questions whether a Federal Court can definitively interpret a State's laws and hold that an entity is entitled to sovereign immunity as a matter of law in the absence of clear State statutory provisions creating such entitlement and in the face of a governing decision by the State's highest Court requiring factual inquiry as a necessary predicate to determining such entitlement.

Petitioner sued JEA in the District Court seeking damages for JEA's tortious conduct in defaming Petitioner's products and interfering with Petitioner's contract with its counterparty, thereby causing counterparty's breach of its contract with Petitioner. JEA raised Florida Statute §768.28, which provides limited sovereign immunity from suit to certain

enumerated entities, as an affirmative defense to the allegations of Petitioner's Complaint. During briefing and argument, Petitioner raised the need for discovery for the District Court to resolve whether JEA was entitled to sovereign immunity pursuant to an applicable 2015 decision of the Florida Supreme Court, *Plancher v. UCF Athletics Association, Inc.*, 175 So. 3d 724 (Fla. 2015)("*Plancher*"). The District Court nevertheless denied Petitioner's request for discovery and decided that JEA was entitled to sovereign immunity *as a matter of law*, asserting that a 1981 case from a Florida District Court of Appeals so held, notwithstanding that JEA is not one of the entities enumerated in the Statute and notwithstanding that *Plancher,* a later case from the Florida Supreme Court, the highest court in Florida, imposed a different, fact-based test. App. C. In due course, the District Court entered its Order and Final Judgment granting summary judgment to JEA and dismissing the case. App. B.

Florida Statute §768.28 provides for a limited waiver of sovereign immunity in tort actions for state "agencies and subdivisions." That Statute expressly identifies the following entities to whom sovereign immunity applies: "(i) the executive departments; (ii) the Legislature; (iii) the judicial branch; (iv) the independent establishments of the ***state***, including state university boards of trustees; (v) counties and municipalities; and (vi) ***corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities***, including the Florida Space Authority." Fla. Stat. § 768.28(1)-(2) (emphasis added). Notably, utility companies (such as

JEA) are not included as enumerated "agencies and subdivisions" entitled to sovereign immunity under the statute. Thus, sovereign immunity will apply to JEA if, and only if, it primarily acts as an instrumentality of the City of Jacksonville.

The Supreme Court of Florida in *Plancher* held that "whether an entity is acting primarily as an instrumentality" and therefore entitled to sovereign immunity depends on the level of control the applicable government maintains over the independent entity. Nevertheless, the District Court in this case held, and the Eleventh Circuit affirmed, that the "control test" articulated in *Plancher* applies only to those corporations that have filed articles of incorporation with the Florida Department of State. There is no such limitation in *Plancher*.

Rather, *Plancher* confirmed that the application of Florida Statute §768.28 depends on whether the governmental entity exercises sufficient control over the day-to-day operations of the corporate "entity" or, alternatively, whether the entity is "autonomous and self-sufficient." 175 So. 3d at 726. Neither the Florida Supreme Court nor any other Florida court has made any distinction that a different standard applies depending on the type of entity at issue. The District Court provided no basis for applying a different standard for private corporations as opposed to an entity such as JEA. Indeed, the Florida Supreme Court's analysis does not address the scope of the application of the "control test." Rather, it consistently speaks in terms of the "entity" that is subject to control. *See id*. at 728 (setting forth the elements of the "control

test" with respect to the ***entity*** at issue); *id.* at 726 ("[T]hree Florida district court decisions have addressed whether an ***entity*** was primarily acting as an instrumentality of the state and, therefore, entitled to limited sovereign immunity under section 768.28, and all three decisions focused upon governmental control over the ***entity***." (emphasis added)); *id*. at 726 (discussing *Shands Teaching Hospital & Clinics, Inc. v. Lee*, 478 So.2d 77 (Fla. Dist. Ct. App. 1985), and noting that "the intent of the legislature was to treat *Shands* as an autonomous and self-sufficient ***entity***[.]" (emphasis added)). If the Florida Supreme Court intended to limit the application of its decision to only private corporations, it could have expressly done so.

The Eleventh Circuit rejected Petitioner's argument on the merits and affirmed the District Court's decision. App. A. In addition, the Eleventh Circuit denied Petitioner's request that the issue of JEA's entitlement to sovereign immunity without factual inquiry be certified to the Florida Supreme Court pursuant to Florida Rule of Appellate Procedure 9.150(a). App. A.

Petitioner sought a rehearing of the appeal from the Eleventh Circuit, which denied rehearing on December 13, 2018. App. D.

REASONS FOR GRANTING THE PETITION

The Petitioner submits that the issue raised in this appeal regarding the application by Federal courts of controlling precedent from the highest Court of a State, in this case Florida, to the interpretation of an issue that is purely a matter of State law goes to the heart of

the Tenth Amendment to the United States Constitution and the application of the doctrine embodied in *Erie v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) and cases decided pursuant thereto (the *"Erie Doctrine*").

Furthermore, this is not an issue with application solely to this case as it relates to how Federal courts apply the *Erie Doctrine* in any case where relevant authority (i) comes from a court that is not the highest court in the relevant State, and (ii) such authority predates the ruling of the highest court of the State and is therefore called into question by the subsequent highest court ruling. Clearly, this situation is capable of recurrence and the issue raised herein calls out for resolution by this Court.

This point is brought further home by the ruling of the Eleventh Circuit in *Bravo v. U.S.,* 577 F.3d 1324 (11th Cir. 2009). In that case, the Eleventh Circuit held that Federal courts "are 'bound' by decisions of Florida intermediate State appellate courts '*unless there is persuasive evidence that the Florida Supreme Court would rule otherwise* (emphasis added)." *Id.* at 1326, quoting *King v. Order of United Commercial Travelers of Am.,* 333 U.S. 153, 158, 68 S.Ct. 488,491, 92 L.Ed. 608 (1948). That is precisely the case here. The Florida Supreme Court definitively held in *Plancher* that the question of sovereign immunity of an entity which is not one enumerated in Florida Statute §768.28 must be resolved by a factual inquiry and the application of the control test. In light of *Plancher*, the 35-year old decision in *Jetton* is no longer viable as a matter of law. Rather, it is clear from *Plancher* that

the question of sovereign immunity for an entity not enumerated in Florida Statute §768.28 is a question of fact.

This was, in fact, the precise basis for Petitioner's *Motion for Certification to the Florida Supreme Court.* App. C. The District Court and the Eleventh Circuit could not rely solely on the precedent of *Jetton,* the ruling of an intermediate Florida court, because *Plancher,* the ruling of Florida's highest Court, imposed a new and different standard on the resolution of the questions before the Federal courts. In such situation, the Federal court had a choice: either make the *Erie "guess*," and try to apply *Plancher* to the facts before it, or, perhaps more advisedly, certify the question to the Florida Supreme Court pursuant to inarguably applicable procedure.

As regards certification of the question to the Florida Supreme Court, the Eleventh Circuit has noted, "We are grateful for the aid of the Supreme Court of Florida. Use of Rule 9.150, Florida Rules of Appellate Procedure contributes to the ability of federal courts to properly determine issues that are primarily state concerns." *Vildibill v. Johnson,* 802 F.2d 1347 (11th Cir. 1986). Furthermore, "Where there is any doubt as to the application of state law, a federal court should certify the question to the state supreme court to avoid making unnecessary *Erie* 'guesses' and to offer the state court the opportunity to interpret or change existing law." *Mosher v. Speedstar Div. of AMCA Intern., Inc.,* 52 F.3d 913, 916 (11th Cir. 1995).

Unfortunately, the District Court and the Eleventh Circuit took neither path and erred in their respective rulings.

CONCLUSION

For the foregoing reasons, petitioner requests that this Court grant the petition for certiorari.

Respectfully submitted.

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