No. 24A325

IN THE

Supreme Court of the United States

SOUTH CAROLINA DEPARTMENT OF PARKS, RECREATION AND TOURISM,

Applicant,

v.

GOOGLE LLC,

Respondent.

RESPONDENT GOOGLE'S OPPOSITION TO APPLICATION TO STAY MANDATE

NEAL KUMAR KATYAL
Counsel of Record
JESSICA L. ELLSWORTH
WILLIAM E. HAVEMANN
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

October 11, 2024

Counsel for Respondent Google LLC

RULE 29.6 DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, undersigned counsel certifies that Respondent Google LLC is a subsidiary of XXVI Holdings Inc., which is a subsidiary of Alphabet Inc., a publicly traded company. No publicly traded company holds more than 10% of Alphabet Inc.'s stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES:

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FOURTH CIRCUIT:

The South Carolina Department of Parks, Recreation, and Tourism ("SCPRT") asserted Eleventh Amendment immunity to defy a judicial subpoena issued in litigation against Google, even though the State of South Carolina has waived its Eleventh Amendment immunity by suing Google in this very case. The courts below easily rejected SCPRT's motion to quash, and SCPRT cannot justify its extraordinary request for a stay. This Court should deny the application.

The State of South Carolina, along with sixteen other States, filed a complaint against Google in federal court in Texas. During discovery, Google sought information from the States that would aid in Google's defense. The States responded by urging Google to seek discovery directly from the state agencies in possession of the materials Google sought. Google therefore served Rule 45 subpoenas on various state agencies. Dozens of state agencies complied with these subpoenas, including two South Carolina state agencies. But SCPRT took the extraordinary position that it retained immunity from the subpoena even though the State of South Carolina, through its duly authorized attorney general, had affirmatively sued Google in this very case.

The district court rejected SCPRT's motion to quash the subpoena, and after an interlocutory appeal, a unanimous panel of the Fourth Circuit affirmed. The Fourth Circuit explained that "[b]y 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." Pet. App.

6a. "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." Pet. App. 6a-7a. SCPRT petitioned for rehearing en banc, which the Fourth Circuit denied without requesting a response and without any judge voting for rehearing. The Fourth Circuit's mandate issued shortly thereafter.

SCPRT did not seek a stay of the Fourth Circuit's mandate. Nor did it comply with the subpoena. Instead, more than two months after the mandate issued, SCPRT asked the Fourth Circuit to recall the mandate pending a forthcoming petition for certiorari. Again, the Fourth Circuit denied that request without asking for a response. SCPRT has now petitioned for certiorari, and has filed this application seeking the extraordinary remedy of a stay from this Court.

SCPRT's stay application is meritless and should be denied. There is no prospect that this Court will grant review and reverse. 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." *Lapides* v. *Bd. of Regents of Univ. Sys. of Georgia*, 535 U.S. 613, 622 (2002). Because South Carolina's attorney general voluntarily invoked federal jurisdiction by suing Google, the State has waived its sovereign immunity, including any immunity SCPRT would otherwise possess as an arm of the State. The Fourth Circuit's unanimous decision is therefore correct in every respect. Moreover, contrary to SCPRT's central contention, the decision below does not create or contribute to a circuit split. Three other courts of

appeals have confronted arguments like the one SCPRT advances in this case; all have rejected it.

SCPRT's request for a stay fails for multiple additional and independent reasons. SCPRT cannot show that compliance with the subpoena imposes any irreparable harm, particularly given that dozens of other state agencies, including agencies in South Carolina, have complied with Google's subpoenas in this same litigation. And while SCPRT styles its request to this Court as an application to *stay* the mandate, SCPRT in fact seeks to *recall* a mandate that was issued three months ago. SCPRT cannot justify its failure to file a timely motion to stay the mandate below. Finally, the rule that SCPRT advances would undermine the public interest, invite litigation abuses, and create "fundamental[] unfair[ness]." Pet. App. 11a. It would permit States to bring suit in federal court while shielding the State's own agencies from complying with the discovery the defendant needs to mount a defense. For all of these reasons, the Court should deny the application.

STATEMENT OF THE CASE

1. Several States sued Google in the Eastern District of Texas alleging that Google's digital advertising practices violate the Sherman Act and various state laws. Pet. App. 2a. The Judicial Panel on Multidistrict Litigation ("JPML") transferred the suit to the Southern District of New York ("MDL court") for coordinated pretrial proceedings. *In re Digit. Advert. Antitrust Litig.*, 555 F. Supp. 3d 1372, 1379-80 (J.P.M.L. 2021).

After the transfer, South Carolina, represented by its attorney general, moved to intervene "as a plaintiff state, in the public interest and on behalf of the people of South Carolina." Pet. App. 3a. The MDL court granted the intervention motion. The States, including South Carolina, then filed second, third, and fourth amended complaints. *Id.* The States sued Google "in their respective sovereign capacities and as *parens patriae* on behalf of the citizens, general welfare, and economy of their respective states." *Id.*

2. During discovery, the MDL Plaintiffs, including the States, sought aggressive productions from Google on tight timelines. Google also served defensive discovery on the States, seeking, among other things, records in the possession of state agencies about the States' advertising practices. The States objected to these requests on the ground that the States "do not have the authority to search for documents that are held by other state agencies or other governmental entities." Pet. App. 3a. Rather than consume resources showing that the States plainly have authority to obtain documents from their component agencies, Google chose to accommodate the States by serving "subpoenas *duces tecum* directly on the relevant state agencies." *Id.* "The state plaintiffs, including South Carolina, explicitly endorsed this course of action as the appropriate method of obtaining the discovery Google sought." *Id.* As they explained in a joint letter, Google issued "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." Pet. App. 3a-4a; *cf.* 1 Discovery Proceedings in Federal

Court § 17:4 (3d ed. 2022 update) ("[A] subpoena under Rule 45 may be served upon both party and nonparty witnesses.").

Google served dozens of subpoenas on agencies of the States suing Google. Fifty-seven state agencies complied with these subpoenas. But SCPRT asserted that sovereign immunity protected it from compliance, notwithstanding that its sovereign immunity derives from the State and notwithstanding that the State affirmatively waived its sovereign immunity by suing Google. Two other South Carolina agencies complied with Google's subpoenas without asserting immunity.

The subpoena at issue mandates production of records highly relevant to South Carolina's claims and Google's defenses. *See* Fourth Circuit J.A. 36-63, Dkt. 16. The States allege that Google engaged in anticompetitive behavior in its display advertising business. The subpoena seeks records bearing on SCPRT's use of display advertising products and its assessment of Google's products and the products of Google's competitors. For instance, the subpoena seeks information on "whether and why [SCPRT] use[s] multiple Ad Buying Tools to purchase Display Advertising," as well as documents showing the "Ad Tech Products that [SCPRT has] used during the Relevant time period." *Id.* at 61-62.

While pretrial proceedings were still underway, the JPML remanded the case from the MDL court back to the Eastern District of Texas as a result of intervening legislation concerning the venue of suits in which "a State is a complainant arising under the antitrust laws." 28 U.S.C. § 1407(g); *see In re Google Digit. Advert. Antitrust Litig.*, 677 F. Supp. 3d 1372, 1375-76 (J.P.M.L. 2023).

3. SCPRT filed a motion to quash Google's subpoena in the U.S. District Court for the District of South Carolina, "arguing that Eleventh Amendment immunity shielded it from any obligation to comply." Pet. App. 4a. Although SCPRT 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," it asserted 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.'" *Id.*

The district court denied SCPRT's motion, concluding that "it makes little sense[] to find a state's immunity can be imputed to its agencies but not its waiver of such immunity." Pet. App. 25a. The district court further noted that Google had "initially requested the subject documents and information from South Carolina through discovery" but was told by the State that subpoenas to state agencies "are the proper channels" for Google to seek the documents. *Id.* The court explained that "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." *Id.*

A unanimous Fourth Circuit panel affirmed. In an opinion authored by Judge Agee, the Fourth Circuit explained that "[b]y 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." Pet. App. 6a. "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." Pet. App. 6a-7a. The panel explained that this holding "reflects a straightforward application of basic Eleventh Amendment principles." Pet. App. 14a.

SCPRT sought rehearing en banc, which the Fourth Circuit denied on July 2, 2024, without calling for a response and without any judge voting for rehearing. Pet. App. 27a-28a. Pursuant to Federal Rule of Appellate Procedure 41(a), the Fourth Circuit's mandate issued eight days later, on July 10, 2024.

SCPRT did not file a motion to stay the mandate before it issued. Nor did it comply with the subpoena. Instead, on September 13, 2024—more than two months after issuance of the mandate—SCPRT filed a motion in the Fourth Circuit to recall the mandate pending the resolution of a forthcoming certiorari petition. While SCPRT's motion claimed that its status as a state agency made it "unable to determine whether to seek certiorari" in a timely manner, SCPRT did not attempt to explain why it had waited more than two months to seek to recall the mandate. Dkt. 42 at 7. The Fourth Circuit denied the motion to recall the mandate without asking for a response. *See* Dkt. 43.

On September 30, 2024, SCPRT filed a petition for certiorari. SCPRT also filed what it labeled an application to stay the Fourth Circuit's mandate.

LEGAL STANDARD

This Court grants a stay pending appeal "only in extraordinary circumstances." *Graves* v. *Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, J., in

chambers). The applicant bears the "especially heavy" burden of proving that such relief is warranted. *Packwood* v. *Senate Select Comm. on Ethics*, 510 U.S. 1319, 1320 (1994) (Rehnquist, C.J., in chambers). In seeking a "stay of mandate pending disposition of a petition for certiorari," a party must establish that there is "a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari," that there is "a significant possibility of reversal of the lower court's decision," and that there is "a likelihood that irreparable harm will result if that decision is not stayed." *White* v. *Florida*, 458 U.S. 1301, 1302 (1982) (Powell, J., in chambers) (citation omitted); *accord* *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010) (per curiam). In deciding whether to grant a stay, the Court may also consider "the equities (including the likely harm to both parties) and the public interest." *Merrill* v. *Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring in grant of applications for stays).

ARGUMENT

SCPRT cannot satisfy any of the factors this Court considers in deciding whether to grant the extraordinary relief of a stay. The Fourth Circuit's unanimous decision is correct and, contrary to the central contention in SCPRT's stay application, does not create or contribute to a circuit split. There is accordingly no prospect that this Court will grant review and reverse. In addition, SCPRT has not shown irreparable harm, and the equities preclude a stay for numerous independent reasons. The Court should deny the application.

I. THERE IS NO REASONABLE PROBABILITY THAT THIS COURT WILL GRANT CERTIORARI TO REVERSE THE DECISION BELOW.

There is no reasonable probability that this Court will grant certiorari in this case, much less reverse. The Fourth Circuit correctly concluded that South Carolina's invocation of federal-court jurisdiction waived SCPRT's sovereign immunity, and the Fourth Circuit's decision is consistent with every other decision addressing a comparable question.

A. The Decision Below Is Correct.

The decision below is correct in every respect. South Carolina waived its Eleventh Amendment immunity when it sued Google, and in doing so it waived the immunity of SCPRT, which derives solely from the State.

A State waives its Eleventh Amendment immunity in federal court when it "voluntarily invoke[s] that court's jurisdiction." *Lapides*, 535 U.S. at 622. In *Lapides*, a State removed a case filed against the State to federal court and then argued that the State remained immune from suit under the Eleventh Amendment. *See id.* at 616-617. This Court unanimously rejected that argument. The Court explained that where "a State *voluntarily* becomes 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 Eleventh Amendment." *Id.* at 619 (citation omitted).

Lapides also addressed *how* a State may voluntarily invoke a federal court's jurisdiction and thereby waive its immunity. As the Court explained, a State waives its immunity when the "State's attorney general, authorized (as here) to bring a case

in federal court, has voluntarily invoked that court's jurisdiction." *Id.* at 622. The Court rejected the argument that the State's law in that case did "not authorize the attorney general to waive the State's Eleventh Amendment immunity." *Id.* at 621. The Court opted instead to adopt a categorical federal rule of "waiver through a state attorney general's invocation of federal-court jurisdiction." *Id.* at 623. As the Court explained, a rule that "denies waiver despite the state attorney general's state-authorized litigating decision" would create "inconsistency and unfairness." *Id.*

An attorney general's decision to bring suit on behalf of the State waives the State's Eleventh Amendment immunity, and it also waives the immunity of the State's agencies, whose immunity derives exclusively from the State. Sovereign immunity "bars suits against States but not lesser entities." *Alden* v. *Maine*, 527 U.S. 706, 756 (1999). State agencies can therefore only assert immunity by "partaking of *the State's* Eleventh Amendment immunity." *Mount Healthy City School Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 280 (1977) (emphasis added). When a "State expressly or impliedly allows itself, or its creation, to be sued," "sovereign immunity" for the State's creation "is necessarily nullified." *Owen* v. *City of Independence*, 445 U.S. 622, 645-646 (1980).

The Fourth Circuit correctly applied these principles to conclude that the South Carolina attorney general's decision to sue Google in federal court on behalf of South Carolina waived SCPRT's Eleventh Amendment immunity. Citing *Lapides*, the Fourth Circuit first concluded that when "South Carolina's attorney general * * * invoked the jurisdiction of a federal court by intervening in the antitrust action

against Google," that act "effected a waiver of the State's Eleventh Amendment immunity." Pet. App. 9a. The Fourth Circuit then observed that SCPRT's "immunity derives solely from the State." *Id.* 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." Pet. App. 10a. "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." *Id.*

A contrary result would lead to the "inconsistency, anomaly, and unfairness" that this Court in *Lapides* sought to prevent. 535 U.S. at 620. As the courts below recognized, "it would be 'fundamentally unfair' to Google 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." Pet. App. 11a (citations omitted); *see Lapides*, 535 U.S. at 621 (highlighting "the unfairness of allowing one who has invoked federal jurisdiction subsequently to challenge that jurisdiction").

SCPRT fails to show any probability that this Court will grant certiorari to review the Fourth Circuit's decision, much less a significant possibility that this Court will reverse. SCPRT principally claims (at 7-8) that the decision below conflicts with *Berger* v. *North Carolina State Conference of the NAACP*, 597 U.S. 179 (2022). SCPRT did not cite *Berger* below, and the Fourth Circuit did not address it, no doubt because *Berger* has no bearing on this case. *Berger* addressed the circumstances in

which state legislative leaders can intervene in a federal lawsuit to defend a state law under Federal Rule of Civil Procedure 24(a)(2). *See* 597 U.S. at 190-200. This Court held that, given North Carolina's "chosen means of diffusing its sovereign powers among various branches and officials," North Carolina's legislative leaders could claim "an interest in the resolution of this lawsuit that may be practically impaired or impeded without their participation." *Id.* at 191. *Berger* addressed the prerequisites for intervention, not for waiving Eleventh Amendment immunity, and it certainly did not disturb this Court's "rule of federal law that finds waiver through a state attorney general's invocation of federal-court jurisdiction." *Lapides*, 535 U.S. at 623.

SCPRT argues (at 8) that the decision below "conflicts with *Lapides*' direction to 'focus on the litigation act the State takes that creates the waiver.'" But that is exactly what the Fourth Circuit did. The relevant "litigation act" the Fourth Circuit addressed was a state attorney general's invocation of federal court jurisdiction, which *Lapides* identified as the quintessential act waiving a state's sovereign immunity. *See* Pet. App. 10; *Lapides*, 535 U.S. at 620; *accord Gunter* v. *Atlantic Coast Line R.R. Co.*, 200 U.S. 273, 284 (1906). SCPRT claims (at 8) that this case is more "nuanced" than *Lapides* because South Carolina's attorney general sued "in the public's interest, without alleging harm to the state or representing any individual state agencies." But SCPRT's premise is incorrect—the Plaintiff States, including South Carolina, all sued Google "in their respective sovereign capacities" to protect the "general welfare, and economy of their respective states." Pet. App. 3a. And, as

the Fourth Circuit explained, it is "immaterial whether the attorney general brought the claims 'in a sovereign capacity' or 'in his non-sovereign *parens patriae* role,'" because "*Lapides* drew no such distinction" and there is "no basis to do so here." Pet. App. 13a n.3. The panel also rejected as meritless SCPRT's "claim that the attorney general waived only *some* of the State's immunity and specifically *not* the portion that purportedly belongs exclusively to SCPRT." *Id.*

SCPRT contends that the decision below conflicts with *Alden*, 527 U.S. at 712, which held that Congress lacks Article I authority to "subject nonconsenting States to private suits for damages in state courts." But the scope of Congress's authority to abrogate a *nonconsenting* State's immunity has no bearing on the State's *voluntary waiver* of its own immunity. SCPRT's argument to the contrary overreads *Alden*. Indeed, this Court recognized in *Alden* that the decision to "consent to certain classes of suits while maintaining its immunity from others," is a State's "privilege of sovereignty concomitant to its constitutional immunity from suit." *Id.* at 758. Concluding that a State waived its agencies' sovereign immunity by voluntarily invoking federal court jurisdiction in no way demeans the State.

B. There Is No Split.

SCPRT claims that the decision below splits with the Second and Tenth Circuits, which SCPRT asserts (at 10) "do not recognize a categorical 'waiver by one rule' and instead examine the structure of each state and the role of the acting agencies." To the contrary, both the Second Circuit and the Tenth Circuit have easily

rejected arguments similar to the argument SCPRT presses here, as has the Eleventh Circuit.

In *In re Charter Oak Associates*, 361 F.3d 760 (2d Cir. 2004), the Second Circuit held that one state agency's litigation conduct waived the immunity of a different state agency. *In re Charter Oak* was a bankruptcy case in which one state agency filed a proof of claim against a debtor, and the bankruptcy estate filed counterclaims against a different state agency. The court "reject[ed]" the latter state agency's "argument that the Eleventh Amendment itself erects an independent bar against extending the waiver by one state agency to other agencies of the same state." *Id.* at 772. "At least where the two agencies in question act as a unitary creditor, fairness (the fundamental driving force behind the waiver-by-litigation doctrine) demands that a waiver by one be deemed to extend to the other." *Id.* (citation omitted). Through selective quotation, SCPRT claims that the Second Circuit held that "a waiver by one [may] be deemed to extend to the other' *only* 'where the two agencies in question act as a unitary creditor.'" Application 10 (quoting *In re Charter Oak*, 361 F.3d at 772) (emphasis added). But the Second Circuit did not say *only*, and its conclusion that one state agency may waive the immunity of another supports—and certainly does not conflict with—the Fourth Circuit's conclusion that the South Carolina attorney general's decision to join a federal lawsuit against Google waives state agencies' immunity in the same lawsuit.

The Tenth Circuit has reached a similar conclusion. In *In re Straight*, 143 F.3d 1387 (10th Cir. 1998), another bankruptcy case, the Tenth Circuit rejected as "rather

remarkable" the State's argument that a state agency's waiver of its sovereign immunity did not effectuate a waiver of sovereign immunity more generally. *Id.* at 1390-91. The Tenth Circuit concluded that "the State of Wyoming is not an amalgam of separate, independent, and self-sustaining branches," and that "in bankruptcy it should be regarded as one unified entity with different arms through which it carries out the affairs of the state." *Id.* at 1391. A year later, the Tenth Circuit reaffirmed that conclusion in *In re Innes*, 184 F.3d 1275 (10th Cir. 1999). While the Tenth Circuit in *Innes* noted that "the entire record and all the facts" "should be examined to determine whether a waiver exists," *id.* at 1280, nothing about that conclusion conflicts with the panel's decision below.

SCPRT also cites to *Green* v. *Graham*, 906 F.3d 955 (11th Cir. 2018) (W. Pryor, J.), but that case too is in accord with the decision below. The Eleventh Circuit held that one state official's invocation of federal-court jurisdiction waived the sovereign immunity of the official's successor when she replaced the original official as a defendant. *Id.* at 961. As the court explained, the original official's "removal" from state to federal court waived the successor's "forum immunity because her forum immunity is none other than that of the State of Alabama." *Id.* The court noted "that sovereign immunity belongs to the state, and only derivatively to state entities and state officials." *Id.* at 961-962. And the court rejected the notion that "the same party in interest—the State of Alabama" could "both waive[] and assert[] forum immunity in one and the same case." *Id.* at 962. Contrary to SCPRT's claim, the Eleventh Circuit's immunity conclusion was not dicta. The court rejected an argument pressed

by the State that did not depend on the Eleventh Amendment "[i]n the alternative" to its Eleventh Amendment holding. *Id.* "[A]lternative holdings are binding precedent." *Alvarez Perez* v. *Sanford-Orlando Kennel Club, Inc.*, 515 F.3d 1150, 1164 (11th Cir. 2008) (citing this Court's precedent).

II. SCPRT FACES NO IRREPARABLE INJURY AND THE EQUITIES WEIGH AGAINST EMERGENCY RELIEF.

SCPRT's stay application fails for multiple independent reasons. SCPRT faces no irreparable harm and the balance of the equities weighs decisively against SCPRT's request for extraordinary relief.

First, SCPRT's claim to irreparable harm is fatally undermined by its failure to ask the Fourth Circuit to stay the mandate before the mandate issued. Instead, SCPRT waited more than two months until after the mandate issued, then filed a belated and unsuccessful motion to recall the mandate. While SCPRT's application to this Court is styled a motion to stay the mandate, it is in fact a motion to recall the mandate that issued more than three months ago. Appellate courts will recall a mandate only in "extraordinary circumstances." *Calderon v. Thompson*, 523 U.S. 538, 550 (1998); *see also O'Connell* v. *Kirchner*, 513 U.S. 1303 (1995) (Stevens, J., in chambers). The power to recall a mandate "is exercised sparingly," 16 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure—Jurisdiction § 3938 (3d ed. 2024 update), in the light of "need to preserve finality in judicial proceedings," *Sargent* v. *Columbia Forest Prods., Inc.*, 75 F.3d 86, 89 (2d Cir. 1996). The power is "one of last resort, to be held in reserve against grave, unforeseen contingencies."

Elijah v. *Dunbar*, 66 F.4th 454, 462 (4th Cir. 2023) (quoting *Calderon*, 523 U.S. at 549).

SCPRT has not remotely satisfied its burden of showing that a recall of the mandate is warranted, nor has it justified its failure to seek a stay of the mandate in the ordinary course in the Fourth Circuit. There is nothing "unforeseen" about the need to seek a stay from an adverse court of appeals decision pending the prospect of this Court's review. While SCPRT claimed below that its status as "a state agency" made it "unable to determine whether to seek certiorari" quickly, Dkt. 42 at 7, this excuse is unconvincing for a host of reasons. SCPRT had no difficulty deciding to seek rehearing en banc within fifteen days of the panel's decision. And if SCPRT needed more time to decide whether to seek certiorari, it could have asked the Fourth Circuit to extend the issuance of the mandate. *See* Fed. R. App. P. 41(b) ("The court may shorten or extend the time [a mandate is to issue] by order."). SCPRT certainly has not justified its delay of more than two months before asking the Fourth Circuit to recall the mandate.

Second, SCPRT cannot show irreparable harm. For one thing, SCPRT lacks any reasonable argument for sovereign immunity, and compliance with the subpoena cannot constitute irreparable injury for that reason alone. *See Miroyan* v. *United States*, 439 U.S. 1338 (1978) (Rehnquist, J., in chambers) (considering likelihood that judgment will be reversed when considering the existence of irreparable injury). For another, Google served subpoenas on dozens of other state agencies, and no other state agency took the extraordinary position that immunity entitled it to withhold

documents from Google in a case where the State of which it is one component affirmatively sued Google.[1] In fact, two other agencies of the State of South Carolina have complied with Google's subpoenas, belying any assertion of irreparable harm.[2] If compliance with a subpoena is especially problematic for SCPRT, it has a remedy—it can urge the South Carolina attorney general to withdraw from the case. *See United States* v. *Burr*, 25 F. Cas. 30, 33-34 (C.C.D. Va. 1807) (Marshall, C.J.) (the President can prevent the subpoena of privileged documents in a criminal proceeding by dropping the indictment).

Third, staying the mandate in this case "will substantially injure" Google's interests in the underlying lawsuit. *Nken* v. *Holder*, 556 U.S. 418, 434 (2009) (citation omitted). The States' lawsuit against Google is scheduled for trial in March 2025, and motions for summary judgment are due on November 18. The subpoena Google served on SCPRT at the urging of the South Carolina attorney general mandates the production of records that are highly relevant to Google's defense, including, for

[1] Later in the same litigation, certain Texas state agencies objected to deposition subpoenas on sovereign immunity grounds, but the U.S. District Court for the Eastern District of Texas denied their motion to quash, describing their position as "a bit of a head scratcher" because "when the State of Texas comes into court, at a minimum it's representing all the arms of the state." 4/18/24 Status Conference Tr. at 12, No. 4:20-cv-00957-SDJ (N.D. Tex.), Dkt. 397; *see also id.* at 13 ("[W]hen you file an original action in federal court on behalf of the State of Texas, you are waiving sovereign immunity for the state and all arms of the state. That seems to me to be uncontroversial."). The agencies did not appeal the denial.

[2] The Fourth Circuit noted that "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." Pet. App. 11a n.1. The University of South Carolina was also subpoenaed, and also complied.

example, information about whether SCPRT uses Google's advertising technology products and its assessment of their value. *See* Fourth Circuit J.A. 61-62. Google is entitled to this information to mount a complete defense.

Finally, a stay would substantially undermine the public interest. The rule SCPRT urges this Court to adopt would be a recipe for manipulation and abuse. It would allow a State to waive its own immunity by bringing suit against a defendant, while nevertheless insulating state agencies from any obligation to comply with the discovery the defendant needs to mount a defense. Because States largely operate through state agencies, and because any immunity state agencies possess derives from the State, SCPRT's proposed rule would give States the upsides of invoking federal jurisdiction while avoiding the downsides. This Court in *Lapides* adopted its categorical waiver rule to avoid precisely this sort of "inconsistency, anomaly, and unfairness," which, as the Court predicted, might include a State's "selective use of 'immunity' to achieve litigation advantages." *Lapides*, 535 U.S. at 620.

This case is a prime example of the mischief SCPRT's proposed rule would produce. As the Fourth Circuit recognized, "[a]fter 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." Pet App. 10a-11a. The Fourth Circuit agreed with the district court that it "would be 'fundamentally unfair' to Google 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—a defense Google is forced to mount because of claims that South Carolina brought against it in federal court." Pet. App. 11a (citations and alterations omitted).

CONCLUSION

For the foregoing reasons, Google respectfully requests that this Court deny SCPRT's Application for a Stay of Mandate.

Respectfully submitted,

NEAL KUMAR KATYAL
Counsel of Record
JESSICA L. ELLSWORTH
WILLIAM E. HAVEMANN
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

October 11, 2024