No. 24-_____

IN THE

Supreme Court of the United States

SOUTH CAROLINA DEPARTMENT OF PARKS, RECREATION AND TOURISM,

Petitioner,

v.

GOOGLE LLC,

Respondent.

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

APPLICATION TO STAY MANDATE

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STATEMENT OF RELATED PROCEEDINGS

In re South Carolina Department of Parks, Recreation and Tourism, Case No. 3:23-cv-2100-JFA, U.S. District Court for the District of South Carolina. Judgment entered July 12, 2023.

In re South Carolina Department of Parks, Recreation and Tourism, Case No. 23-1849, U.S. Court of Appeals for the Fourth Circuit. Judgment entered June 5, 2024, rehearing denied June 2, 2024, stay of mandate denied September 16, 2024.

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APPLICATION FOR STAY OF MANDATE

To the Honorable John G. Roberts, Chief Justice of the United States and Circuit Justice for the Fourth Circuit:

Petitioner South Carolina Department of Parks, Recreation and Tourism respectfully requests that this Court stay the Fourth Circuit's mandate pending the Court's disposition of the Department's concurrently-filed Petition for Writ of Certiorari seeking review of the Fourth Circuit's decision, and any further proceedings in this Court.

The petition follows the Fourth Circuit's published finding that the South Carolina Attorney General waived the Department's immunity from a suit in federal court, even when he was not acting on the Department's behalf. The Fourth Circuit created a brightline rule that any one state officer may waive the immunity of every arm of the state without regard to a state's structure of government or its internal allocation of authority. According to the court, a waiver by one state agency is always a waiver by all—even if state law says otherwise. The Fourth Circuit's decision directly conflicts with this Court's precedent and splits from the Second and Tenth Circuits.

This Court should issue a stay because it is likely to grant certiorari and reverse the Fourth Circuit. A stay pending the Department's petition for certiorari also is necessary to avoid an imminent, permanent, and irremediable infringement of the Department's sovereign immunity before this Court can consider the Department's petition. The Department will have to choose between being held in contempt to protect its claim of sovereign immunity or be stripped of its right to

appeal the denial of it because complying with the underlying order may moot the appeal. Google, on the other hand, will not be prejudiced if a stay is granted. In fact, Google waited until 65 days after the mandate was issued to say anything about enforcing the order in question, and that was only after the Department sought Google's consent to a stay. A stay pending certiorari will leave Google in the position it already put itself in. All the recognized factors for a stay support ordering one here.

OPINION BELOW

The opinion and judgment for which review is sought are attached as Exhibit A. The Fourth Circuit's order denying a stay is attached as Exhibit B.

JURISDICTION

The Department has concurrently petitioned for a writ of certiorari with this application. This Court has jurisdiction to enter a stay under 28 U.S.C. § 1651, 28 U.S.C. § 2101(f), and Supreme Court Rule 23.

STATEMENT OF THE CASE

Several states led by Texas sued Google in federal court for violating federal antitrust and related state laws through its online display ad business. Pet. App. 2a. South Carolina, through its Attorney General, intervened as a plaintiff. *Id.* at 3a. The Attorney General seeks injunctive relief under the Sherman and Clayton Acts, and injunctive relief, a civil penalty (not actual damages), and attorneys' fees and costs under the South Carolina Unfair Trade Practices Act (SCUTPA). See C.A. App. 218–219, 232, 431–432, 445–446, 511. He does not allege harm to the state's sovereign or

proprietary interest. Instead, he seeks recovery for "Google's acts or practices regarding South Carolina consumers." C.A. App. 431–432, 445–446.

In bringing such an action, the Attorney General

> acts in the public interest of the State of South Carolina and not as the legal representative or attorney of any department or agency of state government, including the executive, legislative, or judicial branches, or boards. Departments, agencies, or boards are not parties to these actions, and the documents or electronically-stored information of such departments, agencies, or boards are not in the possession, custody, or control of the Attorney General.

2024–2025 South Carolina Appropriation Act, H.B. 5100, Part 1B, § 59.16, 125th Gen. Assemb. (2024). This law reflects the constitutional and statutory separation between the Attorney General and the Governor of South Carolina. The Governor has sole authority over executive agencies like the Department. See, *e.g.*, S.C. Code Ann. § 1-30-10(A)(16) (establishing the Department as part of the executive branch); *id.* § 1-30-10(D) (letting the Governor create ad hoc committees within the Department); *id.* § 51-1-10(a) (giving the Governor the power to appoint and remove the Department's director). To fulfill that role, he has a right to obtain agency records. *E.g.*, S.C. Const. Art. IV, § 17; S.C. Code Ann. § 1-3-10. The Attorney General, on the other hand, is a separate publicly-elected constitutional state officer. S.C. Const. Art. VI, § 7. And he is not just the executive branch's lawyer. He separately "serv[es] the sovereign of the State and the general public." *State ex rel. Condon* v. *Hodges*, 562 S.E.2d 623, 629 (S.C. 2002); see also *Condon* v. *State*, 583 S.E.2d 430, 434 (S.C. 2003) (holding that the Attorney General's power to sue on behalf of the State is not "unlimited"). Unlike

the Governor, the Attorney General has no statutory or constitutional authority to obtain agency records.

So when Google sought individual agency records in discovery, the Attorney General objected because he does not have possession, custody, or control over them. Pet. App. 3a–4a. As parties without records sought in discovery usually do, he (and the other state attorneys general) said the records must be obtained, if at all, by subpoena. *Id.* at 4a. Google thereafter served an expansive third-party subpoena seeking the Department's proprietary online advertising file. C.A. App. 31–67.

The Department moved to quash Google's subpoena because it violates the Department's Eleventh Amendment sovereign immunity from suit in federal court.[1] Pet. App. 4a; see also C.A. App. 19–23, 103–106 (detailing how subpoenas fall within this immunity because they subject a state to coercive federal judicial process at the insistence of a private party). It also argued that the Attorney General did not waive the Department's immunity by bringing claims against Google because he did not act in a sovereign capacity, he has no executive control over the Department, he does not have custody or control over the Department's records, and this case does not fit within the narrow circumstances under which one agency can waive the immunity of another. C.A. App. 24–27, 109–112. The district court denied the Department's motion. It assumed, without deciding, that states are immune from federal court

[1] States enjoy sovereign immunity from suit, which is at issue here, and sovereign immunity from liability, which is not at issue here. To avoid confusion, the Department uses the term "Eleventh Amendment immunity" as shorthand for a state's broader immunity from suit. See *Alden* v. *Maine*, 527 U.S. 706, 713 (1999).

subpoenas. *Id.* at 23a. But it concluded that "such immunity would have been waived by South Carolina's voluntary involvement in the underlying action." *Ibid.*

The Fourth Circuit affirmed. It too held that the Attorney General had waived any immunity the Department has. Pet. App. 6a–7a. In the court's view, "Eleventh Amendment immunity is an all-or-nothing affair." *Id.* at 13a n.3. The court reasoned that sovereign immunity belongs to the state and only derivatively protects individual agencies and officers. *Id.* at 9a–10a. This leaves no separate identity or authority of state agencies: "Put simply, the arm is the state, and the state is the arm." *Id.* at 10a. A waiver of immunity by one arm of state government therefore is a waiver by all arms. *Id.* at 12a–13. So "it does not matter whether the attorney general 'represents' [the Department] or has custody of its records" under state law, and whether the Attorney General even acted in his sovereign capacity when bringing suit is "immaterial" to a waiver of sovereign immunity. *Id.* at 13a & n.3. That the Attorney General joined a suit in federal court was enough to waive every state agency's immunity. See *id.* at 9a (agreeing with Google that "no immunity is left for the State's arms," including the Department, after the Attorney joined the Google suit); *id.* at 10a ("[W]hen the State waived its immunity by voluntarily joining the suit against Google, it 'nullified' any immunity defense that any of its arms, including [the Department], could have otherwise asserted."); *id.* at 13a (holding that "there is no immunity left for [the Department] to assert" after the Attorney General became a party to the suit against Google).

The Fourth Circuit denied the Department's timely petition for rehearing on July 2, 2024. Pet. App. 27a–28a. The court then denied the Department's motion to recall and stay the mandate on September 16, 2024. Ex. B.

ARGUMENT

"The standards for granting a stay of mandate pending disposition of a petition for certiorari are well established." *White* v. *Florida*, 458 U.S. 1301, 1302 (1982) (Powell, J., in chambers). "[1] There must be a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; [2] there must be a significant possibility of reversal of the lower court's decision; and [3] there must be a likelihood that irreparable harm will result if that decision is not stayed." *Ibid.* (quoting *Times-Picayune Publ'g Corp.* v. *Schulingkamp*, 419 U.S. 1301, 1305 (1974) (Powell, J., in chambers)); accord *Karcher* v. *Daggett*, 455 U.S. 1303 (1982) (Brennan, J., in chambers); *Whalen* v. *Roe*, 423 U.S. 1313, 1316–1317 (1975) (Marshall, J., in chambers).

In addition, "in a close case it may be appropriate to 'balance the equities'— to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Karcher*, 455 U.S. at 1305–1306. Where the appeal "raises a difficult question of constitutional significance" that "also involves a pressing national problem," a stay is warranted. *Certain Named & Unnamed Non-Citizen Children & Their Parents* v. *Texas*, 448 U.S. 1327, 1331 (1980) (Powell, J., in chambers). Here, each of these factors supports granting the stay.

I. There is a Reasonable Probability That This Court Will Grant Certiorari.

There is a reasonable probability this Court will grant certiorari because the Fourth Circuit's disregard of a state's broad authority to structure itself and internally allocate authority directly conflicts with Supreme Court precedent, and conflicts with the decisions of other circuits. The petition also presents a substantial question on our Nation's federalism principles which requires review to ensure the proper functioning of government.

A. The decision below directly conflicts with this Court's decisions.

The Fourth Circuit's decision irreconcilably conflicts with this Court's decisions in *Berger* v. *North Carolina State Conference of the NAACP*, 597 U.S. 179, 197 (2022), *Lapides* v. *Board of Regents*, 535 U.S. 613 (2002), and *Alden* v. *Maine*, 527 U.S. 706 (1999).

In *Berger*, the Court held that

> [w]ithin wide constitutional bounds, States are free to structure themselves as they wish. Often, they choose to conduct their affairs through a variety of branches, agencies, and elected and appointed officials. These constituent pieces sometimes work together to achieve shared goals; other times they reach very different judgments about important policy questions and act accordingly. This diffusion of governmental powers within and across institutions may be an everyday feature of American life.

597 U.S. at 183–184. Federal courts therefore must respect a state's "chosen means of diffusing its sovereign powers among various branches and officials." *Id.* at 191. Presuming state officials act in unison does "much violence to our system of cooperative federalism." *Id.* at 197. But here, the Fourth Circuit created a federal rule

presuming all state officials act in unison when waiving sovereign immunity. Doing so impermissibly expanded the power of a state official by federal judicial fiat in direct conflict with controlling state law. Its rule that a state's internal allocation of power "does not matter" and that the capacity in which a state official acted when allegedly waiving immunity is "immaterial" (Pet. App. 13a & n.3) cannot be squared with *Berger*. See also Pet. 10–16 (discussing the conflict with *Berger* in more detail).

The decision also conflicts with *Lapides*' direction to "focus on the litigation act the State takes that creates the waiver." 535 U.S. at 620. The act constituting a waiver of Eleventh Amendment immunity in *Lapides*—removal by a state attorney who represented the sole agency in question—was clear. *Id.* at 617–618. Here, the act was nuanced: a state attorney general suing in the public's interest, without alleging harm to the state or representing any individual state agencies, and without custody or control over individual agency records. And nowhere does *Lapides* show or say that "as historically understood, Eleventh Amendment immunity is an all-or-nothing affair," as the Fourth Circuit believed. See Pet. App. 13a n.3. Under *Lapides*, the issue below was whether *that limited act* automatically waived the immunity of every state agency which the Attorney General is not representing or seeking recovery for. But the brightline rule the Fourth Circuit adopted prevented it from answering this question. It directly conflicts with *Lapides*, reads into it rules which do not exist, and disregards its core teaching that the facts of each case matter.

And the decision below directly conflicts with *Alden* in two related ways. First, it unconstitutionally exerts federal authority over state governance. "[T]he balance

between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government." *Alden*, 527 U.S. at 751. Federal interference in that process "strikes at the heart of the political accountability so essential to our liberty and republican form of government." *Ibid*. But here, the court here unconstitutionally substituted its preferred order of state government for what South Carolina has constructed.

Second, it fails to treat state immunity as "reciprocal" of federal immunity. *Alden*, 527 U.S. at 749–750; see also *Fed. Mar. Comm'n* v. *S.C. State Ports Auth.,* 535 U.S. 743, 765 (2002) (holding that Eleventh Amendment immunity's "central purpose is to 'accord the States the respect owed them as' joint sovereigns" with the federal government) (quoting *P.R. Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)). For example, only Congress can waive federal sovereign immunity. *United States* v. *N.Y. Rayon Importing Co.*, 329 U.S. 654, 660 (1947). Individual federal officials cannot waive it. *Ibid.* A state court could not disregard this limitation and find that the actions of a federal official nevertheless waived immunity. Federal courts likewise cannot disregard the order of state government to give officials power they do not have to waive the immunity of other state entities. Doing so, as the Fourth Circuit did here, unconstitutionally "relegate[s] [states] to the role of mere provinces or political corporations" and deprives them of "the dignity * * * of sovereignty." See *Alden*, 527 U.S. at 714.

B. The decision below conflicts with the decisions of other circuit courts.

No court has adopted the "waiver by one" theory when presented with the question. In fact, they have rejected it. The decision below therefore creates a split among the circuits.

The question presented here—whether a waiver by one arm is a waiver by all—often arises in bankruptcy proceedings because a state waives immunity when it files a proof of claim against the debtor's estate. *Gardner* v. *New Jersey*, 329 U.S. 565, 573–574 (1947). So, when one state entity files a claim, has all immunity been waived such that the debtor may raise claims he has against *other* state entities to offset the claim asserted against him? See, *e.g.*, 11 U.S.C. § 106(c) ("Notwithstanding any assertion of sovereign immunity by a governmental unit, there shall be offset against a claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.").

The Second and Tenth Circuits do not recognize a categorical "waiver by one rule" and instead examine the structure of each state and the role of the acting agencies. For example, in the Second Circuit "a waiver by one [may] be deemed to extend to the other" only "where the two agencies in question act as a unitary creditor." *Ossen* v. *Dep't of Soc. Servs. (In re Charter Oak Assocs.)*, 361 F.3d 760, 772 (2d Cir. 2004); see also *id.* at 771 ("If that relationship reveals that the agencies act, in effect, as a unitary creditor for non-bankruptcy purposes, the agencies should be treated as such in the bankruptcy context as well."). When they do not act as a unitary creditor, there may not be a waiver. *Id.* at 772. The Tenth Circuit requires a similar

examination of the facts of the case in determining waiver. *Innes* v. *Kansas State Univ. (In re Innes)*, 184 F.3d 1275, 1280 (10th Cir. 1999) (holding that "the entire record and all the facts in this case should be examined to determine whether a waiver exists."). One of the cases *Innes* cited was the court's earlier decision in *Wyoming Department of Transportation* v. *Straight (In re Straight)*, 143 F.3d 1387 (10th Cir. 1998)). In *Straight*, the court held that the Wyoming Department of Transportation was a unitary creditor with two other state agencies. *Id.* at 1390–1391. It only did so after surveying state law to conclude that Wyoming's structure was like the federal government's, so the state was "one unified entity with different arms through which it carries out the affairs of the state." *Id.* at 1391. It did not short circuit its analysis using a "waiver by one" theory.

To be sure, the Eleventh Circuit has held that an officer's waiver of Eleventh Amendment immunity was a waiver for others within different agencies. *Green* v. *Graham*, 906 F.3d 955, 961–963 (11th Cir. 2018). At best, *Green* merely deepens this split. But this conclusion is dicta because the state conceded it was not asserting Eleventh Amendment immunity as a defense. *Id.* at 962–963. The outcome in *Green* also turned on the court's characterization of Eleventh Amendment immunity as jurisdictional. In the court's view, a later-added state party cannot deprive the court of jurisdiction because jurisdiction is established at the time of removal. *Green*, 906 F.3d. at 962. None of those issues are present here.

C. The question presented in the petition is of exceptional importance because it concerns how a state defines itself as a sovereign.

"Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991). And so states agencies only possess those powers given to them to them under state law. *SGM-Mooglo, Inc.* v. *S.C. Dep't of Re*v., 662 S.E.2d 487, 488 (S.C. Ct. App. 2008). Federal interference with this balance "strikes at the heart of the political accountability so essential to our liberty and republican form of government." *Alden*, 527 U.S. at 751. South Carolina passed a law saying the Attorney General is not acting on behalf of or representing individual agencies, or in possession, custody, or control of their records, in cases like this one. See 2024–2025 South Carolina Appropriation Act, H.B. 5100, Part 1B, § 59.16, 125th Gen. Assemb. (2024). And the Attorney General has no executive control over the Department or right to obtain its records. Yet the Fourth Circuit held the will of the state "does not matter." Pet. App. 13a.

The decision below improperly intrudes into every state's prerogative to order its own government and disregards foundational principles of federalism. This Court's guidance is needed on this important question discerning the balance of state and federal power.

D. This case is an excellent vehicle.

This case presents an excellent vehicle to resolve the conflict with this Court's precedent and the deep split in the circuits.

There is no dispute about the jurisdiction of any lower court or of this Court, the dispute is ripe, and the lower court directly ruled on the question presented in a published opinion. There is no reason to allow further percolation, as each day which passes results in a further irreparable diminution of that very process by which a state defines itself. See *Gregory*, 501 U.S. at 460. Finally, there are no alternative grounds of decision to support the judgment. The Fourth Circuit addressed just one issue—whether the South Carolina Attorney General waived the Department's immunity. There were no other dispositive grounds for judgment.

* * *

For all these reasons, this Court is likely to grant certiorari to review the Fourth Circuit's decision denying the Department's sovereign immunity.

II. This Court is Likely to Reverse the Fourth Circuit.

This Court is likely to reverse the Fourth Circuit's decision. Waiver is not reducible to sweeping brightline rules. The scope of any waiver must respect a state's order of government, be determined case-by-case, and honor the state's place in our federal system. By disregarding these principles, the Fourth Circuit's decision is wrong and marks a clear and unacceptable conflict with this Court's precedent.

III. There is a Likelihood of Irreparable Harm Absent a Stay.

Absent a stay, the Department will be irreparably injured by forfeiting its potential immunity from the federal court subpoena. If forced to respond, the Department has two courses of action: (1) comply with the subpoena and forfeit its

right to seek review because the issue may become moot, or (2) be held in contempt of court. Each choice will result in irreparable harm.

"Eleventh Amendment" sovereign immunity "avoid[s] the indignity of subjecting a State to the coercive process of judicial tribunals at the insistence of private parties." *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 58 (1996) (quotation omitted). The type of relief sought is "irrelevant to the question [of] whether the suit is barred by the Eleventh Amendment." *Ibid.* Suits from which the government is immune include all instances where a judgment would be paid by public funds, would "interfere with the public administration," or would "restrain the Government from acting, or to compel it to act." *Dugan* v. *Rank*, 372 U.S. 609, 620 (1963) (cleaned up); see also *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 101 n.11 (1984) (citing this language from *Dugan* in a case involving state sovereign immunity). A subpoena like Google's falls squarely within the Department's immunity.

A stay is how a party preserves its right to appellate review of a district court's order when enforcing that order would otherwise negate the appellate process. *Nken* v. *Holder*, 556 U.S. 418, 429 (2009) ("A stay simply suspends judicial alteration of the status quo[.]") (internal quotation and citation omitted). "Refusing to grant a stay in order to appeal the denial of sovereign immunity undermines the entire constitutional basis for the doctrine because 'immunity is effectively lost if a case is erroneously permitted to go to trial.'" *Myers* v. *Iowa Bd. of Regents*, No. 3:19-CV-00081-SMR-SBJ, 2020 WL 6387376, at *2 (S.D. Iowa July 9, 2020) (quoting *Van Wyhe* v. *Reisch*, 581 F.3d 639, 647–648 (8th Cir. 2009)); cf. *Va. Off. for Prot. & Advoc.* v.

Stewart, 563 U.S. 247, 258 (2011) ("The specific indignity against which sovereign immunity protects is the insult to a State of being haled into court without its consent."). It "makes no sense for trial to go forward while the court of appeals cogitates on whether there should be one." *Coinbase, Inc.* v. *Biekski*, 143 S. Ct. 1915, 1920 (2023) (quoting *Apostol* v. *Gallion*, 870 F.2d 1335, 1338 (7th Cir. 1989)). This risk of irreparable harm is why this district court's order was immediately appealable. *E.g.*, *Bonnet* v. *Harvest (U.S.) Holdings, Inc.*, 741 F.3d 1155, 1158–1159 (10th Cir. 2014).

If the Court does not grant a stay, the Department will be subject to federal jurisdiction while pending review of the very question of whether the Department should even be subject to such jurisdiction at all. This Court should therefore stay the Fourth Circuit's mandate. See *Stewart*, 563 U.S. at 256 ("To be sure, we have been willing to police abuses of the doctrine that threaten to evade sovereign immunity.").

A stay also is necessary to preserve the Court's authority to hear this important question of federalism. In *Nken*, the Court recognized the need for a stay when appellate review would "come too late for the party seeking review." *Id.* at 421; see also *MOAC Mall Holdings LLC* v. *Transform Holdco LLC*, 598 U.S. 288, 295 (2023) ("A 'case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.'") (quoting *Chafin* v. *Chafin*, 568 U.S. 165, 172 (2013)). Here, if the Department must respond to Google's subpoena before the Court can review the Department's petition, the question presented may be moot because the infringement on the Department's sovereign immunity will be complete

and irreparable. See *Mission Prod. Holdings, Inc.* v. *Tempnology, LLC*, 587 U.S. 370, 378 (2019) (recognizing that complying with a judicial subpoena will moot a case if it is impossible to undo the effects of compliance) (quoting 13B Wright & Miller § 3533.2.2, at 852)). If the Department refuses, it will be held in contempt of court, and again, irreparably injure the Department's potential claim of immunity. See *Alden*, 527 U.S. at 749 (recognizing immunity is threatened not only when a state must "defend or default" but also when "it must face the prospect of being thrust, by federal fiat and against its will * * * to levy on its treasury").

Google, on the other hand, will suffer no prejudice with a stay. Google subpoenaed other South Carolina entities which voluntarily responded. *E.g*, C.A. App. 141. And even though the injunctive relief sought in the underlying case is nationwide, Google has not served subpoenas upon 33 of the 50 states. Motion to Transfer Case at 2, 6, *In re S.C. Dep't of Parks, Recreation & Tourism*, No. 3:23-cv-2100-JFA (D.S.C. April 4, 2023), ECF No. 4 (stating the underlying was brought by 17 state actors and that "the agencies that have been subpoenaed are arms of the same states that are plaintiffs"). A stay for one South Carolina agency will not harm Google any more than its decision to not subpoena any arm of state government in 33 states—that is to say, it will not harm Google at all. That likely is why Google never sought to enforce its subpoena until 65 days after the Fourth Circuit issued its mandate—and only after the Department asked Google if it would consent to a stay. Granting a stay now will not materially change Google's position.

CONCLUSION

The Court should grant the Department's application for a stay of the Fourth Circuit's mandate pending its consideration of the Department's petition for certiorari.

Respectfully submitted,

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SEPTEMBER 30, 2024

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-1849

In re: SOUTH CAROLINA DEPARTMENT OF PARKS, RECREATION AND TOURISM.

In re: GOOGLE DIGITAL ADVERTISING ANTITRUST LITIGATION, 1:21-md-3010-PKC; and STATE OF TEXAS, et al. v. GOOGLE LLC, 1:21-cv-6841-PKC.

SOUTH CAROLINA DEPARTMENT OF PARKS, RECREATION AND TOURISM,

Movant – Appellant,

v.

GOOGLE LLC,

Respondent – Appellee.

Appeal from the United States District Court for the District of South Carolina, at Columbia. Joseph F. Anderson, Jr., Senior District Judge. (3:23-cv-02100-JFA)

Argued: May 8, 2024 Decided: June 5, 2024

Before AGEE and THACKER, Circuit Judges, and TRAXLER, Senior Circuit Judge.

Affirmed by published opinion. Judge Agee wrote the opinion in which Judge Thacker and Senior Judge Traxler joined.

ARGUED: Robert W. Humphrey, II, WILLOUGHBY HUMPHREY & D'ANTONI P.A., Charleston, South Carolina, for Appellant. Jason R. LaFond, YETTER COLEMAN LLP, Houston, Texas, for Appellee. **ON BRIEF:** Mitchell Willoughby, Margaret M. O'Shields, Hunter R. Pope, WILLOUGHBY HUMPHREY & D'ANTONI, P.A., Columbia, South Carolina, for Appellant. Jamie Alan Aycock, Ayla S. Syed, YETTER COLEMAN LLP, Houston, Texas, for Appellee.

AGEE, Circuit Judge:

Along with several other states, the State of South Carolina ("South Carolina" or the "State") sued Google LLC in federal court for violations of federal and state antitrust laws. With South Carolina's express approval, Google subpoenaed the South Carolina Department of Parks, Recreation and Tourism ("SCPRT") for discovery pertinent to its defense. But SCPRT refused to comply. Asserting Eleventh Amendment immunity, SCPRT moved to quash the subpoena. The district court below denied the motion, holding that any Eleventh Amendment immunity that SCPRT may have otherwise been entitled to assert was waived when the State, through its attorney general, voluntarily joined the federal lawsuit against Google. SCPRT now appeals. We affirm.

I.

Several states led by Texas sued Google in the U.S. District Court for the Eastern District of Texas for violating federal and state antitrust laws through its online display advertising business. The particulars of Google's alleged anticompetitive conduct are not relevant for purposes of this appeal. Rather, we are concerned with the undisputed conduct of a particular plaintiff: South Carolina.

After Texas and the other states filed suit, South Carolina, through its attorney general, intervened "as a plaintiff state, in the public interest and on behalf of the people of South Carolina." J.A. 480. Thereafter, the state plaintiffs filed an amended complaint naming South Carolina as a plaintiff. According to the operative complaint, all the state

plaintiffs, including South Carolina, "bring this action in their respective sovereign capacities and as *parens patriae* on behalf of the citizens, general welfare, and economy of their respective states." J.A. 232. And in doing so, the state plaintiffs expressly invoke federal jurisdiction. *See* J.A. 233 ("The Court has jurisdiction over this action under Sections 1, 2, and 4 of the Sherman Act, 15 U.S.C. §§ 1-2 & 4; Section[] 16 of the Clayton Act, 15 U.S.C. § 26; and under 28 U.S.C. §§ 1331, 1337, and 1407.").

Discovery commenced, and Google served document requests on the state plaintiffs through their respective attorneys general. The state plaintiffs objected to these requests, asserting that the attorneys general "do not have the authority to search for documents that are held by other state agencies or other governmental entities." J.A. 94. Google therefore served subpoenas *duces tecum* directly on the relevant state agencies, SCPRT among them, to obtain the requested documents. The state plaintiffs, including South Carolina, explicitly endorsed this course of action as the appropriate method of obtaining the discovery Google sought. In a joint letter to Google, South Carolina and the other state plaintiffs wrote: "Google issued Federal Rule 45 subpoenas to numerous state agencies, and State Plaintiffs believe that these subpoenas are the proper channels for Google to seek documents that are in the possession, custody, or control of those agencies." J.A. 94–95; *see also* J.A. 94 (the state plaintiffs averring that "[m]ost of Google's [discovery requests] target documents that are not within the possession, custody or control of State Plaintiffs and can be more easily obtained from sources that are more convenient, less burdensome, or less expensive than obtaining that information from State Attorneys General").

Despite South Carolina's communicated position that Rule 45 subpoenas were the "proper channels" for Google to seek documents in the possession of state agencies separate from the attorney general's office, SCPRT took a different view. When it received one of these subpoenas, SCPRT filed a motion to quash in the U.S. District Court for the District of South Carolina—the district where compliance with the subpoena is required and thus where related challenges must be brought, *see* Fed. R. Civ. P. 45(d)(3)(A)—arguing that Eleventh Amendment immunity shielded it from any obligation to comply. Although it acknowledged that the State's attorney general "may have waived a limited portion of South Carolina's sovereign immunity" by joining the federal suit against Google, SCPRT maintained that the attorney general did not and could not "waive the subpoena sovereign immunity of an agency he does not represent and over whose records he does not have custody or control." J.A. 27.

Following a hearing, the district court issued a written opinion denying SCPRT's motion. The court began by noting that it's an open question in this circuit "whether a subpoena can be considered a 'suit' for the purposes of Eleventh Amendment immunity"—that is, whether Rule 45 subpoenas trigger a state's Eleventh Amendment immunity or whether they fall outside that immunity. J.A. 162. But the court ultimately found that it was "unnecessary" to decide that issue for purposes of resolving the motion to quash. J.A. 163. Instead, the court "[a]ssum[ed] without deciding that SCPRT is entitled to Eleventh Amendment immunity" from a subpoena and held that "such immunity would have been waived by South Carolina's voluntary involvement in the underlying action pending in the Eastern District of Texas." J.A. 163. Elaborating, the court stated: "SCPRT's immunity is

derivative in nature. It only exists due to the immunity afforded to South Carolina and its relationship to South Carolina as a state agency. Thus, it makes little sense[] to find a state's immunity can be imputed to its agencies but not its waiver of such immunity." J.A. 164.

The district court further emphasized that Google had "initially requested the subject documents and information from South Carolina through discovery" but was told by the State (and the other state plaintiffs) that "Federal Rule 45 subpoenas are the proper channels for Google to seek documents that are in the possession, custody, or control of those agencies." J.A. 164 (cleaned up). In the court's view, "it would be fundamentally unfair to punish Google for simply following South Carolina's instruction to subpoena the requested documents because South Carolina allegedly lacks custody, control, and possession over documents within SCPRT." J.A. 164–65.

SCPRT noted a timely appeal, over which we have jurisdiction under the collateral order doctrine. *See P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993) ("States and state entities that claim to be 'arms of the State' may take advantage of the collateral order doctrine to appeal a district court order denying a claim of Eleventh Amendment immunity.").

II.

We review a district court's order concerning "the applicability of Eleventh Amendment immunity *de novo*." *Harter v. Vernon*, 101 F.3d 334, 336–37 (4th Cir. 1996).

III.

This case presents two questions: (1) whether Eleventh Amendment immunity applies to Rule 45 subpoenas; and (2) assuming that it does, whether the State, by joining the federal action against Google, waived any such immunity SCPRT would have otherwise been able to assert with respect to Google's subpoena. Like the district court, we find it unnecessary to address the first question because the second question is dispositive. By joining the lawsuit against Google, the State voluntarily invoked the jurisdiction of a federal court, thereby effecting a waiver of its Eleventh Amendment immunity as to all matters arising in that suit. And because SCPRT's immunity derives solely from that of the State, South Carolina's waiver of Eleventh Amendment immunity equally effected a waiver of SCPRT's immunity. The district court therefore properly denied SCPRT's motion to quash.

A.

The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. As construed by the Supreme Court, this Amendment "confirmed . . . state sovereign immunity as a constitutional principle." *Alden v. Maine*, 527 U.S. 706, 728–29 (1999). Under that principle, "an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State." *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304 (1990). And this immunity extends not just to the state, but also "to state agencies and other government

entities properly characterized as arms of the State." *Gray v. Laws*, 51 F.3d 426, 430 (4th Cir. 1995) (cleaned up).

Importantly, however, "[t]he Eleventh Amendment bar to suit is not absolute." *Feeney*, 495 U.S. at 304. Relevant here, a state waives its Eleventh Amendment immunity when it "voluntarily invoke[s] the jurisdiction of [a] federal court." *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 622 (2002) (emphasis omitted). And such a waiver, long-standing Supreme Court precedent holds, is irrevocable: "[W]here a state voluntarily become[s] a party to a cause, and submits its rights for judicial determination, it will be bound thereby, and cannot escape the result of its own voluntary act by invoking the prohibitions of the 11th Amendment." *Gunter v. Atl. Coast Line R.R. Co.*, 200 U.S. 273, 284 (1906); *accord Porto Rico v. Ramos*, 232 U.S. 627, 632 (1914) ("[T]he immunity of sovereignty from suit without its consent cannot be carried so far as to permit it to reverse the action invoked by it, and to come in and go out of court at its will, the other party having no right of resistance to either step.").

With these principles in mind, we consider the case at bar.

B.

There is no dispute that SCPRT is an arm of the State and is thus ordinarily entitled to share in South Carolina's Eleventh Amendment immunity. But the parties disagree as to the impact of the attorney general's litigation conduct in adding the State as a plaintiff to the federal lawsuit against Google.

According to SCPRT, because the attorney general "does not represent SCPRT or have custody, possession, or control over its records," and because he "did not bring his

claims against Google in a sovereign capacity," his joining the State to the litigation against Google could not have waived the Eleventh Amendment immunity of SCPRT, which is a "statutorily and constitutionally separate" state agency. Opening Br. 20, 33.

Google responds that by exercising his litigation control over the State, the attorney general caused South Carolina to make a "general appearance in litigation in a federal court," resulting in a waiver of the State's Eleventh Amendment immunity for purposes of that litigation. Response Br. 8 (cleaned up). And because of that waiver, Google continues, no immunity "is left for [the State's] arms," including SCPRT. Response Br. 10.

We agree with Google.

In *Lapides*, the Supreme Court made clear that a state waives its Eleventh Amendment immunity "when [its] attorney general, authorized . . . to bring a case in federal court, has voluntarily invoked that court's jurisdiction." 535 U.S. at 622. That is precisely what happened here. South Carolina's attorney general, who is indisputably authorized to bring a case on behalf of the State in federal court, invoked the jurisdiction of a federal court by intervening in the antitrust action against Google. That act, *Lapides* teaches, effected a waiver of the State's Eleventh Amendment immunity.

So what does this mean for SCPRT? We think Google summarized it well: "As South Carolina goes, so goes [SCPRT]." Response Br. 9. As an arm of the State, SCPRT enjoys no independent immunity. Rather, its immunity derives solely from the State, the sovereign to whom the immunity belongs. *See Cash v. Granville Cnty. Bd. of Educ.*, 242 F.3d 219, 223 (4th Cir. 2001) (stating that "state agents and state instrumentalities . . . partake of the *State's* Eleventh Amendment immunity" (emphasis added)); *see also Va. Off.*

for Prot. & Advocacy v. Stewart, 563 U.S. 247, 253 (2011) ("Our cases hold that the *States* have retained their traditional immunity from suit[.]" (emphasis added)). And if an arm of a state enjoys Eleventh Amendment immunity only by virtue of its relation to the state, it necessarily follows that when the state waives its immunity, then there no longer remains any immunity that the arm may assert. Put simply, the arm *is* the state, and the state is the arm. *Cf. Hutto v. S.C. Ret. Sys.*, 773 F.3d 536, 542 (4th Cir. 2014) ("The Eleventh Amendment shields a state entity from suit in federal court if, in the entity's operations, the state is the real party in interest, in the sense that the named party is the alter ego of the state." (cleaned up)); *Ristow v. S.C. Ports Auth.*, 58 F.3d 1051, 1053, 1055 (4th Cir. 1995) ("[T]he Ports Authority, from an Eleventh Amendment perspective, is the alter ego of the State of South Carolina" and thus "is entitled to Eleventh Amendment immunity from suit."). Accordingly, when the State waived its immunity by voluntarily joining the suit against Google, it "nullified" any immunity defense that any of its arms, including SCPRT, could have otherwise asserted. *Owen v. City of Independence*, 445 U.S. 622, 645–46 (1980) (stating that "the principle of sovereign immunity . . . is necessarily nullified when the State expressly or impliedly allows itself, or its creation, to be sued").

South Carolina's own litigation conduct in this case reflects a recognition of that fact. After Google's unsuccessful attempts to obtain discovery from the State's attorney general, South Carolina expressly endorsed Google's alternative course of serving Rule 45 subpoenas directly on the state agencies in possession of the relevant documents, including SCPRT: "Google issued Federal Rule 45 subpoenas to numerous state agencies, and *State Plaintiffs believe that these subpoenas are the proper channels* for Google to seek

documents that are in the possession, custody, or control of those agencies." J.A. 94–95 (emphasis added); *see also* J.A. 94 ("Most of Google's [discovery requests] target documents that are not within the possession, custody or control of State Plaintiffs and can be more easily obtained from sources that are more convenient, less burdensome, or less expensive than obtaining that information from State Attorneys General.").[1] As the district court recognized, it would be "fundamentally unfair" to Google, J.A. 164, to permit SCPRT to invoke Eleventh Amendment immunity in response to a subpoena that the State itself told Google was "the proper channel[]" for seeking documents pertinent to the company's defense, J.A. 95—a defense Google is forced to mount because of claims that South Carolina brought against it in federal court. *See Lapides*, 535 U.S. at 620 (observing "the [Eleventh] Amendment's presumed recognition of the judicial need to avoid inconsistency, anomaly, and *unfairness*," which might include a state's "selective use of 'immunity' to achieve litigation advantages" (emphasis added)); *Ramos*, 232 U.S. at 632 (stating that "the immunity of sovereignty from suit without its consent cannot be carried so far as to permit it to reverse the action invoked by it, and to come in and go out of court at its will, *the other party having no right of resistance to either step*" (emphasis added)); *cf. In re Creative Goldsmiths of Wash., D.C., Inc.*, 119 F.3d 1140, 1148 (4th Cir. 1997) ("[I]t would violate the *fundamental fairness of judicial process* to allow a state to proceed in federal court and

[1] Notably, one other South Carolina agency—the South Carolina Department of Social Services—was subpoenaed, and unlike SCPRT, it voluntarily complied by producing the responsive documents.

at the same time strip the defendant of valid defenses because they might be construed to be affirmative claims against the state." (emphasis added)).[2]

SCPRT's arguments urging a different result are unavailing. SCPRT stresses that under South Carolina state law, the attorney general "does not represent" SCPRT—a distinct state agency—or have custody or control of its records. Opening Br. 24. That being so, SCPRT contends, the attorney general "cannot waive [SCPRT's] sovereign immunity from being compelled to produce records in federal court." Opening Br. 24. But that claim rests on a false premise. Under *Lapides*, "whether a particular [state action] amounts to a waiver of the State's Eleventh Amendment immunity is a question of *federal* law," not state law. 535 U.S. at 623 (emphasis added). On that score, *Lapides* set forth a bright-line rule: a state waives its Eleventh Amendment immunity "when [its] attorney general, authorized (as here) to bring a case in federal court, has voluntarily invoked that court's jurisdiction." *Id.* at 622.[3] Thus, it does not matter whether the attorney general "represents" SCPRT or

[2] We should emphasize, however, that our conclusion would remain the same even if the state plaintiffs had not explicitly endorsed directing subpoenas to individual state agencies. As we have explained, South Carolina's decision to intervene as a plaintiff in the federal lawsuit against Google was sufficient, in and of itself, to waive the state's Eleventh Amendment immunity.

[3] In its reply brief and at oral argument, SCPRT argued that *Lapides*' holding is limited to its facts—that is, when a state invokes federal jurisdiction by removing a case against it from state court to federal court. *See* 535 U.S. at 616–17. We disagree. The Court's opinion in that case clearly stated that its decision was an application of the "general principle" that a state's invocation of federal jurisdiction constitutes a waiver of Eleventh Amendment immunity, regardless of the form that invocation might take. *Id.* at 620; *see also id.* at 624 (stating that "removal is a *form* of voluntary invocation of a federal court's jurisdiction sufficient to waive the State's otherwise valid objection to litigation of a matter . . . in a federal forum" (emphasis added)).

has custody of its records. He represents the *State*. And in that capacity, he caused the *State* to become a party to the action against Google, thereby invoking a federal court's jurisdiction and waiving the *State's* sovereign immunity.[4] As a result of that unconditional waiver, there is no immunity left for SCPRT to assert.

The district court therefore properly denied SCPRT's motion to quash.

IV.

Our holding today reflects a straightforward application of basic Eleventh Amendment principles. When South Carolina, through its attorney general, joined the action against Google, it voluntarily invoked federal jurisdiction. That invocation, Supreme Court precedent plainly instructs, resulted in a complete and irrevocable waiver of the State's Eleventh Amendment immunity as to all matters arising in that lawsuit, including the State-endorsed Rule 45 subpoena issued to SCPRT.

The district court's order is

AFFIRMED.

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[4] Despite SCPRT's assertions, we think it immaterial whether the attorney general brought the claims "in a sovereign capacity" or "in his non-sovereign *parens patriae* role." Opening Br. 20, 30. *Lapides* drew no such distinction, and we see no basis to do so here. Nor do we accept SCPRT's related claim that the attorney general waived only *some* of the State's immunity and specifically *not* the portion that purportedly belongs exclusively to SCPRT. *See* Opening Br. 31–32 (stating that "[e]ach state agency may choose whether to remove the cloak of Eleventh Amendment immunity" and that one state agency's ability "to waive the Eleventh Amendment immunity of another" is "strictly circumscribe[d]" (cleaned up)). SCPRT provides no persuasive, let alone binding, authority supporting that kind of piecemeal approach to a state's Eleventh Amendment immunity. To the contrary, as historically understood, Eleventh Amendment immunity is an all-or-nothing affair. *Cf. Lapides*, 535 U.S. at 620–23; *Ramos*, 232 U.S. at 632; *Gunter*, 200 U.S. at 284.

FILED: September 16, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-1849
(3:23-cv-02100-JFA)

In re: SOUTH CAROLINA DEPARTMENT OF PARKS, RECREATION AND TOURISM

In re: GOOGLE DIGITAL ADVERTISING ANTITRUST LITIGATION, 1:21-md-3010-PKC; and STATE OF TEXAS, et al. v. GOOGLE LLC, 1:21-cv-6841-PKC

SOUTH CAROLINA DEPARTMENT OF PARKS, RECREATION AND TOURISM

Movant - Appellant

v.

GOOGLE LLC

Respondent - Appellee

O R D E R

Upon consideration of the submission relative to appellant's motion to recall

and stay the mandate, the court denies the motion.

Entered at the direction of Judge Agee with the concurrence of Judge Thacker and Senior Judge Traxler.

For the Court

/s/ Nwamaka Anowi, Clerk