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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Federal courts must respect a state's "chosen means of diffusing its sovereign powers among various branches and officials." *Berger* v. *N.C. State Conf. of the NAACP*, 597 U.S. 179, 191 (2022). Presuming state officials act in unison does "much violence to our system of cooperative federalism." *Id.* at 197. Federal interference in a state's internal processes "strikes at the heart of the political accountability so essential to our liberty and republican form of government." *Alden* v. *Maine*, 527 U.S. 706, 751 (1999). But here, the Fourth Circuit created a federal rule presuming all state officials act in unison when waiving sovereign immunity. In the court's view, one agency's power to waive the immunity of another "does not matter" and the nature of its act is "immaterial." Waiver by one state official is a waiver by all—even if state law says otherwise.

The Fourth Circuit's decision directly conflicts with multiple decisions of this Court and splits from the Second and Tenth Circuits.

The question presented is:

Whether state law can limit the power of one state agency to waive the sovereign immunity of another.

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.

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PETITION FOR A WRIT OF CERTIORARI

The Tenth and Eleventh Amendments sit at the heart of our federalist system. The Tenth Amendment requires federal courts to respect a state's allocation of power among its officers, agencies, and branches. And the principles enshrined in the Eleventh Amendment immunize those officers, agencies, and branches from private suits in federal court without consent. This immunity is a personal privilege which a state can waive. So an important question arises where these amendments meet: can state law limit one agency's ability to waive the immunity of another state agency, or is a waiver by one necessarily a waiver by all?

Before the decision below, no court had adopted the "waiver by one" theory when presented with the question. Instead, courts recognized that the structure of state government and the nature of the action allegedly constituting waiver are relevant. The Fourth Circuit here broke from this line of authority by holding that a waiver by one arm of the state is a waiver by all. According to the court, a state's discretion to confer varying degrees of authority to its agencies is irrelevant.

The decision below irreconcilably conflicts with this Court's precedent, splits from other circuits, and will have profound consequences throughout the country. This Court should grant certiorari to review this important question that goes to the core of our government.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a–14a) is reported at 103 F.4th 287. The opinion of the district court (App., *infra*, 17a–26a) is unreported.

JURISDICTION

The court of appeals entered its judgment on June 5, 2024. App., *infra*, 15a–16a. A petition for rehearing was denied on July 2, 2024. App., *infra*, 27a–28a. This Court's jurisdiction is timely invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Amendment X:

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

The United States Constitution, Amendment XI:

> 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.

2024–2025 South Carolina Appropriation Act, H.B. 5100, Part 1B, § 59.16, 125th Gen. Assemb. (2024):

> In the current fiscal year, when the Attorney General institutes or defends an action on behalf of the State of South Carolina pursuant to any power granted by the common law, the Constitution of South Carolina, 1895, or the South Carolina Code of Laws, he 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. This provision does not affect the ability of the Attorney General to institute or defend an action in a proprietary capacity on behalf of or representing any department, agency, or board. Unless the Attorney General institutes actions for damages in the name of and on behalf of a department, state agency, or board, the Attorney General acts in the public interest of South Carolina as provided in this provision.

STATEMENT

1. Several states led by Texas sued Google in federal court for violating federal antitrust and related state laws through its online display ad business. App.,

infra, 2a. South Carolina, through its Attorney General, intervened as a plaintiff. *Id.* at 3a. The state plaintiffs' causes of action fall into two categories: (1) Counts I–IV asserting violations of 15 U.S.C. §§ 1 and 2 (the Sherman Act) and seeking only injunctive relief pursuant 15 U.S.C. § 26 (the Clayton Act), and (2) Counts V and VI asserting violations of state antitrust and unfair competition laws. See C.A. App. 218–219, 232, 511. In Counts V and VI, the South Carolina Attorney General seeks injunctive relief, a civil penalty (not actual damages), and attorneys' fees and costs under the South Carolina Unfair Trade Practices Act (SCUTPA), S.C. Code Ann. §§ 39-5-10 to -180, for "Google's acts or practices regarding South Carolina consumers." C.A. App. 431–432, 445–446. The Attorney General does not assert harm to South Carolina's sovereign or proprietary interest.

At Google's urging, the antitrust court found that each state was not acting "in the capacity of a sovereign but as a private enforcer" when bringing its federal claims for injunctive relief. C.A. App. 503–505, 591–593. Similarly, the South Carolina Attorney General brought the SCUTPA claim only in his non-sovereign, *parens patriae* capacity. Pet. 13–16. When he proceeds as *parens patriae*, he does not represent any South Carolina agency or department, and does not have possession, custody, or control over their records. 2024–2025 South Carolina Appropriation Act, H.B. 5100, Part 1B, § 59.16, 125th Gen. Assemb. (2024). As a result, the Attorney General objected to producing individual agency records in discovery. App., *infra*, 3a–4a. And as parties without records sought in discovery usually do, he (and other state attorneys general) said the records must be obtained 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 subpoena has 118 defined terms and demands that the Department produce, under the threat of contempt, 27 categories of records which will expose the Department's digital advertising campaign. *Ibid.* Nearly all the records sought are trade secrets exempt from production under the South Carolina Freedom of Information Act. See S.C. Code Ann. § 30-4-40(1) (defining the trade secret exemption).

2. The Department moved to quash Google's subpoena because it violates the Department's Eleventh Amendment sovereign immunity from private suits in federal court.[1] App., *infra*, 4a; see also C.A. App. 19–23, 103–106 (detailing how subpoenas fall within this immunity). The Department argued that the Attorney General did not waive its immunity by bringing claims against Google because the Attorney General 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. The court assumed, without deciding, that states are immune from federal court subpoenas. App., *infra*, 23a.

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).

But it concluded that "such immunity would have been waived by South Carolina's voluntary involvement in the underlying action." *Ibid.* The court characterized the Department's immunity as "derivative in nature" and "only exist[ing] due to the immunity afforded to South Carolina and [the Department's] relationship to South Carolina as a state agency." *Id.* at 24a–25a. It determined that "it makes little sense[ ] to find a state's immunity can be imputed to its agencies but not its waiver of such immunity." *Id.* at 25a. And citing the Attorney General's suggestion that the records can be obtained by subpoena, the district court believed "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 them. *Ibid.*

In reaching this conclusion, the district court did not analyze the nature of the Department's and the Attorney General's relationship, the nature of the Attorney General's role in the antitrust case, the cases restricting one state agency's ability to waive the immunity of another, or the context of the state plaintiffs' "instruction" to subpoena agency records.

3. The Department timely appealed, asserting jurisdiction under the collateral order doctrine. App., *infra*, 6a. Like the district court, the Fourth Circuit assumed that the Department is immune from Google's subpoena. *Ibid.* And it too held that the Attorney General waived this immunity. *Id.* at 6a–7a. The court viewed "Eleventh Amendment immunity [a]s an all-or-nothing affair." *Id.* at 13a n.3. It 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–13a.

From this, the Fourth Circuit held that "it does not matter whether the attorney general 'represents' [the Department] or has custody of its records" under state law. App., *infra*, 13a. Also, whether the Attorney General even acted in his sovereign capacity when bringing suit is "immaterial" to whether he waived the Department's 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 General 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).

4. The Department timely petitioned for rehearing, which was denied on July 2, 2024. App., *infra*, 27a–28a.

REASONS FOR GRANTING THE PETITION

A. The Decision Below Directly Conflicts With This Court's Decisions.

The individual states "retain 'a residuary and inviolable sovereignty'" and "are not relegated to the role of mere provinces or political corporations[.]" *Alden* v. *Maine*, 527 U.S. 706, 715 (1999) (quoting The Federalist No. 39, at 245). Given their sovereign status, "[t]he Founders believed that both 'common law sovereign immunity' and 'law-of-nations sovereign immunity' prevented States from being amenable to process in any court without their consent." *Franchise Tax Bd. of Cal.* v. *Hyatt*, 587 U.S. 230, 238 (2019). This means federal courts cannot hear suits brought by private parties against non-consenting states. *Tenn. Student Assistance Corp.* v. *Hood*, 541 U.S. 440, 446 (2004). Though it often is called "Eleventh Amendment" immunity,[2] a state's sovereign immunity from private suits in federal court "derives not from the Eleventh Amendment but from the structure of the original Constitution itself." *Alden*, 527 U.S. at 728. It is an "integral component" of state sovereignty. *Fed. Mar. Comm'n* v. *S.C. State Ports Auth.*, 535 U.S. 743, 751–752 (2002).

Eleventh Amendment immunity is "a personal privilege which [a state] may waive at pleasure." *Coll. Sav. Bank* v. *Fla. Prepaid Postsecondary Educ. Expense*

2. "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." U.S. Const. Amend. XI.

Bd., 527 U.S. 666, 675 (1999) (quoting *Clark* v. *Barnard*, 108 U.S. 436, 447 (1883)). Still, the test for waiver is "stringent." *Sossamon* v. *Texas*, 563 U.S. 277, 284 (2011) (quoting *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 241 (1985)). Courts must indulge every reasonable presumption against waiver. *Coll. Sav. Bank*, 527 U.S. at 682 (citation omitted). Furthermore, determining whether a state has waived its Eleventh Amendment immunity "must be guided by the principles of federalism that inform Eleventh Amendment doctrine." *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 100 (1984) (cleaned up). Waiver therefore implicates the Tenth Amendment as well. See *Printz* v. *United States*, 521 U.S. 898, 924 n.13 (1997) (holding that the Tenth Amendment speaks "explicitly" of federalism); see also U.S. Const. Amend. X. ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); *Alden*, 527 U.S. at 713–714 ("Any doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment.").

And so, waiver is not reducible to sweeping brightline rules. As explained below (Pet. 10–20), 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.

1. The decision conflicts with *Berger*'s command that federal courts respect how states structure their government and delegate their officers' powers.

1. *Berger* v. *North Carolina State Conference of the NAACP*, 597 U.S. 179 (2022), confirmed the breadth of a state's right to order its internal affairs. In *Berger*, the NAACP challenged North Carolina's voter ID law. *Id.* at 185–186. The named defendants were the Governor and members of the State Board of Elections. *Id.* at 186. The North Carolina Attorney General—an independently elected official—defended the Board members. *Ibid.* Because the Attorney General previously voted against a voter ID law, the speaker of the State House of Representatives and the president pro tempore of the State Senate moved to intervene to defend the law. *Ibid.* State law lets them intervene in any suit challenging a state statute, and they argued that "important state interests" would not be represented without their involvement because the named defendants opposed voter ID laws. *Id.* at 186–187.

The district court and the en banc Fourth Circuit disregarded the legislative leaders' right to intervene. The courts presumed that the Attorney General adequately represented the state's interests. *Berger*, 597 U.S. at 187–188, 190. And for that reason, they denied intervention.

This Court reversed. It began by confirming a state's right to internally allocate power in sweeping terms:

> Within 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.

Berger, 597 U.S. at 183–184.

Next, the Court explained how and why federal courts must respect a state's division of power among its agencies and officers:

- "[T]he separation of government powers has long been recognized as vital to the preservation of liberty, and it is through the power to 'structure . . . its government, and the character of those who exercise government authority, [that] a State defines itself as a sovereign.'" *Berger*, 597 U.S. at 191 (quoting *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991)).

- "[W]hen a State chooses to allocate authority among different officials who do not answer to one another, different interests and perspectives, all important to the administration of state government, may emerge." *Ibid.* (citing *Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 67 (2021)).

- Permitting courts to question a state's interests would "evince disrespect for a State's chosen means of diffusing its sovereign powers among

various branches and officials" and "turn[ ] a deaf federal ear to the voices the State has deemed crucial to understanding the full range of its interests." *Ibid.*

- "Respecting the States' plans for the distribution of governmental powers also serves important national interests. It better enables the States to serve as a balance to federal authority. It permits States to accommodate government to local conditions and circumstances. And it allows States to serve as laboratories of innovation and experimentation from which the federal government itself may learn and from which a mobile citizenry benefits." *Id.* at 192 (cleaned up).

- "[W]here a State chooses to divide its sovereign authority among different officials and authorize their participation in a suit challenging state law, a full consideration of the State's practical interests may require the involvement of different voices with different perspectives." *Id.* at 195.

So the Court bluntly rejected the lower courts' "presumption of adequate representation" of an entire state's interest by one officer:

- "For a federal court to presume a full overlap of interests when state law more nearly presumes the opposite would make little sense and do much violence to our system of cooperative federalism. In cases like ours, state agents may pursue 'related' state interests, but they cannot be fairly presumed to bear 'identical' ones." *Berger*, 597 U.S. at 197.

- "Any presumption against intervention is *especially* inappropriate when wielded to displace a State's prerogative to select which agents may defend its lawyers and protect its interests. Normally, a State's chosen representatives should be greeted in federal court with respect, not adverse presumptions." *Ibid.*

- "[T]his litigation illustrates how divided state governments sometimes warrant participation by multiple state officials in federal court." *Id.* at 198.

2. Properly defining the extent of a state actor's power is critical. "Not all that a State does * * * is based on its sovereign character." *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico, ex rel., Barez*, 458 U.S. 592, 601 (1982). For example, the South Carolina Attorney General's actions do not extend to the state as a whole when he does not proceed on behalf of the state's sovereign or propriety interest. See *State ex rel. Condon* v. *Hodges*, 562 S.E.2d 623, 629 (S.C. 2002) (noting the Attorney General can separately perform his "dual role of serving the sovereign of the State and the general public"). These *parens patriae* claims pursue quasi-sovereign interests which "stand apart" from sovereign ones. *Snapp*, 458 U.S. at 602; see also *New York* v. *Microsoft Corp.*, 209 F. Supp. 2d 132, 150 (D.D.C. 2002) ("Injury in a suit brought by a state in its *parens patriae* capacity rests upon 'sufficiently severe and generalized' harm to the welfare of that state's citizens, rather than harm to the proprietary interest of the state."). So courts must begin with the question which the Fourth Circuit held does not matter: who was the agency acting on behalf of?

This case illustrates the error of not asking that question. The Governor of South Carolina has "[t]he supreme executive authority of this State" and is popularly elected. S.C. Const. Art. IV, §§ 1, 3. He is 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 constitutional and statutory right to obtain agency records. S.C. Const. Art. IV, § 17; S.C. Code Ann. § 1-3-10.

The Attorney General is not an appointee. He is a separate popularly elected constitutional officer. S.C. Const. Art. VI, § 7 ("There shall be elected by the qualified voters of the State * * * an Attorney General" whose duties "shall be prescribed by law."). So he does not answer to the Governor; he may be removed only at the ballot box or by impeachment. S.C. Const. Art. XV. The Attorney General also is not just the executive branch's lawyer. He separately "serv[es] the sovereign of the State and the general public." *Hodges*, 562 S.E.2d at 629; 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"). To be sure, he advises the Governor and agency heads upon request, and he can represent agencies in court as necessary. *E.g.*, S.C. Code Ann. § 1-7-40; *id.* § 1-7-90; *id.* § 1-7-110. But he cannot automatically appear in court on their behalf. *Condon*, 583 S.E.2d at 433–434. And—underscoring the separation between the Governor and the Attorney General—the Attorney General can sue the Governor without violating any constitutional, statutory, or attorney conflict rules. *E.g.*, *Hodges*, 562 S.E.2d at 627–629. He

also has no statutory or constitutional authority to obtain agency records like the Governor has.

For these reasons, South Carolina law expressly states that when the Attorney General sues in the public interest he does not act

> 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.[3]

2024–2025 South Carolina Appropriation Act, H.B. 5100, Part 1B, § 59.16, 125th Gen. Assemb. (2024).

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3. This budget proviso is the law for the current fiscal year. See *Amisub of S.C., Inc.* v. *S.C. Dep't of Health & Env't Control*, 757 S.E.2d 408, 415–416 (S.C. 2014). The 2023–2024 budget contained identical language. See H. 4300, Pt. 1B, § 59.19, 125th Gen. Assemb. (2023). A prior bill proposed in 2023, House Bill 3866, was substantively identical and sought to "clarify that, when the Attorney General proceeds in the public interest, the Attorney General does not undertake representation of State agencies and cannot be considered to have possession, custody, or control over State agency" records. The bill did not pass after the House unanimously rejected the Senate's amendment to require that the Attorney General facilitate the production of agency records by subpoena. H. 125-25, Reg. Sess., at 36–38 (S.C. 2024). But its provisions otherwise are law through budget provisos and the structure of state government.

Here, the state plaintiffs brought their federal antitrust claims against Google only as private enforcers and not as sovereigns. C.A. App. 503–505, 591–593. And the South Carolina Attorney General brought his SCUTPA claim on behalf of South Carolina consumers, not the state itself. C.A. App. 431–432, 445–446. His SCUTPA claim therefore is non-sovereign too. See *AU Optronics Corp.* v. *South Carolina*, 699 F.3d 385, 394 (4th Cir. 2012) (holding that a SCUTPA claim by the Attorney General asserts a quasi-sovereign *parens patriae* interest); see also *Snapp*, 458 U.S. at 602 (holding that quasi-sovereign interests are not sovereign interests); *State ex rel. Wilson* v. *Ortho-McNeil-Janssen Pharms., Inc.*, 777 S.E.2d 176, 192 (S.C. 2015) (holding that such an "action [is] brought by the State [ ] to *protect the citizens of South Carolina* from unfair or deceptive acts in the conduct of any trade or commerce") (emphasis added). As a result, he does not represent the Department in that case or have possession, custody, or control of its records. And without that relationship, he could not waive the Department's immunity from a federal court subpoena for them.

3. The federalism principles on which *Berger* rested control here. The respect owed to states is not limited to instances when a state defends its laws—it is a foundational right by which "a State defines itself as a sovereign." *Berger*, 597 U.S. at 191 (quoting *Gregory*, 501 U.S. at 460). The Fourth Circuit did not simply overlook South Carolina's right to structure itself and limit one official's ability to act on behalf of another; it explicitly held this right does not matter. App., *infra*, 13a & n.3. By doing so, the court impermissibly expanded the power of a state official by federal judicial fiat in direct conflict with *Berger* and controlling state law. This Court therefore should review the decision below.

2. The decision conflicts with *Lapides*' direction to examine the nature of the act constituting a waiver of immunity.

Although the Fourth Circuit believed *Lapides* v. *Board of Regents*, 535 U.S. 613 (2002), compelled its conclusion here (App., *infra*, 12a–13a), the opposite is true. *Lapides* requires consideration of the facts which the Fourth Circuit held are irrelevant. The decision below thus directly conflicts with *Lapides*.

The question in *Lapides* was whether the University of Georgia waived its Eleventh Amendment immunity when an attorney with the state attorney general's office removed a case against the University to federal court. *Id.* at 617–618. The answer to that narrow question is "yes." *Id.* at 619–620. While the state argued that the attorney had authority to remove the case but not the authority to waive immunity, the Court declined to draw that line. *Id.* at 622–623. The rule *Lapides* announced simply was "that removal is a form of voluntary invocation of a federal court's jurisdiction sufficient to waive" immunity. *Id.* at 624.

Contrary to the Fourth Circuit's belief, *Lapides* did not create a brightline rule applicable to every action taken by a state attorney general. *Lapides* simply refused to dissect the authority of an attorney acting *on behalf of the agency named in the case*. There was no question about the actions of an attorney who does *not* represent or act on behalf of the agency in question. So this Court could not have created a rule where one state attorney's actions always bind every state agency, even ones he does not represent.

Lapides instead directed courts to "focus on the litigation act the State takes that creates the waiver." *Id.* at 620. The act in *Lapides*—removal by a state official who represented the sole agency in question—was clear. 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 "as historically understood, Eleventh Amendment immunity is an all-or-nothing affair," as the Fourth Circuit believed. See App., *infra*, 13a n.3. So 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.

The opinion below directly conflicts with *Lapides*, reads into it rules which do not exist, and disregards its core teaching that the facts of each case matter. This Court's review is needed.

3. The decision conflicts with *Alden* by interfering with state government and denying states a "reciprocal" immunity.

Alden asked whether, under Article I, Congress could authorize suits against states in their own courts without consent. 527 U.S. at 712. In concluding that Congress could not, this Court explained that "[t]he federal system established by our Constitution preserves the sovereign status of the States in two ways." *Id.* at 714. First, states retain a "substantial portion of the Nation's primary sovereignty, together with the dignity and essential

attributes inhering in that status." *Ibid.* They are "no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere." *Ibid.* (quoting The Federalist No. 39, at 245). Second, the Constitution created a system where "the State and Federal Governments would exercise concurrent authority over the people." *Alden*, 527 U.S. at 714 (quoting *Printz*, 521 U.S. at 919–920). States therefore "are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty." *Id.* at 714.

From there, the Court "reject[ed] any contention that substantive federal law by its own force necessarily overrides the sovereign immunity of the States." *Id.* at 732. Eleventh Amendment immunity is not a question of "the primacy of federal law but the implementation of the law in a manner consistent with the constitutional sovereignty of the States." *Ibid.* States are "residuary sovereigns and joint participants in the governance of the Nation." *Id.* at 748; see also *Fed. Mar. Comm.*, 535 U.S. at 765 (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)). This entitles states to "reciprocal" sovereignty with the federal government. *Alden*, 527 U.S. at 749–750. The dual sovereignty was a "great innovation" of the founders: "our citizens would have two political capacities, one state and one federal, each protected from incursion by the other—a legal system unprecedented in form and design." *Printz*, 521 U.S. at 920 (quotation omitted).

The Fourth Circuit's rule 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 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. 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. Under *Alden*, 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 *id.* at 714.

This Court should review the Fourth Circuit's decision which directly conflicts with *Alden.*

B. The Decision Below Conflicts with the Decisions of Other Circuit Courts Refusing to Set a Brightline Rule for Cross-Agency Waivers of Immunity.

In decreeing that state law limits on cross-agency waiver "do[ ] not matter" and are "irrelevant," the Fourth Circuit split with those circuits which have held these issues do matter.

1. This question arises in bankruptcy proceedings. 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 in these cases. They instead examine the structure of each state and the role of the acting agencies. 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, there may not be a waiver. *Id.* at 772.

Thus, the waiver-by-litigation question under Section 106 cannot be answered without looking to the nature of the debt and the relative positions of agencies as defined by state law. *Charter Oak*, 361 F.3d at 771–772. Applying this rule in *Charter Oak*, the Second Circuit held that the Connecticut Department of Revenue Services, which had filed a proof of claim, was a unitary creditor with the state Department of Social Services, which owed the debtor money. *Id.* at 772. It reached this result by comparing Connecticut's structure to the federal government's. *Ibid.* But the court recognized that the result could be different when "state governments may operate differently than the federal government." *Ibid.*

The Tenth Circuit requires a similar examination of the facts of each 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 in support of this requirement 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. The court notably did not short circuit its analysis as the Fourth Circuit did using a "waiver by one" theory.

2. Google has cited the Eleventh Circuit's decision in *Green* v. *Graham*, 906 F.3d 955 (11th Cir. 2018), as

supporting the Fourth Circuit's rule. *E.g.*, C.A. App. 87–88. At best, *Green*'s finding that an officer's waiver of immunity was a waiver for others within different agencies merely deepens this split. See 906 F.3d at 961–963. Like the decision below, *Green* sharply parts with the Second and Tenth Circuits by creating a brightline rule of waiver that disregards the order and power of the arms of state government.

In any event, this question was not before the *Green* court. *Green* concerned the denial of state-policeman retirement status to employees of the Alabama Law Enforcement Agency. 906 F.3d at 958–959. The plaintiffs sued the then-secretary of the agency and the head of the state retirement systems. *Id.* at 959. The original defendants removed the case to federal court. *Ibid.* The plaintiffs later amended their complaint to include the head of the State Personnel Department as a defendant. *Ibid.* The new defendant moved for summary judgment based on, among others, sovereign immunity. *Ibid.* The district court denied the motion without discussing whether the original defendants' removal waived the new defendant's immunity.

The new defendant did not assert Eleventh Amendment immunity. *Green*, 906 F.3d at 962. Her argument instead was that Alabama's constitution immunized her from liability. *Id.* at 963. Even so, the Eleventh Circuit reached the Eleventh Amendment question and determined that the new defendant's "immunity is none other than that of the State of Alabama," *id.* at 961; claimed that "sovereign immunity belongs to the state, and only derivatively to state entities and state officials," *id.* at 961–962; and "reject[ed] [the] contradiction" that by letting this official

assert the immunity (which she had not done) "it would be one and the same party in interest—the State of Alabama—that both waived and asserted forum immunity in one and the same case." *Id.* at 962. Only then did the court recognize "[i]n the alternative" that the state official "unambiguously waived" this immunity at oral argument. *Ibid.*

Because Eleventh Amendment immunity was not at issue, the court's discussion is dicta. 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 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*, 501 U.S. at 460. 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 Rev.*, 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. Despite these commands, the court below asserted federal authority over a state's right to structure its government.

Automatically collapsing the arms of state government into one indivisible mass will wreak havoc. For example, if two state agencies are named as defendants in a lawsuit, can one agency now force the other into federal court by removing over the other's objection? Can one agency sue on behalf of another without consent? If a plaintiff names the wrong agency in a lawsuit, can that agency nevertheless defend the case on the merits and bind the correct agency? Can one agency settle a case on behalf of another, thereby requiring money to be spent from the second agency's budget? What if one agency responds to a federal court subpoena—does that waive every other agency's immunity? That example hits close to home, as another South Carolina agency voluntarily responded to a subpoena it received from Google. App., *infra*, 11a n.1. Under the Fourth Circuit's "waiver by one" ruling, that response itself waived the Department's immunity here regardless of the Attorney General's role in the underlying suit.[4] These questions can be answered only after reviewing state law.

In this era of complex national litigation, agencies otherwise will repeatedly trip over each other in federal court. Internecine battles will result where independent state agencies which are not involved in a federal lawsuit might refuse to follow an order directed to another agency which, by this new rule, is considered to act as the entire

4. To the extent the Fourth Circuit's rule is limited to only actions taken by a state attorney general and not any other agency, this limitation further proves the court's error. It presumes one agency does not act on behalf of another, while the Attorney General always acts on behalf of every agency. But this presupposes the question which the court held "does not matter" and is "immaterial": does the Attorney General in fact act on behalf of any other agency in each case?

state. And states will be powerless to mitigate the fallout. South Carolina tried to do so by passing 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). But the Fourth Circuit held the will of the state "does not matter." App., *infra*, 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 of 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. This Court has recognized the tremendous respect due to a state's internal allocation of government power and responsibility. Pet. 10–13. Each day which passes results in a further irreparable diminution of that very process by which a state defines itself. *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. The Fourth Circuit did claim the Attorney General "expressly endorsed" subpoenaing agencies when, in a discovery conferral letter, he and the other state attorneys general expressed a belief "that these subpoenas are the proper channels" to obtain agency records. App., *infra*, 11a (emphasis removed). The court found it unfair for the Department "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." *Ibid.* But the court conceded the letter is not controlling. App., *infra*, 12a n.2. And it begs the question presented here—if the Attorney General does not have possession, custody, or control of the Department's records and does not represent the Department, can he waive the Department's immunity by "expressly endors[ing]" (App., *infra*, 11a) a subpoena? For the reasons explained above (Pet. 13–16), he cannot waive it. The letter therefore does not support the decision below; if anything, reliance on it to prove waiver underscores the need for review.

The question raised here therefore warrants this Court's immediate review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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SEPTEMBER 30, 2024

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED JUNE 5, 2024

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

Appendix A

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.

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.

Appendix A

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, 113 S. Ct. 684, 121 L. Ed. 2d 605 (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, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (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, 110 S. Ct. 1868, 109 L. Ed. 2d 264 (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, 122 S. Ct. 1640, 152 L. Ed.

2d 806 (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, 26 S. Ct. 252, 50 L. Ed. 477 (1906); *accord Porto Rico v. Ramos*, 232 U.S. 627, 632, 34 S. Ct. 461, 58 L. Ed. 763 (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, 131 S. Ct. 1632, 179 L. Ed. 2d 675 (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, 100 S. Ct. 1398, 63 L. Ed. 2d 673 (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

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.

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 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

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.

court's jurisdiction." *Id.* at 622.[3] Thus, it does not matter whether the attorney general "represents" SCPRT or 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.

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3. 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.

4. 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)).

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.

APPENDIX B — NOTICE OF JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED JUNE 5, 2024

FILED: June 5, 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.

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ NWAMAKA ANOWI, CLERK

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, COLUMBIA DIVISION, FILED JULY 12, 2023

IN THE UNITED STATES DISTRICT
COURT DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

CA No. 3:23-cv-2100-JFA

IN RE:

SOUTH CAROLINA DEPARTMENT
OF PARKS, RECREATION, AND TOURISM,

Movant.

In re: C/A No. 1:21-md-03010 (PKC)

IN RE GOOGLE DIGITAL ADVERTISING
ANTITRUST LITIGATION

In re: C/A No. 1:21-cv-06841 (PKC)

STATE OF TEXAS, *et al.*,

Plaintiffs,

v.

GOOGLE, LLC,

Defendant.

Appendix C

ORDER

This matter is before the Court on the South Carolina Department of Parks, Recreation and Tourism ("SCPRT")'s Motion to Quash a subpoena issued by Google, LLC ("Google") on January 27, 2023. (ECF No. 1). This motion has been fully briefed, and therefore, is ripe for this Court's review.

I. FACTUAL AND PROCEDURAL BACKGROUND

This case arises from a lawsuit pending in the Eastern District of Texas in which seventeen states including South Carolina (the "states") have sued Google alleging it engaged in anticompetitive behavior. (SDNY Dkt. No. 1).[1] The plaintiff states' allegations are that "Google has monopolized or attempted to monopolize various markets related to online display ads [ ] and unlawfully used its market power to tie the sale of Google's 'ad server,' a tool used by publishers to manage their inventory of display ads, to Google's 'ad exchange' a distinct product that conducts auctions for sale of display adds. [ ]. (ECF No. 1 at 2-3). They also allege that Google entered into an unlawful restraint of trade with nonparties Facebook, Inc. and Facebook Ireland Limited ("Facebook") [ ]." *Id.* Specifically, the plaintiff states assert violations of 15 U.S.C. §§ 1 and 2 (the Sherman Act) and seek injunctive relief pursuant to 15 U.S.C. § 26 (the Clayton Act). (ECF

1. "SDNY Dkt." Refers to the CM/ECF docket for Texas v. Google, No. 1:21-cv-06841 in the Southern District of New York.

No. 1 at 2). The remainder of the plaintiff states' claims are violations of state antitrust and unfair competition laws which have been stayed. *Id.*

This case was initiated in Eastern District of Texas but on August 31, 2021, the case was consolidated by the Judicial Panel on Multi-District Litigation ("JPML") for pre-trial proceedings in the Southern District of New York. (ECF No. 10 at 9). However, recently, the JPML ordered a remand of this suit back to the Eastern District of Texas. (ECF No. 19). Although Google has indicated its intent to appeal this decision, it is important to note that the underlying lawsuit is currently pending in the Eastern District of Texas. *Id.*

Importantly, this matter is before this Court because Google served a third-party subpoena on SCPRT pursuant to Federal Rule of Civil Procedure 45 seeking the department's online advertising records. Subsequently, SCPRT filed the instant motion to quash. (ECF No. 1).

II. LEGAL STANDARD

Rule 45 also permits the subpoenaed nonparty to quash or modify a subpoena where it, inter alia, "requires disclosure of privileged or other protected matter" or "subjects a person to undue burden." Fed. R. Civ. P. 45(d)(3)(A). The scope of discovery under a subpoena is the same as the scope of discovery under Federal Rule of Civil Procedure 26(b). *Cook v. Howard*, 484 F. App'x 805, 812 (4th Cir. 2012). When discovery is sought from nonparties, however, its scope must be limited even further. *Va. Dep't*

of Corr. v. Jordan, 921 F.3d 180, 189 (4th Cir. 2019). As the Fourth Circuit explained in *Jordan*, "nonparties are 'strangers' to the litigation, and since they have 'no dog in [the] fight,' they have 'a different set of expectations' from the parties themselves. *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 717 (1st Cir. 1998). Bystanders should not be drawn into the parties' dispute without some good reason, even if they have information that falls within the scope of party discovery." *Id.*

A more demanding variant of the proportionality analysis therefore applies when determining whether, under Rule 45, a subpoena issued against a nonparty "subjects a person to undue burden" and must be quashed or modified. Fed. R. Civ. P. 45(d)(3)(A)(iv). As under Rule 26, the ultimate question is whether the benefits of discovery to the requesting party outweigh the burdens on the recipient. *In re Modern Plastics Corp.*, 890 F.3d 244, 251 (6th Cir. 2018); *Citizens Union of N.Y.C. v. Att'y Gen. of N.Y.*, 269 F. Supp. 3d 124, 138 (S.D.N.Y. 2017). But courts must give the recipient's nonparty status "special weight," leading to an even more "demanding and sensitive" inquiry than the one governing discovery generally. *In re Public Offering PLE Antitrust Litig.*, 427 F.3d 49, 53 (1st Cir. 2005).

III. DISCUSSION

SCPRT, a non-party to the underlying lawsuit involving South Carolina and Google, seeks an order protecting it from a subpoena for documents and information issued by

Google based on Eleventh Amendment immunity.[2] Thus, the issue before this Court is whether state sovereign immunity shields a non-party state entity, SCPRT, from having to respond to a lawfully issued Rule 45 subpoena. If so, this Court must consider whether such immunity has been waived by South Carolina's involvement in the underlying lawsuit against Google.

Pursuant to the Eleventh Amendment, "[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." U.S. Const. amend. XI. The Supreme Court "has drawn on principles of sovereign immunity to construe the Amendment to establish that 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, 110 S.Ct. 1868 (1990) (internal quotation marks omitted). The States' immunity also extends to "state agents and state instrumentalities." *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429, 117 S.Ct. 900 (1997); *see Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101-02 (1984) (state sovereign immunity bars suit not

2. Although the terms are sometimes used interchangeably, there is a difference between the states' Eleventh Amendment immunity from suit in federal court, and the general doctrine of sovereign immunity of the states from suit in any court. See generally, *Stewart v. North Carolina*, 393 F.3d 484, 487-88 (4th Cir. 2004) (discussing generally the distinction between state sovereign immunity and Eleventh Amendment immunity); *Alden v. Maine*, 527 U.S. 706, 713 (1999) (same).

only against a state, but also against an instrumentality of a state, such as a state agency, often referred to as an "arm of the state.").

As an undisputed state agency, SCPRT would ordinarily be immune from "suit" in federal court. However, the issue before this Court is not so simple. The Fourth Circuit has not had the opportunity to interpret the Constitution to hold whether a subpoena can be considered a "suit" for the purposes of Eleventh Amendment immunity. *See Port Auth. Trans–Hudson Corp.*, 495 U.S. at 304 (1990) (states immune from *suits* brought in federal court); *See Va. Dept. of Corrs. v. Jordan*, 921 F.3d 180, 188 (4th Cir. 2019) (bypassing the question of whether "a subpoena issued against a nonparty state agency…runs afoul of state's sovereign immunity…"). Although the parties supply this Court with ample case law from other district courts and Courts of Appeals supporting their respective positions, the cited authority is not binding and more significantly, it evidences a split amongst federal courts on the answer to this question.[3]

3. *See Barnes v. Black*, 544 F.3d 807, 812 (7th Cir. 2008) ("[A]n order commanding a state official who is not a party to a case between private persons to produce documents in the state's possession during the discovery phase of the case" does not violate the Eleventh Amendment "because [it does] not compromise state sovereignty to a significant degree"); *In re Missouri Dep't of Nat. Res.*, 105 F.3d 434, 436 (8th Cir. 1997) ("There is simply no authority for the position that the Eleventh Amendment shields government entities from discovery in federal court."); *Ali v. Carnegie Inst. of Wash.*, 306 F.R.D. 20, 30 n.8 (D.D.C.2014) (Eleventh Amendment would "not completely shield [the University of Massachusetts] from certain non-party discovery requests" if it were not joined

Nonetheless, this Court finds an answer to this question to be unnecessary for resolving the motion pending before this Court. Assuming without deciding that SCPRT is entitled to Eleventh Amendment immunity, this Court finds such immunity would have been waived by South Carolina's voluntary involvement in the underlying action pending in the Eastern District of Texas. It is well established that a state may waive its sovereign immunity by voluntarily litigating a case in federal court. *See Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S.

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as a party); *Arista Records LLC v. Does 1–14*, No. 7:08-CV-00205, 2008 WL 5350246, at *1–3 (W.D. Va. Dec. 22, 2008) (nonparty state university's motion to quash subpoenas was denied on the grounds that the doctrine of sovereign immunity did not apply to third-party subpoena requests); *Laxalt v. McClatchy*, 109 F.R.D. 632, 634–35 (D. Nev. 1986) (affirming magistrate's denial of nonparty state agency's motion to dismiss discovery subpoena and notice of deposition; rejecting agency's argument for Eleventh Amendment immunity); *Allen v. Woodford*, 544 F. Supp. 2d 1074, 1079 (E.D. Cal. 2008) (subpoena not a "suit" under the Eleventh Amendment); *United States v. Univ. of Mass., Worcester*, 167 F. Supp. 3d 221, 224 (D. Mass. 2016) (distinguishing federal and tribal immunity and concluding that state college not immune from Rule 45 subpoena under the Eleventh Amendment); *Charleston Waterkeeper v. Frontier Logistics, L.P.*, 488 F. Supp. 3d at 248 ("After considering the doctrines of state and federal sovereign immunity and the principles that undergird each, the court agrees with plaintiffs and holds that the doctrine of state sovereign immunity does not preclude a court from enforcing the subpoena against the Ports Authority or any of its employees."); Cf. *Russell v. Jones*, 49 F.4th 507, 515-16 (5th Cir. 2022) (holding states are immune from subpoenas issued by private parties in federal court); *Boron Oil Co. v. Downie*, 873 F.2d 67, 70-71 (4th Cir. 1989) (holding the federal government is immune from subpoenas in state court proceedings).

613, 619 (2002); "Waiver by litigation ... 'involve[s] actions in which the state acted as an affirmative participant rather than as a beleaguered defendant.' " *Beckham v. Nat'l R.R. Passenger Corp.*, 569 F.Supp.2d 542, 553 (D. Md. 2008)(quoting *Unix Sys. Labs., Inc. v. Berkeley Software Design, Inc.*, 832 F.Supp. 790, 801-02 (D.N.J. 1993)). SCPRT attempts to put forth an argument that it is separate from South Carolina when it comes to the underlying lawsuit. SCPRT outlines the organization of the government in South Carolina and explains that as an agency it is controlled by the Governor whereas this lawsuit was initiated by the Attorney General. As two separately elected officials with different duties and responsibilities, SCPRT asserts that the Attorney General's actions cannot be imputed onto SCPRT to constitute a waiver of immunity. However, SCPRT cannot have its cake and eat it too.

The Supreme Court has established that sovereign immunity belongs solely to the state, and from there, it flows to state entities and state officials. Indeed, the Eleventh Amendment makes no mention of the states' agencies, entities, departments, or officials. But, over time, Courts have interpreted the Eleventh Amendment to extend to the states' agencies because they are indistinguishable from the state, itself. Of course, SCPRT does not dispute it is a state agency that would be entitled to Eleventh Amendment immunity under normal circumstances, but it argues the state's waiver of such immunity does not function the same way. This Court is unpersuaded. Google's argument for waiver is a strong one as it explains that 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 senses to find a state's immunity can be imputed to its agencies but not its waiver of such immunity.

Further, on a practical note, Google initially requested the subject documents and information from South Carolina through discovery. In response, South Carolina along with the other states provided 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." (ECF No. 10-1 at 2-3). Accordingly, 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.

Therefore, this Court denies SCPRT's motion to quash finding it would have waived any immunity to be afforded to it by the Eleventh Amendment in two different instances. First, it would have waived such immunity when South Carolina voluntarily initiated suit against Google, and second, it would have waived such immunity when South Carolina instructed Google to issue a subpoena to its agency, SCPRT, for the documents it was seeking through discovery. Importantly, SCPRT does not raise any other arguments as to why this Motion should be quashed such as whether it seeks privileged or other protected matter or whether it places an undue burden on SCPRT. Thus, these arguments are not before this Court for consideration.

Appendix C

IV. RECOMMENDATION

Therefore, this Court denies SCPRT's Motion to Quash. (ECF No. 1). SCPRT shall respond to the subpoena according to its terms for production. See (ECF No. 1 at 2).

IT IS SO ORDERED

July 12, 2023
Columbia, South Carolina

/s/ Joseph F. Anderson, Jr.
Joseph F. Anderson, Jr.
United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED JULY 2, 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.

FILED: July 2, 2024

Appendix D

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Agee, Judge Thacker, and Senior Judge Traxler.

For the Court

/s/ Nwamaka Anowi, Clerk