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Reaching for Immunity: The Third Circuit’s Approach to the Extension of Eleventh Amendment Immunity to Instrumentalities as Arms of the State in Benn v. First Judicial District of Pennsylvania

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Issues in the Third Circuit

REACHING FOR IMMUNITY: THE THIRD CIRCUIT'S APPROACH TO THE EXTENSION OF ELEVENTH AMENDMENT IMMUNITY TO INSTRUMENTALITIES AS ARMS OF THE STATE IN BENN V. FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

I. Introduction

The United States Court of Appeals for the Third Circuit recently changed its multi-factor test to determine whether to extend Eleventh Amendment sovereign immunity to state entities and instrumentalities where the state is not a named party in the suit. The Third Circuit’s test previously consisted of three factors: (1) the risk that a potential judgment against the entity will be paid out of state funds, (2) state law’s treatment of the entity and (3) the entity’s degree of autonomy from the state. Although no factor was “dispositive,” the Third Circuit treated the first factor—the potential risk to the state’s treasury—as the “most important” factor and afforded the treasury risk factor the most weight. In Benn v. First Judicial District of Pennsylvania, however, the Third Circuit chose to treat the state treasury risk factor as a co-equal factor in its Eleventh Amendment immunity analysis, focusing on the state’s “legal liability” instead of the practical effect of an adverse judgment on the state’s treasury. Many circuits still give the state treasury risk factor the most

1. See Benn v. First Judicial Dist. of Pa., 426 F.3d 233, 239 (3d Cir. 2005) (changing previous multi-factor test, which gave most weight to treasury risk factor, to new test making treasury risk factor co-equal factor).
2. See Fitchik v. N.J. Transit Rail Operations, 873 F.2d 655, 659 (3d Cir. 1989) (stating “Fitchik Factors” used by Third Circuit to determine whether entity is entitled to Eleventh Amendment sovereign immunity). For a discussion of Fitchik, see infra notes 39-44 and accompanying text.
3. See id. at 659-60 (discussing relative weight of factors and stressing importance of treasury risk factor).
4. 426 F.3d 233 (3d Cir. 2005).
5. See id. at 239 (discussing previous multi-factor test and reasons for change, including focus on “entity’s potential legal liability”). But see Febres v. Camden Bd. of Educ., 445 F.3d 227, 236 (3d Cir. 2006) (affirming Benn, but noting that “in close cases where indicators of immunity point in different directions . . . prevention of . . . judgments that must be paid out of a State’s treasury [should be courts’] prime guide” (internal citations and quotations omitted)).

Recently, the Third Circuit expanded on its focus on “legal liability” in Febres, 445 F.3d at 236 (discussing legal liability). The Febres court stated: [T]he practical or indirect financial effects of a judgment may enter a court’s calculus, but rarely have significant bearing on a determination of an entity’s status as an arm of the state. A state’s legal liability (or lack thereof) for an entity’s debts merits far greater weight, and is therefore
weight.6

This Casebrief discusses the Third Circuit’s recent change to its Eleventh Amendment immunity analysis.7 Part II summarizes United States Supreme Court precedent relating to state sovereign immunity and recent decisions involving its arm of the state doctrine.8 Part III discusses the development of the arm of the state doctrine in the Third Circuit and the Third Circuit’s new approach to its multi-factor inquiry in Benn.9 Part IV examines other circuits’ arm of the state immunity tests and compares these tests with the new Third Circuit test, focusing in particular on the differences in how various circuits treat the state treasury risk factor.10 Part V concludes that (1) there is Supreme Court precedent that supports both the Third Circuit’s test and the other circuits’ slightly different tests, and (2) despite some differences in the circuits’ various tests, the tests are unlikely to produce different results in most situations.11

II. THE SUPREME COURT: ELEVENTH AMENDMENT IMMUNITY AND ARM OF THE STATE DOCTRINE

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,

the key factor in our assessment of the state treasury prong of the Fitchik analysis.

Id. (stressing importance of “legal liability” rather than “practical” effect of judgment). For a discussion of the facts and reasoning of Benn and the reasons for the new Third Circuit approach, see infra notes 45-66 and accompanying text. For a discussion of the facts and reasoning of Febres, see infra notes 67-72 and accompanying text.

6. See, e.g., Morris-Hayes v. Bd. Chester Union Free Sch., 423 F.3d 153, 164 (2d Cir. 2005) (finding state treasury risk controls if other factors and consideration of twin aims of Eleventh Amendment are not dispositive); Md. Stadium Auth. v. Ellebre Becket, Inc., 407 F.3d 255, 261 (4th Cir. 2005) (instructing court must first establish effect on state treasury); Ernst v. Rising, 427 F.3d 351, 364 (6th Cir. 2005) (stating “state-treasury inquiry” is “generally . . . most important” inquiry); Frenesiyn Med. Care Cardiovascular Res. v. Puerto Rico, 322 F.3d 56, 68 (1st Cir. 2003) (holding state treasury risk controls if other factors not dispositive); Hudson v. City of New Orleans, 174 F.3d 677, 682 (5th Cir. 1999) (considering risk to state treasury most important factor); Hadley v. N. Ark. Cmty. Tech. Coll., 76 F.3d 1437, 1439-42 (8th Cir. 1996) (treating risk to treasury as most important factor). For an illustration of the circuits’ differing approaches to the state treasury risk factor, see infra note 21 and accompanying text.

7. For a discussion of the facts and reasoning of Benn and the reasons for the new Third Circuit approach, see infra notes 45-66 and accompanying text.

8. For a discussion of Supreme Court Eleventh Amendment immunity and arm of the state doctrine, see infra notes 12-33 and accompanying text.

9. For a discussion of the development of the Third Circuit’s arm of the state doctrine and the facts and reasoning of Benn, see infra notes 34-66 and accompanying text.

10. For a discussion of the arm of the state immunity tests of other circuits, see infra notes 67-137 and accompanying text.

11. For an analysis and comparison of the differing approaches to the state treasury risk factor to the Third Circuit approach, see infra notes 138-53 and accompanying text.
commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."12 Additionally, the Supreme Court has construed the Eleventh Amendment to provide immunity in a third category of lawsuits, those commenced against a state by citizens of that state.13 Despite this seemingly broad grant of immunity, Congress can abrogate states' immunity from suit when: (1) Congress has "unequivocally" expressed the "intent" to abrogate immunity and (2) Congress is acting "pursuant to a valid exercise of power."14

12. U.S. Const. amend. XI. The Eleventh Amendment was adopted to respond to "States' fears that federal courts would force them to pay their Revolutionary War debts, leading to their financial ruin." See Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 39 (1994) (discussing Eleventh Amendment history). The Amendment was adopted to ensure that states would receive the "respect" and "integrity" they deserved. See id. (same).

13. See Hans v. Louisiana, 134 U.S. 1, 13 (1890) (recognizing each state's sovereignty and noting that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent" (quoting The Federalist No. 81 (Alexander Hamilton))); see also P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, 506 U.S. 139, 146 (1993) ("The Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity.").

14. See Green v. Mansour, 474 U.S. 64, 68 (1985) (describing requirements to determine whether Congress has abrogated state immunity). Regarding the first requirement, the Court has required that Congress state its intent to abrogate states' immunity by making a "clear legislative statement." See Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 786 (1991) (describing specifics of first prong of Court's analysis of whether Congress may constitutionally abrogate state immunity); see also Dellmuth v. Muth, 491 U.S. 223, 228 (1989) ("Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute."). In its consideration of the second requirement, the Court asks whether the Act was "passed pursuant to a constitutional provision granting Congress the power to abrogate." See Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 59 (1996) (discussing narrow inquiry into whether Congress has power to abrogate Eleventh Amendment immunity). Currently, the Court recognizes only one provision of the Constitution under which Congress can abrogate immunity—the Fourteenth Amendment. See Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (holding that Congress could validly abrogate state immunity from suit guaranteed by Fourteenth Amendment). In describing the Fitzpatrick decision, the Seminole Tribe Court noted that the Fitzpatrick Court explained "that through the Fourteenth Amendment, federal power extend[s] to intrude upon the province of the Eleventh Amendment and therefore . . . [section] 5 of the Fourteenth Amendment allow[s] Congress to abrogate the immunity from suit guaranteed by that Amendment." See Seminole Tribe, 517 U.S. at 59. In Fitzpatrick, the Court held that Congress could properly abrogate state immunity pursuant to the Fourteenth Amendment because that amendment "expressly" gave Congress the "authority" to interfere with Fourteenth Amendment cases. See Fitzpatrick, 427 U.S. at 455 (discussing impact of Fourteenth Amendment on Eleventh Amendment). Thus, in Fitzpatrick, the Court held that the Civil Rights Act of 1965 abrogated state immunity because Congress had permissibly enacted the Act pursuant to its Fourteenth Amendment enforcement powers. See id. at 456 ("We think that Congress may, in determining what is appropriate legislation for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts." (internal quotations omitted)).
A. Supreme Court Arm of the State Doctrine

Supreme Court jurisprudence has addressed the issue of whether the Eleventh Amendment also extends immunity to state instrumentalities and entities with some connection to the state when the state is not actually a named party in the action. The Court has held that Eleventh

Until 1996, the Court also recognized Congress's power to abrogate state immunity under the Commerce Clause of the Constitution. See Pennsylvania v. Union Gas Co., 491 U.S. 1, 5 (1989), overruled by Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (allowing Congress to abrogate states' immunity when Congress is acting pursuant to Commerce Clause, U.S. CONST., art. I, § 8, cl. 3 (granting congressional powers)). The Court previously held in Union Gas that Congress could abrogate state immunity pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C.A. § 9601 et seq. (1980), which Congress enacted pursuant to its Commerce Power. See Union Gas, 491 U.S. at 5 (discussing facts of case). In Seminole Tribe of Florida v. Florida, however, the Court held that its previous decision in Union Gas was "wrongly decided" and should be overruled because the Eleventh Amendment served to constrain Congress's power pursuant to the Commerce Clause. See Seminole Tribe, 517 U.S. at 66 (overruling prior decision in Union Gas). Seminole Tribe dealt with the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq. (1988), which allowed Native American tribes to "conduct certain gaming activities only in conformance with a valid compact between the tribe and the State in which the gaming activities [were] located." See id. at 47 (describing Indian Gaming Regulatory Act). Congress passed the Indian Gaming Regulatory Act ("IGRA") pursuant to the Indian Commerce Clause, and, inter alia, the Act "authorize[d] a tribe to bring suit in federal court against a State in order to compel performance of [the State's duty to negotiate in good faith with an Indian tribe toward the formation of a compact] . . . ." Id. (discussing facts of case).

Florida argued that IGRA violated the state's sovereign immunity. See id. at 52 (describing procedural history). The Court began its analysis of Florida's argument by first determining that the Indian Commerce Clause was indistinguishable from the Interstate Commerce Clause. See id. at 62-63 ("If anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause . . . . [w]e agree [that there is no] principled distinction in favor of the States to be drawn between the Indian Commerce Clause and the Interstate Commerce Clause."). In a departure from its decision in Union Gas, the Court held that Congress could not rely on the Indian Commerce Clause to abrogate state immunity explaining: "the Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." Id. at 72-73 (overruling Union Gas and holding that Congress cannot constitutionally abrogate state immunity pursuant to Commerce Power). Thus, today Congress may only constitutionally abrogate Eleventh Amendment immunity pursuant to the Fourteenth Amendment. See Benn v. First Judicial Dist. of Pa., 426 F.3d 233, 238 (3d Cir. 2005) ("Congress may abrogate the States' Eleventh Amendment immunity pursuant to its authority under Section Five of the Fourteenth Amendment provided it has unequivocally expressed its intent to do so."); Joseph A. Powers, Casebrief, Circumventing the Eleventh Amendment in the Third Circuit: College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board and Related Case Law, 43 VILL. L. REV. 923, 927 (1998) ("Therefore, Congress can now only validly abrogate the states' Eleventh Amendment immunity when (1) Congress unequivocally expresses its intent to abrogate and (2) Congress legislates pursuant to its Fourteenth Amendment power.").

15. See Regents of the Univ. of Cal. v. Doe, 519 U.S. 425, 429 (1997) ("It has long been settled that the reference to actions against one of the United States
Amendment immunity bars suits against state entities and instrumentalities even where the state is not a named party, so long as the state is the real party in interest.16 When determining whether a state instrumentality can enjoy the state's immunity, the Court examines the relationship between the state and the instrumentality and whether the instrumentality acts or should be treated as an "arm of the state."17 Particularly important in the Court's analysis are (1) "the essential nature and effect of the proceeding"18 and (2) the "nature of the entity created by state law."19

B. Supreme Court Application of Arm of the State Doctrine and Treatment of Treasury Risk Factor

Three relatively recent Supreme Court decisions provide some guidance for states struggling with the arm of the state problem.20 These encompasses not only actions in which a state is actually named as the defendant, but also certain actions against state agents and state instrumentalities." (internal citations and quotations omitted)); see also Edelman v. Jordan, 415 U.S. 651, 663 (1974) (recognizing that state may not be named party); Powers, supra note 14, at 935 (discussing fact that state is sometimes not named party in suit against state). In Regents, the Court evaluated whether the University of California, in operating a university laboratory, was entitled to Eleventh Amendment immunity. See Regents, 519 U.S. at 429-32 (discussing facts of case). The Court held that the University was immune as an arm of the state because a judgment against the University would cause the state to be legally liable. See id. at 431 (holding University was immune). For a complete discussion of Regents, see infra notes 26-30 and accompanying text.

16. See Regents, 519 U.S. at 429 (holding suit may be barred if state is "real, substantial party in interest" (internal citations and quotations omitted)); Edelman, 415 U.S. at 665 (applying Eleventh Amendment immunity despite state not being named as party); Ford Motor Co. v. Dep't of Treasury of Ind., 323 U.S. 459, 464 (1945), overruled on other grounds by Lapides v. Bd. of Regents of Univ. System of Ga., 535 U.S. 613 (2002) ("[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.").

17. See Regents, 519 U.S. at 429-30 (quoting Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977)) (discussing factors previously used by Court to determine whether state entity should receive Eleventh Amendment immunity).

18. See Ford Motor, 323 U.S. at 464 (examining factors used to determine whether state instrumentality can invoke state's immunity). The Ford Motor Court explained that the state was the "real party in interest" when a judgment would have the effect of causing the state to pay for the judgment. See id. (explaining "essential nature and effect of the proceeding" inquiry).

19. See Mt. Healthy City Bd. of Ed. v. Doyle, 429 U.S. 274, 280 (1977) (discussing factors used to determine whether state instrumentality can invoke state's immunity). The Mt. Healthy Court explained that, central to the "nature of the entity" inquiry, was whether the entity was more like a state entity (entitled to immunity) or, as turned out to be the case in Mt. Healthy, a county or city entity (not entitled to immunity). See id. at 280-81 (explaining nature of entity inquiry).

20. See Fed. Maritüme Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 765 (2002) (noting that protecting state treasuries is important function of Eleventh Amendment, but central purpose is to respect states as joint sovereigns); Regents, 519 U.S. at 425 (focusing on impact of money judgment on state treasury and holding that state university was entitled to Eleventh Amendment immunity de-
decisions specifically address one arm of the state factor that has received
different treatment by the various circuit courts: in arm of the state analy-
sis, how important is it that a potential money judgment would or would
not come from the state treasury?21

In Hess v. Port Authority Trans-Hudson Corporation,22 the Court consid-
ered whether Port Authority, an entity created by a bi-state compact, was
an arm of the state for state immunity purposes when two workers were
injured on the railway.23 The Court placed special emphasis on one of the
goals of the Eleventh Amendment—protecting state treasuries—because
the indicators for arm of the state immunity “point[ed] in different direc-
tions.”24 Noting that most circuit courts placed primary importance on

spite fact that university agreed to indemnify state against judgment); Hess v. Port
purpose of Eleventh Amendment was to protect state treasuries and holding that
Port Authority was not entitled to Eleventh Amendment immunity because state
would not be liable for money judgment). For a further discussion of Hess, see
infra notes 22-25 and accompanying text. For a discussion of Regents, see infra
notes 26-30 and accompanying text. For a discussion of Federal Maritime, see infra
notes 31-32 and accompanying text.

(2d Cir. 2005) (holding risk to state treasury controls if other factors and consider-
tion of twin aims of Eleventh Amendment are not dispositive); Benn v. First Judi-
cial Dist. of Pa., 426 F.3d 233, 239-40 (3d Cir. 2005) (holding risk to state treasury
is co-equal factor, rather than dispositive); Md. Stadium Auth. v. Ellebre Becket,
Inc., 407 F.3d 255, 261 (4th Cir. 2005) (instructing court must first establish effect
on state treasury); Ernst v. Rising, 427 F.3d 351, 364 (6th Cir. 2005) (stating “state-
treasury inquiry” is “generally” “most important” inquiry); Abusaid v. Hillsborough
County Bd., 405 F.3d 1298, 1304-15 (11th Cir. 2005) (treating risk to state treasury
as one of several factors); Fresenius Med. Care Cardiovascular Res. v. Puerto Rico,
322 F.3d 56, 68 (1st Cir. 2003) (noting risk to state treasury controls if other factors
not dispositive); Sturdevant v. Paulsen, 218 F.3d 1160, 1165 (10th Cir. 2000) (“In
answering [the treasury risk question], we focus on the legal incidence, not the
practical effect, of the liability.”); Hudson v. City of New Orleans, 174 F.3d 677, 682
(5th Cir. 1999) (holding risk to state treasury most important factor); Doe v. Law-
rence Livermore Nat’l Lab., 131 F.3d 836, 838-39 (9th Cir. 1997) (explaining focus
is on potential legal liability, rather than risk to treasury); Thiel v. State Bar of Wis.,
94 F.3d 399, 401-03 (7th Cir. 1996) (implying effect on state treasury may, in some
cases, be irrelevant if other factors support Eleventh Amendment immunity) (em-
phasis added); Hadley v. N. Ark. Cmty. Tech. Coll., 76 F.3d 1437, 1439-42 (8th Cir.
1996) (treating risk to treasury as most important factor).


23. See id. at 45-51 (evaluating whether Port Authority, entity created through
bi-state compact between New York and New Jersey, was arm of state when two
workers were injured on railway).

24. See id. at 47-48 (concluding that indicators of arm of state analysis were
inconclusive and shifting focus to protection of state treasury factor). The indica-
tors pointing towards immunity included general state control over Port Authority
and state court treatment of Port Authority as a state entity. See id. at 39-46 (dis-
scussing indicators of arm of state analysis). The most important indicator pointing
away from immunity was that the states were not financially tied to Port Authority.
See id. (same). The Court went on to explain that “the award of money judgments
against the states [was the] traditional core of Eleventh Amendment protection.”
See id. at 47 (explaining why state treasury risk, rather than state control over entity,
should be weightiest factor in arm of state inquiry).
the question of whether a money judgment would come from state funds, the Court focused on the fact that neither state would be "legally" or "practically" liable for a possible money judgment, and held that Port Authority was not entitled to Eleventh Amendment immunity.25

In Regents of the University of California v. Doe,26 the Court elaborated on its focus in Hess on the state treasury risk factor.27 In Regents, the Court evaluated whether the University of California, in operating a university laboratory, was entitled to Eleventh Amendment immunity.28 The distinguishing feature of the situation in Regents was the fact that there was technically no risk to California's treasury because the University had entered into a contractual relationship that indemnified the state against judgments against the University in connection with the laboratory.29 The Court rejected the notion that the indemnification prohibited Eleventh Amendment immunity noting, "with respect to the underlying Eleventh Amendment question, it is the entity's potential legal liability, rather than its ability or inability to require a third party to reimburse it, or to discharge the liability in the first instance, that is relevant."30

In 2002, the Supreme Court attempted to further illuminate the policy goals behind the Eleventh Amendment in Federal Maritime Commission v. South Carolina State Ports Authority.31 The Court noted that "[w]hile state

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25. See id. at 51-52 (finding Port Authority not entitled to Eleventh Amendment immunity). The Hess Court explained:
A discrete entity created by constitutional compact among three sovereigns, the Port Authority is financially self-sufficient; it generates its own revenues, and it pays its own debts. Requiring the Port Authority to answer in federal court to injured railroad workers who assert a federal statutory right . . . to recover damages does not touch the concerns—the States' solvency and dignity—that underpin the Eleventh Amendment. Id. at 52.


27. See id. at 429-32 (evaluating whether University of California, in its operation of laboratory, was acting as arm of state).

28. See id. at 426-28 (explaining that, although University did enjoy immunity in some of its functions, there was question as to whether it enjoyed immunity in its function of managing separate laboratory).

29. See id. at 428-31 (discussing situation where United States Department of Energy, rather than University or State of California, would be liable for potential money judgment).

30. See id. at 431 (rejecting idea that indemnification would prevent Eleventh Amendment from applying and explaining that "[t]he Eleventh Amendment protects the State from the risk of adverse judgments even though the State may be indemnified by a third party"). In Regents, the Supreme Court held that the inquiry of whether a state agency was an arm of the state was not just a "formalistic question of ultimate financial liability," but rather the inquiry should be focused on "the entity's potential legal liability, rather than its ability or inability to require a third party to reimburse it, or to discharge the liability in the first instance . . . ." See id. at 431 (discussing relative importance of financial liability and legal liability, and holding that financial liability is not most important factor).

31. 535 U.S. 743 (2002). In Federal Maritime, the Supreme Court was asked to determine whether the South Carolina State Ports Authority was an arm of the state entitled to Eleventh Amendment immunity from a suit before the Federal
sovereign immunity serves the important function of shielding state treasuries...the doctrine's central purpose is to accord the states the respect owed to them as joint sovereigns." It is in light of these Supreme Court decisions that the Third Circuit has developed its arm of the state analysis and considered how much weight to give certain immunity factors, particularly the state treasury risk factor.33

III. THE THIRD CIRCUIT AND ARM OF THE STATE ANALYSIS

A. Third Circuit Arm of the State Analysis Prior to Benn v.
First Judicial District of Pennsylvania

The Third Circuit’s approach to granting Eleventh Amendment immunity to state instrumentalities has varied as the Supreme Court’s approach has evolved.34 In Urbano v. Board of Managers of the New Jersey State Prison,35 the Third Circuit developed a nine-factor test36 to determine whether the Board of Managers for the State Prison was an arm of the state for Eleventh Amendment immunity purposes when prison inmates sued the Board for breach of its fiduciary duty.37 The Urbano court did not reach the merits of the case, but noted that, although no factor was “conclusive,” the most important factors were whether a potential money

Maritime Commission (“FMC”). See id. at 746-47 (discussing facts of case). The Court held that the Ports Authority was an arm of the state and that the FMC could not hear the case. See id. at 747 (holding “state sovereign immunity” barred suit). The Court further rejected the arguments that FMC decisions were not self-executing and that FMC decisions were less of a threat to the “financial integrity” of the state. See id. at 761-66 (noting that “[s]overeign immunity does not merely constitute a defense to monetary liability or even to all types of liability...[r]ather it provides an immunity from suit”).

32. See id. at 765 (internal citations and quotations omitted) (discussing policy goals behind Eleventh Amendment, particularly that Amendment was intended to show respect and deference to sovereign states).

33. For a discussion of Supreme Court decisions relied on by the Third Circuit, see supra notes 20-32 and infra notes 34-60 and accompanying text.

34. See Benn v. First Judicial Dist. of Pa., 426 F.3d 233, 238-41 (3d Cir. 2005) (discussing Third Circuit’s evolving analysis of Eleventh Amendment issues with new Supreme Court opinions).

35. 415 F.2d 247 (3d Cir. 1969).

36. See id. at 250-51 (listing factors and noting that each factor is “only one of a number that are of significance...and no one of which is conclusive” (internal citations omitted)). The “Urbano Factors” are: (1) the circumstances of “[l]ocal law and decisions defining the status and nature of the agency involved in its relation to the sovereign,” (2) whether, “in the event plaintiff prevails, the payment of the judgment will have to be made out of the state treasury,” (3) “whether the agency has the funds or the power to satisfy the judgment,” (4) “whether the agency is performing a governmental or proprietary function,” (5) “whether [the entity] has been separately incorporated,” (6) “the degree of autonomy [the entity has] over its operations,” (7) “whether [the entity] has the power to sue and be sued and to enter into contracts,” (8) “whether [the entity’s] property is immune from state taxation,” and (9) “whether the sovereign has immunized itself from responsibility for the agency's operations.” Id. (listing factors).

37. See id. at 248-50 (discussing facts of case).
judgment against the Board would be paid by the state and whether the Board had the funds to satisfy a potential judgment.\textsuperscript{38}

In 1989, the Third Circuit in \textit{Fitchik v. New Jersey Transit Rail Operations}\textsuperscript{39} divided the nine \textit{Urbano} factors into three general questions in order to determine whether New Jersey Transit was an arm of the state after transit workers were injured on the job.\textsuperscript{40} First, the court considered "[w]hether the money that would pay the judgment would come from the state."\textsuperscript{41} Second, the court examined "the status of the agency under state law."\textsuperscript{42} Finally, the court considered the agency's degree of autonomy.\textsuperscript{43} The \textit{Fitchik} court noted that, while none of the factors were dispositive, the "most important" was "whether any judgment would be paid from the state treasury."\textsuperscript{44}

B. \textit{Third Circuit Changes its Analysis of Eleventh Amendment Arm of the State Immunity Factors in Benn v. First Judicial District of Pennsylvania}

The Third Circuit recently had the opportunity to apply its Eleventh Amendment immunity analysis in \textit{Benn v. First Judicial District of Pennsylvania}.\textsuperscript{45} In \textit{Benn}, the court considered whether the First Judicial District of Pennsylvania was a state agency entitled to Eleventh Amendment immunity.\textsuperscript{46} The plaintiff, a parole officer for the First Judicial District, sued the Judicial District for violations of Title I of the Americans with Disabilities

\textsuperscript{38} See id. at 251 (discussing relative weight of factors).
\textsuperscript{39} 873 F.2d 655 (3d Cir. 1989).
\textsuperscript{40} See id. at 659 (simplifying \textit{Urbano} factors into three basic questions).
\textsuperscript{41} See id. (explaining that first question—whether money that would pay judgment comes from State—encompasses three \textit{Urbano} factors: "whether payment will come from the state’s treasury, whether the agency has the money to satisfy the judgment and whether the sovereign has immunized itself from responsibility for the agency’s debts").
\textsuperscript{42} See id. (explaining that second question—status of agency under state law—encompasses four \textit{Urbano} factors: "how state law treats the agency generally, whether the entity is separately incorporated, whether the agency can sue or be sued in its own right, and whether it is immune from state taxation").
\textsuperscript{43} See id. at n.2 (noting that one \textit{Urbano} factor—whether government exercises governmental or proprietary function—is no longer considered).
\textsuperscript{44} See id. at 659-60 (explaining that decision to place more importance on whether money would come from state treasury was supported by Third Circuit’s own decision in \textit{Urbano} and Supreme Court’s discussion of issue in \textit{Edelman}). In \textit{Urbano}, the Third Circuit called this source of funds factor the “most significant” factor. See \textit{Urbano} v. Bd. of Managers of the N.J. State Prison, 415 F.2d 247, 251 (3d Cir. 1969) (discussing factors). Similarly, in \textit{Edelman}, the Supreme Court noted that a primary goal of the Eleventh Amendment was to prevent federal court judgments from being paid out of the state’s treasury. See \textit{Edelman} v. Jordan, 415 U.S. 651, 663-66 (1974) (explaining goals of Eleventh Amendment).
\textsuperscript{45} 426 F.3d 233, 239-41 (3d Cir. 2005) (applying arm of state analysis to determine whether First Judicial District of Pennsylvania was immune from suit).
\textsuperscript{46} See id. at 235 (discussing issue in case).
Act ("ADA"). The court held that states are immune from suits brought pursuant to Title I of the ADA. Thus, if the court found the state to be the real party in interest in the suit (i.e., Judicial District is an arm of the state), the Judicial District would also be entitled to immunity from suit under Title I of the ADA.

The court next discussed its previous jurisprudence, including Urbano and Fitchik, dealing with Eleventh Amendment immunity and arm of the state analysis. Despite this jurisprudence and in reliance on the Supreme Court's decision in Regents, the court chose to alter its previously established policy of placing primary importance on the state treasury risk factor. The Third Circuit determined in Benn that it was inappropriate to continue to weigh the treasury risk factor so heavily because the Regents Court focused primarily on the Eleventh Amendment's protection of a state's dignity as well as its treasury. The Benn court reasoned that the Supreme Court's focus in Federal Maritime on the need to protect state sovereigns further supported this reduced focus on the treasury risk aspect of arm of the state analysis. The Benn court was careful to note, however,

47. See id. at 235-36 (detailing claims by plaintiff). Elaborating on the plaintiff's particular claims, the Benn court noted:

As his brief recites, in the new position he had to wear a firearm and a bullet-proof vest, use handcuffs, and locate and apprehend dangerous criminals. In his complaint, Benn alleges that "he was not mentally suited for this position" and, shortly after his transfer, began experiencing job-related anxiety and stress. He allegedly suffered post-traumatic shock after seeing a co-worker assaulted. In October 1996, he was accidentally struck by a car after seeing a probation violator on the street. He took leave from work for the next eight months, citing physical injuries from the accident, post-traumatic shock disorder, and chronic depression. Benn alleges that the Judicial District refused to offer any accommodation for his stress disorder, and that he was wrongfully terminated.

48. See id. at 238-39 (discussing whether state was immune from suit under Title I of ADA). In its consideration of whether the Judicial District should be entitled to the state's immunity, the court first explained that the current case was governed by a recent Supreme Court case that held that Congress could not constitutionally abrogate state Eleventh Amendment immunity pursuant to Title I of the ADA. See id. (discussing impact of Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001), on Third Circuit's consideration of Benn and noting that "[i]t follows that Pennsylvania, if sued under Title I, retains its Eleventh Amendment immunity").

49. See Benn, 426 F.3d at 239 (confirming that Eleventh Amendment immunity may be invoked even if state is not named party in action).

50. See id. (discussing previous tests from Urbano and Fitchik, and listing factors considered in arm of state analysis). For a discussion of the Urbano and Fitchik decisions and factors, see supra notes 35-44 and accompanying text.

51. See id. at 239 (explaining need to change policy of placing "source of funds" factor as most important factor in light of Regents).

52. See id. (discussing Regents). For a full discussion of Regents, see supra notes 26-30 and accompanying text.

that just because the treasury risk prong of the arm of the state inquiry was
no longer the most important factor in the test, it did not mean the factor
should be "ignored." 54 Rather, the court treated the treasury risk factor as
"co-equal" with the other factors set out in Fitchik. 55

The Benn court then examined all three of the factors in turn. 56 First,
in light of the Supreme Court's decision in Regents, the court held that the
financial status of the Judicial District did not bar it from invoking Eleventh
Amendment immunity. 57 Thus, the court was unconvinced that the
statutory funding scheme for state courts, which places "considerable fi-
nancial responsibility for the operation of the courts onto the counties,"
should prevent the Judicial District from claiming immunity. 58 Rather,
the Benn court relied heavily on the Pennsylvania Supreme Court's inter-
pretation of the state constitution treating judicial districts as state enti-
ties. 59 Similarly, the court placed little weight on the fact that the Judicial
District may have had an indemnification agreement with the city in which
it was situated, relying on the Supreme Court's holding in Regents that
"[t]he Eleventh Amendment protects the State from the risk of adverse
judgments even though the State may be indemnified by a third party." 60

See 535 U.S. at 765 (holding the Ports Authority was immune, and noting that "the
central purpose" of Eleventh Amendment immunity "is to accord the States the
respect owed to them as joint sovereigns" (internal citations and quotations o-
mitted)). For a discussion of Federal Maritaine, see supra notes 31-32 and accompanying
text.

54. See Benn, 426 F.3d at 240 (discussing importance of financial liability fac-
tor). The Benn court further explained that:
The relegation of financial liability to the status of one factor co-equal
with others in the immunity analysis does not mean that it is to be ig-
nored . . . [rather,] [I]ike the other two factors referred to in Fitchik, it is
simply to be considered as an indicator of the relationship between the
State and the entity at issue.

Id.

55. See id. (stressing that financial liability should be neither ignored nor
made dispositive factor in arm of state analysis).

56. See id. at 240-41 (considering three co-equal factors).

57. See id. (discussing first prong of arm of state analysis and holding that,
although Judicial District was "locally funded" and possibly indemnified by city in
case of judgment, Judicial District was still arm of state).

58. See id. at 240 (responding to plaintiff's argument that Judicial District was
"merely a local entity undeserving of the protection of the Eleventh
Amendment").

59. See id. (considering whether Judicial District is local entity, which does not
enjoy protection of Eleventh Amendment, or state entity, that can invoke Eleventh
Amendment protection). The Benn court placed special emphasis on a Penn-
sylvania state court decision dealing with whether state courts were state or local
entities. See id. (discussing financial backing and status of state courts). In County
of Allegheny v. Commonwealth, 534 A.2d 760 (Pa. 1987), the Supreme Court of Penn-
sylvania stated that Pennsylvania's bifurcated funding scheme was "in conflict with
the intent clearly expressed in the [Pennsylvania] [C]onstitution that the judicial
system be unified." See id. at 765 (discussing local funding for state courts).

60. See Benn, 426 F.3d at 240-41 (quoting Regents and holding that states do
not lose their Eleventh Amendment immunity simply because they may be indem-
Second, with regard to the second *Fitchik* factor—the status of the entity under state law—the court noted that the Pennsylvania Constitution provided for a "unified judicial system," including all state courts under the supervision of the Pennsylvania Supreme Court. Further, the court determined that the state courts were part of the "Commonwealth government," and thus were "state rather than local" entities. Accordingly, the *Benn* court found the relationship between the state and the Judicial District "strongly favor[ed]" Eleventh Amendment immunity.

Finally, the court considered the third of the *Fitchik* factors—the degree of the entity's autonomy. The court relied on its analysis of the relationship between the state and the Judicial District under state law, and concluded that the Judicial District was "not independent of the Commonwealth and hardly can be regarded as having significant autonomy from the Pennsylvania Supreme Court." Thus, the *Benn* court held that because Pennsylvania was the real party in interest in the suit against the Judicial District and could possibly be "subjected to both indignity and an impermissible risk of legal liability if the suit were allowed to proceed," the Eleventh Amendment barred the plaintiff's ADA claim against the Judicial District.

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**nified by third party).** For a discussion of *Regents*, see *supra* notes 26-30 and accompanying text.


62. *See Callahan*, 207 F.3d at 672 (discussing Pennsylvania Constitution and its treatment of Pennsylvania courts). In *Callahan*, the Third Circuit came close to deciding the issue presented in *Benn*—whether or not judicial districts were entitled to Eleventh Amendment immunity—but dismissed the suit on other grounds. *See id.* at 673 (dismissing suit because Judicial District was not "person" within meaning of statute at issue). The *Callahan* court, however, presented a thorough analysis of the Pennsylvania Constitution and its treatment of Pennsylvania courts:

The Pennsylvania Constitution provides for the vesting of the Commonwealth's judicial power in a "unified judicial system" which includes all of the courts in Pennsylvania. **Pa. Const.** art. V, § 1. Moreover, the constitution provides that the Pennsylvania Supreme Court will exercise "general supervisory and administrative authority" over the unified judicial system. **Pa. Const.** art. V, §§ 1, 2, and 10. All courts and agencies of the unified judicial system, including the Philadelphia Municipal Court, are part of "Commonwealth government" and thus are state rather than local agencies. *See Pa. Const.** art. V, § 6(c); 42 Pa. Cons. Stat. Ann. § 102 (West Supp. 1999); 42 Pa. Cons. Stat. § 301 (West 1981).

Id. at 672.

63. *See Benn*, 426 F.3d at 240 (holding that second of *Fitchik* factors—status of entity under state law—strongly favored immunity for judicial district).

64. *See id.* (discussing third *Fitchik* factor).

65. *See id.* (quoting *Callahan*, 207 F.3d at 673) (holding that autonomy factor favored granting Judicial District Eleventh Amendment immunity).

66. *See id.* at 241 (holding Eleventh Amendment immunity applied to the Judicial District, the *Benn* court explained:}
C. Third Circuit’s Recent Discussion of Benn v. First Judicial District of Pennsylvania and its New Arm of the State Test

The Court of Appeals for the Third Circuit recently had an opportunity to comment on its decision in Benn in Febres v. Camden Board of Education.67 In Febres, the court had to determine whether the Camden Board of Education was an arm of the state entitled to Eleventh Amendment immunity.68 The Febres court held that the Board was not an arm of the state because: (1) the Board’s status under state law, specifically that “the Board [could] sue or be sued under state law, [was] separately incorporated, and [was] not immune from state taxation,” weighed against immunity, (2) the Board’s autonomy weighed “slightly in favor of the Board’s immunity” because the Governor had veto power in some instances and could appoint members of the Board, and (3) the state treasury risk factor weighed against immunity because the state had no “legal obligation . . . to provide funds in response to an adverse judgment against the Board.”69

The court noted that the first and second factors “point[ed] in different directions,” thus the third factor, state treasury risk, was “particularly significant.”70 Rejecting the Board’s argument that a judgment against the Board could have the “practical” effect of requiring the state to replace funds used by the Board to pay the judgment, the court instead focused on the absence of any indication that the state had a “legal obligation” to do so or that any funds would actually be paid out of the state’s treasury.71

The Pennsylvania constitution envisions a unified state judicial system, of which the Judicial District is an integral component. From a holistic analysis of the Judicial District’s relationship with the state, it is undeniable that Pennsylvania is the real party in interest in Benn’s suit and would be subjected to both indignity and an impermissible risk of legal liability if the suit were allowed to proceed. We agree with the District Court that the Judicial District has Eleventh Amendment immunity which functions as an absolute bar to Benn’s ADA claim.

Id.

67. 445 F.3d 227 (3d Cir. 2006).
68. See id. at 228 (discussing facts of case).
69. See id. at 230-36 (discussing three prongs of test). Regarding the state treasury risk factor, the court explained that despite the fact that the state could choose to provide funds to satisfy a judgment, the Board failed to “point to any evidence demonstrating that additional funds would, in fact, be provided by the state.” See id. at 236 (explaining reasoning behind ruling that state treasury risk factor weighed against immunity).
70. See id. at 232 (explaining importance of state treasury risk factor in Febres was “significant” because other indicators pointed in opposing directions). The Febres court explained that this approach was derived from Hess v. Port Authority Trans-Hudson Corp., 513 U.S. 30, 47 (1994). See Febres, 445 F.3d at 229-30 (discussing Hess). The Hess court held that, in cases where “indicators of immunity point in different directions,” courts should focus on one of the important purposes of the Eleventh Amendment—“the prevention of federal-court judgments that must be paid out of a [s]tate’s treasury.” See Hess, 513 U.S. at 47-48 (addressing circumstances where indicators of immunity may not all weigh in favor of or against immunity); see also Febres, 445 F.3d at 229-30 (quoting Hess).
71. See Febres, 445 F.3d at 232-36 (considering state treasury risk).
In finding that the Board was not entitled to immunity, the Febres court stated that “[a] state’s legal liability (or lack thereof) for an entity’s debts merits far greater weight [than the “practical or indirect financial effects of a judgment”], and is therefore the key factor in our assessment of the state-treasury prong of the *Fitchik* analysis.”

IV. **ARM OF THE STATE TESTS UTILIZED BY OTHER CIRCUIT COURTS—A COMPARISON TO THE THIRD CIRCUIT’S TEST**

A. **Review of Arm of the State Tests Among Other Circuit Courts: Interpretation and Application**

The Third Circuit applies a multi-factor test to determine whether an entity is entitled to Eleventh Amendment immunity. Likewise, most circuit courts also employ some version of a multi-factor or multi-step inquiry in their respective immunity tests. Although many of the factors used by the various circuits are similar, the courts’ approaches to weighing the factors and interpreting Supreme Court precedent vary—particularly in their treatment of the state treasury risk factor.

For example, the Court of Appeals for the First Circuit uses a two-step inquiry to determine whether an entity is an arm of the state. The First Circuit begins by analyzing whether “the state [has] clearly structured the entity to share its sovereignty.” In order to assist courts in evaluating the first prong of the inquiry, the First Circuit considers the following non-exclusive list of factors:

1. whether the agency has the funding power to enable it to satisfy judgments without direct state participation or guarantees;
2. whether the agency’s function is governmental or proprie-

72. *See id.* at 236 (elaborating on treatment of state treasury risk factor).


74. For a discussion of the multi-factor immunity tests used by other circuit courts, see *infra* notes 76-137 and accompanying text.

75. For a brief description of some of the different approaches employed by other circuits and their treatment of the treasury risk factor, see *supra* note 21 and accompanying text. *See also* Hudson v. City of New Orleans, 174 F.3d 677, 681 (5th Cir. 1999) (discussing difficulty of determining when entity is arm of state). The *Hudson* court describes the Eleventh Amendment as “a mess” and explains that the process of “identifying when a state is a real, substantial party in interest is often not an easy task.” *See id.* (discussing Eleventh Amendment jurisprudence and quoting John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 Va. L. Rev. 47, 47 (1998)).


77. *See Fresenius*, 322 F.3d at 68 (discussing first prong of inquiry, relying on non-exclusive list of factors).
tary; (3) whether the agency is separately incorporated; (4) whether the state exerts control over the agency, and if so, to what extent; (5) whether the agency has the power to sue, be sued, and enter contracts in its own name and right; (6) whether the agency's property is subject to state taxation; and (7) whether the state has immunized itself from responsibility for the agency's acts or omissions. 78

If the factors "point in different directions," then the risk to the state treasury is the "dispositive" factor. 79 Therefore, in Fresenius Medical Care Cardiovascular Resources v. Puerto Rico, 80 the First Circuit Court of Appeals held that a public corporation hospital was not an arm of the state because (1) the first prong factors did not all indicate that the corporation was an arm of the state, and (2) Puerto Rico would not be required to pay for a possible money judgment against the corporation out of its treasury. 81

78. Id. at 62 n.6 (listing "non-exclusive" set of factors derived from Metcalf & Eddy v. P.R. Aqueduct & Sewer Auth., 991 F.2d 935, 939-40 (1st Cir. 1993)); see also Wojcik v. Mass. State Lottery Comm'n, 300 F.3d 92, 99 (1st Cir. 2002) (listing First Circuit factors for arm of state analysis); Padilla Roman v. Hernandez Perez, 381 F. Supp. 2d 17, 24 n.3 (D.P.R. 2005) (restating First Circuit arm of state test).

The Fresenius court explained that, in addition to the seven factors listed, courts should also consider other factors discussed in Supreme Court decisions such as Hess, and Lake Country Estates v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979). See Fresenius, 322 F.3d at 68 (discussing factors to be considered in first prong of arm of state inquiry). The factors in Hess include state control over the entity and its actions and whether the entity can be "readily classified" as state or local. See Hess, 513 U.S. at 42-45 (discussing factors indicating immunity). In Lake Country Estates, relevant factors included city (as opposed to state) control over the entity and "local" functions performed by the entity. See Lake Country Estates, 440 U.S. at 402 (discussing considerations for immunity). The Fresenius court noted that evaluation of the first prong of the arm of the state inquiry—whether the state [had] clearly structured the entity to share its sovereignty—should be evaluated "in light of the different factors described in Hess, Lake Country Estates and Metcalf & Eddy." See Fresenius, 322 F.3d at 68 (discussing first prong).

In Wojcik, the First Circuit held that the Lottery Commission was an arm of the state because it had a "limited ability" to satisfy a money judgment without the help of the state; had a "governmental" function; was not separately incorporated; was under "significant" state control; and had "limited" ability to enter into contracts. See Wojcik, 300 F.3d at 99-101 (applying multi-factor test and finding Lottery Commission qualified as arm of state).

79. See Fresenius, 322 F.3d at 68 (noting that state treasury risk is most important factor).

80. 322 F.3d 56 (1st Cir. 2003).

81. See id. at 72-75 (holding public corporation hospital was not arm of state).

In its discussion of the non-exclusive list of factors, the Fresenius court focused, in particular, on (1) the fact that the hospital's enabling act did not specifically "contain language declaring that the [state was] not responsible for [the hospital's] debt," (2) the lack of any example of a Puerto Rican court holding that the hospital was "part of the government of Puerto Rico," (3) the lack of "judicial authority to support" the contention that the hospital's functions were "those of a government," and (4) nothing "determinative" to indicate that the hospital was controlled by the state. See id. at 68-72.
Similar to the First Circuit approach, the Court of Appeals for the Second Circuit also begins its arm of the state analysis with a multi-factor test, examining:

(1) how the entity is referred to in the documents that created it;
(2) how the governing members of the entity are appointed; (3) how the entity is funded; (4) whether the entity’s function is traditionally one of local or state government; (5) whether the state has a veto power over the entity’s actions; and (6) whether the entity’s obligations are binding upon the state.82

If all of these factors weigh in favor of granting the entity Eleventh Amendment immunity, the court’s inquiry ends.83 If, however, the court finds that its consideration of the six factors does not lead to a solid answer of whether to grant immunity, the court must then take into account the purposes behind the Eleventh Amendment; specifically, whether allowing the entity to be sued will “threaten the integrity of the state” and whether the suit “expos[es] the state treasury to risk.”84 Finally, if the factors still remain “evenly balanced,” the court will allow the “vulnerability to the state’s purse” to control its decision.85 Thus, in Mancuso v. New York State


83. See id. (“Only if [the six arm of state] factors point in different directions do we then turn to the next questions: (a) will allowing the entity to be sued in federal court threaten the integrity of the state? and (b) does it expose the state treasury to risk?”); see also McGinty v. N.Y., 251 F.3d 84, 100 (2d Cir. 2001) (ending inquiry when six factors from Mancuso “point[ed] in the same direction”).

84. See Mancuso, 86 F.3d at 293 (discussing rationale behind Eleventh Amendment and its relationship to multi-factor test). The Second Circuit relied heavily on the Supreme Court’s decision in Hess, where the Court focused on the goals behind the Eleventh Amendment and noted that “if [immunity] factors point in different directions . . . we then turn to the next questions: (a) will allowing the entity to be sued in federal court threaten the integrity of the state? and (b) does it expose the state treasury to risk?” See id. (discussing situations where immunity factors are not conclusive and citing Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 47 (1994) (“When indicators of immunity point in different directions, the Eleventh Amendment’s twin reasons for being remain our prime guide.”)). For a discussion of Hess, see supra notes 22-25 and accompanying text.

85. See Mancuso, 86 F.3d at 293 (“We remain mindful of the Supreme Court’s emphasis that ‘the vulnerability of the State’s purse [is] the most salient factor’ . . . [and] . . . [i]f all the elements are evenly balanced, this concern will control.” (internal citations omitted)); see also Morris-Hayes v. Bd. of Educ., 423 F.3d 153, 164 (2d Cir. 2005) (restating arm of state inquiry steps and explaining first step is to evaluate six factors listed in McGinty and Mancuso); Cohn v. New Paltz Cent. Sch. Dist., 363 F. Supp. 2d 421, 427 (N.D.N.Y. 2005) (restating arm of state inquiry steps and explaining first step is to evaluate six factors listed in McGinty and Mancuso). In Morris-Hayes, the court described the subsequent steps courts should take after applying the six factor test:

If these factors point in one direction, the inquiry is complete. If not, a court must ask whether a suit against the entity in federal court would
Thruway Authority,\textsuperscript{86} when the Thruway Authority was accused of violating the Clean Water Act, the Second Circuit ruled that the Thruway Authority was not an arm of the state worthy of immunity after (1) determining that the six-factor test was inconclusive; (2) finding a suit against the Thruway Authority was unlikely "an affront" to the state; and, (3) placing greatest importance on the fact that the state treasury was "not even minimally at risk."\textsuperscript{87}

The Court of Appeals for the Fourth Circuit begins by applying a four-factor test, considering:

[1] whether a judgment against the governmental entity would have to be paid from the State’s treasury . . . [2] the degree of control that the State exercises over the entity or the degree of autonomy from the State that the entity enjoys; [3] the scope of the entity’s concerns—whether local or statewide—with which the entity is involved; and [4] the manner in which State law treats the entity.\textsuperscript{88}

Notwithstanding these four factors, however, the Fourth Circuit places dispositive importance on the first factor—whether the money judgment will ultimately come from the state’s treasury—and only considers the other three factors if a judgment will not affect the state’s treasury.\textsuperscript{89}

threaten the integrity of the state and expose its treasury to risk. If the answer is still in doubt, a concern for the state fisc will control. Morris-Hayes, 423 F.3d at 164 (quoting McGinty, 251 F.3d at 96).

86. 86 F.3d 289 (2d Cir. 1996).

87. See id. at 296 (explaining steps taken to determine that Thruway Authority was not arm of state). In its discussion of the circuit’s six-factor test, the Mancuso court noted that (1) the legislature referred to the Thruway Authority as a "political subdivision," (2) the Thruway Authority’s board members were appointed by the governor under the advice of the state senate, (3) the state was not required "to fund the Thruway’s operations," (4) the Thruway “perform[ed] a function that the state would normally provide” because it “stretch[ed] across the entire state,” (5) the state did not have “veto power” over the Thruway, and (6) “any judgment against the Thruway Authority in this case [would pose] no threat to the finances of [the state].” See id. at 293-96 (discussing six factor test). With regard to whether allowing a suit against the Thruway Authority would be an affront to the state, the court noted that “[a]lthough the Thruway Authority may be identified closely with the state, New York State has given the Thruway Authority an existence quite independent from the state and exercises the most minimal control over the Thruway Authority.” Id. at 296.


89. See id. (noting that “[b]ecause the State treasury factor is the ‘most salient factor in Eleventh Amendment determinations,’ a finding that the State treasury will not be affected by a judgment against the governmental entity weighs against finding that entity immune." (internal citations omitted)); see also Md. Stadium Auth. v. Ellerbe Becket, Inc., 407 F.3d 255, 261 (4th Cir. 2005) (placing most importance on risk to state treasury factor in arm of state cases); Kitchen v. Upshaw, 286 F.3d 179, 184 (4th Cir. 2002) (quoting Cash, 242 F.3d at 223) (noting that determination that judgment will come from state treasury is "often the end of the inquiry" because “consideration of any other factor becomes unnecessary").
Further, if the factors are not conclusive, courts in the Fourth Circuit turn to the "twin reasons" for the Eleventh Amendment. Thus, in Cash v. Granville County Board of Education, the Fourth Circuit held that the Board of Education was not entitled to Eleventh Amendment immunity because a judgment against the Board would not adversely affect the state’s treasury and would not "impinge on the sovereign dignity of [the state]" because the Board was more of a county entity than a state entity.

Similar to most circuits, the Court of Appeals for the Fifth Circuit applies a multi-factor test, examining six factors:

1. [w]hether the state statutes and case law view the agency as an arm of the state; 2. [t]he source of the entity’s funding; 3. [t]he entity’s degree of local autonomy; 4. [w]hether the entity is concerned primarily with local, as opposed to statewide, problems; 5. [w]hether the entity has the authority to sue and be sued in its own name; [and] 6. [w]hether the entity has the right to hold and use property.

The Fifth Circuit makes clear, however, that it does not give the six factors equal weight. Rather, it gives the second factor the greatest weight, and

90. See Cash, 242 F.3d at 223 (stressing importance of rationale and purpose behind Eleventh Amendment). The Cash court described the twin reasons for the Eleventh Amendment as: "(1) the States' fears that federal courts would force them to pay their Revolutionary War debts, leading to their financial ruin, and (2) the integrity retained by each State in our federal system, including the States' sovereign immunity from suit." Id. (quoting Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 39 (1994)) (describing reasons for Eleventh Amendment).

91. 242 F.3d 219 (4th Cir. 2001).

92. See id. at 225-27 (denying Eleventh Amendment immunity to county school board); see also Kitchen, 286 F.3d at 184-85 (denying Eleventh Amendment immunity for regional jail authority because (1) state treasury was not at risk, (2) authority had significant autonomy from state, and (3) state law did not treat authority as arm of state). The Cash court noted, with respect to the state treasury risk factor, that "[t]he speculative, indirect, and ancillary impact on the State treasury that a judgment against the School Board in this case would have does not give rise to Eleventh Amendment protection." See Cash, 242 U.S. at 225.

93. See United States ex rel. Barron v. Deloitte & Touche, 381 F.3d 438, 440-42 (5th Cir. 2004) (applying factors and holding company was not arm of state); Skelton v. Camp, 234 F.3d 292, 297-98 (5th Cir. 2000) (applying six-factor test and holding that "removal court" was not arm of state); Anderson v. Red River Waterway Comm’n, 231 F.3d 211, 214 (5th Cir. 2000) (applying six-factor test and holding that Red River Waterway Commission was not arm of state); Clark v. Tarrant County, 798 F.2d 736, 744-45 (5th Cir. 1986) (establishing Fifth Circuit test).

94. See Hudson v. City of New Orleans, 174 F.3d 677, 681-82 (5th Cir. 1999) (discussing relative importance of different factors in Fifth Circuit test and explaining that factors are not given equal weight). The Hudson court explained that the factors are not given equal weight because "an important goal" of the Eleventh Amendment is "the protection of state treasuries." See id. at 682 (quoting Delahoussaye v. City of New Iberia, 937 F.2d 144, 147-48 (5th Cir. 1991) (explaining reason for focus on state treasury risk factor).
the fifth and sixth factors much less weight.\textsuperscript{95} This approach, according to the Fifth Circuit, enables courts to forgo a “precise test” in favor of a balancing of the factors to determine “as a general matter whether the suit is in reality a suit against the state itself.”\textsuperscript{96} In its application of the six-factor test, however, the Fifth Circuit has been careful to remain deferential to how state laws and courts have treated the entity in question.\textsuperscript{97}

The Court of Appeals for the Sixth Circuit applies a multi-factor test in its arm of the state analysis, and places the highest importance on the state treasury risk factor.\textsuperscript{98} The Sixth Circuit considers “(1) whether the state would be responsible for a judgment against the entity in question; (2) how state law defines the entity; (3) what degree of control the state maintains over the entity; and (4) the source of the entity’s funding.”\textsuperscript{99} Following the Supreme Court’s decision in Hess,\textsuperscript{100} the Sixth Circuit, while not disregarding its multi-factor test completely, has placed primary importance on the source of funds factor.\textsuperscript{101} The Sixth Circuit, at one point, questioned whether, after Hess, it should even consider its original factors when there is clear evidence relating to the source of funds factor.\textsuperscript{102} Re-
cently, however, in *Ernst v. Rising,*\(^{103}\) the court rejected this notion, explaining that "[i]mportant as the monetary liability factor may be, it is not the only factor."\(^{104}\) Thus, in *Rising,* the court focused on both state control over a government retirement system and treasury risk in order to determine that the retirement system was an arm of the state.\(^{105}\)

The Court of Appeals for the Seventh Circuit also applies a multi-part test, examining: (1) the "extent of control" exercised by the state over the entity, (2) whether the entity is "acting as the agent" of the state and (3) whether a judgment against the entity "would ultimately be paid by the state’s treasury."\(^{106}\) The Seventh Circuit is unique, however, because instead of placing the most weight on the treasury risk factor, the Seventh Circuit has, in some cases, placed the least weight on this factor.\(^{107}\)

For the most important factor in arm-of-the-state analysis, though it is unclear whether it is the only factor or merely the principal one."\(^{108}\) The *Roberts* court noted:

But *Hess* enhanced the importance of state treasury liability, to the extent that, after *Hess,* the possibility arose that other factors (aside from state treasury liability) can no longer be considered at all . . . after *Hess,* it is unclear whether other factors may even be considered when evidence is presented regarding whether the state treasury would be liable for a judgment . . . .

379 F.3d at 382 (discussing consideration of other factors).

103. 427 F.3d 351 (6th Cir. 2005).

104. *See id.* at 364-65 (relying on *Hess* and explaining that "[t]he sovereign immunity doctrine is about money and dignity—it not only protects a State’s treasury, but also pervasively . . . emphasizes the integrity retained by each State in our federal system" (internal quotations omitted)). For a discussion of *Hess,* see *supra* notes 22-25 and accompanying text.

105. *See id.* at 355 (holding retirement system was arm of state). The court focused on a variety of factors, including that the retirement system was (1) "a product of state legislation," (2) "run by state officials," (3) "serve[d] state officials" and (4) "funded by the state treasury." *See id.* at 355 (enumerating factors). The court also noted that "if the retirement system faces a monetary shortfall, state legislation requires the state treasurer to make up the difference with state funds." *Id.* (describing treasury risk implications).

106. *See Takle v. Univ. of Wis. Hosp. & Clinics,* 402 F.3d 768, 772 (7th Cir. 2005) (listing three factors for arm of state analysis); *Thiel v. State Bar of Wis.**, 94 F.3d 399, 401-08 (7th Cir. 1996) (applying three-part test to state bar question and determining that state bar was entitled to Eleventh Amendment immunity because state supreme court exercised control over state bar and state bar acted as agent of state supreme court); *Crossetto v. State Bar of Wis.**, 12 F.3d 1396, 1401-03 (7th Cir. 1993) (considering whether to extend Eleventh Amendment immunity to state bar and announcing three-part test, but never actually deciding).

107. *See Thiel,* 94 F.3d at 401 (reiterating that the "effect on the state treasury was the least important of the three factors, and would be irrelevant if the first two weigh in favor of Eleventh Amendment immunity"); *Crossetto,* 12 F.3d at 1402:

We hasten to note, however, that even when there is no risk to the state treasury, the state is immune when sued in its own name . . . [and] even without any impact on the state’s treasury, the district court must consider whether [an entity] occupies the position of a public agency or official, necessarily forbidding any suit in federal court.

*Id.* *But see Takle,* 402 F.3d at 772 (noting that prior cases had not held that source of funds factor was "never of any importance"). The *Takle* court noted that the *Thiel* decision (downplaying importance of state treasury risk factor) was based on

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example, in *Thiel v. State Bar of Wisconsin*, the court concluded that the State Bar was entitled to Eleventh Amendment immunity in an injunctive suit because the Bar was under the significant control of the state supreme court and an agent of the state. Because these first two factors pointed towards granting immunity, the court did not even consider the treasury risk factor. The *Thiel* court, instead, chose to focus on the question of "whether the [State] Bar [was] the 'state' for Eleventh Amendment purposes," rather than the practical effect of a judgment against the State Bar on the state. Recently, however, in *Takle v. University of Wisconsin Hospital & Clinics*, the Seventh Circuit held that a privatized former state hospital was not an arm of the state, and stressed that the source of funds factor should sometimes be a consideration, particularly in suits for damages rather than for injunctive relief.

Rather than beginning its arm of the state analysis by applying a multi-factor test like most circuits, the Court of Appeals for the Eighth Circuit uses a test consistent with its interpretation of the Supreme Court's decision in *Hess*, examining "the particular entity in question and its powers and characteristics as created by state law to determine whether the suit is in reality a suit against the state." Following *Hess*, the Eighth Circuit would add that a suit seeking injunctive relief, rather than damages, which made the state treasury risk factor far less important. See id. (discussing *Thiel*).

108. 94 F.3d 399 (7th Cir. 1996).
109. See id. at 403 (examining first two factors of immunity analysis and concluding that state bar was immune).
110. See id. at 400-03 (noting that United States Supreme Court had recently taken "expansive view" of Eleventh Amendment immunity in *Seminole Tribe* and explaining that if first two factors weigh in favor of granting immunity, treasury risk factor becomes "irrelevant"). The *Thiel* court rejected the argument that *Hess* made the source of funds factor the "most important" factor. See id. at 401 (doubting this was "accurate construction of *Hess*"). Instead, the *Thiel* court relied on the Supreme Court's language in *Seminole Tribe* that the "Eleventh Amendment does not exist solely to prevent federal court judgments that must be paid out of a State's treasury. . . . [and] the relief sought by the plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment." See id. (quoting Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 58 (1996) (quoting Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 48 (1994)) (discussing basis for Eleventh Amendment). For a discussion of the Supreme Court's rulings in *Hess* and *Seminole Tribe*, see supra notes 14 (Seminole Tribe) and 22-25 and accompanying text (*Hess*).

111. See *Thiel*, 94 F.3d at 401 (discussing reasons for lack of dispositive weight on state treasury risk factor).
112. 402 F.3d 768 (7th Cir. 2005).
113. See id. at 770-73 (holding former state hospital not entitled to Eleventh Amendment immunity and explaining that, in *Thiel*, state treasury risk "issue was not presented; and to say that the effect of a judgment on state finances is never important would be inconsistent with numerous decisions of the Supreme Court and the courts of appeals"). For a discussion of *Thiel*, see supra notes 107-11 and accompanying text.
114. See Hadley v. N. Ark. Cmty. Tech. Coll., 76 F.3d 1437, 1439-42 (8th Cir. 1996) (announcing Eighth Circuit arm of state test (internal citations omitted)). The *Hadley* court derived its test directly from the Supreme Court's *Hess* decision.
Circuit notes that "[c]ourts typically look at the degree of local autonomy and control and most importantly whether the funds to pay any award will be derived from the state treasury."115 This approach is most apparent in Hadley v. North Arkansas Community Technical College,116 where the court held that the community college was entitled to Eleventh Amendment immunity principally because a judgment against the community college could be paid out of state treasury funds.117

The Court of Appeals for the Ninth Circuit employs a five-factor test, considering:

(1) whether a money judgment would be satisfied out of state funds, (2) whether the entity performs central governmental functions, (3) whether the entity may sue or be sued, (4) whether the entity has the power to take property in its own name or only the name of the state, and (5) the corporate status of the entity.118

See id. at 1439 (explaining that "[a] narrow majority of the Supreme Court recently held that exposure of the state treasury is a more important factor than whether the State controls the entity in question"). The Hadley court, in comparing its test to the approach in Hess, noted "[w]e see nothing inconsistent with the majority's reasoning in Hess and the approach we have developed for deciding whether [an entity] is entitled to Eleventh Amendment immunity." See id. (comparing Hess approach). For a discussion of Hess, see supra notes 22-25 and accompanying text.

115. See Gorman v. Easley, 257 F.3d 738, 743 (8th Cir. 2001):
In our own arm of the state jurisprudence, we have looked generally to three factors: (1) an agency's powers and characteristics under state law; (2) an agency's relationship to the state—its autonomy from the state and degree of control over its own affairs, and (3) whether any award would flow from the state treasury.


116. 76 F.3d 1437 (8th Cir. 1996).

117. See id. at 1441 (discussing importance of funding factor). Regarding the relationship between the state and the community college, the Hadley court noted, specifically:

The relevant funding inquiry cannot be whether [the community college] enjoys some non-state funding, such as user fees (tuition), because then most state departments and agencies, and all state universities, would be denied Eleventh Amendment immunity. Here, even if [the community college] could initially satisfy a judgment from other operating revenues, such as tuition payments or federal grants, the judgment would produce a higher operating budget shortfall that must, by state law, be satisfied by an appropriation from the state treasury. Thus, [the suit] is in essence one for the recovery of money from the state.

Id. (internal citations and quotations omitted).

118. Beentjes v. Placer County Air Pollution Control Dist., 397 F.3d 775, 778 (9th Cir. 2005) (describing five-factor arm of state test employed by Ninth Circuit); Mitchell v. Los Angeles, 861 F.2d 198, 201 (9th Cir. 1989) (announcing Ninth Circuit test).
Like many circuits, the Ninth Circuit considers the first factor—whether a money judgment would be paid out of state funds—the most important.\textsuperscript{119} The Ninth Circuit, however, has clarified that its focus on this "most important" factor is not simply on the state’s financial liability, but also on its "legal liability."\textsuperscript{120} Thus, in \textit{Doe v. Lawrence Livermore National Laboratory},\textsuperscript{121} the court found that the University of California was an arm of the state because the state was potentially legally liable for a judgment, although the state would be indemnified by a third party.\textsuperscript{122}

In the Tenth Circuit, courts engage in "two general inquiries" to determine whether an entity is an arm of the state.\textsuperscript{123} First, the court "examines the degree of autonomy given to the agency, as determined by the characterization of the agency by state law and the extent of guidance and control exercised by the state."\textsuperscript{124} Second, the court "examines the extent of financing the agency receives independent of the state treasury and its

\textsuperscript{119} \textit{See Beentjes}, 397 F.3d at 778 (explaining that "[t]he first prong of the . . . test—whether a money judgment would be satisfied out of state funds—is the predominant factor"); \textit{Eason v. Clark County Sch. Dist.}, 303 F.3d 1137, 1141 (9th Cir. 2002) (restating five-factor test and explaining that "whether a money judgment will be satisfied out of state funds . . . is the most important [factor]"); \textit{Doe v. Lawrence Livermore Nat’l Lab.}, 131 F.3d 836, 839 (9th Cir. 1997) (noting that "the element of state liability is the single most important factor in determining whether an entity is an arm of state . . .").

\textsuperscript{120} \textit{See Lawrence Livermore Nat’l Lab.}, 131 F.3d at 838-39 (explaining that Ninth Circuit’s approach of placing greatest weight on factor of state’s legal liability, rather than actual financial liability is result of Supreme Court’s statement in Regents of the Univ. of Cal. v. Doe, 519 U.S. 425, 431 (1997), that immunity should be based on state’s “potential legal liability” rather than “ultimate financial liability”).

\textsuperscript{121} 131 F.3d 836 (9th Cir. 1997).

\textsuperscript{122} \textit{See id.} at 838-39 (finding University of California arm of state because of potential state legal liability, despite fact that University would be indemnified by third party). Conversely, in \textit{Eason v. Clark County School District}, 303 F.3d 1137 (9th Cir. 2002), the Ninth Circuit denied Eleventh Amendment immunity to a Nevada school district because a potential judgment would not be satisfied out of the state treasury and the state was in no way legally liable. \textit{See id.} at 1142-44 (explaining that state will not be responsible for possible money judgment because “even though Nevada school districts receive state funding, local funds lost to satisfy a money judgment will not necessarily be replaced with state funds”).

\textsuperscript{123} \textit{See Watson v. Univ. of Utah Med. Ctr.}, 75 F.3d 569, 574-75 (10th Cir. 1996) (describing two-prong test to determine whether entity is arm of state and holding state university medical center was arm of state because it was controlled by state and money from judgment against medical center would possibly come from state); \textit{Haldeman v. Wyo. Farm Loan Bd.}, 32 F.3d 469, 473-75 (10th Cir. 1994) (applying two-pronged analysis and finding Wyoming Farm Loan Board was entitled to Eleventh Amendment immunity because (1) it was not autonomous from state, (2) interest from loans was deposited into account controlled by state, (3) it did not have control over its budget and funds and (4) judgment would be paid by state funds).

\textsuperscript{124} \textit{See Watson}, 75 F.3d at 74 (listing first prong of Tenth Circuit arm of state inquiry—degree of autonomy).
ability to provide for its own financing."\textsuperscript{125} In \textit{Sturdevant v. Paulsen},\textsuperscript{126} the Tenth Circuit elaborated on its arm of the state factors in order to determine whether the State Board for Community Colleges and Occupational Education was an arm of the state, focusing on (1) the state's legal liability for a judgment, and (2) the entity's autonomy and financial independence.\textsuperscript{127} Within the "general rubrics of autonomy and financial independence," the court identified four other factors "relevant" to arm of the state inquiries:

(1) the characterization of the governmental unit under state law; (2) the guidance and control exercised by the state over the governmental unit; (3) the degree of state funding received; and (4) the governmental unit's ability to issue bonds and levy taxes on its own behalf.\textsuperscript{128}

Although the Tenth Circuit does place high importance on whether a potential money judgment would come from the state treasury, it also considers the state's potential legal liability.\textsuperscript{129} The \textit{Sturdevant} court concluded that the question of the state's legal liability for a judgment was "ambiguous," but after applying the autonomy and financial indepen-

\textsuperscript{125} See \textit{id}. at 74-75 (listing second prong of Tenth Circuit arm of state inquiry—source of entity's financing).

For example, in \textit{V-I Oil Company v. Utah State Department of Public Safety}, 131 F.3d 1415 (10th Cir. 1997), the Tenth Circuit applied its two-prong test to determine whether the Utah Department of Public Safety and some of its divisions were arms of the state for the purpose of Eleventh Amendment immunity. \textit{See id}. at 1420-21 n.1 (granting Eleventh Amendment immunity to Utah Department of Public Safety, Utah State Fire Marshall Division (division of Department of Public Safety), and Liquefied Petroleum Gas Board (policymaking board with Department of Public Safety)). Relying on the status of the Department of Public Safety as a department within the executive branch of the government as well as the Department's financial ties to the state, the court found the Department and its divisions to be "alter egos or instrumentalities" of the state and immune from suit pursuant to the Eleventh Amendment. \textit{See id}. (noting factors important to court's analysis).

\textsuperscript{126} 218 F.3d 1160 (10th Cir. 2000).

\textsuperscript{127} \textit{See id}. at 1164-71 (elaborating on factors for arm of state analysis and holding that Colorado State Board for Community Colleges and Occupational Education was arm of state for Eleventh Amendment purposes).

\textsuperscript{128} \textit{id}. at 1166 (considering additional factors within autonomy and financial independence prong of Tenth Circuit arm of state analysis); \textit{see also} Duke v. Grady Mun. Schs., 127 F.3d 972, 974 n.3 (10th Cir. 1997) (describing two part inquiry and explaining that first two additional factors fit into first prong of inquiry and third and fourth factors fit into second prong of inquiry).

\textsuperscript{129} \textit{See Sturdevant}, 218 F.3d at 1165 ("In answering [the question of state treasury liability], we focus on legal incidence, not the practical effect, of the liability."); Elam Constr. v. Reg'l Transp. Dist., 129 F.3d 1343, 1345 (10th Cir. 1997) ("Historically, the most important consideration is whether a judgment against the entity would be paid from the state treasury.").

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dence test, the court found that the Board for Community Colleges was an arm of the state and entitled to immunity.130

Finally, the Court of Appeals for the Eleventh Circuit applies a four-factor test, taking into account "(1) how state law defines the entity; (2) what degree of control the state maintains over the entity; (3) the source of the entity's funds; and (4) who bears financial responsibility for judgments entered against the entity."131 Although the Eleventh Circuit notes "no single factor is dispositive," the fourth factor—financial responsibility or legal liability for judgments—is "of considerable importance" because that factor has historically been important to courts in arm of the state inquiries.132 When examining whether an entity is an arm of the state, the Eleventh Circuit is careful to consider the entity's function responsible for bringing about the suit.133 This special focus is most apparent in two recent contrasting Eleventh Circuit cases, *Abusaid v. Hillsborough County Board*134 and *Purell v. Toombs County*. In *Abusaid*, the court held that a sheriff was not an arm of the state when the function he was performing

130. See Sturdevant, 218 F.3d at 1164-70 (holding Board of Community Colleges was arm of state because (1) state appointed people to Board, (2) state controlled Board, (3) Board focused on state concerns, (4) Board could not levy taxes and (5) classification as state agency).


132. See *Vierling v. Celebrity Cruises*, 339 F.3d 1309, 1314 (11th Cir. 2003) (noting historical importance of risk to state treasury and citing *Regents* for support). But see *Manders*, 338 F.3d at 1325 (noting that Supreme Court has never suggested that risk to state treasury was "required per se" and emphasizing importance of risk to state dignity rather than state treasury). For a discussion of *Regents*, see *supra* notes 26-30 and accompanying text.

133. See *Abusaid*, 405 F.3d at 1303 (quoting *McMillian v. Monroe County*, 520 U.S. 781, 785 (1997)) (discussing whether sheriff was arm of state and noting "the question is not whether [the sheriff] acts for [the state] or [the county] in some categorical, 'all or nothing manner,' but rather whether the sheriff is acting for the state 'in a particular area, or on a particular issue'"; *Manders*, 338 F.3d at 1308 (noting that "[w]hether a defendant is an arm of the state must be assessed in light of the particular function in which the defendant was engaged when taking the actions out of which liability is asserted to arise"); *Shands Teaching Hosp. & Clinics v. Beech St. Corp.*, 208 F.3d 1308, 1311 (11th Cir. 2000) (explaining that "[t]he pertinent inquiry is not into the nature of [an entity's] status in the abstract, but its function or role in a particular context"). In *Shands*, for example, the court found that certain private corporations were entitled to Eleventh Amendment immunity, despite the fact that they were neither funded or controlled by the state of Florida, because (per the contractual relations between the parties) the corporations were "administrators acting at the behest of the State with reference to Florida's health insurance program." See *id.* at 1311 (discussing corporations' contractual relationship with state of Florida). Thus, Eleventh Amendment immunity was granted "only to the extent that a judgment would expose the government to financial liability or interfere with the administration of government programs." *Id.* (same).

134. 405 F.3d 1298, 1304-13 (11th Cir. 2005).

135. 400 F.3d 1313, 1324-25 (11th Cir. 2005).
was enforcing a county ordinance.\textsuperscript{136} By contrast, in \textit{Purcell}, the court found that a sheriff was acting as an arm of the state when he was performing the state-granted function of “establishing and administering jail policies and practices.”\textsuperscript{137}

B. \textit{Comparing the Third Circuit’s Approach to Eleventh Amendment Immunity to the Approaches of Other Circuits and Supreme Court Precedent}

The Third Circuit, in modifying its Eleventh Amendment immunity test so that the state treasury risk factor has equal weight with the status under state law and the degree of autonomy factors, has veered away from the Eleventh Amendment immunity tests used by many other circuits.\textsuperscript{138} The First, Second, Fourth, Fifth, Sixth and Eighth Circuits all place primary, if not dispositive, importance on the question of whether the state treasury is at risk in evaluating whether an entity is entitled to Eleventh Amendment protection.\textsuperscript{139} In contrast, the Seventh Circuit sometimes

\textsuperscript{136} See \textit{Abusaid}, 405 F.3d at 1303 (“The relevant function in this case is enforcement of a County ordinance . . . [i]n deed, all . . . claims against the Sheriff arise out of actions taken in the course of enforcing Hillsborough County’s Rave/Dance Hall Ordinance.”). The \textit{Abusaid} court also considered the four factors in its Eleventh Amendment immunity test, concluding (1) the state law’s definition of the sheriff weighed against immunity because Florida’s Constitution labels sheriffs as “county officers,” and state law treats sheriffs as county officials, (2) the degree of state control over the sheriff was “mixed,” but mostly weighed against immunity because counties exercised more control over sheriffs than the state, (3) the source of funding factor weighed against immunity because sheriffs’ salaries were paid out of county taxes and (4) the burden on the treasury factor also weighed against immunity because “no provision of Florida law provides state funds to a Florida sheriff to satisfy a judgment against the sheriff.” See \textit{id.} at 1305-13 (discussing four-factor arm of state inquiry).

\textsuperscript{137} See \textit{Purcell}, 400 F.3d at 1252 (quoting \textit{Manders}, 338 F.3d at 1315) (noting that “[a]lthough we declined to determine that [a] sheriff wears a ‘state hat’ for all functions, we decided that a sheriff’s ‘authority and duty to administer the jail in his jurisdiction flows from the State, not [the] County’”). In \textit{Manders}, the Eleventh Circuit held that a Georgia sheriff was acting as an arm of the state when overseeing the jail, but declined to hold that a sheriff was an arm of the state in every function performed. See \textit{Manders}, 338 F.3d at 1328 (concluding sheriff was functioning as arm of state).

\textsuperscript{138} See \textit{Hess} v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 48 (1994) (noting that “Courts of Appeals have recognized the vulnerability of the State’s purse as the most salient factor in Eleventh Amendment determinations”). The \textit{Hess} court went on to note that the “vast majority of Circuits . . . have concluded that the state treasury factor is the most important factor to be considered . . . and, in practice, have generally accorded this factor dispositive weight.” \textit{Id.} at 49 (discussing risk to state treasury factor). For a discussion of \textit{Hess}, see supra notes 22-25 and accompanying text.

\textsuperscript{139} See, e.g., Morris-Hayes v. Bd. of Educ., 423 F.3d 153, 164 (2d Cir. 2005) (holding risk to state treasury controls if other factors and consideration of twin aims of Eleventh Amendment are not dispositive); Md. Stadium Auth. v. Ellebre Becket, Inc., 407 F.3d 255, 261 (4th Cir. 2005) (instructing court must first establish effect on state treasury); Ernst v. Rising, 427 F.3d 351, 364 (6th Cir. 2005) (stating “state-treasury inquiry” is “generally” “most important” inquiry); Fresenius Med. Care Cardiovascular Res. v. Puerto Rico, 322 F.3d 56, 68 (1st Cir. 2003) (not-
considers the state treasury risk factor irrelevant to Eleventh Amendment immunity if other factors weigh in favor of granting immunity.\textsuperscript{140} The Third Circuit, however, takes an approach similar to that used by the Eleventh Circuit, which regards the state treasury risk factor as one factor considered along with other important factors, and the Ninth and Tenth Circuits, which define their approaches as a focus on "legal liability" rather than actual treasury risk.\textsuperscript{141} This approach does not place dispositive weight on the risk to the state treasury factor, although this factor remains important.\textsuperscript{142}

\textsuperscript{140} See Thiel v. State Bar of Wis., 94 F.3d 399, 401-03 (7th Cir. 1996) (implying effect on state treasury is irrelevant if other factors support Eleventh Amendment immunity). For a discussion of the Seventh Circuit's approach to Eleventh Amendment immunity, see supra notes 106-13 and accompanying text.

\textsuperscript{141} See Benn v. First Judicial Dist. of Pa., 426 F.3d 233, 239-40 (3d Cir. 2005) (holding risk to state treasury is co-equal factor, rather than dispositive factor); Abusaid, 405 F.3d at 1304-13 (concluding risk to state treasury is one of several factors); Sturdevant v. Paulsen, 218 F.3d 1160, 1165 (10th Cir. 2000) (explaining that "[i]n answering [the treasury risk question], we focus on the legal incidence, not the practical effect, of the liability"); Doe v. Lawrence Livermore Nat'l Lab., 131 F.3d 836, 838-39 (9th Cir. 1997) (focusing on potential legal liability, rather than risk to treasury). But see Febres v. Camden Bd. of Educ., 445 F.3d 227, 236 (3d Cir. 2006) (quoting Hess, 515 U.S. at 47-48) (affirming Benn, but noting that "in close cases where indicators of immunity point in different directions . . . prevention of . . . judgments that must be paid out of a State's treasury [should be courts'] prime guide").

The Eleventh Circuit discussed the relative importance of the state treasury risk factor and noted that the Supreme Court has "never suggest[ed] that for Eleventh Amendment immunity a state treasury drain is necessary per se." See Manders, 338 F.3d at 1325 (discussing Supreme Court treatment of state treasury risk factor). Further, the Eleventh Circuit explained that the Supreme Court's focus is on "legal liability" as opposed to the actual financial impact of a judgment on the state. See id. (same). Likewise, the Ninth and Tenth Circuits have also focused on "legal liability." See Sturdevant, 218 F.3d at 1165 (discussing importance of legal liability); Lawrence Livermore Nat'l Lab., 131 F.3d at 838-39 (focusing on potential legal liability). For a discussion of the arm of the state approach of the Third Circuit, see supra notes 34-72 and accompanying text. For a discussion of the Ninth Circuit's approach to Eleventh Amendment immunity, see supra notes 118-22 and accompanying text. For a discussion of the Tenth Circuit's approach to Eleventh Amendment immunity, see supra notes 124-33 and accompanying text. For a discussion of the Eleventh Circuit's approach to granting Eleventh Amendment immunity, see supra notes 151-37 and accompanying text.

\textsuperscript{142} See Vierling v. Celebrity Cruises, 339 F.3d 1309, 1314 (11th Cir. 2003) (noting that no factor is "dispositive" but stressing that state treasury risk factor can be important). For a discussion of the Third Circuit's arm of the state approach, see supra notes 34-72 and accompanying text. For a discussion of the Ninth Circuit's approach to Eleventh Amendment immunity, see supra notes 118-22 and accompanying text. For a discussion of the arm of the state approach of the Tenth Circuit, see supra notes 124-33 and accompanying text. For a discussion of the arm of the state approach of the Eleventh Circuit, see supra notes 151-37 and accompanying text.
The source of the differences among the circuits regarding the treatment of this treasury risk factor and its relative importance to the overall scheme of Eleventh Amendment immunity lies, most likely, in the circuit courts’ respective interpretations of Hess and Regents.\(^{143}\) The majority of circuits are careful to compare their respective arm of the state tests and the approaches to immunity with Hess, placing great importance on the state treasury factor.\(^{144}\) The First and Second Circuits both have gone so far as to model their Eleventh Amendment immunity tests directly after

\(^{143}\) See, e.g., Benn, 426 F.3d at 239 (citing Supreme Court’s decision in Regents in support of its new Eleventh Amendment immunity test and de-emphasizing state treasury risk factor); Fresenius, 322 F.3d at 67-68 (noting that Hess “binds [the court] and has not been overruled” and rejecting Seventh Circuit’s suggestion in Thiel that state treasury risk factor is sometimes not important); Manders, 338 F.3d at 1327 (citing Regents and Hess for support of its decision to downplay state treasury risk factor and noting that Supreme Court has “never required an actual drain of the state treasury” in order to find sovereign immunity); Lawrence Livermore Nat’l Lab., 131 F.3d at 888-89 (changing focus to state’s legal liability, rather than financial liability, after Supreme Court struck down Ninth Circuit’s previous decision in Regents). Regarding different circuits’ treatment of Hess, the First Circuit noted, “some have questioned Hess’s viability in light of Seminole Tribe and its aftermath.” See Fresenius, 322 F.3d at 67 (discussing Hess as precedent). For a discussion of the approaches of various circuits and their interpretations of Hess and Regents, see infra notes 139-48 and accompanying text. For a detailed discussion of the facts and holdings of Regents and Hess, see supra notes 22-30 and accompanying text.

\(^{144}\) See Md. Stadium Auth., 407 F.3d at 262 n.11 (discussing impact of Hess and modeling Fourth Circuit focus on twin aims of Eleventh Amendment and importance of risk to state treasury factor on Hess); Ernst v. Rising, 427 F.3d at 358-59 (comparing Sixth Circuit arm of state approach to Hess, and concluding that Sixth Circuit follows “a similar approach”); Fresenius, 322 F.3d at 63-68 (discussing Supreme Court’s decision in Hess, Hess’s impact on First Circuit arm of state test, and modeling First Circuit’s two prong inquiry directly after Hess); Savage v. Glendale Union High Sch. Dist. No. 205, 345 F.3d 1036, 1041 (9th Cir. 2003) (citing Hess in support of Ninth Circuit’s placing most weight on risk to state treasury factor); Sturdevant, 218 F.3d at 1166 (noting Tenth Circuit arm of state factors “derived” from Hess); Hudson, 174 F.3d at 682 (citing Hess in support of Fifth Circuit’s emphasis on importance of risk to state treasury factor); Elam Constr. v. Reg’l Transp. Dist., 129 F.3d 1343, 1345 (10th Cir. 1997) (relying on Hess for support that “[h]istorically, the most important consideration is whether a judgment against the entity would be paid from the state treasury”); Mancuso v. N.Y. State Thruway Auth., 86 F.3d 289, 293 (2d Cir. 1996) (following Hess); Hadley, 76 F.3d at 1439 (seeing “nothing inconsistent” between Supreme Court’s approach in Hess and Eighth Circuit’s approach to arm of state immunity).

The Mancuso court most clearly lays out its interpretation of Hess:

[F]ollowing the Supreme Court’s lead [in Hess], we first look to the six . . . factors . . . . Only if those factors point in different directions do we then turn to the next questions: (a) will allowing the entity to be sued in federal court threaten the integrity of the state? and (b) does it expose the state treasury to risk? . . . . We remain mindful of the Supreme Court’s emphasis that the vulnerability of the State’s purse [is] the most salient factor . . . . If all the elements are evenly balanced, this concern will control.

Mancuso, 86 F.3d at 293 (internal citations and quotations omitted). For a discussion of Hess, see supra notes 22-25 and accompanying text.
the Supreme Court’s approach in Hess.  

145. See Fresenius, 322 F.3d at 68 (modeling two prong inquiry directly after Hess); Mancuso, 86 F.3d at 293 (adopting Hess approach to immunity).

146. See Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 48 (1994) (noting that “impetus for the Eleventh Amendment” is “the prevention of federal court judgments that must be paid out of a state’s treasury”).

147. See Benn, 426 F.3d at 239 (quoting Fed. Mar. Comm’n v. S.C. State Ports Auth., 535 U.S. 743, 765 (2002)) (explaining that, while Eleventh Amendment was there to prevent risk to state treasury, its “central purpose” was to preserve respect for states as “joint sovereigns”); Manders, 338 F.3d at 1325-26 (placing greater importance on whether suit against sheriff would jeopardize State’s “integrity”); Lawrence Livermore Nat’l Lab., 151 F.3d at 838-39 (explaining that Ninth Circuit places greatest weight on factor of state’s legal liability, rather than actual financial liability); Thiel v. State Bar of Wis., 94 F.3d 299, 301 (7th Cir. 1996) (rejecting idea that Hess forces states to consider treasury risk most important factor and stressing that Eleventh Amendment did not exist solely to protect state treasuries).

148. See Benn, 426 F.3d at 239 (declining to mention Hess but agreeing with First Judicial District that, after Lawrence Livermore Nat’l Lab., court “can no longer ascribe primacy to the [source of funds] factor”). For a discussion of Hess, see supra notes 22-25 and accompanying text.

149. See id. at 230-40 (explaining interpretation of Regents and reasons for no longer ascribing primacy to source of funds factor). For a detailed discussion of the Benn court’s holding and its interpretation of Regents, see supra notes 45-66 and accompanying text.

150. See Febres v. Camden Bd. of Educ., 445 F.3d 227, 229-30, 236 (refining Third Circuit state treasury risk prong and expanding on its decision in Benn, noting that “practical or indirect financial effects of a judgment may enter a court’s calculus, but rarely have significant bearing on a determination of an entity’s status as an arm of the state”). For a complete discussion of Febres, see supra notes 67-72 and accompanying text.
The Third Circuit's approach finds support in Supreme Court precedent because, as the Court noted in *Regents*, it is "a state's potential legal liability," rather than whether a state's treasury is technically at risk, that is relevant to a State's Eleventh Amendment immunity. The Supreme Court supported this point further in *Federal Maritime*, noting that "[w]hile state sovereign immunity serves the important function of shielding state treasuries . . . the doctrine's central purpose is to accord the states the respect owed them as joint sovereigns." Finally, in *Seminole Tribe*, the Court emphasized that the "Eleventh Amendment does not exist solely to prevent federal court judgments that must be paid out of a state's treasury," but also serves to protect the states from "indignity."

V. Conclusion

While many circuit court decisions addressing Eleventh Amendment immunity still place primary importance on the state treasury risk factor, there is also strong support, both in Supreme Court precedent and circuit court decisions, for the Third Circuit's de-emphasis of the state treasury risk factor. Further, the two factors utilized by the Third Circuit beyond state treasury risk—the status of the entity under state law and the

151. See *Regents* of the Univ. of Cal. v. Doe, 519 U.S. 425, 431 (1997) (noting that "with respect to the underlying Eleventh Amendment question, it is the entity's potential legal liability, rather than its ability or inability to require a third party to reimburse it, or to discharge the liability in the first instance, that is relevant"). The Court in *Regents* also expressly clarified its focus in *Hess* on the state treasury risk as a focus on the State's legal or practical liability. See id. at 430 (discussing *Hess*).

152. See *Fed. Maritime Comm'n v. S.C. State Ports Auth.*, 555 U.S. 743, 765 (2002) (explaining that, while risk to state treasury is important, it is not Eleventh Amendment's only purpose).


155. See, e.g., *Ernst v. Rising*, 427 F.3d 351, 359 (6th Cir. 2005) (quoting S.J. v. Hamilton County, 374 F.3d 416, 420 (6th Cir. 2004)) (listing factors such as "how state law defines the entity"); *Beentjes v. Placer County Air Pollution Control Dist.*, 397 F.3d 775, 778 (9th Cir. 2005) (quoting Belanger v. Medera Unified Sch. Dist., 963 F.2d 248, 250-51 (9th Cir. 1992)) (listing factors such as "whether the entity performs central governmental functions" and "the corporate status of the entity"); *Abusaid v. Hillsborough County Bd.*, 405 F.3d 1298, 1303 (11th Cir. 2005) (listing factors such as "how state law defines the entity"); United States ex rel. *Barron v. Deloitte & Touche*, 381 F.3d 438, 440-42 (5th Cir. 2004) (examining factors such as "whether the state law considers the entity an arm of the state [and] whether the entity is concerned primarily with local or statewide problems"); *Fresenius Med. Care Cardiovascular Res. v. Puerto Rico*, 322 F.3d 56, 68 (1st Cir. 2003) (discussing analysis of how state has structured entity); *Cash v. Granville County Bd. of Educ.*, 242 F.3d 219, 224 (4th Cir. 2001) (focusing on
degree of autonomy the entity has—-are consistent with and address essentially the same issues as the multi-factor tests of other circuits.

Therefore, the only instance in which the Third Circuit's unique approach to state treasury risk would potentially present a different result would be in a case where there was no risk to the state treasury, because most circuit factors such as "the scope of the entity's concerns—whether local or statewide—with which the entity is involved [and] the manner in which State law treats the entity"; Mancuso v. N.Y. State Thruway Auth., 86 F.3d 289, 293 (2d Cir. 1996) (including factors such as "how the entity is referred to in the documents that created it[,] . . . how the entity is funded [and] . . . whether the entity's function is traditionally one of local or state government"); Hadley v. N. Ark. Cnty. Tech. Coll., 76 F.3d 1437, 1439 (8th Cir. 1996) (quoting Greenwood v. Ross, 778 F.2d 448, 453 (8th Cir. 1985)) (stressing importance of "the particular entity in question and its powers and characteristics as created by state law"); Watson v. Univ. of Utah Med. Ctr., 75 F.3d 569, 574-75 (10th Cir. 1996), reh'g denied, 159 Fed. App'x. 986 (11th Cir. July 29, 2005) (quoting Haldeman v. Wyo. Farm Loan Bd., 32 F.3d 469, 473 (10th Cir. 1994)) (noting focus on "the degree of autonomy given to the agency, as determined by the characterization of the agency by state law and the extent of guidance and control exercised by the state")

156. See, e.g., Rising, 427 F.3d at 359 (quoting S.J., 374 F.3d at 420) (listing factors such as "what degree of control the state maintains over the entity" and "the source of the entity's funding"); Beentjes, 397 F.3d at 778 (quoting Belanger, 963 F.2d at 250-51) (listing factors such as "whether a money judgment would be satisfied out of state funds[,] . . . whether the entity may sue or be sued . . . [and] whether the entity has the power to take property in its own name or only the name of the state"); Abusaid, 405 F.3d at 1303 (listing factors such as "what degree of control the state maintains over the entity[,] . . . the source of the entity's funds . . . [and] who bears financial responsibility for judgments entered against the entity"); Barron, 381 F.3d at 440-42 (examining factors such as "the source of the entity's funding[,] . . . the entity's degree of local autonomy[,] . . . whether it has the authority to sue and be sued in its own name [and] whether it has the right to hold and use property"); Fresenius, 322 F.3d at 62 n.6 (quoting Metcalf & Eddy v. P.R. Aqueduct & Sewer Auth., 991 F.2d 935, 939-40 (1st Cir. 1993)) (listing factors such as "whether the agency is separately incorporated[,] . . . whether the state exerts control over the agency, and if so, to what extent[,] . . . whether the agency has the power to sue, be sued, and enter contracts in its own name and right . . . [and] whether the state has immunized itself from responsibility for the agency's acts or omissions"); Cash, 242 F.3d at 224 (focusing on factors such as "the degree of control that the State exercises over the entity or the degree of autonomy from the State that the entity enjoys"); Mancuso, 86 F.3d at 293 (listing factors such as "how the governing members of the entity are appointed [and] whether the state has a veto power over the entity's actions and whether the entity's obligations are binding upon the state"); Hadley, 76 F.3d at 1439 (quoting Greenwood, 778 F.2d at 453) (noting that "[c]ourts typically look at the degree of local autonomy and control"); Watson, 75 F.3d at 774-75 (quoting Haldeman, 32 F.3d at 473) (noting that court focuses on "the degree of autonomy given to the agency, as determined by the characterization of the agency by state law and the extent of guidance and control exercised by the state"); Crosetto v. State Bar of Wis., 12 F.3d 1396, 1402 (7th Cir. 1993) (applying factors such as "extent of state control," whether entity "is acting as an agent of the Court" and whether "a judgment . . . would . . . be paid by the state's treasury"

157. For factors from circuit courts regarding the treatment of the entity under state law, see supra note 155. For factors from circuit courts regarding the autonomy of the entity, see supra note 156. For a discussion of the multi-factor immunity tests of other circuits, see supra notes 73-137 and accompanying text.
courts would grant immunity to an entity if a possible money judgment would come from the state’s purse.\textsuperscript{158}

If there was no risk to the state treasury, the Third Circuit, and likewise the Seventh, Ninth, Tenth and Eleventh Circuits, would simply weigh this factor among the other factors to determine whether the state was legally, as opposed to technically, liable, or would suffer some type of indignity.\textsuperscript{159} In the other circuits, the result would depend on how strongly the other factors weighed in favor of immunity because they consider the state treasury risk factor the most important, if not dispositive, factor.\textsuperscript{160} But, there is an inherent benefit to the extremely fact sensitive multi-factor tests used by the Third Circuit and most other circuits—courts are not constrained by a bright-line rule when evaluating Eleventh Amendment immunity.\textsuperscript{161} Rather, courts have the flexibility to consider a variety of relevant facts and circumstances and make their own value judgments as to when a state’s sovereign dignity or purse is indeed under attack.\textsuperscript{162}

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\textsuperscript{158} See Manders v. Lee, 338 F.3d 1304, 1327 n.51 (11th Cir. 2003) (noting that “presence of a state treasury drain alone” may be enough to trigger immunity without discussion of other factors because protection of state treasury is “core concern” of Eleventh Amendment). The court in Manders stresses that the Supreme Court in Hess only focused on the state treasury risk factor after considering possible damages to the dignity of the two states involved. See id. (adding “[i]f the State footed the entire bill here, there would be no issue to decide”). For a discussion of Hess, see supra notes 22-25 and accompanying text.

\textsuperscript{159} For a discussion of the Third Circuit’s multi-factor state immunity test, see supra notes 45-72 and accompanying text. For a discussion of the multi-factor tests of the Seventh, Ninth, Tenth and Eleventh Circuits, see supra notes 106-13 (Seventh Circuit), 118-22 (Ninth Circuit), 123-30 (Tenth Circuit), 121-37 (Eleventh Circuit) and accompanying text.

\textsuperscript{160} For a discussion of the state immunity tests of the First, Second, Fourth, Fifth, Sixth and Eighth Circuits, see supra notes 76-81 (First Circuit), 82-87 (Second Circuit), 88-92 (Fourth Circuit), 95-97 (Fifth Circuit), 98-105 (Sixth Circuit), 114-17 ( Eighth Circuit) and accompanying text.

\textsuperscript{161} See Hudson v. City of New Orleans, 174 F.3d 677, 682 (5th Cir. 1999) (noting that “[r]ather than forming a precise test, these factors help us balance the equities and determine as a general matter whether the suit is in reality a suit against the state itself” (internal quotations omitted)); Powers, supra note 14, at 943-44 (describing advantages to practitioners of multi-factor Third Circuit arm of state test because they need not rely on “abstract” or “pigeon-holed” tests).

\textsuperscript{162} See Powers, supra note 14, at 943-44 (describing advantages to practitioners of multi-factor Third Circuit arm of state test because they need not rely on “abstract” or “pigeon-holed” tests).