No. 18-1210

IN THE

# Supreme Court of the United States

CHAD CHRONISTER, as Sheriff of the Hillsborough County Sheriff's Office,
*Petitioner,*

v.

DORIS FREYRE, *et al.*,
*Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

## RESPONDENT DORIS FREYRE'S BRIEF IN OPPOSITION

MATTHEW W. DIETZ
*Counsel of Record*
DISABILITY INDEPENDENCE GROUP
2990 S.W. 35th Avenue
Miami, FL 33133
(305) 669-2822
mdietz@justdigit.org

*Counsel for Respondent Doris Freyre*

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## QUESTIONS PRESENTED

Respondent Doris Freyre brought this case after her 14-year old daughter MAF was removed from her custody, temporarily sheltered at a Tampa hospital, and then transferred to a nursing home in Miami, where she died. Although a court order required a hearing if Ms. Freyre did not consent to medical treatment for MAF, MAF was transferred to the nursing home over Ms. Freyre's objection and without a hearing.

The district court determined that Ms. Freyre had standing to pursue a claim under the Americans with Disabilities Act, that there were genuine issues of material fact as to whether the Hillsborough County Sheriff's Office (HCSO) acted with deliberate indifference when it transferred MAF without a hearing, and that HCSO was not entitled to Eleventh Amendment immunity when it conducted child-protective investigations under a grant agreement with a state agency.

The Sheriff of Hillsborough County took an immediate appeal to the Eleventh Circuit, which determined that it could review the district court's determination on Eleventh Amendment immunity under the collateral order doctrine, affirmed the district court's determination that HCSO was not entitled to Eleventh Amendment immunity, and declined to exercise pendent appellate jurisdiction over the Sheriff's appeal of the district court's determination on standing.

The questions presented are:

1) Whether the Eleventh Circuit violated the principle that courts should avoid reaching constitutional questions if a case can be decided on nonconstitutional grounds when it declined to review the district court's determination that Ms. Freyre had standing.

2) Whether the Eleventh Circuit correctly held that HCSO was not entitled to Eleventh Amendment immunity.

## PARTIES TO PROCEEDING AND RELATED CASES

The parties to the proceeding in the Eleventh Circuit are listed in the petition for a writ of certiorari.

The following proceedings are directly related to this case:

• *Freyre v. Hillsborough County Sheriff's Office, et al.*, No. 8:13-cv-2873-JDW-TBM, U.S. District Court for the Middle District of Florida. Judgment in favor of Iris C. Valdez and Jessica Pietrzak entered March 13, 2017. No judgment entered as to claims against Hillsborough County Sheriff's Office and Sheriff Chad Chronister.

• *Freyre v. State of Florida*, No. 16-11287, U.S. Court of Appeals for the Eleventh Circuit. Dismissed May 23, 2016.

• *In re: Agency for Health Care Administration, Department of Children and Families, Agency for Persons with Disabilities*, No. 16-11635, U.S. Court of Appeals for the Eleventh Circuit. Petition for Writ of Mandamus denied May 12, 2016.

• *Freyre v. Chronister*, No. 17-11231, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered December 14, 2018.

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## INTRODUCTION

The Sheriff of Hillsborough County took an immediate appeal under the collateral order doctrine of a district court's decision that the Hillsborough County Sheriff's Office (HCSO) was not acting as an arm of the state entitled to Eleventh Amendment immunity when conducting child-protective investigations. The Sheriff also attempted to include in the ambit of that appeal the district court's simultaneous rulings that Respondent Doris Freyre had standing to pursue her claims against HCSO and that HCSO was not entitled to summary judgment on one of the claims. The Eleventh Circuit determined that Eleventh Amendment immunity was the only issue that was immediately appealable under the collateral order doctrine and limited the appeal to that issue. The court then carefully weighed factors such as the level of control the state has over HCSO, whether the state is financially responsible for the office, and whether the state would be responsible for paying a judgment against the office, and affirmed the district court's decision that HCSO is not entitled to Eleventh Amendment immunity.

The Sheriff seeks review of the Eleventh Circuit's decision, asking this Court to give "closer appellate review" to the factors considered by the court of appeals in determining that HCSO is not entitled to Eleventh Amendment immunity. But there is no need for this Court to grant review to reconsider the application of a properly stated rule of law to the facts of this case. Moreover, the Eleventh Circuit did *not* misapply the law: it carefully considered the relevant factors and correctly determined that HCSO was not acting as an

arm of the state when it engaged in child-protective investigations.

The Sheriff also contends that the Eleventh Circuit erred in limiting the appeal to the question of Eleventh Amendment immunity. According to Petitioner, by not reviewing the district court's determination on standing as a "nonconstitutional matter" before affirming the district court's determination on immunity, the court of appeals violated the principle that courts should avoid constitutional issues if cases can be decided on nonconstitutional grounds. That principle is irrelevant here, however, because this case was appealed under the collateral order doctrine, under which the scope of the appeal is limited. Likewise irrelevant is Petitioner's claim of a circuit split over whether Eleventh Amendment immunity must be considered before the merits. And *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), which held that courts may not assume jurisdiction for the purpose of deciding a case's merits, did not require the court of appeals to review the district court's determination on standing as a "nonconstitutional matter" (or, for that matter, as a constitutional matter) before reviewing the district court's determination on Eleventh Amendment immunity.

The Eleventh Circuit correctly limited the scope of this appeal to Eleventh Amendment immunity and correctly concluded that HCSO is not entitled to immunity in this case. Review by this Court is unnecessary.

## STATEMENT OF THE CASE

**A**. HCSO conducts child-protective investigations in Hillsborough County under a grant agreement with the Florida Department of Children and Families

(DCF). Pet. App. 2. On March 29, 2011, HCSO removed Respondent Doris Freyre's 14-year old disabled daughter, MAF, from her home and temporarily sheltered her at Tampa State Hospital. At a shelter hearing held the next day before a dependency court judge, the judge asked about Ms. Freyre's ability to care for MAF independently and learned that Ms. Freyre's own physical disability prevented her from providing the amount of care that MAF needed. The judge authorized placing MAF into shelter care, but stated that DCF should supply additional services to MAF, and that MAF would go home once those services were in place. *Id.* at 56; D. Ct. Doc. 189-11, at 17.

HCSO did not provide MAF with additional services and return her to her home. Instead, after determining that Medicaid would not cover the additional services, HCSO decided to institutionalize MAF in a nursing facility in Miami, approximately five hours away.

The shelter order signed by the dependency judge gave DCF the right to authorize medical treatment for MAF, but required a court hearing if Ms. Freyre did not consent to that treatment. Pet. App. 41; *see* D. Ct. Doc. 189-12, at 4. On Friday April 22, 2011, one of HCSO's child protective investigators spoke with Ms. Freyre about transferring MAF to the nursing home. Pet. App. 42. Ms. Freyre objected to the transfer, explaining that she would not be able to see her daughter in Miami. *Id.* Later that afternoon, MAF's grandfather called the child protective investigator, requesting a hearing about the move. *Id.* And on Mon-

day, April 25, Ms. Freyre filed a *pro se* petition requesting an emergency hearing. *Id.*[1] Nonetheless, MAF was transferred from Tampa to the Miami nursing home on Tuesday, April 26, without a court hearing. MAF died shortly after arriving at the facility. *Id.* at 4.

**B**. In November 2013, Ms. Freyre filed this case in the U.S. District Court for the Middle District of Florida against, among others, HCSO, the Sheriff, and two HCSO child protective investigators. Ms. Freyre asserted claims under the Americans with Disabilities Act (ADA), the Rehabilitation Act, and 42 U.S.C. §§ 1983 & 1985. Pet. App. 4. At the time, David Gee was the Sheriff of HCSO, and Ms. Freyre sued him in his official capacity. Petitioner Chad Chronister, Sheriff Gee's successor, was later substituted for Sheriff Gee. *Id.* at 4–5.

The district court granted summary judgment to the child protective investigators, and granted summary judgment to HCSO on all claims except Ms. Freyre's claim that HCSO discriminated against her based on her association with a disabled person. *Id.* at 4. The district court determined that Ms. Freyre had standing to pursue that associational ADA claim because she was deprived of the ability to be heard before MAF was institutionalized, *id.* at 28, and that a genuine issue of material fact existed as to whether HCSO acted with deliberate indifference when it consented to MAF's institutionalization without a hearing, thereby precluding summary judgment on the claim, *id.* at 44.

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[1] HCSO contends that its personnel did not see the motion. Pet. App. 4.

The court then considered whether HCSO was an arm of the state entitled to Eleventh Amendment immunity while it was sheltering MAF. *Id.* at 48. The court considered four factors in its Eleventh Amendment immunity analysis: 1) how state law defined HCSO; 2) the degree of control exercised by the state over HCSO; 3) the source of HCSO's funding; and 4) who was financially responsible for judgments against HCSO. *Id.* The court found that the first, second, and fourth factors weighed against arm-of-the-state status, while the third weighed in favor of it. *Id.* at 48–51. "Considering the record and weighing the relevant factors," the court concluded that HCSO was "not entitled to Eleventh Amendment immunity." *Id.* at 51.

**C**. The Sheriff took an immediate appeal to the Eleventh Circuit, raising the issues of whether the district court erred in denying HCSO Eleventh Amendment immunity, in determining that Ms. Freyre had associational standing under the ADA, and in denying HCSO summary judgment on the associational ADA claim. Ms. Freyre cross-appealed, raising the issues of whether the district court erred in granting summary judgment to the child-protective officers and to HCSO on her individual (non-associational) claim, and the extent of HCSO's duties under the ADA to provide accommodations in the dependency proceedings. Pet. App. 5.

The Eleventh Circuit began its analysis by noting that parties can usually appeal only from final orders that dispose of all claims. *Id.* It recognized, however, that the collateral order doctrine described in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), provides an exception to the final judgment

rule. The court explained that an order denying Eleventh Amendment immunity is subject to immediate appeal under the collateral order doctrine, *see Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993), and therefore concluded that the question of Eleventh Amendment immunity was properly before it. Pet. App. 6. By contrast, the court of appeals explained, the issue of standing is not immediately appealable under the collateral order doctrine because it is "not effectively unreviewable on appeal from a final judgment." *Id.* at 7 (quoting *Summit Med. Assocs. v. Pryor*, 180 F.3d 1326, 1334 (11th Cir. 1999)). Likewise, the court determined that HCSO's challenge to Ms. Freyre's claim on the merits and the issues presented in Ms. Freyre's cross-appeal were not immediately appealable under the collateral order doctrine. *Id.* at 7 n.3 & 8.

The court noted that even if an order is not immediately appealable under the collateral order doctrine, a court can exercise pendent jurisdiction over the order it if it is "'inextricably intertwined' with [an] appealable decision or when 'review of the former decision [is] necessary to ensure meaningful review of the latter.'" *Id.* (quoting *King v. Cessna Aircraft Co.*, 562 F.3d 1374, 1379 (11th Cir. 2009) (quoting *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 51 (1995))). The court determined that the standing issue, HCSO's merits challenge, and the issues raised in Ms. Freyre's cross-appeal were not inextricably linked with the Eleventh Amendment issue or necessary to ensure meaningful review of that issue. Accordingly, the court declined to exercise pendent jurisdiction over those issues. *Id.* at 9–11.

The court of appeals then reviewed *de novo* the district court's determination on Eleventh Amendment immunity and affirmed. Like the district court, the Eleventh Circuit looked at four factors in determining whether HCSO was acting as an arm of the state: "(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." *Id.* at 12 (quoting *Manders v. Lee*, 338 F.3d 1304, 1309 (11th Cir. 2003) (en banc)). The court explained that its analysis was "function specific": "[O]ur question is not simply whether HCSO acts as an arm of the state generally, but whether it does so when performing child protective investigations under the Grant Agreement with DCF." *Id.*

On the first factor—how state law defines the entity—the court noted that state law defines sheriffs as county officers. The court then explained that a sheriff can nonetheless act as an arm of the state when carrying out some functions, so it looked at the grant agreement between HCSO and DCF. The court pointed out that the grant agreement defined HCSO as an "independent contractor," not an agent. *Id.* at 14–15. Moreover, the grant agreement specifically stated that HCSO would be considered an agent of DCF only for the sole and limited purpose of certain functions that do not include "the function at issue in this case—child-protective investigations." *Id.* at 16. "All in all," the court concluded "that this first factor weighs against arm of the state status." *Id.* at 17.

The court then turned to the second factor, looking at the degree of control the state exercises over HCSO

both generally and with respect to the specific function at issue. "Considering both the autonomy that the Grant Agreement affords HCSO and the control the state exerts through state-set standards and reporting requirements," the court concluded that this factor was neutral. *Id.* at 19–20.

With respect to the third factor, where the entity derives its funds, the court explained that DCF provides all funding for child-protective services, and that this factor thus weighed in favor of arm-of-the-state status. *Id.* at 20.

Finally, on the last factor, which the Eleventh Circuit considered the most important, the court concluded "that a judgment against HCSO would not be satisfied with state funds and that this factor weighs against arm-of-the-state status." *Id.* at 21.

Overall, although it believed that the case presented "an especially close call," the court determined "that HCSO does not act as an arm of the state when conducting child-protective investigations pursuant to the specific Grant Agreement between HCSO and DCF." *Id.* Accordingly, the court concluded that the district court "correctly denied HCSO summary judgment on its sovereign immunity defense" and affirmed. *Id.*

The United States had intervened in the court of appeals to address the question whether the ADA's provision abrogating Eleventh Amendment immunity for suits under the ADA, as applied to Title II claims involving child-protective services, is a valid exercise of Congress's authority. The United States urged the Eleventh Circuit not to reach this issue unless necessary, but, if it reached the issue, to hold that the ADA's abrogating provision, as applied to such claims,

is valid legislation under Section 5 of the Fourteenth Amendment. Because it affirmed the district court's determination that HCSO was not an arm of the state, the court of appeals did not reach this issue, which had also been raised by Ms. Freyre as an alternate ground for affirmance.

## REASONS FOR DENYING THE WRIT

### I. The Eleventh Circuit's Determination that the Scope of the Appeal Was Limited to Eleventh Amendment Immunity Does Not Warrant Review.

#### A. This case does not implicate the constitutional avoidance principle.

Petitioner seeks review of the Eleventh Circuit's decision not to exercise jurisdiction to review the district court's determination that Ms. Freyre had standing. Petitioner argues that by declining to review a *nonconstitutional* standing issue before addressing Eleventh Amendment immunity the Eleventh Circuit violated the "fundamental rule of judicial restraint" stating that courts should avoid reaching constitutional issues if they do not need to be decided. Pet. 13. According to Petitioner, he "sought appellate review of whether Respondent had Article III standing … as a nonconstitutional matter that requires judicial review prior to determining Petitioner's right to Eleventh Amendment immunity," *id.* at 15, and the Eleventh Circuit should have considered that nonconstitutional issue before deciding whether Petitioner was entitled to Eleventh Amendment immunity.

Although Petitioner refers to Article III, his argument appears to be that the Eleventh Circuit should have considered *non*-Article III standing doctrines,

such as the doctrine of statutory standing, before considering Eleventh Amendment immunity. In contrast to such doctrines, Article III standing is derived from Article III of the Constitution and is not a "nonconstitutional matter." Pet. 15.[2]

The principle that courts should avoid reaching constitutional issues if a case can be decided on nonconstitutional grounds did not, however, require the Eleventh Circuit to review Ms. Freyre's statutory standing (or any other issue) before considering Eleventh Amendment immunity. Even assuming the constitutional avoidance principle applies to Eleventh Amendment issues, *but see*, *e.g.*, *Puerto Rico Aqueduct*, 506 U.S. at 144–45 (explaining that the Eleventh Amendment confers "immunity from suit" and that a litigant claiming such immunity may take an immediate appeal to ensure that the issue is decided before trial on the merits), that principle would not grant the court of appeals appellate jurisdiction over an issue outside the bounds of the collateral order doctrine. The collateral order doctrine allows parties to immediately appeal interlocutory decisions "that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable

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[2] That the issue on which Petitioner sought Eleventh Circuit review was a question of statutory standing is underscored by Petitioner's continued focus on whether the ADA grants a person in Ms. Freyre's position the entitlement to sue, Pet. App. 15, which is a question of statutory, not Article III, standing, *see Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 & n.4 (2014) (explaining that the question whether a plaintiff "falls within the class of plaintiffs whom Congress has authorized to sue" does not "implicate subject-matter jurisdiction").

on appeal from the final judgment in the underlying action." *Swint*, 514 U.S. at 42. As the requirement that the question be separate from the merits makes clear, an appeal under the doctrine does not involve adjudication of "the whole case." *Puerto Rico Aqueduct*, 506 U.S. at 143 (quoting *Cohen*, 337 U.S. at 546). Instead, the court of appeals' jurisdiction over the appeal is limited to the immediately appealable order, and to issues over which the court properly exercises pendent appellate jurisdiction.

Here, the Eleventh Circuit correctly determined that it did not have jurisdiction over the standing issue under the collateral order doctrine, because that issue was not effectively unreviewable on appeal from a final judgment. Pet. App. 7; *cf. Van Cauwenberghe v. Biard*, 486 U.S. 517, 527 (1988) ("Because the right not to be subject to a binding judgment may be effectively vindicated following final judgment, we have held that the denial of a claim of lack of jurisdiction is not an immediately appealable collateral order."). And the court of appeals correctly declined to exercise pendent appellant jurisdiction over the issue of standing, Pet. App. 8–10, because that issue was neither "inextricably intertwined with" nor "necessary to ensure meaningful review of" the Eleventh Amendment issue, *Swint*, 514 U.S. at 51; *see also id.* at 44–45 (rejecting the argument that the fact that the issue could resolve the case justified exercising pendent appellate jurisdiction over it). Thus, the Eleventh Circuit correctly determined that the scope of the appeal was limited to the Eleventh Amendment issue. The principle that courts should avoid constitutional issues if the case can be decided on nonconstitutional grounds did not require (or permit) the court to consider issues that were not properly before it.

The collateral order doctrine permits parties that claim to be entitled to Eleventh Amendment immunity to have that issue resolved on appeal before the parties may appeal other issues in the case. *Puerto Rico Aqueduct*, 506 U.S. at 144–45. Petitioner took advantage of that opportunity and filed an immediate appeal under the collateral order doctrine, under which the scope of the appeal is limited. If Petitioner had wanted to ensure that nonconstitutional issues that were neither independently appealable under the collateral order doctrine nor inextricably intertwined with Eleventh Amendment immunity were decided before or at the same time as Eleventh Amendment immunity, it should have waited to appeal until there was a final judgment on all issues in the case. In this appeal under the collateral order doctrine, however, the Eleventh Circuit correctly recognized the limits of its jurisdiction and did not violate any "fundamental rule of judicial restraint" in declining to address nonconstitutional issues before addressing Eleventh Amendment immunity.

### B. This case does not implicate any circuit split over whether Eleventh Amendment immunity must be considered before the merits.

As part of its argument that the Eleventh Circuit violated the "fundamental rule of judicial restraint" in not reviewing standing as a nonconstitutional matter, Petitioner claims that there is a circuit split over whether Eleventh Amendment issues must be considered before the merits. Petitioner cites *Steel Co.,* 523 U.S. 83, in which this Court held that courts generally must address Article III jurisdiction before considering the merits, then states that *Calderon v. Ashmus*,

523 U.S. 740, 745 n.2 (1998), implied that "Eleventh Amendment questions are excluded from the category of Article III issues that must be addressed before the merits of the case," Pet. 18. Petitioner asserts that "[s]ister courts have followed this Supreme Court precedence [*sic*] on this very issue, while others have not," *id.*, and cites cases from eight other circuits, some for the proposition that jurisdiction must be considered before the merits, some for the proposition that Eleventh Amendment immunity is not the type of jurisdictional issue that must be considered before the merits, some for the proposition that standing should be considered before Eleventh Amendment immunity, and some for a combination of the three propositions, *id.* at 18–20. Petitioner then claims that there is a conflict between those circuits and the Eleventh Circuit, which "has held that '[a]n assertion of Eleventh Amendment immunity must be resolved before a court may address the merits of the underlying claims,'" *id.* at 20–21 (quoting *Seaborn v. Florida Dep't of Corrs.*, 143 F.3d 1405, 1407 (11th Cir. 1998)), and that this case would have come out differently in those other circuits because "Petitioner would have had Respondent's Article III standing reviewed prior to the constitutional question of Eleventh Amendment immunity," *id.* at 21.[3]

Contrary to Petitioner's argument, however, the Eleventh Circuit does not always require Eleventh

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[3] Petitioner's reliance on principles concerning the priority of Eleventh Amendment and the "merits" reinforces that the "non-constitutional" standing issue he says the Eleventh Circuit should have considered is a statutory standing issue rather than a jurisdictional one.

Amendment immunity to be considered before the merits. Since *Seaborn*, the case cited by Petitioner for the purported split, the Eleventh Circuit has explained that a federal court may consider the merits before addressing Eleventh Amendment immunity when the party that may be entitled to immunity "invites it do so." *McClendon v. Ga. Dep't of Cmty. Health*, 261 F.3d 1252, 1258 (11th Cir. 2001). Likewise, the other circuits discussed by Petitioner do not require that courts always address the merits prior to Eleventh Amendment immunity. *See, e.g.*, *Brait Builders Corp. v. Mass., Div. of Capital Asset Mgmt.*, 644 F.3d 5, 11 (1st Cir. 2011) (deciding the Eleventh Amendment issue before the merits); *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 482 (4th Cir. 2005) (same).

Moreover, the Eleventh Circuit did not limit its review to the district court's determination on Eleventh Amendment immunity because it believed that Eleventh Amendment immunity must be considered before the merits, or that courts should consider the merits before jurisdiction, or that Eleventh Amendment immunity must be considered before standing. Rather, it limited its review to Eleventh Amendment immunity because the case was on appeal under the collateral order doctrine, which sets narrow parameters for interlocutory review. Pet. App. 5–11.

None of the cases cited by Petitioner to argue that this case would have been decided differently in other circuits holds that a court must exercise jurisdiction in a case on appeal under the collateral order doctrine over an issue, whether a merits issue or standing issue, that is neither itself immediately appealable nor inextricably intertwined with an appealable issue.

Four of the cases involve direct appeals following a final judgment. *See Fleck & Assocs., Inc. v. Phoenix, City of, an Ariz. Mun. Corp.*, 471 F.3d 1100, 1102 (9th Cir. 2006); *Constantine*, 411 F.3d at 478; *Kennedy v. Nat'l Juvenile Det. Ass'n*, 187 F.3d 690, 692 (7th Cir. 1999); *Parella v. Ret. Bd. of R.I. Employees' Ret. Sys.*, 173 F.3d 46, 50 (1st Cir. 1999). One involves an appeal on the merits of a denial of injunctive relief. *See Cox v. City of Dallas*, 256 F.3d 281, 284 (5th Cir. 2001). One involves both appeals of Eleventh Amendment immunity under the collateral order doctrine and an appeal of a merits question under 28 U.S.C. § 1292(b) and does not address standing except to note, in the course of discussing whether Eleventh Amendment immunity must be addressed before the merits, that it cannot be seriously disputed that the case meets Article III's minimum requirements. *See Bowers v. Nat'l Collegiate Athletic Ass'n*, 346 F.3d 402, 410, 416 (3d Cir. 2003). And one involves an appeal of Eleventh Amendment immunity under the collateral order doctrine and the exercise of pendent appellate jurisdiction over an inextricably linked statutory question and does not address the parties' standing. *See U.S. ex rel. Long v. SCS Bus. & Tech. Inst., Inc.*, 173 F.3d 890 (D.C. Cir. 1999). Only one of the cases, *Balogh v. Lombardi*, 816 F.3d 536 (8th Cir. 2016), addresses the plaintiffs' standing (specifically, Article III standing) in the course of an interlocutory appeal of Eleventh Amendment immunity. There, however, the court of appeals did not analyze the scope of jurisdiction under the collateral order doctrine, and no one contested that standing was within the scope of the appeal. Moreover, the Eighth Circuit noted that it only ad-

dressed standing before Eleventh Amendment immunity to "err on the side of caution." *Balogh*, 816 F.3d at 541 n.1.[4]

### C. The Eleventh Circuit correctly declined to exercise jurisdiction to review the district court's determination on standing.

As discussed above (at p. 11), the Eleventh Circuit correctly concluded that the issue of standing is not immediately appealable under the collateral order doctrine, because it is not "effectively unreviewable on appeal from the final judgment in the underlying action." *Swint*, 514 U.S. at 42. The Eleventh Circuit also correctly declined to exercise pendent appellate jurisdiction over standing, because the district court's decision on standing was not "inextricably intertwined" with its decision on Eleventh Amendment immunity, and "review of the former decision" was not "necessary to ensure meaningful review of the latter." *Id.* at 51.

Petitioner nonetheless argues that the Eleventh Circuit should have considered standing, citing *Steel Co.* for the proposition that courts must always consider standing before considering other issues. As Petitioner himself asserts, however, and as is underscored by his reliance on the constitutional avoidance principle, Petitioner sought review of standing as a

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[4] Likewise, *Calderon*, 523 U.S. 740, did not involve an appeal under the collateral order doctrine. There, the Ninth Circuit exercised jurisdiction under 28 U.S.C. § 1292(a)(1) to review a preliminary injunction and the declaratory judgment on which it was based, and this Court granted review on Eleventh Amendment and First Amendment questions. 523 U.S. at 745. Under the procedural posture of the case, if this Court had reached and affirmed on the issues on which it granted certiorari, the injunction would have been affirmed.

"nonconstitutional matter." Pet. 15. *Steel Co.*'s requirement that standing be considered before the merits does not apply to nonconstitutional standing doctrines, such as statutory standing. As *Steel Co.* states, "a merits question can be given priority over a statutory standing question." 523 U.S. at 97.

Moreover, even if Petitioner sought review of Ms. Freyre's standing as a constitutional matter, *Steel Co.* did not require the Eleventh Circuit to review the district court's determination on that issue in this collateral appeal. As the Third Circuit explained in declining to review a denial of a motion to dismiss for lack of standing on an appeal of a denial of a motion to compel arbitration, "although standing is always a threshold issue, standing to appeal should not be confused with standing to sue. Once a district court has determined that a plaintiff has standing to sue, our power to adjudicate that issue on an interlocutory basis is limited." *Griswold v. Coventry First LLC*, 762 F.3d 264, 268–70 (3d Cir. 2014); *see also Triad Assocs., Inc. v. Robinson*, 10 F.3d 492, 496 n.2 (7th Cir. 1993) (in declining to review standing in considering a denial of qualified immunity under the collateral order doctrine, noting that "a denial of a motion to dismiss for lack of standing does not qualify as a final judgment and thus is not eligible for review at this time," and that having "jurisdiction to review the district court's denial of qualified immunity … is not sufficient to confer on us jurisdiction to review other claims presented to the district court").

Moreover, *Steel Co.* held only that a court "may not assume jurisdiction for the purpose of deciding *the merits of the case*." *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) (emphasis

added). Since *Steel Co.* this Court has clarified that *Steel Co.* "does not dictate a sequencing of jurisdictional issues," *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999), and that "[j]urisdiction is vital only if the court proposes to issue a judgment on the merits," *Sinochem*, 549 U.S. at 431 (citation omitted).[5] Accordingly, a court may address a non-merits threshold issue such as sovereign immunity without first considering standing. *See, e.g.*, *Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 892 F.3d 332, 342 (D.C. Cir. 2018) (explaining that the court could address "a jurisdictional condition attached to the government's waiver of sovereign immunity" without "reaching other jurisdictional issues such as standing" (citation omitted)); *Meyers v. Oneida Tribe of Indians of Wis.*, 836 F.3d 818, 822–23 (7th Cir. 2016) (explaining that "the question of sovereign immunity is not one on the merits," so a court may decide it before addressing standing without "run[ning] afoul of the Supreme Court's prohibitions in *Steel Company*"). Here, the only issue decided by the Eleventh Circuit was the issue of Eleventh Amendment immunity, and *Steel Co.* did not require the court of appeals to review the district court's determination on standing before addressing that issue.

Indeed, this Court has decided an Eleventh Amendment immunity question in a case appealed under the collateral order doctrine without first addressing standing. In *Virginia v. Reinhard*, 568 F.3d 110, 113 (4th Cir. 2009), the Fourth Circuit held that

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[5] All of the cases Petitioner cites for the proposition that courts must consider standing before sovereign immunity precede *Sinochem*, except *Balogh*, which did not decide the issue. *See* 816 F.3d at 541 n.1.

the Eleventh Amendment barred a lawsuit brought by a state agency against state officials. In so holding, the court of appeals noted that it was "not clear that [the state agency] has the requisite standing to sue," but that, because the appeal arose under the collateral order doctrine, the court only needed to address the Eleventh Amendment issue. *Id.* at 123 n.3. This Court granted review and held that the Eleventh Amendment did not bar the suit. *Va. Office for Protection & Advocacy v. Stewart*, 563 U.S. 247, 261 (2011). Without addressing standing, the Court reversed the Fourth Circuit's judgment and remanded for further proceedings. *See id.*; *see also id.* at 260 n.7 (referring to the Eleventh Amendment issue as an "antecedent question of jurisdiction" (quoting *id.* at 265 (Kennedy, J., concurring))).

If Petitioner files an appeal in this case after a final judgment on the merits, the Eleventh Circuit will be required in that appeal to review the district court's determination on Article III standing before it reaches the merits. But Petitioner did not wait for such a judgment to appeal. Instead, he appealed under the collateral order doctrine, under which the scope of the appeal is limited. The collateral order doctrine does not provide a back door for parties to appeal issues that are neither immediately appealable themselves nor inextricably intertwined with the immediately appealable issue. As this Court has recognized, parties should not be able to "parlay *Cohen*-type collateral orders into multi-issue interlocutory appeal tickets." *Swint*, 514 U.S. at 50. The Eleventh Circuit correctly determined that the scope of the appeal was limited to the question of Eleventh Amendment immunity, and its determination on that issue does not warrant review.

### D. The district court correctly concluded that Ms. Freyre has standing.

Review of whether the Eleventh Circuit properly declined to exercise jurisdiction over Article III standing, even assuming the petition raises an issue about such standing as well as "nonconstitutional" standing, is further unwarranted here because the district court correctly concluded that Ms. Freyre had Article III standing.

Article III standing requires three elements: 1) an injury in fact 2) that is traceable to the challenged action of the defendant and 3) that is likely to be redressed by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000). Here, the district court concluded that Ms. Freyre was "denied the opportunity to be heard before MAF was transferred," as the shelter order required. Pet. App. 28. That denial of her legally protected right to be heard about her daughter's medical care and placement, in which she had a concrete interest, *see*, *e.g.*, *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion) (noting that "the interest of parents in the care, custody, and control of their children" is a "fundamental liberty interest[]"), constituted an injury in fact, caused by HCSO's actions, and redressible by money damages. Accordingly, Ms. Freyre had Article III standing to pursue her claim.

Petitioner's arguments that Ms. Freyre lacks standing misconstrue the district court's decision. First, Petitioner claims that the "district court greatly contradicted itself" because, after determining that Ms. Freyre was denied the ability to be heard before MAF was transferred, the court found that she was "involved in MAF's dependency case." Pet. 14. But

there is no contradiction: That Ms. Freyre participated in parts of the process—attending, for example, the shelter hearing held the day after MAF was removed from her home—does not change the fact that she was deprived the ability to be heard at a court hearing before MAF was transferred and institutionalized. *See* Pet. App. 41–44. Petitioner then notes that the district court found that the evidence did not support Ms. Freyre's claim that she was discriminated against because of her disability. Pet. 14. But the claim the district court allowed to go forward was the claim that Ms. Freyre was discriminated against based on her association with MAF, not that she was discriminated against based on her personal disability. Pet. App. 40–44. Finally, Petitioner contends that unjustified institutionalization claims must be brought by the institutionalized patient. Pet. 15. But the injury on which the district court based its determination that Ms. Freyre had standing was the denial of her right to be heard about the care and placement of her child—an injury that was personalized to Ms. Freyre.

In short, none of Petitioner's arguments demonstrates that the outcome below would have been any different if the Eleventh Circuit had exercised jurisdiction to review the district court's determination on standing. Moreover, Petitioner will be able to raise its challenges to Ms. Freyre's standing—and its arguments about the merits—on a direct appeal of a final judgment that resolves all claims in the case. In this appeal under the collateral order doctrine, however, the Eleventh Circuit correctly limited the scope of the appeal to the immediately appealable issue of Eleventh Amendment immunity.

## II. The Eleventh Circuit's Determination on Eleventh Amendment Immunity Does Not Warrant Review.

### A. There is no need for the Court to reconsider the application of properly stated law to the facts.

Petitioner also asks this Court to grant review of the Eleventh Circuit's determination that HCSO was not acting as an arm of the state entitled to Eleventh Amendment immunity when it conducted child-protective investigations. In requesting review, Petitioner does not contend that the test the Eleventh Circuit applied for determining whether HCSO was an arm of the state conflicts with either the test used by other courts of appeals or state courts of last resort or with relevant decisions of this Court. *See* S. Ct. R. 10(a), (c). Indeed, the petition itself applies the same four-factor test applied by the Eleventh Circuit below. *See* Pet. 25–35 (discussing and weighing the "four *Manders* factors"). And that test in turn follows this Court's analysis in *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994), in which this Court considered multiple "indicators of immunity or the absence thereof" in determining whether an entity was entitled to Eleventh Amendment immunity, *id.* at 44, including how state law classified the entity, how much control the states at issue had over the entity, whether the states were financially responsible for the entity, and whether the states would be responsible for payment of judgments against the entity, *id.* at 44–46.

Instead, "Petitioner submits that this being an *especially close call* … to the court of appeals merits review by this Honorable Court." Pet. 22 (citing Pet. App. 21 (emphasis in petition)). The petition accuses

the court of appeals of "disregarding" evidence in the record and "misapplying long-standing precedence [*sic*]," *id.* at 3, and asks the Court to reweigh factors the court of appeals already carefully considered and to reach different conclusions about the specifics of Petitioner's relationship with the state. As this Court's rules explain, however, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." S. Ct. R. 10. This Court does not review application of settled law to facts whenever a "close call" is at issue. There is no need for the Court to grant review to reconsider the facts of this case or to reapply law that the Eleventh Circuit has already applied.

### B. The Eleventh Circuit properly determined that HCSO is not an arm of the state entitled to Eleventh Amendment immunity.

Review of the Eleventh Circuit's fact-bound analysis is particularly unnecessary here because the Eleventh Circuit's decision was correct: HCSO was not acting as an arm of the state entitled to Eleventh Amendment immunity when conducting child-protective investigation services.

**First**, the court of appeals correctly determined that state law does "not type the [HCSO] as a state agency." *Hess*, 513 U.S. at 44. To begin with, the Florida Constitution defines sheriffs as "county officers," not state officers. Fla. Const. Art. VIII, § 1(d). Other indicia of state law similarly indicate that sheriffs "are, by default, county officers." Pet. App. 13. Moreover, the relationship between HCSO and the state was governed by a grant agreement, which specified

that HCSO was acting "in the capacity of an independent contractor while performing child protective services." *Id.* As the Eleventh Circuit pointed out, "the label 'independent contractor' is legally significant." *Id.* Florida statutes and caselaw distinguish between agents and independent contractors. *See id.* at 14–15 & n.10.

Furthermore, despite Petitioner's insistence that it was "definitely an agent of DCF and therefore the state," Pet. 28, the grant agreement specifically stated that HCSO would only be considered a DCF agent "*for the sole and limited purpose* of receiving information obtained from or concerning applicants and recipients of public assistance programs." Pet. App. 16 (emphasis added by Eleventh Circuit). As the Eleventh Circuit noted, "the function at issue in this case—child-protective investigations—does not fall into this narrow exception to HCSO's general status as an independent contractor." *Id.* Thus, in entering into the grant agreement, HCSO specifically agreed that it would not be considered an agent for these purposes.

Finally, Petitioner accuses the Eleventh Circuit of "simply disregard[ing]" language in the grant agreement providing that Petitioner may "assert any privileges and immunities which are available as a result of Grantee performing the state functions required by Chapter 39, F.S., and this Grant Agreement." Pet. 28. But the court of appeals did not "disregard" this provision; it quoted and addressed it. Pet. App. 16. As the Eleventh Circuit explained, that provision "simply leaves intact whatever 'privileges and immunities' HCSO might have as a result of performing under the Grant Agreement." *Id.* It does not endow HCSO with

those privileges and immunities "in the first place." *Id.*

**Second**, the Eleventh Circuit correctly determined that the state's level of control does not weigh in favor of arm-of-the-state status. As the court of appeals explained, the state does exert some control over HCSO's conduct of child-protective investigations, including by setting minimum standards. *Id.* at 17. At the same time, the agreement also "provides HCSO significant autonomy" in conducting those investigations. *Id.* at 18. The grant agreement "allows HCSO to develop its own policies and procedures for child-protective investigations," "gives HCSO control over child-protective investigators and supervisors," allows "HCSO to develop hiring criteria for these positions," and "even gives HCSO the ability to subcontract investigations related to neglect reports and assigns HCSO 'full responsibility' for safety decisions made by subcontractors." *Id.* This level of autonomy makes this factor neutral, at the very least.

**Third**, as Petitioner and Ms. Freyre both agree, the Eleventh Circuit correctly concluded that the fact that HCSO receives funding from the state for its child-protective investigations weighs in favor of state immunity.

**Fourth**, the Eleventh Circuit correctly concluded that judgments against HCSO would not be paid out of the state treasury. This factor in the arm-of-the-state analysis goes to the "impetus for the Eleventh Amendment: the prevention of federal-court judgments that must be paid out of a State's treasury," *Hess*, 513 U.S. at 48, and is, as Petitioner and the Eleventh Circuit agree, the "most important factor" in

the analysis, Pet. 32, Pet. App. 20. Here, as the Eleventh Circuit explained, Florida law provides that the state funds are for "providing child protective investigations," without mentioning judgments. Fla. Stat. § 39.3065(3)(c). And the Eleventh Circuit has "repeatedly acknowledged that 'no provision of Florida law provides state funds to a Florida sheriff to satisfy a judgment against the sheriff.'" Pet. App. 21 (quoting *Stanley v. Israel*, 843 F.3d 920, 930 (11th Cir. 2016), and *Abusaid v. Hillsborough Cty. Bd. of Cty. Comm'rs*, 405 F.3d 1298, 1312 (11th Cir. 2005)).

Petitioner relies primarily on testimony from HCSO employee Major Robert Bullara to argue that a judgment would be paid by state funds, accusing the Eleventh Circuit of "completely ignor[ing]" Major Bullara's testimony. Pet. 33. The Eleventh Circuit, however, did not "ignore" the testimony. To the contrary, it quoted Major Bullara's testimony in its decision. Pet. App. 20. It concluded, however that Major Bullara's assessment that a judgment would be paid out of state funds was wrong under Florida law. *Id*. Petitioner also faults the Eleventh Circuit for not specifically quoting a portion of Major Bullara's testimony in which he stated that HCSO would have to ask for additional funds if the funding it received from DCF would not cover a judgment, and a provision of the grant agreement that allowed HCSO to seek additional funds due to unforeseen adverse events. Pet. 33. That the Eleventh Circuit did not quote a provision, however, does not mean it ignored it, and that HCSO would *ask* for funds if it had to pay a judgment does not assure that the state would provide those funds. Indeed, that HCSO would have to *request* funds only underscores that the judgment would not be one that "*must* be paid out of the State's treasury." *Hess*, 513

U.S. at 48 (emphasis added).

**Overall**, Petitioner deems it "unjust" that the state should be entitled to Eleventh Amendment immunity when engaged in child-protective investigations, but that HCSO is not entitled to Eleventh Amendment immunity when it conducts such investigations. *Id.* at 36. But that is a function of how Eleventh Amendment immunity works: Although states are entitled to immunity, counties are not, unless they are acting as arms of the state. *See*, *e.g.*, *N. Ins. Co. of N.Y. v. Chatham Cty.*, 547 U.S. 189, 193 (2006); *see also id.* at 193–94 (explaining that "[t]his is true even when" counties "exercise a 'slice of state power'" (citation omitted)). Here, the Eleventh Circuit carefully considered the facts, analyzed Florida law, and weighed the relevant factors to determine that HCSO was not acting as an arm of the state when it was providing child-protective investigation services and was therefore not entitled to Eleventh Amendment immunity. The Eleventh Circuit's decision was well-reasoned and correct, and there is no need for further review.

### C. Even if HCSO were an arm of the state, it would not be entitled to sovereign immunity in this case.

Review is further unwarranted here because there is an alternative ground for affirmance: Congress's abrogation of Eleventh Amendment immunity under the ADA. Congress may abrogate Eleventh Amendment immunity if it "unequivocally expresse[s] its intent to abrogate that immunity" and "act[s] pursuant to a valid grant of constitutional authority." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000). This Court has recognized that 42 U.S.C. § 12202, a provision of the

ADA, is "an unequivocal expression of Congress's intent to abrogate state sovereign immunity." *United States v. Georgia*, 546 U.S. 151, 154 (2006); *see* 42 U.S.C. § 12202 ("A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter."). And, as the United States explained in its brief in the Eleventh Circuit, "the ADA's abrogating provision, as applied to Title II claims involving public child-protective services, is valid section 5 legislation." Br. for the U.S. as Intervenor, 11th Cir. Doc. 43, at 12.

This alternative ground for affirmance makes review of the correctness of the Eleventh Circuit's arm-of-the-state analysis a matter of even less importance than it otherwise would be. Even if the Court were to disagree with the decision below on the arm-of-the-state question, that disagreement could ultimately have no impact on the case. In that circumstance, the Court either would be presented with a constitutional question that was neither mentioned in the petition nor passed upon by the courts below, or would have to remand the issue to the Eleventh Circuit to decide in the first instance. In either event, the result would be further proceedings likely to lead to the same result: denial of HCSO's motion for summary judgment on Eleventh Amendment immunity grounds.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MATTHEW W. DIETZ
*Counsel of Record*
DISABILITY INDEPENDENCE GROUP
2990 S.W. 35th Avenue
Miami, FL 33133
(305) 669-2822
mdietz@justdigit.org

*Counsel for Respondent Doris Freyre*

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