

2017

**Geometwatch Corporation, Plaintiff- Appellant, v. Alan Hall, Utah State University Research Foundation, Robert Behunin, Curtis R Oberts, Utah State University Advanced Weather System Foundation, and Scott J Ensen, Defendants-Appellees.**

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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GeoMetWatch Corporation,  
Appellant,

v.

Alan Hall, Utah State University  
Research Foundation, Robert Behunin,  
Curtis Roberts, Utah State University  
Advanced Weather Systems Foundation  
and Scott Jensen,  
Appellees.

Appellate Case No. 20170264-SC

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**Response Brief of Utah State University Advanced Weather Systems Foundation,  
Scott Jensen**

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On certified questions from United States District Court, District of Utah  
The Honorable Jill N. Parrish, No. 1:14-CV-00060

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## ARGUMENT

### **I. GMW IMPROPERLY CONFLATES ELEVENTH AMENDMENT IMMUNITY WITH UTAH'S GOVERNMENTAL IMMUNITY ACT**

GMW conflates Eleventh Amendment immunity with state sovereign immunity under the Governmental Immunity Act of Utah ("Immunity Act"). By way of background, in Utah, there are two types of sovereign immunity: 1) sovereign immunity under the Eleventh Amendment of the United States Constitution; and 2) common law sovereign immunity that pre-dates the constitution, which is statutorily-codified under Utah's Governmental Immunity Act. *Compare Wagoner Cnty. Rural Water Dist. No. 2 v. Grand River Dam Auth.*, 577 F.3d 1255, 1258 (10th Cir. 2009) (analyzing sovereign immunity under the Eleventh Amendment); *with Tindley v. Salt Lake City Sch. Dist.*, 2005 UT 30, ¶ 9, 116 P.3d 295 (analyzing sovereign immunity under the Immunity Act).

GMW's apparent confusion between "Eleventh Amendment sovereign immunity" and sovereign immunity as defined by the State in state statute may be somewhat understandable given the contradictory language used in the relevant cases. As outlined in AWSF's opening brief, courts have often analyzed the question of whether a state has the authority to deprive federal courts of subject matter jurisdiction as a question of "Eleventh Amendment immunity." *See, e.g., Pennhurst State Sch. and Hosp. v. Halderman*, 465 U.S. 89, 97-99, 118, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984) (noting that "Eleventh Amendment immunity" is the "explicit limitation on [Article III] federal jurisdiction.") But the U.S. Supreme Court has clarified that while the phrase "Eleventh Amendment immunity" "is convenient shorthand" for the States' "immunity from suit," it

is “something of a misnomer, [because] the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment.” Alden v. Maine, 527 U.S. 706, 713, 119 S. Ct. 2240, 144 L.Ed.2d 636 (1999). Indeed, “the States’ immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today.” Id. See also id. at 736 (noting that the “[b]are text of the [Eleventh] Amendment is not an exhaustive description of the States’ constitutional immunity from suit.”); Fed. Maritime Comm’n v. S. Carolina Ports Auth., 535 U.S. 743, 753, 122 S.Ct. 1864, 152 L.Ed.2d. 962 (2002) (“[T]he Eleventh Amendment does not define the scope of the States’ sovereign immunity; it is but one particular exemplification of that immunity.”)<sup>1</sup> It is this “fundamental aspect of the sovereignty of the State” that endows the State of Utah to determine “not merely *whether* it may be sued, but *where* it may be sued.” See, e.g., Alden, 527 U.S. at 713; Pennhurst, 465 U.S. at 97-99.

To be clear, neither AWSF nor USURF have asserted sovereign immunity under the Eleventh Amendment in this case to date. Instead, AWSF and USURF have sought to dismiss GMW’s non-contract based claims because GMW failed to file a notice of claim and an undertaking under Utah’s state statutory Governmental Immunity Act. (R. 243; 339.) Those underlying motions gave rise to the district court’s certified questions

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<sup>1</sup> For an overview of U.S. Supreme Court jurisprudence on sovereign immunity and a discussion regarding the distinctions between a State’s Sovereign Immunity and Eleventh Amendment immunity, see Actions in Which a State is a Defendant—State Sovereign Immunity and the Eleventh Amendment, 13 FED. PRAC. & PROC. JURIS. § 3524 (3d ed.).



that are the subject of this appeal. (See R. 542-552, Attached as Addendum A to AWSF's Opening Br.)

The first certified question poses a classic question of state statutory interpretation. Specifically, the first question requires the Court to evaluate the meaning of "public corporation" and "instrumentality of the state" as those terms are used in the Governmental Immunity Act of Utah. (R. 543.)

The second certified question poses a similar question of state statutory interpretation, asking this Court to determine whether the Utah Governmental Immunity Act's venue and jurisdiction provisions in Utah code sections 63G-7-501 and -502 "vest exclusive original jurisdiction" in Utah state district courts. (R. 543.) In other words, this question asks whether the state legislature has made the affirmative decision to limit its waiver of immunity to its own state district courts. The short answer to this question is: yes. But GMW focuses instead on whether the State of Utah has the *authority* to deprive the federal courts of jurisdiction to hear claims brought under the Utah Governmental Immunity Act. (See R. 543.) Established U.S. Supreme Court jurisprudence disproves GMW's argument.

Indeed, the U.S. Supreme Court has established that individual States—as sovereign entities—do in fact have authority to deprive federal courts of jurisdiction to hear claims brought against the State in federal court in the limited cases involving a state's sovereign immunity. See, e.g., *Pennhurst State Sch. and Hosp. v. Halderman*, 465 U.S. 89, 97-99, 118, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984) (explaining that while Article III traditionally provides federal courts with jurisdictional authority, a State's sovereign

immunity is an “explicit limitation on [Article III] federal jurisdiction;” and concluding that this limitation on Article III authority allows a state to determine not only “*whether* it may be sued, but *where* it may be sued.”)

Finally, the third certified question asks whether the Office of the Attorney General or any litigant has the authority to waive the jurisdictional and venue provisions of the Act. (R. 543.) While the parties provide different analysis on this question, each party answers this question in the affirmative.

## **II. AWSF IS A PUBLIC CORPORATION AND/OR INSTRUMENTALITY OF THE STATE UNDER THE APPLICABLE STATUTORY FRAMEWORK**

### **A. GMW’S Proposed Six-Factor Test is Inapplicable**

GMW ignores the plain language of Utah’s Immunity Act and instead proposes a “six-factor test,” which is based on federal case law analyzing the distinct Eleventh Amendment sovereign immunity framework. (GMW Br. at 20-33.) This approach incorrectly applies an Eleventh Amendment “arm-of-the-state” test to this simple issue of statutory construction under Utah’s Immunity Act. Specifically, the first certified question asks this Court to interpret the phrases “public corporation” and “instrumentality of the state” as those terms are used in the Governmental Immunity Act of Utah. (R. 543.) This Court’s longstanding canons of statutory construction provide the applicable framework for analyzing these statutory terms. Yet GMW would have this Court to disregard its established canons of statutory construction and instead adopt an entirely new test, made up of various “factors” that other courts have used in analyzing whether a certain entity is considered an “arm of the state” under Eleventh Amendment Immunity.

GMW's proposed six-factor test should be rejected outright. First, GMW's proposed factors improperly conflate the "arm-of-the-state" doctrine under Eleventh Amendment immunity with the State of Utah's governmental immunity as articulated under the Governmental Immunity Act of Utah. Indeed, GMW's proposed test would turn this Court's sovereign immunity jurisprudence on its head. Utah courts have long held that a state entity may be entitled immunity Utah's Immunity Act even where that same entity is not entitled to Eleventh Amendment Sovereign Immunity. *See, e.g., Ambus v. Granite Bd. of Educ.*, 995 F.2d 992, 995, 997 (10th Cir. 1993) (en banc) (holding that school districts are not entitled to Eleventh Amendment immunity even though "Utah courts have consistently held that school districts are entitled to" immunity under Utah's Immunity Act.).

Second, none of GMW's cited cases address Utah's Governmental Immunity Act, which is squarely at issue here. *See, e.g.,* (GMW Br. 22-23 (citing *Woods v. Rondout Valley Cent. Sch. Dist. Bd. Of Educ.*, 466 F.3d 232, 240 (2d. Cir. 2006) (applying six-factor test to determine whether an entity was an "arm of the state" for purposes of the Eleventh Amendment); *United States ex rel. Fields v. BI-State Dev. Agency of Missouri-Illinois Metro. Dist.*, No. 16-3783, 2017 WL 3254401, at \*2 (8th Cir. Aug 1, 2017) (same).) Even the cases cited in GMW's multi-page footnote 3 are not persuasive, given that each of those cases merely use various iterations of the Eleventh Amendment immunity's "arm of the state" test to analyze either Eleventh Amendment immunity or various state sovereign immunity statutes. (*See* GMW Br. P. 20-22, fn. 3.) In fact, none of the state cases cited by GMW even analyzes how other states define "public



corporation” or “instrumentality of the state,” as those terms are defined by the various states. (*See id.*) As such, the Court should reject GMW’s proposed six-factor test.

**B. The Court Should Use Applicable Canons of Statutory Construction to Hold That AWSF is a Public Corporation and/or an Instrumentality of the State Under the Act**

Instead, the Court should rely on its longstanding canons of statutory construction, which require the Court to first look to the plain language of the statute, and then to consider dictionary definitions to determine the ordinary meaning of those terms. *See, e.g., Marion Energy, Inc. v. KFJ Ranch P'ship*, 2011 UT 50, ¶ 14, 267 P.3d 863 (plain language); *State v. Canton*, 2013 UT 44, ¶ 13, 308 P.3d 517 (noting that Utah courts look to dictionary definitions as a “starting point” in “determining the ordinary meaning of nontechnical terms of a statute”). As previously briefed, the Act’s plain language, other similar provisions of the Utah Code, dictionary definitions, and Utah case law all dictate that AWSF is properly considered a “public corporation” and/or an “instrumentality of the state” under Utah’s Act. (*See* AWSF Br. 2-7; *see also* USURF Br. 8-17.)

Specifically, AWSF is a public corporation since: 1) it is government owned, in that it is wholly owned, operated, and controlled by USU, which is “the State” under the Act; 2) it was created pursuant to the legislature’s permission under Utah statute; and 3) it was created for the public purpose of administration of government, including research and education. *See, e.g.,* Utah Code Ann. § 63G-7-102(10) ; *id.* § 53B-18-501(1). (*See also* R. 353-354; R. 360-363.)

Similarly, AWSF is also an “instrumentality of the state” under the Act because AWSF acts as the “means . . . through which a function of [USU as the state] is accomplished.” BLACK’S LAW DICTIONARY, “instrumentality” (10th ed. 2014). Specifically, AWSF was created by USU pursuant to statutory and regulatory authority to meet USU’s public function of providing higher education and technical education, including scientific, research and educational objectives. Utah Code Ann. § 63G-7-102(10); *id.* § 53B-1-101; *id.* § 53B-18-501(1). (*See also* R. 353.)

**C. Even Applying GMW’s Misguided Six-Factor Test, These Factors Weigh in AWSF’s Favor**

Yet even if the Court were persuaded by GMW to abandon its longstanding cannons of statutory construction and adopt GMW’s proposed six-factor test—which it should not do—the majority of these factors weigh in AWSF’s favor. First, AWSF was created pursuant to state statute, with legislative and executive oversight. Utah Code § 53B-18-501(1). Specifically, the Utah legislature specifically enabled “Utah State University [to] form nonprofit corporations or foundations controlled by the president of the university and the State Board of Regents to aid and assist the university in attaining its charitable, scientific, literary, research, and educational objectives.” Utah Code § 53B-18-501(1). Moreover, the executive body, the Board of Regents, has authority to oversee and approve contracts entered into by nonprofit corporations created by USU. *Id.* at §53B-7-103(4). Second, AWSF was financially dependent on USU, which is the “state” under the statute. Utah Code Ann. § 63G-7-102(10). (*See* R. 353-354; R. 360-363.) Indeed, AWSF was established and funded by a seed grant from USU. Third,

AWSF was created by the government, since it was created by USU, which is “the state” under the Act. Utah Code Ann. § 63G-7-102(10). (See R. 353-354; R. 360-363.)

Fourth, AWSF was created for the integral state function of education and research. Utah Code § 53B-18-501(1). Specifically, AWSF was “created for public purposes connected with the administration of government” for research and education. (R. 353.) Thus, AWSF would still be considered a governmental entity under GMW’s flawed test. Nonetheless, the Court should reject GMW’s six-factor test and hold that AWSF is a public corporation and/or instrumentality of the state using long-established cannons of statutory construction.

### **III. THE PLAIN LANGUAGE OF THE ACT PROHIBITS PLAINTIFFS FROM BRINGING IMMUNITY ACT CLAIMS IN FEDERAL COURT**

The second certified question asks whether Utah’s Government Immunity Act “reflect[s] an intent by the State of Utah to limit the Immunity Act’s waiver of sovereign immunity to suits brought in Utah district courts.” (R. 543.) GMW urges that the answer to this question is “no.” GMW argues that the jurisdictional provisions in the Immunity Act do not preclude suit in federal court because state sovereign immunity merely embodies “the principal that the state *cannot be sued in its own courts* without consent.” (GMW Br. 36, citing *Madsen v. Borthick*, 658 P.2d 628, 629 (Utah 1983)<sup>2</sup>.) GMW’s position is contradicted by U.S. Supreme Court case law on this question.

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<sup>2</sup> Notably, *Madsen* was decided before *Pennhurst* or *Atascadero*, which both held that “[a] State’s constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued.” Additionally, *Madsen* cited *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890) for the proposition that “the state *cannot be sued in its own courts* without consent.” 658 P.2d 628, 629 (Utah 1983). But *Hans*



The U.S. Supreme Court has long held that “[a] State’s constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued.” *Pennhurst State Sch. and Hosp. v. Halderman*, 465 U.S. 89, 99, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984) (emphasis in original); see also *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985); *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 473-474 (1987); *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304-308.

For instance, in *Pennhurst*, the Court held that a federal court did not have jurisdiction to hear the plaintiff’s claims against state officials because the State of Pennsylvania had sovereign authority—as outlined in the Eleventh Amendment<sup>3</sup>—to establish “not merely *whether* it may be sued, but *where* it may be sued.” 465 U.S. at 99. The Court held that “[t]his Court’s decisions thus establish that ‘an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another state’ and that “[t]his jurisdictional bar applies *regardless of the nature of relief sought*.” *Id.* at 100 (emphasis added). There, the court ultimately held that the federal court did not have authority to rule on the plaintiff’s claims against Pennsylvania state officials with regard to either their state claims or on the basis of pendent jurisdiction.

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actually held that, as in *Pennhurst* and *Atascadero*, a federal court could not hear a suit brought by a citizen against his own State. See *Pennhurst*, 465 U.S. at 98 (analyzing *Hans*); *Atascadero*, 473 U.S. at 238 (same).

<sup>3</sup> As previously explained, the U.S. Supreme Court has since noted that the phrase “Eleventh Amendment immunity” is often used as “convenient shorthand” for the States’ “immunity from suit,” but it is “something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment.” *Alden v. Maine*, 527 U.S. 706, 713, 119 S. Ct. 2240, 144 L.Ed.2d 636 (1999).

*Id.* at 120-121 (holding that “neither pendent jurisdiction nor any other basis of jurisdiction may override the Eleventh Amendment”).

In keeping with this line of Supreme Court jurisprudence, the Tenth Circuit has analyzed these cases, along with the plain language of Utah’s Governmental Immunity Act, and concluded that Utah’s Act “goes beyond mere consent to be sued in its own courts in that it *expressly declares that its own courts are the exclusive tribunals for suits against it*. This is a positive expression of policy against suits against Utah in United States Courts.” *Richins v. Indus. Constr., Inc.*, 502 F.2d 1051, 1055 (10th Cir. 1974) (emphasis added); *see also* *Sutton v. Utah State Sch. for the Deaf and Blind*, 173 F.3d 1226, 1235 (10th Cir. 1999); *Johns v. Stewart*, 57 F.3d 1544, 1554 (10th Cir. 1995). Indeed, numerous Utah federal courts have cited this proposition in holding that federal courts do not have jurisdiction to hear claims brought under the Immunity Act, absent “unequivocal consent” from the State. *See, e.g.*, *Shultz v. Dixie State Univ.*, No. 2:16-CV-830-TS, 2017 WL 1968651 (D. Utah, May 11, 2017) (citing *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985)); *Zimmerman v. Univ. of Utah*, No. 2:13-CV-01131-JNP-DBP, 2016 WL 6839371 (D. Utah, Nov. 21, 2016). In sum, there is a long line of U.S. Supreme Court, Tenth Circuit, and federal case law rejecting GMW’s argument that the State of Utah does not have the authority to prevent cases against the State from being brought in federal court.

Finally, GMW also makes the unpersuasive argument that the Act does not apply to this case because GMW has not “articulated a reliance upon the waivers expressed in the Immunity Act.” (GMW Br. 38-39.) This argument misunderstands the application of

the Act. Under the Act, “each governmental entity and each employee of a governmental entity are immune from suit for any injury that results from the exercise of a governmental function.” Utah Code Ann. § 63G-7-201(1); *see also id.* § 63G-7-101(2) (“The scope of the waivers and retentions of immunity found in this comprehensive chapter: (a) applies to all functions of government, no matter how labeled; and (b) governs all claims against governmental entities or against their employees or agents arising out of the performance of the employee’s duties, within the scope of employment, or under color of authority.”); *id.* at -101(3) (“A governmental entity and an employee of a governmental entity retain immunity from suit unless that immunity has been expressly waived in this chapter.”).

The Act also sets out strict procedural requirements, which apply to “[a]ny person having a claim against a governmental entity” or its employee, “regardless of whether or not the function giving rise to the claim is characterized as governmental.” *See id.* § 63G-7-401; § 63G-7-402; § 63G-7-601(2). (emphasis added).<sup>4</sup> Thus, whether or not the Immunity Act applies here depends on the definition of “governmental entity” as that term is defined under the Act. *See id.* 63G-7-102. It is irrelevant whether GMW has invoked or otherwise “articulated a reliance upon the waivers expressed in the Immunity Act,” as GMW asserts. Indeed, GMW’s reading of the statute would require an absurd

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<sup>4</sup> As previously noted, an entity may be subject to the Act’s procedural Notice of Claim requirements, but still not qualify for sovereign immunity under the Eleventh Amendment or even under the Immunity Act. *See, e.g., Thorpe v. Washington City*, 2010 UT App 297, ¶ 17, 243 P.3d 500 (citing *Hall v. Utah State Dep’t of Corr.*, 2001 UT 34, ¶ 27, 24 P.3d 958) (noting that the Act’s Notice of Claim requirement applied to an entity, even though that entity was not entitled to sovereign immunity under the Immunity Act)



result whereby any plaintiff could avoid the implications of the Immunity Act by simply crafting their pleading in a way to avoid “articulating a reliance” upon the Act. The Court can and should reject GMW’s interpretation of the Act to “avoid[] absurd results.” *See, e.g., Bagley v. Bagley*, 2016 UT 48 ¶ 27, 387 P.3d 1000.

#### **IV. A STATE ENTITY MAY WAIVE THE IMMUNITY ACT’S JURISDICTIONAL PROVISIONS BY INVOKING THE JURISDICTION OF THE FEDERAL COURT**

Finally, GMW agrees with AWSF that a Utah entity may waive the Act’s jurisdictional and venue provisions by invoking the jurisdiction of the federal court. (GMW Br. 39-42.) While the briefs rely on different authority to come to this conclusion, each party nonetheless reaches the same conclusion. Accordingly, the Court can and should hold that a State may waive the Act’s jurisdictional provisions, which is consistent with the wealth of U.S. Supreme Court, Tenth Circuit, and Utah federal district court jurisprudence.

#### **CONCLUSION AND REQUEST FOR RELIEF**

The Court should resolve the three certified questions as follows.


First, AWSF is entitled to the protections of the Immunity Act as a public corporation and/or an instrumentality of the state. This conclusion is supported by the plain language of the statute, related statutory provisions, dictionary definitions, and case law. The Court should reject GMW’s proposed six-factor test, which improperly conflates Eleventh Amendment arm-of-the state analysis with this question interpreting Utah’s Governmental Immunity Act.

Second, sections 63G-7-501 and -502 of the Immunity Act reflect an intent by the State of Utah to limit the Immunity Act's waiver of sovereign immunity to suits brought in Utah district courts, rather than federal courts. This is consistent with U.S. Supreme Court jurisprudence and federal courts that have analyzed these questions.

Third, while federal district courts generally do not have authority to hear a plaintiff's claims subject to the Act, this case presents an exception because AWSF has invoked the jurisdiction of the federal court by filing counterclaims in federal court. State entities do have the authority to waive these provisions.

DATED this 30th day of October, 2017.

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**CERTIFICATE OF COMPLIANCE WITH RULE 24(F)(1)**

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1. This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because: This brief contains 3,493 words, excluding the parts of brief exempted by Utah R. App. P. 24(f)(1)(B).
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DATED this 30th day of October, 2017.

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**CERTIFICATE OF SERVICE**

I certify that this 30th day of October, I have served the foregoing **RESPONSE**  
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