

No. _____

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 Writ of Certiorari to the United States
Court of Appeals for the Eleventh Circuit*

PETITION FOR WRIT OF CERTIORARI

Jason G. Gordillo
Counsel of Record
Hillsborough County
Sheriff's Office
2008 East 8th Avenue
Post Office Box 3371
Tampa, Florida 33601
813.247.8102
jgordill@hcsso.tampa.fl.us

Counsel for Petitioner

QUESTIONS PRESENTED

The Child Protective Investigations Division (“CPID”) of the Hillsborough County Sheriff’s Office (“HCSO”) received a report of prospective child abuse, abandonment and/or neglect from the Florida Department of Children and Families’ (“DCF”) Abuse Hotline regarding Doris Freyre’s disabled daughter, MAF. After investigating the allegations and attending a multi-agency staffing, probable cause existed to remove MAF from her mother’s custody. This removal was confirmed the following day by the Honorable Vivian Corvo at a shelter hearing, wherein Doris Freyre was represented by counsel.

MAF was placed into the State’s custody pending reunification with Doris Freyre, only if certain conditions could be met. However, the service providers from Hillsborough Kids, Incorporated (“HKI”) and other state entities could not meet those conditions. Ultimately, the service providers from HKI in conjunction with other governmental agencies such as Children’s Medical Services (“CMS”) and Tampa General Hospital (“TGH”) were only able to secure placement at a skilled nursing facility in Miami, as assessed and recommended by the state’s medical professionals and MAF’s attending physician.

The questions presented are:

1. Whether the court of appeals violated this Honorable Court’s “fundamental rule of judicial restraint” by failing to address whether Doris Freyre had standing to bring an associational ADA claim

thereby properly invoking the jurisdiction of the district court and the court of appeals.

2. Whether HCSO, in conducting child protective investigations under a Grant Agreement with DCF on the State's behalf in accordance with Florida Statute §39.3065 acted as an "arm of the state" and is therefore entitled to Eleventh Amendment Immunity.

LIST OF PARTIES TO THE PROCEEDINGS

The Petitioner in this case is Chad Chronister, in his official capacity as the Sheriff of Hillsborough County (Hillsborough County Sheriff's Office), who was the defendant-appellant below.

The Respondent in this case is Doris Freyre, who was the plaintiff-appellee below.

Iris C. Valdez and Jessica Pietrzak, in their individual capacities as employees of the Hillsborough County Sheriff's Office, were defendants-appellees below.

The United States of America, through the United States Department of Justice, Civil Rights Division, was an Intervenor in the appellate case before the court of appeals, but was not a party to the original matter before the district court.

Nextgen Alliance, Inc., the State of Florida, Julie Emerson, Alexis Argerious, Angeline Attila, Jill Adams and Tiffany Short were defendants in the original matter before the district court. However, all of these defendants settled the matter below with Respondent and were therefore dismissed prior to summary judgment.

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
LIST OF PARTIES TO THE PROCEEDINGS. . . .	iii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW.	1
JURISDICTION.	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	1
STATEMENT OF THE CASE.	3
A. Factual Background.	3
B. District Court Proceedings.	7
C. The Court of Appeals’ Opinion.	12
REASONS FOR GRANTING THE PETITION . . .	13
I. The Eleventh Circuit Disregarded the Fundamental Rule of Judicial Restraint by Summarily Declining to First Address Whether Respondent has Article III Standing.	13
A. Findings regarding Respondent’s Article III standing made by the District Court and Court of Appeals.	13
B. The Eleventh Circuit’s failure to address whether Respondent has Article III standing to bring an associational ADA claim deviates markedly from this Honorable Court’s “fundamental rule of judicial restraint.” . . .	16

II. Even Assuming that Respondent had Article III Standing, the Court of Appeals' Decision on Eleventh Amendment Immunity Contravenes Its Own and this Honorable Court's Precedent.	21
A. First Factor.	25
B. Second Factor.	28
C. Third Factor.	32
D. Fourth Factor.	32
E. Weighing the Factors.	35
CONCLUSION.	37
APPENDIX	
Appendix A Opinion in the United States Court of Appeals for the Eleventh Circuit (December 14, 2018)	App. 1
Appendix B Order in the United States District Court, Middle District of Florida, Tampa Division (March 15, 2017)	App. 22
Appendix C Order in the United States District Court, Middle District of Florida, Tampa Division (March 10, 2017)	App. 52

TABLE OF AUTHORITIES

CASES

<i>Abusaid v. Hillsborough County Bd. of County Com'rs,</i> 405 F.3d 1298 (11th Cir. 2005).	<i>passim</i>
<i>Adarand Constructors, Inc. v. Mineta,</i> 534 U.S. 103 (2001).	20
<i>Ashwander v. TVA,</i> 297 U.S. 288 (1936).	13
<i>Balogh v. Lombardi,</i> 816 F.3d 536 (8th Cir. 2016).	20
<i>Bowers v. National Collegiate Athletic Assoc.,</i> 346 F.3d 402 (3d Cir. 2003)	18, 19
<i>Brent v. Wayne Co. Dept. Of Human Services,</i> 901 F.3d 656 (6th Cir. 2018).	36
<i>Calderon v. Ashmus,</i> 523 U.S. 740 (1998).	18, 19, 20
<i>Clapper v. Amnesty Intern. USA,</i> 568 U.S. 398 (2013).	17
<i>Constatine v. Rectors and Visitors of George Mason Univ.,</i> 411 F.3d 474 (4th Cir. 2005).	19
<i>Cox v. City of Dallas,</i> 256 F.3d 281 (5th Cir. 2001).	19
<i>Dorse v. Armstrong World Industries, Inc.,</i> 513 So.2d 1265 (Fla. 1987)	27

<i>Fennel v. Gilstrap</i> , 559 F.3d 1212 (11th Cir. 2009).	34
<i>Fleck and Associates, Inc. v. Phoenix, City of, an Ariz. Mun. Corp.</i> , 471 F.3d 1100 (9th Cir. 2006).	20
<i>Friends of the Earth, Inc. v. Laidlaw Envir. Svcs. (TOC), Inc.</i> , 528 U.S. 167 (2000).	14
<i>Gamble v. Fla. Dep’t of Health & Rehab. Servs.</i> , 779 F.2d 1509 (11th Cir. 1986).	28, 35
<i>Great Southern Fire Proof Hotel Co. v. Jones</i> , 177 U.S. 449 (1900).	16
<i>Gulf Oil Co. v. Bernard</i> , 452 U.S. 89 (1981).	13
<i>Hess v. Port Auth. Trans-Hudson Corp.</i> , 513 U.S. 30 (1994).	32
<i>Horn v. Fla. DCF</i> , 2005 WL 1618218 (M.D. Fla. 20005).	35
<i>Hufford v. Rodgers</i> , 912 F.2d 1338 (11th Cir. 1990).	23
<i>Jean v. Nelson</i> , 472 U.S. 846 (1985).	13
<i>Keene v. Prine</i> , 477 Fed. Appx. 575 (11th Cir. 2012)	22
<i>Kennedy v. Nat’l Juvenile Detention Ass’n</i> , 187 F.3d 690 (7th Cir. 1999).	19

<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992)	14
<i>Lyng v. Northwest Indian Cemetary Protective Ass’n</i> , 485 U.S. 439 (1988)	13
<i>Manders v. Lee</i> , 338 F.3d 1304 (11th Cir. 2003)	<i>passim</i>
<i>Mansfield, C. & L.M.R. Co. v. Swan</i> , 111 U.S. 379 (1884)	17
<i>Mayo v. Reiger</i> , 2005 WL 2088580 (M.D. Fla. 2005)	35
<i>McCall v. Dept. of Human Resources</i> , 176 F.2d 1355 (M.D. Ga. 2001)	36
<i>Ex parte McCardle</i> , 74 U.S. 506 (1868)	16
<i>McCullum v. Orlando Regional Healthcare System, Inc.</i> , 768 F.3d 1135 (11th Cir. 1994)	15, 21
<i>McMillian v. Monroe County, Ala.</i> , 520 U.S. 781 (1997)	23, 36
<i>Mitchell v. Maurer</i> , 293 U.S. 237 (1934)	17
<i>Olmstead v. L.C. ex rel. Zimring</i> , 527 U.S. 581 (1999)	15, 21
<i>Parella v. Ret. Bd. of the R.I. Employees’ Ret. Sys.</i> , 173 F.3d 46 (1st Cir. 1999)	18

<i>Pellitteri v. Prine</i> , 776 F.3d 777 (11th Cir. 2015).	22, 31
<i>Powell v. Dept. of Human Resources of Ga.</i> , 918 F. Supp. 1575 (S.D. Ga. 1996)	35, 36
<i>Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.</i> , 506 U.S. 139 (1983).	12, 21, 22
<i>Raines v. Byrd</i> , 521 U.S. 811 (1997).	17
<i>Regents of the Univ. of Cal. v. Doe</i> , 519 U.S. 425 (1997).	22
<i>Rosario v. American Corrective Counseling Services, Inc.</i> , 506 F.3d 1039 (11th Cir. 2007).	26, 27
<i>Seaborn v. Florida Dep't of Corrections</i> , 143 F.3d 1405 (11th Cir. 1998).	21
<i>Spector Motor Co. v. McLaughlin</i> , 323 U.S. 101 (1944).	13
<i>Spokeo, Inc. v. Robins</i> , 136 S.Ct. 1540 (2016)	17
<i>Stanley v. Israel</i> , 843 F.3d 920 (11th Cir. 2016).	23, 31, 33
<i>Steel Co. v. Citizens for a Better Environment</i> , 523 U.S. 83 (1998).	16, 17, 18, 19, 21
<i>Stem v. Ahearn</i> , 908 F.2d 1 (5th Cir. 1990).	36

<i>Stoll v. Noel</i> , 694 So.2d 701 (Fla. 1997)	27
<i>Summit Med. Assoc. v. Pryor</i> , 180 F.3d 1326 (11th Cir. 1999).	15
<i>Swint v. Chambers County Comm’n</i> , 514 U.S. 35 (1995).	16
<i>Three Affiliated Tribes of Berthold Reservation v.</i> <i>Wold Engineering</i> , 467 U.S. 138 (1984).	13
<i>United States ex rel. Lesinski, v. S. Fla. Water</i> <i>Mgmt. Dist.</i> , 739 F.3d 598 (11th Cir. 2014).	29, 30, 31
<i>U.S. ex rel. Long v. SCS Business & Tech. Inst.</i> , <i>Inc.</i> , 173 F.3d 890 (D.C. Cir. 1999).	20
<i>United States v. Corrick</i> , 298 U.S. 435 (1936).	17
<i>United States v. Hays</i> , 515 U.S. 737 (1995).	18
<i>Warth v. Seldin</i> , 422 U.S. 490 (1975).	17
CONSTITUTION	
Fla. Const. Art. VIII, §1(d).	25, 26
U.S. Const. amend. XI	2
STATUTES	
28 U.S.C. §1254(1)	1

42 U.S.C. §1983	8, 11
42 U.S.C. §1985	7
42 U.S.C. §12132	2
42 U.S.C. §12182(b)(1)(E)	2
Fla. Stat. §20.19	26
Fla. Stat. §39.001(1)(a)	24, 30
Fla. Stat. §39.001(3)	30
Fla. Stat. §39.001(8)	25, 30
Fla. Stat. §30.072(5)	26
Fla. Stat. §30.079	26
Fla. Stat. §30.15(1)(a)	23
Fla. Stat. §30.15(3)	23
Fla. Stat. §39.3065	<i>passim</i>
Fla. Stat. §39.3065(3)(a)	2
Fla. Stat. §39.3605(3)(b)	2, 30
Fla. Stat. §39.3065(3)(c)	3, 33
Fla. Stat. §39.3605(3)(d)	31
Fla. Stat. §39.402	4
Fla. Stat. §324.171	33
Fla. Stat. §768.28	27
Fla. Stat. §768.28(16)	33

OTHER AUTHORITIES

Florida Department of Children and Families Annual Program Performance Evaluation Report for Florida Sheriffs Performing Child Protective Investigations at: http://centerforchildwelfare.fmhi.usf.edu/kb/LegislativeMandatedRpts/SO%20Annual%20Peer%20Review%20DCF%20Report%202017_2018.pdf	36
Restatement (Second) of Agency §14N (1957)	27

OPINIONS BELOW

The opinion of the court of appeals (App. A, pp. 1-21) is reported at 910 F.3d 1371. The memorandum opinion of the district court denying Eleventh Amendment Immunity (App. B, pp. 22-51) is not reported, but is available as a Westlaw citation at 2017 WL 1017837. The memorandum opinion of the district court granting summary judgment to HCSO employees, Iris Valdez-Corey and Jessica Pietrzak, in their respective individual capacities, (App. C, pp. 52-72) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 14, 2018. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondent's only claim to survive summary judgment was brought under Title II of the Americans with Disabilities Act ("ADA") based on her association with her daughter, MAF. This lone surviving claim alleges that MAF was unjustifiably institutionalized. Furthermore, the district court failed to extend Eleventh Amendment immunity to Petitioner, which was affirmed by the court of appeals.

The ADA provides that "[n]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public

entity, or be subjected to discrimination by any such entity.” 42 U.S.C. §12132.

Furthermore, the ADA provides that “[i]t shall be discriminatory to exclude or otherwise deny equal goods, services, facilities, privileges, advantages, accommodations, or other opportunities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.” 42 U.S.C. §12182(b)(1)(E).

The Eleventh Amendment protects states from being subject to suit in federal court. It provides that “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” *U.S. Const. amend. XI*.

“Beginning in 2000-2001, the Department of Children and Families is authorized to enter into grant agreements with sheriffs of other counties to perform child protective investigations in their respective counties.” *See Florida Statute §39.3065(3)(a)*.

“The sheriffs shall operate, at a minimum, in accordance with the performance standards and outcome measures established by the Legislature for protective investigations conducted by the Department of Children and Families. Each individual who provides these services must complete, at a minimum, the training provided to and required of protective investigators employed by the Department of Children and Families.” *See Florida Statute §39.3605(3)(b)*.

“Funds for providing child protective investigations must be identified in the annual appropriation made to the Department of Children and Families, which shall award grants for the full amount identified to the respective sheriffs’ offices ... Funds for the child protective investigations may not be integrated into the sheriffs’ regular budgets. Budgetary data and other data relating to the performance of child protective investigations must be maintained separately from all other records of the sheriffs’ offices and reported to the Department of Children and Families as specified in the grant agreement. *See Florida Statute §39.3065(3)(c).*”

STATEMENT OF THE CASE

This case raises the important and recurring question of whether Eleventh Amendment immunity applies to sheriffs’ offices. The question posed should not be asked in a general sense, but instead requires consideration to the function in which the sheriff is engaged, under what authority it acts, and for whom. This case also calls for this Honorable Court to correct the court of appeals for disregarding undisputed record evidence and misapplying long-standing precedence regarding “the traditional core of Eleventh Amendment protection” - whether any monetary judgment would be paid out of the state treasury.

A. Factual Background.

On March 16, 2011, DCF’s Florida Abuse Hotline received a report alleging that MAF had been abused, abandoned and/or neglected by Respondent. (App. C, pg. 53) On March 29, 2011, a Child Protection Team

staffing was held wherein all attendees discussed their concerns for MAF. Ultimately, all attendees found probable cause to believe that MAF had been abused, neglected, or abandoned, or was in imminent danger of suffering an illness or injury as a result of the abuse, neglect or abandonment in accordance with Florida Statute §39.402 as memorialized by Jessica Pietrzak, Child Protective Investigator:

“The concern is two fold. Based on the lengthy history of the mother’s lack of involvement and concern for the child’s care and her claimed back injury, there is a great concern for the child’s safety and well-being when the home health care nurses are not in the home. Based on the mother’s past actions, the child would be in imminent risk of harm through neglect if left in the mother’s care. Most recently, while the child was in the ER on 03/16/11, the ER doctor gave orders to administer a medication that the mother knew the child was allergic to and the mother just sat there and did not inform the doctor of the child’s allergy. After the mother did not inform the doctor, the home health nurse had to do so ... There have already been documented incidents of physical and verbal abuse by the mother ... including hitting the child and yelling threats at the child that the mother would place her in a nursing home and no one would ever come and visit her ... Based on the continued opportunity for assistance, continued failure to follow through with appointments, continued lack of concern and involvement regarding the child’s medical

issues, and failure to take the child to the ER when she had a 103.5 fever until the home health nurse made the mother call the ambulance, I gave PC on the basis of prospective neglect.” (App. C, pg. 54-55)

As a result, it was recommended by the CPT staffing attendees that MAF be sheltered into medical foster care as a “safe and nurturing environment where her needs can be properly met”, which was agreed to by the Assistant Attorney General. (App. C, pg. 55)

On March 30, 2011, the Honorable Vivian Corvo held a shelter hearing regarding MAF’s removal from Respondent and placement into medical foster care, wherein Respondent was represented by counsel. (App. C, pg. 55) Judge Corvo found that probable cause existed to remove MAF from Respondent and authorized her placement with the State after reviewing the probable cause statement and taking testimony from Respondent. (App. C, pp. 55-56) During the hearing, Kristine Carstens, resource specialist with HKI, represented to Judge Corvo that HKI had authorized their funds to be utilized for two to three weeks to place home health care into Respondent’s home daily from midnight to 7 a.m. During these two to three weeks, HKI along with Respondent would attempt to obtain permanent funding for the needed hours of care from Medicaid. As a result, Judge Corvo ordered that MAF could return to Respondent’s home *“once they [HKI] have someone to be there from midnight to 7 a.m.”* (App. C, pg. 56)

Ultimately, HKI was unable to obtain the necessary funding as Medicaid would not authorize the 24 hour

coverage and Maxim, MAF's home health care provider, was no longer willing to provide the services due to past difficulties with Respondent. (App. C, pg. 57) In addition, HKI did not utilize their funds based on the advice of CMS Nurse Julie Emerson because the required night services would not be available after HKI funds were exhausted. (App. C, pg. 64, n. 7)

Thereafter, the Children's Multi-disciplinary Assessment Team ("CMAT") and the Agency for Persons with Disabilities ("APD") determined that MAF would require a "skilled" level of care at a nursing facility for one year. (App. C, pg. 57) Additionally, APD determined that its specialized services were not applicable to MAF due to her need for "skilled" care (App. C, pp. 57-58) and that MAF could not be placed into any of their homes due to the "Cost Plan freeze and the inability to increase plans" (App. C, pg. 65, fn. 7). Therefore, HKI determined that MAF was not appropriate "for any traditional foster care settings" or APD settings. (App. C, pg. 65, n. 7)

Based on these determinations from the State's medical professionals, HKI began searching for a skilled nursing facility in which to place MAF with the assistance of CMS Nurse Emerson. (App. C, pg. 58) HCSO's Jessica Pietrzak spoke to HKI's Kristine Carstens to explore whether MAF could be enrolled into Prescribed Pediatric Extended Care ("PPEC") as a solution to the 24 hour required care for her to return to Respondent's home. However, PPEC advised HKI's Carstens that MAF would not qualify for their services. (App. C, pp. 58 & 65, n. 7)

On April 14, 2011, an arraignment hearing was held before the Honorable Emily Peacock wherein the Assistant Attorney General informed the court about Medicaid's refusal to pay for the 24 hour home care, Maxim's refusal to re-enter Respondent's home to provide the 24 hour home care, the fact that MAF did not qualify for PPEC's services and that HKI was looking into placement at a skilled nursing facility based on the determinations from the State's medical professionals. (App. C, pp. 58-59)

On April 26, 2011, MAF was transferred from TGH to Florida Club Care Center ("FCCC"), a skilled nursing facility in Miami, which was found by HKI working in conjunction with the TGH social worker. (App. C, pp. 59 & 65, n. 7) Lakeshore Villas, the only available placement option in Tampa declined to accept MAF on that same morning thereby making FCCC the only placement option in the State of Florida for MAF. (App. C, pp. 59 & 65, n. 7)

B. District Court Proceedings.

Respondent brought suit in the United States District Court for the Middle District of Florida. As to HCSO employees Iris Valdez-Corey and Jessica Pietrzak, Respondent brought a claim for conspiracy to deny her civil rights pursuant to 42 U.S.C. §1985.¹

¹ The same allegations and claims were made against CMS Nurse Julie Emerson as well as Assistant Attorney Generals Alexis Argerious, Angeline Attila, Jill Adams and Tiffany Short. However, those individuals settled all claims with Respondent prior to summary judgment and were therefore dismissed from this action.

(App. C, pp. 52-53) As to Petitioner, Respondent brought claims for a violation of Title II of the ADA, for a violation of Section 504 of the Rehabilitations Act (“RA”), and for a violation of her civil rights pursuant to 42 U.S.C. §1983.² (App. C, pp. 25, 44 & 46) After discovery closed, Petitioner and its employees, Iris Valdez-Corey and Jessica Pietrzak moved for summary judgment.

The district court granted summary judgment in favor of Iris Valdez-Corey and Jessica Pietrzak. In so doing, the district court specifically found that “the record is replete with undisputed evidence of the effort to place MAF locally and the difficulty of securing placement and funding for in-home care.” (App. C, pg. 64, fn. 7) As to Respondent’s claim that her rights to raise MAF were violated, the district court found no such violation because those rights had been taken from her by the court after notice and an opportunity to be heard. (App. C, pp. 64-67) As to Respondent’s claim that MAF was unnecessarily institutionalized, the district court found that Respondent’s “right to make ultimate health care decisions for MAF, including where and under what conditions she was sheltered, had been removed by the Shelter Order”; so the individual defendants could not conspire to deprive Respondent of a right that she did not have. (App. C, pp. 67-68)

² The same allegations and claims were made against HKI and the State of Florida. However, those entities settled all claims with Respondent prior to summary judgment and were therefore dismissed from this action.

As to Petitioner, the district court dismissed all claims except for Respondent's associational ADA claim. In so doing, the district court incorporated the undisputed material facts as summarized in the Order granting summary judgment as to Iris Valdez-Corey and Jessica Pietrzak. (App. B, pg.22, n. 1) The district court found that Respondent had raised three alleged individual ADA claims against Petitioner. (App. B, pg. 29)

As to Respondent's first individual ADA claim [opportunity to participate], the district court found that Medicaid, Maxim and HKI could not get the required 24 hour care into Respondent's home to allow MAF's return. (App. B, pg. 30) Additionally, the district court found that CMAT and APD determined that MAF would require a "skilled" level of care which led HKI to begin searching for a skilled nursing facility in which to place MAF. (App. B, pp. 30-31) Ultimately, MAF was transferred to FCCC in Miami. However, the district court found that Respondent failed to present any material factual dispute surrounding MAF's transfer; and that there is no factual support in the undisputed evidence that the failure to hold a hearing was due to Respondent's disability. As a result, summary judgment was granted in Petitioner's favor. (App. B, pg.33)

As to Respondent's second individual ADA claim [failure to provide a reasonable accommodation], the district court found that the "medically necessary services" - 24 hour in-home care and local placement - were benefits to which MAF was entitled, not Respondent. As such, Petitioner could not deny

Respondent of a benefit to which she was never entitled (App. B, pg. 35); nor was it Petitioner's responsibility to provide those services (App. B, pg. 36). Moreover, the failure to provide MAF with the "medically necessary services" was not Petitioner's fault. (App. B, pg. 37) In short, Petitioner never denied Respondent a reasonable accommodation because it never denied services to MAF. As a result, summary judgment was granted in Petitioner's favor. (App. B, pp. 38-39)

As to Respondent's third individual ADA claim [failure to provide MAF with the least restrictive alternatives], the district court found that this claim fails for essentially the same reasons as the previously discussed "failure to provide a reasonable accommodation" claim. The district court further explained that the undisputed facts of this matter show that in-home services and local placement alternatives were simply not available. As before, the district court again stressed that these services were for MAF, not Respondent. As a result, summary judgment was granted in Petitioner's favor. (App. B, pp. 39-40)

As to Respondent's associational ADA claim, the district court found that Respondent had proffered evidence to raise a question of material fact as to whether MAF was unjustifiably institutionalized. (App. B, pp. 40-41) More specifically, the district court determined that a jury could find that Respondent was discriminated against by virtue of her association with MAF when no hearing was held prior to the transfer to Miami. (App. B, pg. 41 & 44)

As to Respondent's RA claim, the district court found that "the State of Florida is the sole source of all funding" to Petitioner for its CPID. Therefore, Respondent has failed to proffer any evidence showing that Petitioner receives any federal funding. As a result, summary judgment was granted in Petitioner's favor. (App. B, pg.45)

As to Respondent's 42 U.S.C. §1983 claim, the district court found that "there is a lack of evidence to demonstrate any policy or custom of Defendant [Petitioner] leading to the violation of disabled parents' civil rights[.]" (App. B, pg.46) As a result, summary judgment was granted in Petitioner's favor. (App. B, pg. 47)

As to Petitioner's claim of entitlement to Eleventh Amendment immunity, the district court declined to extend the immunity. (App. B, pg.51) When evaluating each "arm of the state" factor, the district court found that: the first factor weighs heavily against granting immunity since Florida law defines sheriffs as county officers (App. B, pp. 48-49); the second factor weighs against granting immunity because Petitioner maintains a level of independence when conducting child protective investigations (App. B, pp. 49-50); the third factor weighs in favor of granting immunity due to the funds to conduct these investigations being derived from the state (App. B, pg.50); and the fourth factor weighs against granting immunity because no provision of Florida law provides state funds to sheriffs to satisfy judgments (App. B, pp.50-51). After weighing all four factors, the district court denied Petitioner Eleventh Amendment immunity when conducting child

protective investigations on behalf of DCF in accordance with Florida Statute §39.3065. (App. B, pg. 51)

C. The Court of Appeals' Opinion.

The court of appeals had jurisdiction over the denial of Eleventh Amendment immunity as a collateral order that was subject to immediate interlocutory appeal. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1983). The court of appeals found that the issue was “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.” (App. A, pg. 12) The court of appeals utilized its four factor test to determine whether an entity is an arm of the state and thus entitled to sovereign immunity. *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003). (App. A, pg. 12) However, during this analysis, the court of appeals unfortunately disregarded undisputed record evidence that weighs in favor of granting Eleventh Amendment immunity, misapplied applicable case law, cited to inapplicable Florida Statutes and relied upon Respondent’s unsupported assertions.

After weighing all four factors, the court of appeals found that “*this case presents an especially close call*”, but ultimately concluded that Petitioner does not act as an arm of the state when conducting child-protective investigations pursuant to the Grant Agreement with DCF. Accordingly, the court of appeals affirmed the district court’s denial of Eleventh Amendment immunity. (App. A, pg.21) (emphasis added)

REASONS FOR GRANTING THE PETITION

I. The Eleventh Circuit Disregarded the Fundamental Rule of Judicial Restraint by Summarily Declining to First Address Whether Respondent has Article III Standing.

A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them. *Lyng v. Northwest Indian Cemetary Protective Ass’n*, 485 U.S. 439, 445-46 (1988) (citing *Jean v. Nelson*, 472 U.S. 846, 854 (1985); *Three Affiliated Tribes of Berthold Reservation v. Wold Engineering*, 467 U.S. 138, 157-58 (1984); *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981); and *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936)).

“Prior to reaching any constitutional questions, federal courts must consider nonconstitutional grounds for decision.” *Gulf Oil Co.*, 452 U.S. at 99. This is the “fundamental rule of judicial restraint.” *Three Affiliated Tribes*, 467 U.S. at 157-58. As this Honorable Court has stressed, “[i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not pass on questions of constitutionality ... unless such adjudication is unavoidable.” *Spector Motor Co. v. McLaughlin*, 323 U.S. 101, 105 (1944).

A. Findings regarding Respondent’s Article III standing made by the District Court and Court of Appeals.

To invoke federal court jurisdiction through Article III standing, Respondent would have had to point to

specific evidence in the record at summary judgment which satisfied the following elements: (1) that she suffered an injury in fact; (2) that the injury was fairly traceable to the challenged conduct of Petitioner; and (3) that she is likely to be redressed by a favorable judicial decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Friends of the Earth, Inc. v. Laidlaw Envir. Svcs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). To establish an injury in fact, Respondent would have had to show that she *personally suffered* “an invasion of a legally protected interest” that is “concrete and particularized” and “actual or imminent, not conjectural or hypothetical.” *Lujan*, 504 U.S. at 560.

At summary judgment, the district court addressed Respondent’s standing to bring an associational ADA claim. However, the district court greatly contradicted itself when reaching this issue in favor of Respondent. First, the district court found that Respondent had associational ADA standing because she was denied an opportunity to be heard before MAF was transferred to Miami. (App. B, pg. 28) Then, the district court irreconcilably summarized in great detail the extent to which Respondent was involved in MAF’s dependency case. (App. B, pp. 29-33) More importantly, the district court concluded that the undisputed evidence contradicts Respondent’s unsupported contention that the hearing was not held due to her disability. (App. B, pg. 33)

Nonetheless, the district court found that Respondent proffered evidence to raise a question of material fact on her associational ADA claim that MAF

was unjustifiably institutionalized without consent or a hearing. (App. B, pp. 40, 41 & 44) This finding is at complete odds with this Honorable Court's prior ruling in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999), wherein it was found that ADA unjustifiable institutionalization claims must be brought by the individually institutionalized patients. (App. B, pg. 46, n. 17)

In addition, the district court even contradicted Eleventh Circuit precedence which previously held that parents lacked ADA standing when they failed to show that they were personally excluded or denied benefits due solely to the their association with a disabled child. *McCullum v. Orlando Regional Healthcare System, Inc.*, 768 F.3d 1135, 1145 (11th Cir. 1994). Furthermore, the district court never identified what evidence Respondent set forth evincing that she was denied an opportunity to be heard due to MAF's disability, considering she had no evidence to support her "opportunity to participate" individual ADA claim. (App. B, pg. 33)

As a result, Petitioner sought appellate review of whether Respondent had Article III standing to bring her associational ADA claim as a nonconstitutional matter that requires judicial review prior to determining Petitioner's right to Eleventh Amendment immunity. However, the Eleventh Circuit summarily declined to review whether Respondent has standing. Instead, the court of appeals cited to its prior ruling in *Summit Med. Assoc. v. Pryor*, 180 F.3d 1326, 1334 (11th Cir. 1999), for the proposition that "the question of standing does not fit within the collateral order

doctrine.” (App. A, pg. 7) Notwithstanding, pendent appellate jurisdiction allows courts of appeal to consider issues that would not otherwise be immediately appealable if the factual and legal issues involved are “inextricably intertwined” with the questions that are properly before the court on interlocutory appeal. *Swint v. Chambers County Comm’n*, 514 U.S. 35, 51 (1995).

B. The Eleventh Circuit’s failure to address whether Respondent has Article III standing to bring an associational ADA claim deviates markedly from this Honorable Court’s “fundamental rule of judicial restraint.”

Stated simply, a court is without jurisdiction if a plaintiff lacks Article III standing. “Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.” *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 74 U.S. 506, 514 (1868)). “On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it.” *Id.* (quoting *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900)). “The requirement that jurisdiction be established as a threshold matter ‘spring[s] from the

nature and limits of the judicial power of the United States’ and is ‘inflexible and without exception.’” *Id.* at 94-95 (quoting *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884)).³

“[E]very federal appellate court has a special obligation to ‘satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review ...’” *Id.* at 95 (quoting *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934)). “And if the record discloses that the lower court was without jurisdiction this court will notice the defect ... [When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.” *Id.* (quoting *United States v. Corrick*, 298 U.S. 435, 440 (1936)).

“No principle is more fundamental to the judiciary’s proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.” *Raines v. Byrd*, 521 U.S. 811, 818 (1997). “The law of Article III standing ... serves to prevent the judicial process from being used to usurp the powers of political branches, *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 407 (2013), and confines the federal courts to a properly judicial role, *Warth v. Seldin*, 422 U.S. 490, 498 (1975).” *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1546 (2016). As a result,

³ This Honorable Court declined to endorse the “doctrine of hypothetical jurisdiction” that several courts of appeal have utilized. Instead, this Honorable Court has directed that without proper jurisdiction, the lower courts cannot proceed at all; but can only note the jurisdictional defect and dismiss the suit. *Id.* at 84.

Federal courts have an “independent obligation to examine their own jurisdiction, and *standing* is perhaps the most important of [the jurisdictional] doctrines.” *United States v. Hays*, 515 U.S. 737, 742 (1995) (emphasis added).

Article III jurisdiction is always an antecedent question to be answered before other questions. *Steel Co.*, 523 U.S. at 101. “For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires.” *Id.* This Honorable Court has implied that Eleventh Amendment questions are excluded from the category of Article III issues that must be addressed before the merits of the case. *Calderon v. Ashmus*, 523 U.S. 740, 745 n. 2 (1998). Sister courts have followed this Supreme Court precedence on this very issue, while others have not.

In *Parella v. Ret. Bd. of the R.I. Employees’ Ret. Sys.*, 173 F.3d 46 (1st Cir. 1999), the First Circuit found that *Steele, Co.* requires a determination of Article III jurisdiction before reaching the merits of the underlying claims. *Id.* at 54-55. The order in which the First Circuit determines cases before it wherein Article III standing and Eleventh Amendment issues arise is to: (1) determine the Article III standing; (2) determine the merits of the underlying claims; and (3) only determine the Eleventh Amendment questions when required to do so considering the “fundamental rule of judicial restraint.” *Id.* at 56-57.

In *Bowers v. National Collegiate Athletic Assoc.*, 346 F.3d 402 (3d Cir. 2003), the Third Circuit applied this

Honorable Court's holding in *Steele, Co.* to mean that a court should "not declare the law where they do not have Article III jurisdiction because any opinion in such a situation would be advisory, thus raising separation of powers problems." *Id.* at 417-18. The Third Circuit held that "a court may reserve judgment on Eleventh Amendment issues even when advanced by a state where it can resolve the case on other grounds and the prevailing party on the merits would be the same as the prevailing party if immunity were recognized." *Id.* at 418.

In *Constatine v. Rectors and Visitors of George Mason Univ.*, 411 F.3d 474 (4th Cir. 2005), the Fourth Circuit acknowledged this Honorable Court's precedence that the "case or controversy" question under Article III must be addressed before Eleventh Amendment issues, which may not need to be addressed due to their "hybrid nature." *Id.* at 48 (citing *Calderon*, 523 U.S. at 745).

In *Cox v. City of Dallas*, 256 F.3d 281 (5th Cir. 2001), the Fifth Circuit determined that standing must be examined before Eleventh Amendment immunity when both are raised by the defendant. *Id.* at 303-304 (citing *Calderon*, 523 U.S. at 745, n. 2).

In *Kennedy v. Nat'l Juvenile Detention Ass'n*, 187 F.3d 690 (7th Cir. 1999), the Seventh Circuit found that Eleventh Amendment immunity is not a jurisdictional issue and therefore requires no determination if the case can be decided on nonconstitutional grounds. *Id.* at 696.

In *Balogh v. Lombardi*, 816 F.3d 536 (8th Cir. 2016), the Eighth Circuit noted that there is confusion among the circuits as to whether Article III standing should be determined prior to Eleventh Amendment immunity, or vice versa. The Eighth Circuit chose to err on the side of caution in light of this Honorable Court’s precedence in *Calderon*, 523 U.S. at 745, by determining the issue of standing first. *Balogh*, 816 F.3d at 541 n. 1.

In *Fleck and Associates, Inc. v. Phoenix, City of, an Ariz. Mun. Corp.*, 471 F.3d 1100 (9th Cir. 2006), the Ninth Circuit addressed allegations of Fourteenth Amendment due process violations and ultimately found that no matter how important the constitutional issue presented, “a court lacking jurisdiction is powerless to reach the merits under Article III of the Constitution.” *Id.* at 1107 n. 4 (citing *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001)).

In *U.S. ex rel. Long v. SCS Business & Tech. Inst., Inc.*, 173 F.3d 890 (D.C. Cir. 1999), the District of Columbia Circuit noted that the “merits” question is, in the Eleventh Amendment context, *inextricably related* to the “jurisdictional” question. *Id.* at 895 (emphasis added). Accordingly, the District of Columbia Circuit has chosen to determine issues relating to jurisdiction prior to reaching any Eleventh Amendment issues. *Id.* at 898.

As opposed to the majority of the circuits, the Eleventh Circuit has held that “[a]n assertion of Eleventh Amendment immunity must be resolved before a court may address the merits of the underlying

claims.” *Seaborn v. Florida Dep’t of Corrections*, 143 F.3d 1405, 1407 (11th Cir. 1998).

This case would have been decided differently had it arisen in any of these sister circuits. In the majority of circuits, Petitioner would have had Respondent’s Article III standing reviewed prior to the constitutional question of Eleventh Amendment immunity; which would have shown that this matter does not require determining the constitutional issue since Respondent lacks associational ADA standing as in *Olmstead*, 527 U.S. at 581, 602 & 607, and as in *McCullum*, 768 F.3d at 1145. Simply put, the district court and court of appeals lacked jurisdiction in this matter and should have therefore shown judicial restraint by noting the jurisdictional defect and dismissing the case. *Steele Co.*, 523 U.S. at 84.

II. Even Assuming that Respondent had Article III Standing, the Court of Appeals’ Decision on Eleventh Amendment Immunity Contravenes Its Own and this Honorable Court’s Precedent.

“The very object and purpose of the Eleventh Amendment was to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.” *Metcalf*, 506 U.S. at 146. Thus, “[t]he entitlement [conferred by the Eleventh Amendment] is an immunity from suit rather than a mere defense to liability; and ... it is effectively lost if a case is erroneously permitted to go to trial.” *Id.* at 144. It is well established that Eleventh Amendment immunity encompasses not only cases in which the State itself is named as a defendant, but also certain

actions against state agents and state instrumentalities. *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997).

In this matter, the court of appeals found that Petitioner does not act as an arm of the state when conducting child protective investigations pursuant to the Grant Agreement between HCSO and DCF. However, the Eleventh Circuit found that this case presents an *especially close call*. (App. A, pg. 21) (emphasis added) Petitioner was optimistic that the court of appeals would have followed its prior precedence in *Pellitteri v. Prine*, 776 F.3d 777 (11th Cir. 2015), wherein it granted Eleventh Amendment immunity to Georgia Sheriff Prine when hiring and firing deputies. In *Pellitteri*, the court of appeals acknowledged that it had incorrectly denied Sheriff Prine of the immunity in the previous case of *Keene v. Prine*, 477 Fed. Appx. 575 (11th Cir. 2012), when performing the same function and corrected itself upon further review.

To no avail, the court of appeals denied Petitioner Eleventh Amendment immunity when performing a state function on behalf of DCF and therefore the State of Florida. Petitioner submits that this being an *especially close call* (App. A, pg. 21) (emphasis added) to the court of appeals merits review by this Honorable Court so that Petitioner does not lose its rightful entitlement to Eleventh Amendment immunity, which will be effectively lost if Petitioner has to erroneously go to trial. *Metcalf*, 506 U.S. at 146.

The three cases cited to by the court of appeals in denying Petitioner its entitlement to Eleventh

Amendment immunity are markedly distinguishable from this matter. In *Hufford v. Rodgers*, 912 F.2d 1338 (11th Cir. 1990), the “function” at issue was a deputy seizing a child from his mother pursuant to an alleged court order which erroneously implied that the father had custody. In *Stanley v. Israel*, 843 F.3d 920 (11th Cir. 2016) the “function” at issue was a sheriff hiring and firing deputies when the sheriff was appointed by the county as the chief correctional officer. In *Abusaid v. Hillsborough County Bd. of County Com’rs*, 405 F.3d 1298 (11th Cir. 2005), the “function” at issue was the enforcement of a county ordinance.

In *Abusaid*, the court of appeals acknowledged their prior failure in *Hufford* to utilize the function-by-function test, as pointed out by this Honorable Court. *Id.* at 1304 (citing *Manders v. Lee*, 338 F.3d 1304, 1308-09 (11th Cir. 2003); *McMillian v. Monroe County, Ala.*, 520 U.S. 781, 785-86 (1997)). More importantly, the court of appeals noted that “[w]hen carrying out some of these enumerated functions, the sheriff may well be acting as an arm of the state. For example, in a case involving a claim arising out of the sheriff’s service of *state* process, *id.* §30.15(1)(a), or his implementation of an antidiscrimination policy, *id.* §30.15(3), a finding that the sheriff is entitled to the protection of the state’s Eleventh Amendment immunity *may be appropriate*. However, our focus is necessarily on the function in which the sheriff was engaged when Abusaid’s cause of action arose, not on the other functions he may carry out at other times.” *Id.* at 1310 (emphasis added).⁴

⁴ It is important to note that after the court of appeals’ ruling in *Abusaid*, Petitioner has abstained from raising Eleventh

The court of appeals further observed, as stated in *Manders*, “[t]he key question is not what arrest and force powers sheriffs have, but *for whom* sheriffs exercise that power.” *Id.* The “function” at issue in this matter is Petitioner conducting child protective investigations on behalf of DCF pursuant to a Grant Agreement. (App. A, pg. 21) As such, *for whom* this power is being exercised is the State of Florida in accordance with Florida Statute §39.3065.

The Florida Legislature has stated its intention to create a state child protection system “[t]o provide for the care, safety, and protection of children in an environment that fosters healthy social, emotional, intellectual, and physical development; to ensure secure and safe custody; to promote the health and well-being of all children under the state’s care; and to prevent the occurrence of child abuse, neglect and abandonment.” *See Florida Statute §39.001(1)(a).*

The Florida Legislature further stated its intention to prevent the abuse, abandonment, and neglect of children because “[t]he incidence of known child abuse, abandonment, and neglect has increased rapidly over the past 5 years. The impact that abuse, abandonment,

Amendment before the court of appeals since 2005. Petitioner was honoring the court of appeals’ ruling in *Abusaid* and did not want to waste the court of appeals’ time or resources. However, this matter presents a set of circumstances that warranted raising Eleventh Amendment immunity for the first time in almost a decade and a half. In this matter, Petitioner was engaging in solely state functions on behalf of DCF, mandated by state statutes, guided by state requirements and utilizing only state funds received by DCF.

or neglect has on the victimized child, siblings, family structure, and inevitably on all citizens of the state has caused the Legislature to determine that the prevention of child abuse, abandonment, and neglect shall be a priority of this state.” See *Florida Statute §39.001(8)*.

In reaction to the importance that the Florida Legislature has placed on the safety of all Floridian children, the Legislature created Florida Statute §39.3065 to provide the state-granted authority for sheriffs of select counties to provide the child protective investigation services on behalf of and in place of DCF. Consequently, in answering the key question posed by the court of appeals in *Abusaid*, 405 F.3d at 1310, Petitioner carries out this function for the State of Florida through the power granted by its Legislature.

A. First Factor.

The first *Manders* factor requires a determination of how state law defines the entity seeking Eleventh Amendment immunity. The court of appeals pointed to Fla. Const. Art. VIII, §1(d) which lists the sheriff, among others, as county officers elected by the electors of his or her respective county. Of note, this constitutional article was amended in 2018 after a statewide vote was held regarding Amendment 10. On November 6, 2018, the voters of Florida chose to pass Amendment 10 which changed Fla. Const. Art. VIII, §1(d) to now read that “a county charter *may not* abolish the office of the sheriff ... [or] transfer the duties of [the sheriff] to another officer or office” (emphasis added), thereby stripping Florida counties of considerable control over their respective sheriff.

In contrast to Fla. Const. Art. VIII, §1(d), the term “Sheriff” is labeled as a *constitutional officer* per Florida Statute §30.072(5). Additionally, Florida Statute §30.079 provides that “nor shall these provisions serve as a limitation on the sheriff’s authority as a *constitutional officer* to determine unilaterally the purpose of the office or department, to such standards of service to be offered to the public, and to exercise control and discretion over the organization and operations of the sheriff’s office or department.” (emphasis added)

Regardless, the key question is the function at issue and *for whom* Petitioner was acting at the time in question. *Abusaid*, 405 F.3d at 1310. Florida Statute §20.19 created DCF as a part of the state’s executive branch of government. In turn, Florida Statute §39.3065 provides the authority, procedures and funding requirements for DCF to transfer all responsibility to sheriff’s offices to conduct all child protective investigations in his or her respective county.

Nonetheless, the court of appeals seems to have based its determination as to the first *Manders* factor due to one instance in the Grant Agreement wherein Petitioner is labeled an “independent contractor” of DCF. (App. A, pp. 14-17) The court of appeals relied upon *Rosario v. American Corrective Counseling Services, Inc.*, 506 F.3d 1039, 1044-45 (11th Cir. 2007) for the proposition that the label of “independent contractor” is legally significant. Unfortunately, the court of appeals failed to explain how that for-profit corporation who received no funding from the state

treasury in *Rosario* is comparable to Petitioner under the circumstances in this matter. Alternatively, Petitioner is a governmental agency that has been placed under contract with DCF to perform solely state functions that are required and regulated by state statutes, while utilizing only state funds.

In finding that the first *Manders* factor weighs against arm-of-the-state status, the court of appeals also relied upon the Florida Supreme Court's finding in *Dorse v. Armstrong World Industries, Inc.*, 513 So.2d 1265 (Fla. 1987). The *Dorse* court found in pertinent part that "an independent contractor remains liable ... when injuries are caused by means the contractor himself freely chooses to employ or not to employ ... where the contract itself is silent on these issues" *Id.* at 1268. In stark contrast, the state and DCF maintained substantial control over Petitioner regarding the function at issue which makes *Dorse* inapplicable to this matter.

The court of appeals also relied upon the Florida Supreme Court's ruling in *Stoll v. Noel*, 694 So.2d 701 (Fla. 1997) wherein CMS physician consultants were provided sovereign immunity under Florida Statute §768.28 due to their agency relationship with DCF's predecessor, HRS. *Id.* at 703-04. The *Stoll* court relied upon the Restatement (Second) of Agency §14N (1957), which explains that the roles of agent and independent contractor are not mutually exclusive. Instead, one who contracts to act on behalf of another and subject to the other's control except with respect to his physical conduct is an agent and also an independent contractor. *Id.* at 703. When applying this definition of

agent and independent contractor to the circumstances in this matter, it becomes apparent that Petitioner was definitely an agent of DCF and therefore the state, as will be shown in more detail as to the second *Manders* factor.

In short, the court of appeals simply disregarded other language in the Grant Agreement acknowledging that Petitioner may “during the performance of this agreement, 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.” (App. A, pg. 16) One of those immunities available to DCF when performing the state function of child protective investigations as required by Florida Statutes Chapter 39 is Eleventh Amendment immunity. *Gamble v. Fla. Dep’t of Health & Rehab. Servs.*, 779 F.2d 1509 (11th Cir. 1986) (affirming the dismissal of a complaint against DCF’s predecessor, the Florida Department of Health and Rehabilitative Services, pursuant to Eleventh Amendment immunity).

As such, answering how state law defines Petitioner is a mixed bag, which requires closer appellate review by this Honorable Court. Petitioner is confident that if given the opportunity, it will show that this factor favors granting arm-of-the-state status and therefore Eleventh Amendment immunity in this matter.

B. Second Factor.

The second *Manders* factor requires a determination of the degree of control that the state exercises over Petitioner while conducting the child protective

investigations. The court of appeals found that this factor was neutral based on the autonomy that the Grant Agreement affords to Petitioner when balanced against the control that the state exerts through state-set standards and reporting requirements. (App. A, pp. 19-20) However, Petitioner submits that the court of appeals once again placed too much weight on the label of independent contractor.

The structural framework of Florida's child protective investigation system is similar to that of Florida's water management districts as discussed in *United States ex rel. Lesinski, v. S. Fla. Water Mgmt. Dist.*, 739 F.3d 598 (11th Cir. 2014). In *Lesinski*, the court of appeals found that the water management districts are creatures of statute created and defined in the Florida Water Resources Act to implement a "comprehensive statewide plan for the conservation, protection, management, and control of state waters." Furthermore, the court of appeals found that "[s]tructurally, the districts are designed to perform a state function - water management and protection - with regional flexibility and discretion." *Id.* at 602-03. In addition, the court of appeals found that "the District's power to manage South Florida's waters stems solely from, and is limited by, the State; the District is not autonomous, and no county, municipality, or other local government delegates to it any authority." *Id.* at 603. Finally, the court of appeals found that "the District maintaining some degree of autonomy over its day-to-day operations does not change the fact that the State of Florida ultimately retains near-total control over it." *Id.* at 604. As a result, the court of appeals found that the South

Florida Water Management District is an arm of the state entitled to Eleventh Amendment immunity. *Id.* at 605.

Petitioner believes that had the court of appeals adopted this line of reasoning and followed its own precedence in *Lesinski*, then this second *Manders* factor would have weighed in favor of granting arm-of-the-state status to Petitioner instead of declaring it a draw. Clearly the Florida Legislature intended on creating a uniform statewide child protection system. *See Florida Statute §39.001(1)(a), (3) & (8)*. In furtherance of keeping child protective investigations uniform throughout the state, the Florida Legislature granted the authority, policies, minimum requirements and funding to perform the investigations to sheriffs throughout the state. *See Florida Statute §39.3065*.

As to the minimum operating requirements, “[t]he sheriffs shall operate, at a minimum, in accordance with the performance standards and outcome measures established by the Legislature for protective investigations conducted by the Department of Children and Families. Each individual who provides these services must complete, at a minimum, the training provided to and required of protective investigators employed by the Department of Children and Families.” *See Florida Statute §39.3605(3)(b)*.

Likewise, “[p]rogram performance evaluation shall be based on criteria mutually agreed upon by the respective sheriffs and the Department of Children and Families. The program performance evaluation shall be conducted by a team of peer reviewers from the respective sheriffs’ offices that perform child protective

investigations and representatives from the department. The Department of Children and Families shall submit an annual report regarding quality performance, outcome-measure attainment, and cost efficiency to the President of the Senate, the Speaker of the House of Representatives, and to the Governor no later than January 31 of each year the sheriffs are receiving general appropriations to provide child protective investigations.” See *Florida Statute §39.3605(3)(d)*.

The court of appeals acknowledged its prior precedence that the state setting minimum standards is “strong indicia of state control.” *Stanley*, 843 F.3d at 928. However, the court of appeals ignored other prior precedence that “even if the State generally stays out of a sheriff’s day-to-day decisions ... the State still maintains a great deal of control.” *Pellitteri*, 776 F.3d at 782 (citing *Lesinski*, 739 F.3d at 604). In addition, the court of appeals also ignored its previous reliance on an important fact that Petitioner’s power to conduct child protective investigations comes solely from the Florida Legislature; not from any county, municipality or other local governmental entity. See *Lesinski*, 739 F.3d at 603.

As such, it seems as though the degree of state control requires closer appellate review by this Honorable Court due to the court of appeals ignoring its own prior precedence. Petitioner is confident that if given the opportunity, it will show that this factor favors granting arm-of-the-state status and therefore Eleventh Amendment immunity considering that the Grant Agreement contains various requirements and

instances of state authority over Petitioner on 23 different pages.

C. Third Factor.

Both the district court and the court of appeals conceded that this factor weighs in favor of arm-of-the-state status for Petitioner. It is important to note though that after consideration to the first of the three *Manders* factors, the court of appeals had a count of 1-1-1; the first factor against granting immunity, the second factor as a draw and the third factor in favor of granting immunity. As such, the fourth *Manders* factor which is typically the most important of all four factors, is especially important in this matter described as an *especially close call*.

D. Fourth Factor.

This Honorable Court has emphasized that the “impetus” for the Eleventh Amendment was the “prevention of federal-court judgments that must be paid out of a State’s treasury.” *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994). Accordingly, the court of appeals has previously stated that “the presence of a state treasury drain alone may trigger Eleventh Amendment immunity and make consideration of the other factors unnecessary.” *Manders*, 338 F.3d at 1328 n. 51.

In this matter, the court of appeals found that this fourth *Manders* factor weighs against arm-of-the-state status by relying on its repeated precedence that “no provision of Florida law provides state funds to a Florida sheriff to satisfy a judgment against the sheriff. (App. A, pg. 21) This repeated precedence comes from

Stanley and *Abusaid*, both of which involved engaging in mixed county and state functions, while utilizing only county funds - unlike this matter.

Additionally, the court of appeals also cited to two Florida Statutes in reaching this determination. First, the court of appeals pointed to the fact that Petitioner is self-insured under Florida Statute §768.28(16). However, this status of being self-insured with the county funds utilized for all functions, except for child protective investigations, is being taken out of context. Being self-insured with regard to county funds has no bearing on the state funds received from DCF, which statutorily must be kept separate from the county funds. *See Florida Statute §39.3065(3)(c)*. The court of appeals further cited to Florida Statute §324.171, which mandates that persons in the State of Florida can qualify and become self-insured for the motor vehicles that they own instead of having to carry automobile insurance. Clearly, this statute has absolutely no bearing on the issues presented in this matter.

Unfortunately, the court of appeals completely ignored the uncontested testimony of Major Robert Bullara, the CPID commander for Petitioner, on this very issue. Major Bullara set forth that “[i]f there were to be a judgment in this matter, it would be paid strictly out of the DCF grant money provided this fiscal year.” (App. A, pg. 20) For some reason, the court of appeals failed to include the remainder of that paragraph in its opinion which read, “[h]owever, if the DCF grant money already received for the current fiscal year was not enough to cover the judgment, then

[HCSO] would have to request additional funds from DCF to cover the excess amounts as the office's county money is not allowed to be utilized in such a circumstance. Therefore, all funds used to satisfy a judgment in this matter would come solely from state money received from DCF." In addition, the court of appeals also curiously refrained from including in its opinion the portion of the Grant Agreement (attached to Major Bullara's affidavit) which includes language to support his uncontested testimony that "[i]f the Grantee requires an additional amount of funding due to an *unforeseen adverse incident* or emergency circumstance, the Grantee will submit a written request to the Grantor stating the amount and purpose of the request." (emphasis added)

In failing to acknowledge the uncontested testimony from Major Bullara and the supporting language in the attached Grant Agreement, the court of appeals violated its own rule that it cannot ignore uncontradicted evidence because it is unfavorable to Respondent. *Fennel v. Gilstrap*, 559 F.3d 1212, 1216 n.3 (11th Cir. 2009). Clearly, the uncontroverted testimony and evidence in this matter shows that a judgment against Petitioner would be paid solely from the DCF funds already received or would have to be requested in the event of an *unforeseen adverse incident* such as an onerous judgment. As such, an adverse judgment in any amount would absolutely constitute a drain on the state's treasury.

As such, this fourth and most important *Manders* factor of whether the state treasury would be burdened by a judgment against Petitioner requires

closer appellate review by this Honorable Court due to the court of appeals ignoring both its own prior precedence and the undisputed record evidence in this matter. Petitioner is confident that if given the opportunity, it will show that this factor favors granting arm-of-the-state status and therefore Eleventh Amendment immunity.

E. Weighing the Factors.

When weighing all four *Manders* factors, Petitioner believes that the court of appeals would have granted Eleventh Amendment immunity had it followed the its own precedence as well as that of this Honorable Court. Petitioner was clearly performing a state function, on behalf of the state, under state-mandated minimum requirements, subject to state-mandated performance standards and outcome measures established by the Florida Legislature, utilizing investigators that were required to meet the minimum training requirements mandated by DCF, and utilizing only state money received solely from DCF. If DCF is entitled to Eleventh Amendment immunity, then so should Petitioner when acting on their behalf while conducting child protective investigations. *See Gamble*, 779 F.2d at 1513 & 1520; *Horn v. Fla. DCF*, 2005 WL 1618218, *1 (M.D. Fla. 20005); and *Mayo v. Reiger*, 2005 WL 2088580, *3 (M.D. Fla. 2005). Any ruling to the contrary is implausible.

Additionally, even if Petitioner is generally seen as a county office in the abstract, then Eleventh Amendment immunity should have still been granted to a county office when engaging in child protective investigations as provided by other courts. *See Powell*

v. Dept. of Human Resources of Ga., 918 F. Supp. 1575, 1578-79 (S.D. Ga. 1996); *McCall v. Dept. of Human Resources*, 176 F.2d 1355, 1362 (M.D. Ga. 2001); *Stem v. Ahearn*, 908 F.2d 1, 4-5 (5th Cir. 1990); and *Brent v. Wayne Co. Dept. Of Human Services*, 901 F.3d 656, 683 (6th Cir. 2018) These rulings have been a product of this Honorable Court's precedence that the question is not whether the officer acts for the state or the county "in some categorical, 'all or nothing' manner." *McMillian*, 520 U.S. at 785.

Of the 67 counties in the State of Florida, DCF conducts the child protective investigations in 61 of them. The only 6 counties in the State of Florida where the child protective investigations are conducted by a Sheriff's Office are Broward, Hillsborough, Manatee, Pasco, Pinellas and Seminole. These 6 counties conduct 24.60% of the total number of child protective investigations statewide.⁵ It seems unjust to allow the 61 counties covered by DCF to receive Eleventh Amendment immunity while denying the other 6 counties covered by the sheriffs offices. This disparity should not exist simply due to the agency's name stitched on the front of the investigator's shirt. As a result, reaching a resolution to this disparity is of grave importance to not only Petitioner, but also to the other five sheriff's offices who are also effected.

⁵ See page 3 of the Florida Department of Children and Families Annual Program Performance Evaluation Report for Florida Sheriffs Performing Child Protective Investigations at: http://centerforchildwelfare.fmhi.usf.edu/kb/LegislativeMandatedRpts/SO%20Annual%20Peer%20Review%20DCF%20Report%202017_2018.pdf.

CONCLUSION

For all of the foregoing reasons contained herein,
this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Jason G. Gordillo

Counsel of Record

Hillsborough County Sheriff's Office

2008 East 8th Avenue

Post Office Box 3371

Tampa, Florida 33601

813.247.8102

jgordill@hcsso.tampa.fl.us

Counsel for Petitioner