Georgia State University Law Review

Volume 38
Issue 2 *Winter 2022*

Article 12

4-1-2022

The Eleventh Circuit's Misguided "Arm-of-the-State" Analysis in Pellitteri v. Prine

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THE ELEVENTH CIRCUIT'S MISGUIDED "ARM-OF-THE-STATE" ANALYSIS IN *PELLITTERI V. PRINE*

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"When courts are open and when they are shut . . . concerns all citizens, not just the legal community."
-John V. Orth

ABSTRACT

The Supreme Court has determined that the Eleventh Amendment to the United States Constitution exemplifies a greater principle of state sovereign immunity that extends beyond the plain text of the Amendment. When agents and instrumentalities of a state are sued and claim sovereign immunity, courts examine whether these "arms of the state" exercise state power to such an extent that they are entitled to Eleventh Amendment immunity. Because the Supreme Court has failed to articulate a clear test for determining whether an entity acts as an arm of the state, the Circuit Courts of Appeal have fashioned their own tests coalesced around several factors.

The Eleventh Circuit first spelled out its arm-of-the-state test in the 2003 case of Manders v. Lee. *The Eleventh Circuit examines whether an entity acts as an arm of the state in the specific function at issue in each case. In 2012, the Eleventh Circuit, using its* Manders *test, held that a Georgia sheriff did not act as an arm of the state when terminating employees. Curiously, in the 2015 case* Pellitteri v. Prine,

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the Eleventh Circuit changed its mind—it held that the same Georgia sheriff's office with the same sheriff acted as an arm of the state when exercising the same power to hire and fire employees.

This Comment examines the evolution of sovereign immunity doctrine in the United States and discusses the Eleventh Circuit's arm-of-the-state analysis in Manders *and* Pellitteri. *This Comment then argues that the Eleventh Circuit's decision in* Pellitteri *was wrong and proposes alternatives for how the court could arrive at its original, correct decision—a Georgia sheriff does not act as an arm of the state when making day-to-day employment decisions.*

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INTRODUCTION

Upon ratifying the United States Constitution in 1788, the Framers "split the atom of sovereignty" to create a novel system of governance called federalism, in which the state and national political spheres would be "each protected from incursion by the other."[1] More than two hundred years later, the American legal system continues to grapple with the fallout from that political fission reaction; courts must determine if they can entertain claims brought against either the federal "sovereign" or the state "sovereign" because sovereign immunity is accorded to both players in the federal system.[2] Historians, legal scholars, and jurists have produced an immense amount of commentary on sovereign immunity in the United States since the founding of the country, and this Comment will focus on one narrow

1. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring); *see also* Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) ("Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."); THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961) ("In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.").

2. ERWIN CHEMERINSKY, CLOSING THE COURTHOUSE DOOR: HOW YOUR CONSTITUTIONAL RIGHTS BECAME UNENFORCEABLE 22 (2017) ("[B]oth the federal and state governments . . . are deemed to have sovereign immunity and cannot be sued in any court without their consent."). Courts may never be able to divine the true nature of sovereign immunity:

> The search for the original understanding on state sovereign immunity bears this much resemblance to the quest for the Holy Grail: there is enough to be found so that the faithful of whatever persuasion can find their heart's desire. And, of course, the object of the search may prove equally illusory.

JOHN V. ORTH, THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY 28 (1987). While courts contend with the intricacies of sovereign immunity in a juridical context, the disciplines of history and political science also struggle to make sense of federalism more broadly. *See* ROBERT W. HOFFERT, A POLITICS OF TENSIONS: THE ARTICLES OF CONFEDERATION AND AMERICAN POLITICAL IDEAS xi–xii (1992) (explaining that academic fields studying federalism have not yet come to a uniform understanding of the meaning of federalism).

facet of sovereign immunity—Eleventh Amendment immunity as it applies to an "arm of the state."[3]

An arm of the state can be characterized as any agent or instrumentality of a state that operates as a *de facto* alter ego and is thus accorded the state's Eleventh Amendment immunity.[4] Because states (and their arms by extension) are able to employ Eleventh Amendment immunity as an absolute jurisdictional bar to suit, defendants make frequent use of the immunity defense to avoid litigating the actual merits of the case.[5] All manner of state agencies and instrumentalities in every circuit have attempted to bring an Eleventh Amendment immunity defense.[6]

Despite the power and popularity of such a defense, the Supreme Court has provided only general guidance as to how a lower court might investigate a defendant's claim that the party is essentially the state even though the state is not mentioned by name in the suit.[7] The

3. The Eleventh Amendment states: "The 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.

4. Regents of the Univ. of Cal. v. Doe, 519 U.S. 425, 429 (1997); Watson v. Univ. of Utah Med. Ctr., 75 F.3d 569, 574 (10th Cir. 1996); Manders v. Lee, 338 F.3d 1304, 1308 (11th Cir. 2003) (en banc); *see also* Kelsey Joyce Dayton, *Tangled Arms: Modernizing and Unifying the Arm-of-the-State Doctrine*, 86 U. CHI. L. REV. 1603, 1605 (2019) (defining an "arm of the state" as "an entity so closely bound up with the state that it accesses the state's sovereign immunity under the Eleventh Amendment").

5. *See* 13 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3524.1 (3d ed. 2021) [hereinafter FEDERAL PRACTICE AND PROCEDURE] ("Under the Eleventh Amendment and more general notions of sovereign immunity, states usually are immune from private suits without their consent."). There are generally three narrow exceptions to Eleventh Amendment immunity: (1) A person can sue a state actor in federal court for prospective injunctive relief under the legal doctrine created by *Ex parte* Young, 209 U.S. 123 (1908); (2) A state may waive its immunity or "otherwise consent to suit;" and (3) Congress can abrogate Eleventh Amendment immunity. *Id.* § 3524.

6. *E.g.*, Royal Caribbean Corp. v. P.R. Ports Auth., 973 F.2d 8, 9 (1st Cir. 1992) (Puerto Rico Ports Authority); Allen v. Cuomo, 100 F.3d 253, 260 (2d Cir. 1996) (state department of corrections); Christy v. Pa. Tpk. Comm'n, 54 F.3d 1140, 1143 (3d Cir. 1995) (turnpike commission); Gray v. Laws, 51 F.3d 426, 430 (4th Cir. 1995) (county health department); Duncan v. Univ. of Tex. Health Sci. Ctr., 469 F. App'x 364, 366 (5th Cir. 2012) (public university); Dubuc v. Mich. Bd. of L. Exam'rs, 342 F.3d 610, 614 (6th Cir. 2003) (board of law examiners and state bar); Landers Seed Co. v. Champaign Nat. Bank, 15 F.3d 729, 730 (7th Cir. 1994) (state supreme court); Pub. Sch. Ret. Sys. v. State St. Bank & Tr. Co., 640 F.3d 821, 823 (8th Cir. 2011) (public education employee retirement system); Durning v. Citibank, N.A., 950 F.2d 1419, 1421 (9th Cir. 1991) (community development authority); Haldeman v. Wyo. Farm Loan Bd., 32 F.3d 469, 469 (10th Cir. 1994) (farm loan board); Carr v. City of Florence, 916 F.2d 1521, 1523 (11th Cir. 1990) (sheriff's office).

7. *See* Alex E. Rogers, *Clothing State Governmental Entities with Sovereign Immunity: Disarray in the Eleventh Amendment Arm-Of-The-State Doctrine*, 92 COLUM. L. REV. 1243, 1269 (1992) ("The

Court can examine "the essential nature and effect of the proceeding," the "nature of the entity created by state law," and if "the action is in essence one for the recovery of money from the state" to make the arm-of-the-state determination.[8] Following these guidelines, federal circuit courts generally make use of the following factors to conduct their analyses: state-law definitions of the entity, entity autonomy, entity powers, and entity funding.[9] In *Manders v. Lee*, the Eleventh Circuit first clearly delineated its unique version of the circuit courts' general factors used to make an arm-of-the-state determination: (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.[10]

In 2015, the Eleventh Circuit decided *Pellitteri v. Prine*, holding that a county sheriff in the State of Georgia "acts as an 'arm of the State' when exercising his power to hire and fire the deputies that enforce the laws of Georgia on his behalf," and is thus accorded Eleventh Amendment immunity against the plaintiff's claims brought under 42 U.S.C. § 1983 and the Americans with Disabilities Act (ADA).[11] This was certainly a puzzling judicial reversal—just three years earlier, in

Supreme Court's multifactored balancing approach to arm-of-the-state questions—devoid of guidance with respect to the relative weight or importance of each criterion—has afforded lower courts excessive discretion in fashioning their own formulae.").

8. *Regents of the Univ. of Cal.*, 519 U.S. at 429–30 (first quoting Ford Motor Co. v. Dep't of Treasury of Ind., 323 U.S. 459, 464 (1945); and then quoting Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977)).

9. *See* FEDERAL PRACTICE AND PROCEDURE, *supra* note 5, § 3524.2; *see also* Rogers, *supra* note 7 ("The myriad factors employed by the lower courts fall into five broad categories: (1) whether the entity performs governmental or proprietary functions and, alternatively, whether it performs state or local functions; (2) the degree of state political and administrative control and influence over the entity; (3) the nature of the powers that the entity enjoys, especially the extent of its fiscal autonomy from the state; (4) the state-law definition of the entity, including state courts' characterization of the entity; and (5) whether the state treasury would be used to satisfy a judgment against the entity.").

10. Manders v. Lee, 338 F.3d 1304, 1309 (11th Cir. 2003) (en banc) ("In Eleventh Amendment cases, this Court uses four factors to determine whether an entity is an 'arm of the State' in carrying out a particular function: (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."). In cases at both the district court and circuit court levels since the *Manders* decision, courts in the Eleventh Circuit ubiquitously refer to these four factors as "*Manders* factors." *E.g.*, Freyre v. Chronister, 910 F.3d 1371, 1380–81 (11th Cir. 2018); Miller v. Advantage Behav. Health Sys., 677 F. App'x 556, 559, 560 (11th Cir. 2017); McRae v. Telfair Cnty., No. CV 318-077, 2020 WL 5608637, at *5 (S.D. Ga. Sept. 18, 2020).

11. Pellitteri v. Prine, 776 F.3d 777, 779 (11th Cir. 2015).

the unpublished decision of *Keene v. Prine*, the *same* court held that the *same* Georgia sheriff's office (with the *same* sheriff) did not act as an arm of the state when exercising the *same* power to hire and fire deputies.[12] *Pellitteri* thus explicitly overruled *Keene*, and the court explained in its second opinion that it made sure it got the arm-of-the-state determination correct on the second attempt.[13]

This Comment seeks to illustrate how the court's decision in *Pellitteri* was incorrect, setting a dangerous precedent for plaintiffs who bring similar civil rights and employment discrimination claims against purported arms of the state. Part I reviews the history of sovereign immunity in the United States and Eleventh Amendment jurisprudence since the amendment's 1795 ratification.[14] Part II discusses the arm-of-the-state doctrine and examines the *Pellitteri* decision in the context of the Eleventh Circuit's *Manders* factors.[15] Part III argues that the court erred in its arm-of-the-state analysis in *Pellitteri* and provides alternative frameworks that the court could use to correct itself once again.[16]

I. BACKGROUND

To understand the current reasons for and effects of arm-of-the-state analyses, it is important to trace the origin and development of sovereign immunity doctrine in the United States since the Founding.

A. Sovereign Immunity at the Founding

Justice Oliver Wendell Holmes Jr. once reasoned that "[a] sovereign is exempt from suit, not because of any formal conception or obsolete

12. Keene v. Prine, 477 F. App'x 575, 576–77 (11th Cir. 2012) (per curiam).

13. *Pellitteri*, 776 F.3d at 779, 781. The text of the *Pellitteri* opinion itself serves as evidence that the court took great pains to distance itself from its earlier decision in *Keene v. Prine*. *See, e.g.*, *id.* at 779 ("The District Court denied Sheriff Prine's motion to dismiss, relying on this Court's unpublished opinion in *Keene* . . . ."); *id.* at 781 ("Admittedly, we stated in *Keene* that . . . ."); *id*. ("Upon further review, however, we believe that this conclusion in *Keene* was mistaken on two fronts."); *id.* ("Second, our conclusion in *Keene* was also flawed because . . . .").

14. *See* discussion *infra* Part I.

15. *See* discussion *infra* Part II.

16. *See* discussion *infra* Part III.

theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."[17] Prior to the Revolutionary War, the King of England served as the sovereign that made the law in the American Colonies, and the Founders necessarily responded to a long line of English common law that declared the sovereign (the King) as the ultimate rulemaking authority who, legally speaking, could do no wrong.[18]

When the colonies revolted and gained independence from a unitary sovereign, the Framers took to the task of establishing a new national government (after the Articles of Confederation failed spectacularly).[19] The Framers debated the nature and scope of the new founding document known as the Constitution.[20] Of particular note was Article III, which established the judicial branch of the federal government.[21] Despite the apparent holdover of English common-law

17. Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907).

18. *See* 1 WILLIAM C. SPRAGUE, BLACKSTONE'S COMMENTARIES, ABRIDGED 49 (9th ed. 1915) ("And, first, the law ascribes to the king the attribute of *sovereignty* or pre-eminence. Hence it is, that no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him."); Alden v. Maine, 527 U.S. 706, 715 (1999) ("When the Constitution was ratified, it was well established in English law that the Crown could not be sued without consent in its own courts."); *see also* SPRAGUE, *supra*, at 51 ("The king, moreover, is not only incapable of *doing* wrong, but even *thinking* wrong; he can never mean to do an improper thing; in him is no folly or weakness."). *But see* Seminole Tribe v. Florida, 517 U.S. 44, 105 (1996) (Souter, J., dissenting) ("[T]here was no consensus on the issue [of whether states would retain their sovereign immunity at the time of ratification] . . . . There was, on the contrary, a clear disagreement, which was left to fester during the ratification period, to be resolved only thereafter." (citations omitted)); *id.* at 137 ("While the States had limited their reception of English common law to principles appropriate to American conditions, the 1787 draft Constitution contained no provision for adopting the common law at all . . . in sharp contrast to the state constitutions . . . virtually all of which contained explicit provisions dealing with common-law reception."); Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 1–2 (1963) (describing the "doctrine and practice" of various common law exceptions that allowed parties to seek legal remedies against the Crown "at the time the Constitution was drafted"). For example, the signers of the Declaration of Independence certainly did not agree with the King's actions and had formally petitioned for redress. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States."); *id.* at para. 3 ("In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury.").

19. *See* Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 HARV. L. REV. 1817, 1853–62 (2010) (describing the ratification debates among the Federalist and Antifederalist factions of the Founders).

20. *Id.* at 1862 ("Once Antifederalists agreed that the Articles of Confederation were flawed beyond repair, they began to scrutinize the new plan.").

21. *Id.*; U.S. CONST. art. III.

sovereign immunity in the new country, Article III, Section Two extends the judicial power "to Controversies . . . between a State and Citizens of another State" and "between a State . . . and foreign . . . Citizens."[22] A plain reading of Article III thus suggests that federal courts (at the time of the Founding, the Supreme Court only) surely had original jurisdiction over suits between a state and out-of-state citizens. Yet some ratification debates at the time centered around the prospective overreach of the clause and its incompatibility with state sovereign immunity.[23]

The Antifederalists cried foul that such suits would subject states to the litigious whims of the people so that the Constitution would compel states to appear in court just like common criminals. Meanwhile, the Federalists sought to assuage these fears and asserted that the new federal government would not force states' compliance.[24] Given the

22. U.S. CONST. art. III, § 2.

23. *See* William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1045–54 (1983) (describing the Federalist and Antifederalist debates over the "state-citizen diversity clause" of Article III, Section Two).

24. Speaking to the Virginia Convention, Antifederalist George Mason made his opinion of Article III, Section Two clear: "Is this State to be brought to the bar of justice like a delinquent individual?—Is the sovereignty of the State to be arraigned like a culprit, or private offender?—Will the States undergo this mortification? I think this power perfectly unnecessary." George Mason, Address to The Virginia Convention (June 19, 1788), *reprinted in* 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1406 (John P. Kaminski et al. eds., 1993). In one of a series of Antifederalist essays written by an unknown Antifederalist under a pen name, "Brutus," voiced similar concerns:

> But, I conceive the clause which extends the power of the judicial to controversies arising between a state and citizens of another state, improper in itself, and will, in its exercise, prove most pernicious and destructive. It is improper, because it subjects a state to answer in a court of law, to the suit of an individual. This is humiliating and degrading to a government, and, what I believe, the supreme authority of no state ever submitted to.

Brutus, Letter XIII, N.Y.J., Feb. 21, 1788, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 428, 429 (Herbert J. Storing ed., 1981). Alexander Hamilton responded in Federalist No. 81:

> It has been suggested that an assignment of the public securities of one State to the citizens of another would enable them to prosecute that State in the federal courts for the amount of those securities; a suggestion which the following considerations prove to be without foundation. It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States and the danger intimated must be merely ideal.

THE FEDERALIST NO. 81, at 487–88 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

common understanding of legal terminology at the time, it appears that the Federalists had the winning argument.[25] Despite the pronounced Antifederalist concern, the term "sovereign immunity" does not appear anywhere in the Constitution.[26]

B. Chisholm v. Georgia

If there was any residual doubt as to the status of state sovereign immunity after ratification, the Supreme Court's decision in *Chisholm v. Georgia*, the Court's "first important case," brought the debate front and center in the national conversation.[27] Alexander Chisholm, a South Carolina citizen and executor of a South Carolinian's estate, brought an action in assumpsit against the State of Georgia to recover unpaid Revolutionary War debt.[28] Arguing for Chisholm, Edmund Randolph (who was then-Attorney General of the United States) made the case that the Supreme Court had jurisdiction over the suit because of the plain language of the citizen-state diversity clause of Article III, Section Two.[29] The State of Georgia did not enter an appearance, citing sovereign immunity.[30]

The Justices delivered their opinions in *seriatim* form on February 18, 1793.[31] Justices Jay, Blair, Wilson, and Cushing relied on the plain

25. Caleb Nelson has argued that the terms "case" and "controversy" meant something very different for the Founding Fathers. *See* Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1565 (2002) ("Although Article III of the Constitution extends the federal government's judicial power to various 'Cases' and 'Controversies,' many members of the Founding generation thought that a 'Case' or 'Controversy' did not exist unless both sides either voluntarily appeared or could be haled before the court. Traditionally, courts could not command unconsenting states to appear at the behest of an individual. For many members of the Founding generation, Article III did nothing to change this system: if a state did not consent to suit, there would be no 'Case' or 'Controversy' over which the federal government could exercise judicial power.").

26. Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1205 (2001) ("The text of the Constitution is silent about sovereign immunity. Not one clause of the first seven articles even remotely hints at the idea of governmental immunity from suits."); *see also* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 454 (1793) (opinion of Wilson, J.) ("To the Constitution of the United States the term SOVEREIGN, is totally unknown.").

27. *See generally Chisholm*, 2 U.S. (2 Dall.) 419; ORTH, *supra* note 2, at 12.

28. ORTH, *supra* note 2, at 12.

29. *Id.* at 13.

30. *Id.*; Clark, *supra* note 19, at 1878 ("The Georgia House of Representatives passed a resolution on December 14, 1792, denying that Article III of the Constitution gave the Supreme Court jurisdiction to hear the case, and declaring that Georgia would regard any judgment as unconstitutional.").

31. ORTH, *supra* note 2, at 12–13.

language of Article III, Section Two to find that Chisholm could certainly bring his suit against the State of Georgia.[32] Chief Justice Jay found the constitutional clause to be "express, positive, [and] free from ambiguity" and that federal jurisdiction over controversies between citizens and states was supported not only by the express language of the Constitution but also by its "spirit."[33] Chief Justice Jay reasoned that it "would contradict and do violence to the great and leading principles of a free and equal national government" if states could avoid suits due to some implication of sovereign immunity.[34] Justice Wilson opined that the concept of state sovereignty was totally foreign to the Constitution, that the free men of the United States were citizens and not royal subjects, and that the citizens surrendered their sovereignty to the nation, not the individual states.[35]

Only Justice Iredell disagreed with the other Justices.[36] Relying on English common law, Iredell maintained that plaintiffs could not bring actions in assumpsit against states much like how English subjects could not bring actions in assumpsit against the Crown without royal consent.[37] Justice Iredell reasoned that the states' collective surrender of powers was limited to those clearly "delegated" to the Union and

32. Clark, *supra* note 19, at 1879 (describing *Chisholm* as the Court's "first major textualist decision"); *see also* Hans v. Louisiana, 134 U.S. 1, 12 (1890) (discussing that the majority in *Chisholm* was "swayed by a close observance of the letter of the constitution, without regard to former experience and usage . . . see[ing] in this language a power to enable the individual citizens of one state . . . to sue another state of the Union in the federal courts").

33. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 476–77 (opinion of Jay, C.J.).

34. *Id.* at 477.

35. *Id.* at 456–57 (opinion of Wilson, J.) ("In one sense, the term sovereign has for its correlative, subject, [i]n this sense, the term can receive no application; for it has no object in the Constitution of the United States. Under that Constitution there are citizens, but no subjects . . . .As a Judge of this Court, I know, and can decide upon the knowledge, that the citizens of Georgia, when they acted upon the large scale of the Union, as a part of the 'People of the United States,' did not surrender the Supreme or Sovereign Power to that State; but, as to the purposes of the Union, retained it to themselves. As to the purposes of the Union, therefore, Georgia is NOT a sovereign State.").

36. *See id.* at 429–50 (opinion of Iredell, J.). Justice Iredell's opinion is best characterized as a "dissent" in modern terminology because the court issued *seriatim* opinions prior to John Marshall's chief justiceship in 1801.

37. *Id.* at 445 ("Thus, it appears, that in England even in case of a private debt contracted by the King, in his own person, there is no remedy but by petition, which must receive his express sanction, otherwise there can be no proceeding upon it.").

that their common-law sovereign immunity remained reserved to them.[38]

If there was any disagreement as to the role sovereign immunity played in limiting federal jurisdiction over the several states that constituted the new republic, the Supreme Court quickly dispatched that notion—the people of the whole United States, and not the constituent states, were the true sovereigns.[39]

C. The Eleventh Amendment and Ensuing Jurisprudence

Unsurprisingly, states were displeased with the result of *Chisholm v. Georgia*, and the decision "created . . . a shock of surprise throughout the country."[40] Several states had taken on a great deal of debt to finance the Revolutionary War, and the Court had opened the courthouse doors to creditors seeking to make good on states' unpaid war debts.[41] Less than one month after the Court's decision, Congress proposed the Eleventh Amendment, and it received the requisite number of ratification votes by February 7, 1795.[42] The Eleventh Amendment reads: "The 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

38. *Id.* at 435 ("No other part of the common law of England, it appears to me, can have any reference to this subject, but that part of it which prescribes remedies against the crown. Every State in the Union in every instance where its sovereignty has not been delegated to the United States, I consider to be as completely sovereign, as the United States are in respect to the powers surrendered . . . .[T]he United States have no claim to any authority but such as the States have surrendered to them: [o]f course the part not surrendered must remain as it did before.").

39. *Chisholm*, 2 U.S. (2 Dall.) at 471 (opinion of Jay, C.J.) ("[A]t the Revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country . . . .").

40. Hans v. Louisiana, 134 U.S. 1, 11 (1890).

41. Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342, 1361 (1989) ("By opening the doors of the federal courts to foreign citizens' suits against states, *Chisholm* . . . threatened the states with huge liabilities . . . ."); *see also* Cohens v. Virginia, 19 U.S. 264, 406 (1821) ("[A]t the adoption of the constitution, all the States were greatly indebted; and the apprehension that these debts might be prosecuted in the federal Courts, formed a very serious objection to that instrument."). The United States' debt ballooned to approximately $450 million by the end of the Revolutionary War. Janet A. Riesman, *Money, Credit, and Federalist Political Economy*, *in* BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 128, 130 (Richard Beeman et al. eds., 1987).

42. ORTH, *supra* note 2, at 20.

State, or by Citizens or Subjects of any Foreign State," and it expressly overrules the Court's decision in *Chisholm*.[43]

The text of the Eleventh Amendment is clear—federal courts cannot exercise jurisdiction over suits "commenced or prosecuted against one of the United States *by Citizens of another State*."[44] Nevertheless, by virtue of the Supreme Court's decision in *Hans v. Louisiana* roughly a century after its decision in *Chisholm*, the Court held that the Eleventh Amendment also barred suits against states brought by *their own citizens*.[45] The Court reasoned that it would be "almost an absurdity on its face" to construe the Eleventh Amendment to bar suits by citizens of other states but not suits by states' own citizens.[46] Echoing Justice Iredell's original dissenting argument in *Chisholm*, the Court found that states had not surrendered their common-law sovereign immunity at the Founding.[47]

Hans is still good law, and the decision kicked off the Court's continued expansive reading of the Eleventh Amendment beyond its plain language to reflect a larger doctrinal principle of sacrosanct sovereign immunity.[48] In more modern times, the Supreme Court,

43. U.S. CONST. amend. XI; Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378, 382 (1798) ("[T]he [Eleventh] amendment being constitutionally adopted, there could not be exercised any jurisdiction, in any case, past or future, in which a state was sued by the citizens of another state, or by citizens, or subjects, of any foreign state.").

44. U.S. CONST. amend. XI (emphasis added).

45. *Hans*, 134 U.S. at 15.

46. *Id.*

47. *Id.* at 16 ("The suability of a state, without its consent, was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted. It was fully shown by an exhaustive examination of the old law by Mr. Justice IREDELL in his opinion in Chisholm v. Georgia; and it has been conceded in every case since . . . ."); *Accord* Alden v. Maine, 527 U.S. 706, 721 (1999) ("[D]espite the opinion of Justice Iredell, the majority failed to address either the practice or the understanding that prevailed in the States at the time the Constitution was adopted."); Seminole Tribe v. Florida, 517 U.S. 44, 84 (1996) (Stevens, J., dissenting) ("[T]he Court in *Hans* relied expressly on the reasoning of Justice Iredell's dissent in *Chisholm*, which, of course, was premised on the view that the doctrine of state sovereign immunity was a common-law rule that Congress had directed federal courts to respect . . . .").

48. *See* Rogers, *supra* note 7, at 1253 ("States are shielded from the consequences of their illegal conduct not merely in diversity suits, but in federal question actions brought by their own citizens, in claims by foreign sovereigns, and sovereign Native American tribes, and in admiralty suits. Although these rules do not find support in the language of the Eleventh Amendment, the Court interprets the Amendment as embodying the doctrine of state sovereign immunity rather than as providing jurisdictional bar to a narrow category of suits against the states."); *see also* Hess v. Port Auth. Trans-Hudson Corp.,

under Chief Justice Rehnquist, "dramatically expand[ed]" the scope of the Eleventh Amendment.[49] In *Seminole Tribe of Florida v. Florida*, the Court held that Congress could only abrogate state sovereign immunity by using its powers under Section Five of the Fourteenth Amendment.[50] In *Alden v. Maine*, the Court held that sovereign immunity prohibited states from being sued under federal law for private damages in their own state courts, absent state consent.[51] This modern jurisprudence reflects the Rehnquist majority's view that "sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself."[52] The current doctrine of sovereign immunity thus reflects two "dual goals": (1) it protects the state's treasury from a financial drain and (2) it protects the more abstract "dignity" of the state from being subjected to suit by

513 U.S. 30, 53 (1994) (Stevens, J., concurring) ("The [Supreme] Court's decisions have given us 'two Eleventh Amendments,' one narrow and textual and the other—not truly a constitutional doctrine at all—based on prudential considerations of comity and federalism.").

49. Chemerinsky, *supra* note 26, at 1202. This broad "immunity" view of the Eleventh Amendment can be contrasted with a narrower "diversity" view. *See* William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261, 1264 (1989) ("Briefly stated, the diversity explanation is that the Eleventh Amendment was designed to overrule *Chisholm* by eliminating the state-citizen diversity jurisdiction from Article III. In more complicated but more precise terms, the amendment required that the state-citizen diversity clause be construed to authorize jurisdiction only when the state was a plaintiff; when the state was a defendant, the clause was not to be construed to authorize jurisdiction . . . . So understood, the Eleventh Amendment was not intended to eliminate or restrict other heads of jurisdiction. If jurisdiction existed over a suit against a state under the admiralty jurisdiction or the federal question jurisdiction before passage of the amendment, such jurisdiction continued to exist after its passage.").

50. *Seminole Tribe*, 517 U.S. at 47. In a different context, the Supreme Court has since determined that states waived their sovereign immunity regarding in rem bankruptcy jurisdiction by ratifying the Bankruptcy Clause contained within Article I, Section Eight of the Constitution. *See generally* Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356 (2006).

51. *Alden*, 527 U.S. at 728; *see also* Chemerinsky, *supra* note 26, at 1203.

52. *Alden*, 527 U.S. at 728; Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 753 (2002) (quoting *Alden*, 527 U.S. at 723) ("Instead of explicitly memorializing the full breadth of the sovereign immunity retained by the States when the Constitution was ratified, Congress chose in the text of the Eleventh Amendment only to 'address the specific provisions of the Constitution that had raised concerns during the ratification debates and formed the basis of the *Chisholm* decision.' As a result, the Eleventh Amendment does not define the scope of the States' sovereign immunity; it is but one particular exemplification of that immunity."); *see also* Clark, *supra* note 19, at 1826 ("The immunity theory—the Supreme Court's dominant approach since 1890—regards the text of the Eleventh Amendment as underinclusive, and therefore recognizes more state sovereign immunity than the text provides.").

private individuals.[53] It is within this broad sovereign immunity milieu that the arm-of-the-state analysis finds itself today.[54]

II. ANALYSIS

The Supreme Court has made clear that the "state" in the abstract is so dignified as to repel suits by private individuals.[55] But the state is not abstract when it manifests itself through its "state agents and state instrumentalities."[56] Chief Justice John Marshall once maintained that "the jurisdiction of the [Supreme] Court depends . . . upon the actual party on the record."[57] The more modern Court came to the opposite conclusion in *Ford Motor Co. v. Department of Treasury* and found that the state is the "real, substantial party in interest" when the suit in question is brought "for the recovery of money from the state."[58] The

53. FEDERAL PRACTICE AND PROCEDURE, *supra* note 5, § 3524; *cf. Hess*, 513 U.S. at 48 ("[T]he impetus for the Eleventh Amendment [is] the prevention of federal-court judgments that must be paid out of a State's treasury."); P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993) ("The [Eleventh] Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity . . . . It thus accords the States the respect owed them as members of the federation." (citations omitted)); *Ex parte* Ayers, 123 U.S. 443, 505 (1887) ("The very object and purpose of the eleventh amendment were to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties. It was thought to be neither becoming nor convenient that the several states of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer to complaints of private persons . . . .").

54. *See* Rogers, *supra* note 7, at 1243 ("The Court has neglected to fashion an arm-of-the-state doctrine that is informed by, and advances, the principles of federalism that pervade the larger corpus of Eleventh Amendment jurisprudence.").

55. FEDERAL PRACTICE AND PROCEDURE, *supra* note 5, § 3524. *Accord Alden*, 527 U.S. at 712; *Seminole Tribe*, 517 U.S. at 47.

56. Regents of the Univ. of Cal. v. Doe, 519 U.S. 425, 429 (1997); *see also* Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989) ("[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office . . . . As such, it is no different from a suit against the State itself." (citation omitted)); FEDERAL PRACTICE AND PROCEDURE, *supra* note 5, § 3524.2 ("[A] suit will often be against some political subdivision or agency of the state, or against individuals employed by such a subdivision or agency. In these cases, a federal court must determine whether such a defendant—for example, a city, a county, a multi-state agency, a public school, even an individual such as a governor and other officer—should be considered an "arm of the state" and therefore entitled to the state's immunity.").

57. Osborn v. Bank of U.S., 22 U.S. 738, 857 (1824).

58. Ford Motor Co. v. Dep't of Treasury of Ind., 323 U.S. 459, 464 (1945); *see also Ex parte Ayers*, 123 U.S. at 487 ("It must be regarded as the settled doctrine of this court . . . 'that the question whether a suit is within the prohibition of the eleventh amendment is not always determined by reference to the nominal parties on the record.'" (quoting Poindexter v. Greenhow, 114 U.S. 270, 287 (1885))).

state can thus invoke its sovereign immunity defense on behalf of those agents and instrumentalities even when not named as a party in the suit.[59]

A. The Arm-of-the-State Factors Generally

Because only instrumentalities that exercise a bona fide "slice of state power" act as arms of the state, political subdivisions such as local counties and municipalities are generally not deemed to be such arms.[60] The Supreme Court has drawn a distinction between political entities of the state and entities that happen to lie within the state's geographic territory.[61] The state–county dichotomy poses difficult questions for entities that share both local and state character.[62] For example, in *Mount Healthy City School District Board of Education v. Doyle*, the Supreme Court concluded that, on balance, a local school board in Ohio was "more like a county or city than it is like an arm of the State" and was not entitled to Eleventh Amendment immunity.[63] In making its arm-of-the-state determination, the Court examined the

59. *Ford Motor Co.*, 323 U.S. at 464; *Regents of the Univ. of Cal.*, 519 U.S. at 429.

60. FEDERAL PRACTICE AND PROCEDURE, *supra* note 5, § 3524.2 ("Counties, municipalities, municipal agencies, and officers thereof, usually are not considered arms of the state, and thus usually are not entitled to immunity.").

61. *See* Lake Country Ests., Inc. v. Tahoe Reg'l Plan. Agency, 440 U.S. 391, 400–01 (1979) ("By its terms, the protection afforded by that Amendment is only available to 'one of the United States' . . . . [T]he Court has consistently refused to construe the Amendment to afford protection to political subdivisions such as counties and municipalities . . . ." (footnote omitted)); Lincoln Cnty. v. Luning, 133 U.S. 529, 530 (1890) ("The eleventh amendment limits the jurisdiction only as to suits against a state . . . . [W]hile the county is territorially a part of the state, yet politically it is also a corporation created by, and with such powers as are given to it by, the state. In this respect, it is a part of the state only in that remote sense in which any city, town, or other municipal corporation may be said to be a part of the state.").

62. *See* Dayton, *supra* note 4, at 1617 ("Not everything that a local entity does is pursuant to a local policy; states can and do direct local entities and offices to conduct certain actions."); *id.* at 1623 ("Political entities of a 'hybrid' character have features of both state agencies and largely independent public corporations . . . ."); *see also* Jameson B. Bilsborrow, *Keeping the Arms in Touch: Taking Political Accountability Seriously in the Eleventh Amendment Arm-of-the-State Doctrine*, 64 EMORY L.J. 819, 822 (2015) ("Arm-of-the-state analysis is complicated by the fact that in recent decades, state and local government structures have evolved considerably. Increasingly specialized government entities offer a variety of public services beyond classic core governmental functions, and government has grown while simultaneously becoming more fragmented through privatization, revenue sharing, and decentralization. These processes have produced a limitless variety of government entities, and when litigants sue such entities, courts must decide whether these entities are arms of the state.").

63. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280–81 (1977).

school board's definition under Ohio law, its ability to raise funds, and the degree of autonomy it enjoyed.[64] Similarly, in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, the Court found that Tahoe Regional Planning Agency, as an interstate pact between California and Nevada, was akin to an "agency comparable to a county or municipality" and was not entitled to Eleventh Amendment immunity.[65] As it did in *Mount Healthy*, in making the arm-of-the-state determination, the Court examined the agency's definition under the compact, its sources of funding, and its ability to be overruled by state-level actors.[66]

Since the Supreme Court's first attempts to conduct arm-of-the-state analyses in the 1970s, no bright-line rule has emerged as to the exact factors to use or the weight to be accorded to each one.[67] As a result, the lower circuit courts have devised their own disparate "dense tangle of factors" to make arm-of-the-state determinations across the country with differing, unpredictable results.[68] For example, in *Port Authority Trans-Hudson Corp. v. Feeney*, the Supreme Court granted certiorari to resolve a split between the Second and Third Circuit Courts of Appeal regarding the question of whether a New York and New Jersey bi-state port authority could claim Eleventh Amendment immunity from the suit.[69] Using the guidelines established in *Lake Country Estates*, the Second Circuit held that the port authority did not enjoy Eleventh Amendment immunity. Using the same test, the Third Circuit

64. *Id.*

65. *Lake Country Ests., Inc.*, 440 U.S. at 401.

66. *Id.* at 401–02.

67. *See, e.g.*, Rogers, *supra* note 7.

68. *Id.*; Bilsborrow, *supra* note 62, at 829–30 ("The decades since [*Mount*] *Healthy* have produced the following: four Supreme Court sample case analyses, none of which purport to offer a systematic arm-of-the-state test or a formalized list of factors; two competing Eleventh Amendment rationales intended to guide the factor analysis; twelve very different circuit court tests, each with their own twists, measuring a litany of factors that vary by circuit; and scores of lower court precedents classifying a limitless variety of entities as arms of their respective states shielded with their state's sovereign immunity, or else not, with outcomes varying not only circuit by circuit but state by state within a given circuit."); *see also* Leitner v. Westchester Cmty. Coll., 779 F.3d 130, 134 (2d Cir. 2015) ("The Supreme Court has not articulated a clear standard for determining whether a state entity is an 'arm of the state' entitled to sovereign immunity, and the Circuits have applied different tests for establishing sovereign immunity."); Mancuso v. N.Y. State Thruway Auth., 86 F.3d 289, 293 (2d Cir. 1996) ("The jurisprudence over how to apply the arm-of-the-state doctrine is, at best, confused.").

69. Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 302–04 (1990).

came to the opposite conclusion.[70] The Supreme Court concluded that New York and New Jersey had waived their Eleventh Amendment immunity by consenting to suit through the inclusion of a statutory venue provision, and the Court unhelpfully failed to clarify the disparate arm-of-the-state analyses conducted in the lower courts.[71]

B. The Eleventh Circuit's Manders Analysis

As a result of the Supreme Court's inability (or unwillingness) to articulate a clear standard for determining when an entity is an arm of the state, the circuit courts have fashioned their own sets of factors.[72] With varying degrees of weight and importance, the circuit courts look to the following five general guiding factors:

> (1) whether the entity performs governmental or proprietary functions and, alternatively, whether it performs state or local functions; (2) the degree of state political and administrative control and influence over the entity; (3) the nature of the powers that the entity enjoys, especially the extent of its fiscal autonomy from the state; (4) the state-law definition of the entity, including state courts' characterization of the entity; and (5) whether the state treasury would be used to satisfy a judgment against the

70. *Id.* at 302 ("[T]he Third Circuit reasoned that because the States had established the Authority as a state agency and continued to exercise extensive control over its operations, the Authority was entitled to Eleventh Amendment immunity . . . The Court of Appeals for the Second Circuit . . . concluded that PATH did not enjoy the States' sovereign immunity, principally because the treasuries of New York and New Jersey are largely insulated from PATH's liabilities.").

71. *Id.* at 306–08; *see also* Rogers, *supra* note 7, at 1268 ("Rather than addressing the arm-of-the-state confrontation engendered by diametrically opposite circuit court decisions, the Supreme Court skirted the issue entirely. Instead, a unanimous Supreme Court viewed the venue provision as an explicit waiver by the states of Eleventh Amendment immunity for the Authority.").

72. Dayton, *supra* note 4, at 1627 ("In light of the [Supreme] Court's general lack of clarity regarding what factors courts should consider, the circuits have developed their own various arm-of-the-state tests."); Rogers, *supra* note 7 ("The Supreme Court's multifactored balancing approach to arm-of-the-state questions—devoid of guidance with respect to the relative weight or importance of each criterion—has afforded lower courts excessive discretion in fashioning their own formulae.").

entity.[73]

The Eleventh Circuit distilled its choice of factors to four in the 2003 case of *Manders v. Lee*.[74] In 1997, deputies of the Clinch County sheriff's office in Georgia arrested Willie Manders and beat him while they placed him in a holding cell.[75] Manders brought a claim under 42 U.S.C. § 1983 against Sheriff Winston Peterson, in his official capacity, and against his deputies.[76] The court employed the following factors in determining if an entity is an "'arm of the state' in carrying out a particular function: (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."[77]

The court found that first, under state law, Georgia sheriff's offices are independent of their counties and perform law-enforcement duties (here, the use-of-force policy at the local jail) on behalf of the state.[78]

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73. Rogers, *supra* note 7. Taken as a whole, these five factors provide courts with a clear guide as to what the means might be in making an arm-of-the-state determination and encompass the "dual goals" of sovereign immunity—state dignity and state treasury preservation. *See* FEDERAL PRACTICE AND PROCEDURE, *supra* note 5, § 3524.

74. Manders v. Lee, 338 F.3d 1304, 1309 (11th Cir. 2003) (en banc). The court amalgamated a variety of cases since 1984 to create its four-factor test. *See id.*

75. *Id.* at 1306.

76. *Id.* at 1307. 42 U.S.C. § 1983 states in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983; s*ee also* Johnson v. Montgomery Cnty. Cmty. Punishment & Corr. Auth., No. 18-cv-568, 2019 U.S. Dist. LEXIS 127228, at *7 (M.D. Ala. July 31, 2019) ("Section 1983 provides a mechanism whereby civil rights plaintiffs may bring actions to redress violations of federally protected rights." (citing Monroe v. Pape, 365 U.S. 167, 172 (1961))); Joseph G. Cook & John L. Sobieski, Jr., *Civil Rights Actions*, ¶¶ 10.01–10.03 (Matthew Bender & Co. 2021) (explaining that Section 1983 actions are frequently brought against law enforcement officers, especially for the officers' use of excessive force).

77. *Manders*, 338 F.3d at 1309.

78. *Id.* at 1310 (citing GA. CONST. art. IX, §§ 1–2); *id.* at 1318–19; *see also* Bd. of Comm'rs v. Wilson, 396 S.E.2d 903, 903 (Ga. 1990) ("The sheriff . . . is an elected, constitutional officer; he is subject to the charge of the General Assembly and is not an employee of the county commission."). *But see* GA. CONST. art. IX, § 1, para. 3 (listing the position of sheriff, among others, as a "county officer"); *Manders*, 338 F.3d at 1335 (Barkett, J., dissenting) ("The Georgia Constitution is unequivocal in its designation of sheriffs as 'county officers' . . . . This designation of sheriffs as independent county officers militates against considering them arms of the state in *any* of their official functions.").

Next, the court found that the State of Georgia exercised "direct and substantial control over the sheriff's duties, training, and discipline" in the context of the use-of-force policy.[79] Third, the court found that the involvement of state funds "to some extent" as to the use-of-force policy was "sufficient to tilt" towards immunity.[80] Lastly, the court reasoned that even though neither the state nor the county would be required to pay an adverse judgment against the sheriff in his official capacity, both state and county funds would be implicated "indirectly."[81] Although finding that this "responsibility-for-judgments-against-the-entity" factor did not decidedly tilt in favor of immunity like the first three factors, the court nevertheless determined that its insipid treatment of the factor did not "defeat immunity."[82] Weighing all these factors, the court concluded that Sheriff Peterson's office acted as an arm of the state in developing its use-of-force policy at a local jail and was thus accorded Eleventh Amendment immunity.[83]

Going forward, the court decided that its arm-of-the-state inquiry would focus on the particular function at issue in making the arm-of-the-state determination.[84] As such, the court did not determine

79. *Manders*, 338 F.3d at 1322. *But see id.* at 1339 (Barkett, J., dissenting) ("A proper examination of county jails and sheriffs' role in running them gives no indication of state control.").

80. *Id.* at 1323–24. *But see id.* at 1345 (Barkett, J., dissenting) ("[The majority] reaches this conclusion via a route that begins with its mistaken conception of the function at issue in this case. The majority relies on its novel notion of a 'force policy' function to set aside statutes requiring counties to pay for the jail's construction, upkeep, and operations.").

81. *Id.* at 1329. *But see id.* at 1346 (Barkett, J., dissenting) ("[The majority] wrongly concludes . . . that Georgia law . . . unequivocally protects counties from liability for their sheriffs' actions.").

82. *Id.* at 1328–29 ("The State's 'integrity' is not limited to who foots the bill, and, at a minimum, the liability-for-adverse-judgment factor does not defeat Sheriff Peterson's immunity claim."); *see also, e.g.*, Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 39 (1994) ("[C]urrent Eleventh Amendment jurisprudence emphasizes the integrity retained by each State in our federal system."); Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 760 (2002) ("The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities.").

83. *Manders*, 338 F.3d at 1328. *But see id.* at 1347 (Barkett, J., dissenting) ("In this case, each of the factors we normally apply to determine whether a defendant is entitled to Eleventh Amendment immunity weighs against extending such protection to Sheriff Peterson. Georgia law clearly defines Sheriff Peterson as a county officer and jails as county institutions; the state's corrections authorities exercise no control over Sheriff Peterson in his operation of the county jail; Clinch County appropriates Sheriff Peterson's operating budget and pays for the jail's construction and upkeep; and there is no indication that a judgment against Sheriff Peterson would operate against the state of Georgia.").

84. *Id.* at 1309*; see also id.* at 1308 ("Whether a defendant is an 'arm of the State' must be assessed

that the sheriff in *Manders* wore a "state hat" as an arm of the state for any function other than establishing use-of-force policy at the local jail and in training and disciplining his deputies regarding that policy.[85] The Eleventh Circuit assesses all defendants who employ an Eleventh Amendment immunity defense under this function-dependent approach, not just sheriff's offices.[86]

The Eleventh Circuit is unique among the federal circuit courts because it is the only Circuit that consistently applies an "activity-based" approach to arm-of-the-state analyses.[87] This activity or function-based approach differs greatly from that of the majority of circuits which employ an "entity-based" approach to arm-of-the-state analyses where the entity is or is not an arm of the state "regardless of the activity at issue."[88] Theoretically, the Eleventh Circuit's approach allows courts to most faithfully enforce the spirit of the Eleventh

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in light of the particular function in which the defendant was engaged when taking the actions out of which liability is asserted to arise."); *id.* at 1318–19 ("Having examined Georgia's law governing sheriffs, we now specifically apply the Eleventh Amendment factors to Sheriff Peterson's particular functions in issue."); *id.* at 1333 (Barkett, J., dissenting) ("The point of identifying the pertinent governmental function in each case is to keep our analysis focused on the discrete set of positive state law authorities that define the particular area of official responsibility at issue."); *cf.* McMillian v. Monroe Cnty., 520 U.S. 781, 785 (1997) (explaining that, in the context of liability for counties under 42 U.S.C. § 1983 claims, a court should inquire as to whether a sheriff's office acts on behalf of the county or the state for a particular "issue" or "area").

85. *Manders*, 338 F.3d at 1328.

86. *E.g.*, Miller v. Advantage Behav. Health Sys., 677 F. App'x 556, 558–59 (11th Cir. 2017) (per curiam) (community service board); Lightfoot v. Henry Cnty. Sch. Dist., 771 F.3d 764, 766 (11th Cir. 2014) (school board and school district); Fonte v. Lee Mem'l Health Sys., No. 19-cv-54-FtM-38, 2019 WL 4060163, at *1 (M.D. Fla. Aug. 28, 2019) (county health system); Ga. State Conf. of the NAACP v. DeKalb Cnty. Bd. of Registration & Elections, 484 F. Supp. 3d 1308, 1312 (N.D. Ga. 2020) (county board of registration and elections).

87. Dayton, *supra* note 4, at 1631.

88. *Id.* at 1605. For example, the D.C. Circuit examines factors similar to those of the Eleventh Circuit: (1) the state's intent as to the status of the entity, including the functions performed by the entity; (2) the state's control over the entity; and (3) the entity's overall effects on the state treasury. P.R. Ports Auth. v. Fed. Mar. Comm'n, 531 F.3d 868, 873 (D.C. Cir. 2008). But the D.C. Circuit does not allow for an analysis of specific functions or activities:

> Under the three-factor test, an entity either is or is not an arm of the State: The status of an entity does not change from one case to the next based on the nature of the suit, the State's financial responsibility in one case as compared to another, or other variable factors. Rather, once an entity is determined to be an arm of the State under the three-factor test, that conclusion applies unless and until there are relevant changes in the state law governing the entity.

Id. This all-or-nothing approach can lead courts to make "under- and overinclusive arm-of-the-state status holdings" that fail to accurately capture the character of the purported state function in question. Dayton, *supra* note 4, at 1632.

Amendment in protecting states and the functions that agents carry out on behalf of states.[89] Yet federal courts' jurisprudence since *Manders* at both the district and circuit levels has given Georgia's sheriff's offices an almost entity-like status as arms of the state in the breadth of functions accorded Eleventh Amendment immunity.[90]

C. Pellitteri v. Prine

The court's precedent established in *Manders* limited plaintiffs' ability to bring § 1983 claims against sheriff's offices for violations involving use of force and other traditional law enforcement acts.[91] *Pellitteri v. Prine* extended the scope of Eleventh Amendment immunity beyond enforcement acts into the employment sphere.[92]

Felicia Pellitteri, a former deputy sheriff in the Lowndes County Sheriff's Office, injured her knee on the job and requested temporary light duty while she recovered.[93] Sheriff Chris Prine refused to accommodate Pellitteri's injury, and the sheriff's office eventually

89. Dayton, *supra* note 4, at 1633 ("[The entity-based approach to arm-of-the-state analysis] undermines the Eleventh Amendment's goals of protecting only state or state-directed activity."); *see also id.* ("[I]n order to achieve the Eleventh Amendment's core motivations today, the [arm-of-the-state] doctrine must adapt to an activity-based model."); *id.* at 1627 ("[The activity-based approach] most accurately reflects and protects the sovereign immunity concerns that motivated the arm-of-the-state doctrine in the first place."). In 2006, the Supreme Court briefly engaged in a "function-specific" arm-of-the-state approach when it determined that a Georgia county did not act as an arm of the state for the specific function of operating a drawbridge. N. Ins. Co. of N.Y. v. Chatham Cnty., 547 U.S. 189, 197 (2006).

90. *E.g.*, Scruggs v. Lee, 256 F. App'x 229, 231–32 (11th Cir. 2007) (function of establishing policies at local jail for processing arrestees); Lake v. Skelton, 840 F.3d 1334, 1336 (11th Cir. 2016) (function of providing food at county jail); Pellitteri v. Prine, 776 F.3d 777, 779 (11th Cir. 2015) (function of hiring and firing deputies); Brooks v. Wilkinson Cnty., 393 F. Supp. 3d 1147, 1157 (M.D. Ga. 2019) (function of providing medical care at county jail); Temple v. McIntosh Cnty., No. 18-cv-91, 2019 WL 287482, at *1 (S.D. Ga. Jan. 22, 2019) (function of arresting suspect); Townsend v. Coffee Cnty., 854 F. Supp. 2d 1345, 1348–49 (S.D. Ga. 2011) (function of investigatory stop and arrest); Brown v. Newton Cnty. Sheriff's Off., 273 F. Supp. 3d 1142, 1146, 1149 (N.D. Ga. 2017) (function of employing deadly force against mentally ill person).

91. Thomas B. Ward, *Finding Immunity:* Manders v. Lee *and the Erosion of § 1983 Liability*, 55 MERCER L. REV. 1505, 1520 (2004) ("The aftermath of *Manders* means that a citizen will not be able to bring a § 1983 claim against a sheriff in his official capacity in federal court if the sheriff's action at issue was done while executing an application of force.").

92. *Pellitteri*, 776 F.3d at 779.

93. *Id.*

terminated her employment.[94] Pellitteri sued Lowndes County and Sheriff Prine in his official capacity in federal court, bringing claims under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA), and 42 U.S.C. § 1983.[95] Sheriff Prine argued that he was entitled to Eleventh Amendment immunity as to the ADA and § 1983 claims.[96]

The district court, relying on the Eleventh Circuit's unpublished opinion three years earlier in *Keene v. Prine*, found for Pellitteri.[97] In *Keene*, the Eleventh Circuit analyzed the four *Manders* factors to determine that Sheriff Prine (the same sheriff sued in *Pellitteri*) did *not* act as an arm of the state regarding the function of terminating his employees.[98] The court pointed to key differences among the degree of state control, entity funding, and ultimate liability factors implicated in the use-of-force policy function at issue in *Manders* with the very different function of terminating the sheriff's own employees.[99]

The Eleventh Circuit overruled its earlier decision in *Keene* by reversing the district court and finding that Sheriff Prine acted as an arm of the state in performing the function of "exercising his power to hire and fire the deputies that enforce the laws of Georgia on his behalf."[100] The court trudged through the familiar *Manders* factors.[101]

94. *Id.* In addition, the sheriff's office replaced Pellitteri with a male deputy and allowed male deputies to work light-duty jobs after an injury. Pellitteri v. Prine, No. 13-CV-28, 2013 WL 4495847, at *1 (M.D. Ga. Aug. 21, 2013), *rev'd*, 776 F.3d 777 (11th Cir. 2015).

95. *Pellitteri*, 776 F.3d at 779.

96. *Id.* Though not mentioned in the text of the opinion, it is possible that Sheriff Prine did not contest his ability to be sued under Title VII of the Civil Rights Act of 1964 because the Supreme Court has held that Congress validly abrogated states' Eleventh Amendment immunity in passing Title VII under its powers granted by Section Five of the Fourteenth Amendment. *See generally* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

97. *Pellitteri*, 2013 WL 4495847, at *5 ("While in no way conceding that its initial decision in *Keene* was wrong, because of the circumstances presented here, the Court feels bound to follow *Keene*.").

98. Keene v. Prine, 477 F. App'x 575, 579–80 (11th Cir. 2012) (per curiam).

99. *Id.* at 578 ("[T]he state's supervisory authority only allows it to enforce the outermost bounds of sheriffs' conduct generally, and the state otherwise does not inject itself into sheriffs' personnel decisionmaking."); *id.* at 579 ("[T]he County is clearly the principal source of funding for the Sheriff's Office, including for personnel expenditures, a fact that weighs against finding that Sheriff Prine acted as an 'arm of the state' here."); *id.* ("[I]f a sheriff's office budget is being used to satisfy adverse judgments instead of to perform law enforcement activities, then it is up to the county commission to provide additional funds to the office, or to the county's voters to replace the sheriff.").

100. *Pellitteri*, 776 F.3d at 779.

101. *Id.*

For the first factor—how state law defines the entity—the court reasoned that the sheriff's office derives its power from the state and is largely independent from the county in which it sits.[102] In addition, state law provides that sheriffs control their deputies independently of county authority, and sheriffs alone have the power to hire and fire their deputies.[103] On the second factor—the degree of control the state maintains over the entity—the court maintained that the State of Georgia mandated minimum qualifications for peace officers as well as created a statewide "Peace Officer Standards and Training Council" for disciplining law enforcement officers.[104] Combined with the Governor of Georgia's discretionary investigatory powers over sheriff's offices generally, the court determined that Sheriff Prine was subjected to a "significant" amount of state oversight "even if the State generally stays out of a sheriff's day-to-day decisions about who to hire or fire."[105]

On the third factor—where the entity derives its funds—the court once again distanced itself from its prior conclusion in *Keene*, reasoning that the county funded the sheriff's office pursuant to state law and could not "dictate" how the sheriff spent his funds despite actually funding the office.[106] As such, the court "[could] not conclude" that the factor weighed in favor of granting Eleventh Amendment immunity.[107] Regarding the fourth and final factor—responsibility for judgments against the entity—the court actually agreed with its precedent and reasoned that the state treasury would be "spared" from having to pay for an adverse judgment against Sheriff

102. *Id.* at 780 (citing GA. CONST. art. IX, § 1, para. 3); *see also* Bd. of Comm'rs v. Wilson, 396 S.E.2d 903, 903 (Ga. 1990) ("The sheriff . . . is an elected, constitutional officer; he is subject to the charge of the General Assembly and is not an employee of the county commission.").

103. *Pellitteri*, 776 F.3d at 780 (citing GA. CODE ANN. § 15-16-23 (2015)).

104. *Id.* at 781 ("Admittedly, we stated in *Keene* that 'sheriffs are largely independent from the State when they make personnel decisions' . . . . Upon further review, however, we believe that this conclusion in *Keene* was mistaken . . . .").

105. *Id.* at 781–82.

106. *Id.* at 782.

107. *Id.* Georgia counties fund their sheriffs' offices through local taxes. *See* Keene v. Prine, 477 F. App'x 575, 578 (11th Cir. 2012) (per curiam) ("Under Georgia law, the county dictates, and has the power to amend, the sheriff's overall budget."); GA. CODE ANN. § 48-5-220 (2021) ("County taxes may be levied and collected . . . to pay sheriffs . . . .").

Prine.[108] On balance, three factors weighed in favor of Eleventh Amendment immunity, and only the financial responsibility factor cut the other way.[109] The court reversed the district court's denial of Sheriff Prine's motion to dismiss.[110]

III. PROPOSAL

Since its decision in *Manders*, the Eleventh Circuit has consistently found that Georgia sheriffs act as arms of the state in an array of traditional law-enforcement functions, such as arrest procedures and jail administration.[111] The court's conclusion in *Pellitteri* makes it clear that Georgia sheriffs also enjoy the arm-of-the-state status for the function of employment decisions, which lie far outside of their core law-enforcement duties.[112] Former deputies who bring suit against Georgia sheriffs for illegal adverse employment actions now face the same jurisdictional and procedural hurdles as arrestees and inmates, who sue the same sheriffs for bodily injury and carceral mismanagement.[113] Parties seeking remedies for such starkly contrasted harms should not be forced to litigate within the same immunity sphere. Instead, the Eleventh Circuit should reconsider the issue of according Georgia sheriffs Eleventh Amendment immunity in an employment decision-making context. Simply stated, Georgia

108. *Pellitteri*, 776 F.3d at 783 ("On this [responsibility for judgments against the entity] factor, we agree with . . . *Keene* and *Manders* . . . because neither the State nor the County will be required to directly pay for any adverse judgment against the Sheriff's office.").

109. *Id.*

110. *Id.*

111. *E.g.*, Scruggs v. Lee, 256 F. App'x 229, 231–32 (11th Cir. 2007) (function of establishing policies at local jail for processing arrestees); Lake v. Skelton, 840 F.3d 1334, 1336 (11th Cir. 2016) (function of providing food at county jail); Brooks v. Wilkinson Cnty., 393 F. Supp. 3d 1147, 1157 (M.D. Ga. 2019) (function of providing medical care at county jail); Temple v. McIntosh Cnty., No. 18-cv-91, 2019 WL 287482, at *1 (S.D. Ga. Jan. 22, 2019) (function of arresting suspect); Townsend v. Coffee Cnty., 854 F. Supp. 2d 1345, 1348–49 (S.D. Ga. 2011) (function of investigatory stop and arrest); Brown v. Newton Cnty. Sheriff's Off., 273 F. Supp. 3d 1142, 1146, 1149 (N.D. Ga. 2017) (function of employing deadly force against mentally-ill person).

112. *See generally Pellitteri*, 776 F.3d 777.

113. *See id.* A plaintiff would bring a claim under 42 U.S.C. § 1983 for deprivation of civil rights regardless of the context. *Compare Pellitteri*, 776 F.3d at 779 (claim brought under 42 U.S.C. § 1983 in the employment context), *with* Manders v. Lee, 338 F.3d 1304, 1307 (11th Cir. 2003) (en banc) (claim brought under 42 U.S.C. § 1983 for excessive force used against plaintiff in a jail). Yet Eleventh Amendment immunity does not bar Title VII claims. *See supra* note 96 and accompanying text.

sheriffs do not act as arms of the state in making day-to-day employment decisions. There are two theoretical alternatives that the court could employ to correctly align its arm-of-the-state analysis with the realities of a sheriff's function as an employer.[114]

A. Employment Decisions Lie Outside of Sheriffs' State-Empowered Law Enforcement Functions

Pellitteri's claims arose out of her allegedly unlawful termination at the hands of Sheriff Prine.[115] Though Pellitteri brought a § 1983 claim for deprivation of her civil rights, much like plaintiffs who suffered physical harms carried out by law enforcement officers brought § 1983 claims, the similarities in the cases end at the procedural vehicle used.[116] Eleventh Circuit case law is replete with non-deputy plaintiffs seeking civil remedies against local sheriffs for abuses of traditional law enforcement powers; there is a pronounced dearth of former deputies who bring suits in the employment context.[117] The Eleventh Circuit's conclusion that sheriffs act as arms of the state in the employment decision-making context will likely prove to have a chilling effect on plaintiffs who attempt to pursue the vindication of their civil rights. The Eleventh Circuit should seek out an opportunity to reaffirm its holding in *Keene* that a sheriff does not act as an arm of the state in hiring and firing deputies.

1. The Sheriff Is Not a State Entity by Virtue of the Georgia Constitution, Georgia Statutes, and Georgia Case Law

Sheriff Prine's decision to terminate Pellitteri was no more than an unremarkable, supervisory decision fully divorced from state control or oversight. First, the Georgia Constitution establishes the sheriff as

114. *See generally infra* Part III.A. & Part III.B.

115. *Pellitteri*, 776 F.3d at 779.

116. *See supra* note 113 and accompanying text.

117. *See, e.g.*, *Pellitteri*, 776 F.3d 777; Keene v. Prine, 477 F. App'x 575 (11th Cir. 2012) (per curiam). These two cases appear to be the only cases involving former deputies terminated by their sheriffs in contrast to the myriad plaintiffs who bring suit under 42 U.S.C. § 1983 for abuses of police conduct. *See generally Pellitteri*, 776 F.3d 777; *Keene*, 477 F. App'x 575.

a county officer.[118] Unsurprisingly, Georgia courts have drawn the same county-officer conclusion given the clarity of the state constitution.[119] Regardless of the clear constitutional text and longstanding, consistent determination by Georgia state courts, the court in *Manders* and *Pellitteri* decided to treat the county-officer enumeration as a mere "label."[120]

Second, the state has no say over a sheriff's local employment decisions because the Georgia General Assembly has given sheriffs total authority to hire and fire their deputies.[121] The court in *Keene* characterized a sheriff's day-to-day personnel decisions as far removed from state oversight and contrasted the statutory independence that sheriffs enjoyed in this area with only the "outermost bounds" of state involvement and enforcement of a sheriff's conduct.[122] In *Pellitteri*, however, the court saw fit to find a great deal of state involvement with a sheriff's personnel decisions "even if the State generally stays out of a sheriff's day-to-day decisions about who to hire or fire . . . ."[123] So, although the sheriff is an independent county officer empowered with plenary authority to hire and fire his or her own deputies, the Eleventh Circuit holds that the

118. GA. CONST art. IX, § 1, para. 3 ("The . . . sheriff . . . shall be elected by the qualified voters of their respective counties for terms of four years and shall have such qualifications, powers, and duties as provided by general law."); *see also* Grech v. Clayton Cnty., 335 F.3d 1326, 1352 (11th Cir. 2003) (Barkett, J., concurring) ("Georgia's highest law is unequivocal in its designation of sheriffs as county, not state, officials . . . . sheriffs' status as county officers is clearly reflected in the very organization of Georgia's fundamental political charter.").

119. *E.g.*, Massenburg v. Bd. of Comm'rs, 23 S.E. 998, 999 (Ga. 1895) ("By the uniform law of the state there was one of such officers to be elected biennially by the people for each county in the state. That was the exact condition of the office of sheriff, clerk of the superior court, tax collector, coroner; indeed, all county officers."); Truesdel v. Freeney, 197 S.E. 783, 786 (Ga. 1938) ("The tax-collector and tax-receiver and the sheriff function with reference to State matters, as well as county matters; but they are not regarded as State officers."); Best v. State, 136 S.E.2d 496, 497 (Ga. Ct. App. 1964) ("A deputy sheriff is no more a State officer than a sheriff, and may indeed be less."); Teasley v. Freeman, 699 S.E.2d 39, 41 (Ga. Ct. App. 2010) "([A] sheriff is not an entity entirely separate from the county for all purposes, rather he is an elected officer operating within the framework of a county as composed by the Constitution and relevant statutes.").

120. *Pellitteri*, 776 F.3d at 780; Manders v. Lee, 338 F.3d 1304, 1312 (11th Cir. 2003) (en banc).

121. GA. CODE ANN. § 15-16-23 (2021) ("Sheriffs are authorized in their discretion to appoint one or more deputies."); *see also* Warren v. Walton, 202 S.E.2d 405, 409 (Ga. 1973) ("[T]his court has recognized that 'deputy sheriffs and deputy jailors are employees of the sheriff, whom the sheriffs alone are entitled to appoint or discharge.'" (quoting Drost v. Robinson, 22 S.E.2d 475, 480 (Ga. 1942))).

122. *Keene*, 477 F. App'x at 578.

123. *Pellitteri*, 776 F.3d at 782.

sheriff is also somehow simultaneously a state actor with regards to mundane personnel decisions removed from state control by the state's constitution, statutes, and longstanding case law.[124]

2. *Manders Is Best Read to Accord Eleventh Amendment Immunity to Sheriffs in Their Execution of Traditional Law Enforcement Duties*

There is little doubt that a sheriff is a state actor in carrying out core law enforcement functions on behalf of the state. The *Manders* court reasoned:

> [T]he essential governmental nature of [the sheriff's] office is (a) to continue to perform his historical common law duties to enforce the law and preserve the peace on behalf of the sovereign State and (b) to perform specific statutory duties, directly assigned by the State, in law enforcement, in state courts, and in corrections. Most of those duties are an integral part of the State's criminal justice system and are state functions.
>
> . . . .
>
> . . . The sheriff's authority to use force or the tools of violence, whether deadly or non-deadly force, and the sheriff's obligation to administer the jail are directly derived from the State . . . . In addition, use of force and creating force policy are quintessential policing functions, exercised by sheriffs in initial arrests, in subduing inmates in sessions of state superior courts, or in quelling disruptive inmates in county jails.[125]

Even when declining to extend Eleventh Amendment immunity to sheriff's offices for employment decisions in *Keene*, the court opined that a sheriff's law enforcement functions "effectuate[d] a range of functions that is primarily, if not exclusively, oriented toward state

124. *See supra* notes 117–122 and accompanying text.
125. *Manders*, 338 F.3d at 1319.

ends."[126] It is axiomatic that law enforcement functions constitute state duties and state prerogatives because the state's sovereign status rests on its ability to both make and enforce its laws.[127] Sociologist Max Weber once famously proclaimed that the modern definition of a state is a community which can successfully claim a monopoly on violence.[128] The state brings its full arsenal of coercive devices to bear on unlawful actors through investigation, search, arrest, detention, and incarceration.[129] These "quintessential policing functions" that employ state-legitimated "tools of violence" are thus the purest expressions of the state's functional monopoly on violence.[130] Nowhere is a sheriff more an arm of the state than in his or her enforcement of the state's inherently coercive laws via traditional law enforcement functions.

In *Manders*, the Eleventh Circuit had no issue concluding that sheriffs acted for the state in effectuating a use-of-force policy at a jail, a function necessarily appurtenant to a sheriff's "historical" peacekeeping function.[131] At the same time, the court took care to clearly state that it was limiting its arm-of-the-state analysis *only* to the use-of-force policy in question.[132] Acknowledging this analytical

126. *Keene*, 477 F. App'x at 578.

127. *See* JOHN RAWLS, POLITICAL LIBERALISM 136 (expanded ed. 2005) ("[P]olitical power is always coercive power backed by the government's use of sanctions, for government alone has the authority to use force upholding its laws."); *cf.* THOMAS HOBBES, LEVIATHAN 111 (J.C.A. Gaskin ed., Oxford Univ. Press 1998) (1651) ("The laws of nature . . . without the terror of some power, to cause them to be observed, are contrary to our natural passions . . . . And covenants, without the sword, are but words . . . if there be no power erected, or not great enough for our security; every man will, and may lawfully rely on his own strength and art, for caution against all other men."). *See generally* Grant Lamond, *The Coerciveness of Law*, 20 OXFORD J. LEGAL STUD. 39 (2000); Christopher W. Morris, *State Coercion and Force*, 29 SOC. PHIL. & POL'Y 28 (2012).

128. MAX WEBER, POLITICS AS A VOCATION, *reprinted in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY (H.H. Gerth & C. Wright Mills eds. & trans., Routledge 2009) (1919) ("[F]orce is a means specific to the state . . . . a state is a human community that (successfully) claims the *monopoly of the legitimate use of physical force* within a given territory . . . . [T]he right to use physical force is ascribed to other institutions or to individuals only to the extent to which the state permits it. The state is considered the sole source of the 'right' to use violence.").

129. *See* HANS KELSEN, PURE THEORY OF LAW 40–41 (Max Knight trans., 1967).

130. *Manders*, 338 F.3d at 1319.

131. *Id.* at 1313 ("[T]he sheriff, though limited in jurisdiction to his county and generally elected by county voters, was in reality an officer of the State, and ultimately represented the State in fulfilling his duty to keep the peace." (quoting McMillian v. Monroe Cnty., 520 U.S. 781, 794 (1997))).

132. *Id.* at 1319 ("We . . . do not, decide today whether Georgia sheriffs wear a 'state hat' for Eleventh Amendment purposes for all of the many specific duties assigned directly by the State . . . . We . . . must decide here only whether Sheriff Peterson is an 'arm of the State' in establishing force policy at the jail . . . .").

restraint, the *Keene* court distinguished the function of terminating employees and found it to be largely independent from state control, in stark contrast to traditional law enforcement and peacekeeping functions at issue in *Manders*.[133]

Obliterating this sound distinction, the *Pellitteri* court (faultily) reasoned that sheriffs' authority to fire their deputies stemmed from the state because the "legislature has enacted laws giving sheriffs alone the power to hire their deputies."[134] Using this logic, a court could conclude that any governmental agency is an arm of the state simply because it was created by state law.[135] Thus, *Pellitteri*'s precedent not only impedes plaintiffs' abilities to remedy violations of their civil rights but also undermines the very sovereign dignity of the states it seeks to protect by handing out Eleventh Amendment immunity to agents whose functions fail to involve the state in any meaningful way. Reading *Manders* to accord Eleventh Amendment immunity for functions that are truly emblematic of state dignity—those that involve traditional law enforcement and coercive powers—is a more accurate and faithful interpretation of the modern Supreme Court's state sovereign immunity jurisprudence.[136]

B. The Court's Analysis Should Mirror the Twin Aims of the

133. Keene v. Prine, 477 F. App'x 575, 579–80 (11th Cir. 2012) (per curiam).

134. Pellitteri v. Prine, 776 F.3d 777, 780 (11th Cir. 2015).

135. *See Manders*, 338 F.3d at 1335 (Barkett, J., dissenting) ("[A]ll local government is by definition a creature of the state's authority to attach powers and duties to particular offices . . . . the Georgia Constitution authorizes the state legislature to define the powers and duties of the very officials most readily associated in Georgia with policy-making on behalf of local governments: county commissioners. To hold that county commissioners are entitled to Eleventh Amendment immunity plainly flouts established law."); *see also* Grech v. Clayton Cnty., 335 F.3d 1326, 1351 (11th Cir. 2003) (Barkett, J., concurring) ("If any local officeholder whose powers and privileges are defined in some sense by state law thereby becomes a state agent, there could be no county officers, since all local government is a creature of state authority."); Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 47 (1994) ("[U]ltimate control of every state-created entity resides with the State, for the State may destroy or reshape any unit it creates.").

136. *See* Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 760 (2002) ("The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities.").

Eleventh Amendment

In 1994, the Supreme Court had occasion to yet again consider the sovereign immunity of a bi-state port authority in *Hess v. Port Authority Trans-Hudson Corp*.[137] Writing for a five-justice plurality, Justice Ginsburg advanced a new arm-of-the-state analytical paradigm: "[w]hen indicators of [Eleventh Amendment] immunity point in different directions, the Eleventh Amendment's twin reasons for being remain our prime guide."[138] These twin reasons for being are (1) state dignity and (2) state financial liability.[139] Importantly, Justice Ginsburg honed in on the importance of the financial liability aspect regarding the state's treasury: "the impetus for the Eleventh Amendment [is] the prevention of federal-court judgments that must be paid out of a State's treasury."[140]

If the Eleventh Circuit truly wished for its arm-of-the-state analysis to comport with the impetus for Eleventh Amendment, it would jettison its laborious *Manders*-factors analysis for the superior "twin reasons" analysis elucidated in *Hess*.[141] In fact, one of the dissenting opinions in *Manders* correctly recognized that the *Hess* analysis should apply because the arm-of-the-state factors weighed both for and against Eleventh Amendment immunity for the sheriff's office, much like the bi-state port authority did in *Hess*.[142] And though the court

137. *See generally Hess*, 513 U.S. 30.

138. *Id.* at 47.

139. *Id.* at 39–40; Dayton, *supra* note 4, at 1644 n.209.

140. *Hess*, 513 U.S. at 48; *see also, e.g.*, Feeney v. Port Auth. Trans-Hudson Corp., 873 F.2d 628, 631 (2d Cir. 1989), *aff'd*, 495 U.S. 299 (1990) ("In cases where doubt has existed as to the availability of Eleventh Amendment immunity, the Supreme Court has emphasized the exposure of the state treasury as a critical factor."); Cohens v. Virginia, 19 U.S. 264, 406 (1821) ("[A]t the adoption of the constitution, all the States were greatly indebted; and the apprehension that these debts might be prosecuted in the federal Courts, formed a very serious objection to that instrument."); Fletcher, *supra* note 23, at 1129 ("[T]he traditional core of eleventh amendment protection [is] the award of money judgments against the states . . . .").

141. The Eleventh Circuit's proffered reason for adhering to its tiresome *Manders* test is the saturnine behemoth known as judicial inertia. In 2016, the court accorded Eleventh Amendment immunity to a sheriff's office in the context of providing meals at a county jail. *See* Lake v. Skelton, 840 F.3d 1334, 1336 (11th Cir. 2016). Judge Parker, echoing Judge Anderson's dissent over a decade earlier, advocated for the *Hess* test. *Id.* at 1344 ("To the extent that our dissenting colleague [Judge Parker] suggests that this appeal should be decided based on 'the Eleventh Amendment's twin reasons for being,' . . . we can only say that we are bound by the test of the en banc majority in *Manders*, not the dissent.").

142. *See* Manders v. Lee, 338 F.3d 1304, 1329–32 (11th Cir. 2003) (en banc) (Anderson, J., dissenting).

should give dispositive weight to the financial-liability factor (as it directly stems from the reason for the Eleventh Amendment itself), the Eleventh Circuit deprives this factor of its central importance to the analysis by relegating it to just one of four factors to consider.[143]

Using the twin-reasons analysis, the Eleventh Circuit in *Pellitteri* would likely have found that Sheriff Prine was not acting as an arm of the state in terminating Pellitteri. First, the court would have found that the state's "dignity" was unaffected by denying immunity because the sheriff is not a state actor with respect to employment decisions—a sheriff is both a county officer and an independent constitutional officer with total discretion over hiring and firing employees.[144] Secondly, and more persuasively, the court would have found that the state's treasury was unaffected by an adverse judgment because counties principally fund their sheriff's offices.[145] The Eleventh Circuit would do well to consider employing the straightforward *Hess* methodology rather than trudge through a confounding morass of state law definitions and control indicia like it did in *Manders*, *Keene*, and *Pellitteri*.[146] The *Hess* plurality's analysis provides a simplified

143. *Compare Hess*, 513 U.S. at 48 ("Courts of Appeals have recognized the vulnerability of the State's purse as the most salient factor in Eleventh Amendment determinations."), *with Manders*, 338 F.3d at 1324, 1329 ("The fourth factor is the source of the funds that will pay any adverse judgment . . . . At a minimum, this final factor does not defeat immunity."); *see also Manders*, 338 F.3d at 1331 (Anderson, J., dissenting) ("[T]he court overemphasizes the control factor and underemphasizes the state treasury factor.").

144. *See supra* notes 102, 117, 119, and 120; *see also Manders*, 338 F.3d at 1329–30 (Anderson, J., dissenting) ("The first of the twin reasons asked whether it would be 'disrespectful' or a 'threat to the dignity' of the state to require the state to answer the complaint in federal court. Of course, it is well established that an identical claim against a city or a county—*i.e.*, Manders' § 1983 excessive force claim for violating the Eighth Amendment by beating him while in jail—would not be barred by Eleventh Amendment immunity. I see no greater threat to the dignity of the state in the instant suit against the Sheriff . . . .").

145. *See supra* notes 107–108; *see also* Pellitteri v. Prine, 776 F.3d 777, 783 (11th Cir. 2015) ("[A]ny adverse judgment against Sheriff Prine will be paid out of the budget of the Lowndes County Sheriff's Office, which is composed of both County and State funds. . . . Nevertheless, to the extent that the state treasury will be spared here from paying any adverse judgment, this factor weighs in favor of denying immunity.").

146. Although the Eleventh Circuit has not yet formally announced a new framework to replace its *Manders* analysis, some members of the court are ready to abandon *Manders* in its entirety. *See generally* Andrews v. Biggers, 996 F.3d 1235 (11th Cir. 2021). In *Andrews v. Biggers*, Judges Wilson and Rosenbaum concurred with the holding awarding Eleventh Amendment immunity to a Georgia sheriff only because they were expressly bound to the precedent of *Manders* and its progeny. *Id.* at 1236 (Wilson,

framework that courts can use to more readily arrive at the "dignity" and "financial liability" impositions undergirding the Eleventh Amendment.[147] And even if the Eleventh Circuit decided to keep its *Manders* factors in lieu of adopting the preferable *Hess* analysis, it could simply give the financial-liability factor greater weight in the overall *Manders* analysis as a first step in aligning its arm-of-the-state determination with the true driving force behind the Eleventh Amendment.[148]

CONCLUSION

The Eleventh Circuit purports to focus its arm-of-the-state analysis on the specific function at issue in each case.[149] This "activity-based" approach, first defined in *Manders*, allows for the court to focus on a narrow action in question rather than on a broad, all-or-nothing approach that would declare an entity, as a whole, an arm of the state.[150] Hypothetically, plaintiffs seeking redress for deprivations of their civil rights and violations of federal statutes should see the *Manders* analysis as a gift; for when plaintiffs bring claims in federal court, they perhaps have a chance to convince the judge that the *Manders* factors cut in their favor with regard to the specific function in question.

Unfortunately, plaintiffs can take little solace in the court's asserted arm-of-the-state flexibility. The Eleventh Circuit has accorded Georgia sheriff's offices Eleventh Amendment immunity across a broad swath of functions, as evidenced by the court's jurisprudence

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J., concurring); *see also id.* (Rosenbaum, J., concurring). Their message is clear: "It is time for us to reevaluate our decision in *Manders*. Our holding in that case rests on a misinterpretation of Georgia law and our Eleventh Amendment immunity precedent." *Id.* at 1242.

147. *See Hess*, 513 U.S. at 53; *see also* L. Pahl Zinn, Hess v. Port Authority Trans-Hudson Corporation*: Erosion of the Eleventh Amendment*, 4 DET. COLL. L. REV. 1417, 1464 (1995).

148. *See* Zinn, *supra* note 147, at 1464 ("The *Hess* decision establishes a clearer test for Eleventh Amendment immunity, but does not create a strong framework for its application."). To keep its existing arm-of-the-state framework, the Eleventh Circuit could go the route of the First Circuit and "reformulate" its analysis to incorporate the twin-concerns *Hess* approach while keeping its trusty *Manders* factors intact. *See* Irizarry-Mora v. Univ. of P.R., 647 F.3d 9, 12 (1st Cir. 2011).

149. *Manders*, 338 F.3d at 1309.

150. Dayton, *supra* note 4, at 1632.

since *Manders*.[151] And the decision in *Pellitteri* only highlights the extent of the gradual erosion of § 1983 liability that county sheriffs have enjoyed for over a decade.[152] If sheriffs act as arms of the state in making administrative employment decisions at the local level, it is not unreasonable to anticipate that courts within the Eleventh Circuit will continue to find state functions in every corner of the county sheriff's office.

According to the modern Supreme Court, the Eleventh Amendment exemplifies the doctrine of state sovereign immunity.[153] Rather than explicitly granting states sovereign immunity, the Eleventh Amendment merely serves as a concrete example of the sovereign dignity that states retained at the time the Founders ratified the Constitution.[154] Combined with insulation from financial drain on the state's treasury (the impetus for the ratification of the Eleventh Amendment), this dignity is reserved for the state and the state's agents and instrumentalities.[155] The Eleventh Circuit should correct itself and subscribe to the Supreme Court's financial-impetus rationale in *Hess* by updating its *Manders* analysis to give greater weight to the financial-liability factor. If the Eleventh Circuit truly endeavors to "achieve the purposes" of the Eleventh Amendment in respecting state dignity and preventing state financial liability, the court would be wise to stop seeking out increasingly novel ways to accord Eleventh Amendment immunity to non-state actors.[156]

151. *See supra* note 90.

152. *Id.*

153. Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 753 (2002) ("[T]he Eleventh Amendment does not define the scope of the States' sovereign immunity; it is but one particular exemplification of that immunity.").

154. *See supra* note 52.

155. Regents of the Univ. of Cal. v. Doe, 519 U.S. 425, 429 (1997).

156. Dayton, *supra* note 4, at 1651.