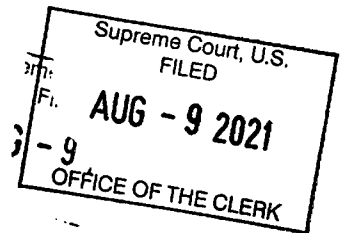


No. 21-216



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**In The Supreme Court of the United States**

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**ROGER BROWN**  
**Petitioner**

**V.**

**UNKNOWN EMPLOYEES OF CITIZENS  
PROPERTY INSURANCE CORPORATION  
and  
CITIZENS PROPERTY INSURANCE  
CORPORATION  
Respondents.**

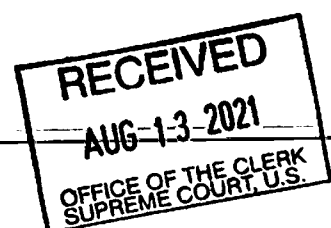
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**ON PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

-----+-----  
**PETITION FOR WRIT OF CERTIORARI**  
-----+-----

**PETITIONER**  
**Roger Brown, Pro Se [Non-Lawyer]**  
**c/o PO Box 566**  
**Dunedin, Florida 34697-0566**  
**956-408-9167, rb127.legal@gmail.com**

**Dated: August 7, 2021**

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## **QUESTIONS PRESENTED**

Both the lower Courts' decisions contradict cases within its own circuit, other circuits, and this Court's precedent in *Thacker v TVA*. Please consider these questions.

A. Does *Thacker v TVA* apply to a similar "sue and be sued" body in determining Eleventh Amendment immunity for a State's "Arm-of-the-State" corporate entity when conducting commercial activities?

B. Does the commercial versus governmental activity test in *Thacker v TVA* over ride or modify the Eleventh Circuit's four [4] prong test in determining Eleventh Amendment immunity for a State's "Arm-of-the-State" corporate entity?

C. Did the Eleventh Circuit err by applying their four prong test in the abstract and too narrowly?

Secondary Issue Questions: If the Court Pleases, for judicial economy, please consider these questions raised in the District and Appeals Court that Brown faces on his journey to justice with a Florida jury.

D. Are Florida laws that impairs contracts unconstitutional?

E. Are Florida's limits on punitive damages unconstitutional?

F. Are lack of pro se fee awards unconstitutional?

**LIST OF PARTIES**

**Roger Brown**, Pro Se [Non-Lawyer]  
c/o PO Box 566, Dunedin, Florida 34697  
956-408-9167, rb127.legal@gmail.com

**Unknown Employees** of Citizens Property  
Insurance Corporation

**Citizens Property Insurance Corporation**  
**Maureen Percy** [Attorney for Citizens],  
Paul R. Percy, P.A.,  
7700 N. Kendall Drive, Suite 412  
Miami, Florida 33156  
Office: 305-663-8850, Cell: 305-742-7405  
maureen@pearcylawyer.com  
service@pearcylawyer.com

**The State of Florida** nor any agency, officer, or  
employee thereof is a party hereto. Thus pursuant to  
Supreme Court Rule 29.4.(c) it is noted that 28  
U.S.C. §2403(b) may be applicable to the  
constitutionality of a Florida statute that may be  
drawn into question.

**Ashley Moody**, Attorney General  
oag.civil.eserve@myfloridalegal.com

This e-serve box is to be used in the following  
circumstances: To provide notice of a constitutional  
challenge to a statute, charter, ordinance or  
franchise, pursuant to Section 86.091, Fla. Stat.  
(2012); Rule 1.071, Florida Rules of Civil Procedure;  
Rule 5.1(a)(2), Federal Rules of Civil Procedure; and  
Title 28 U.S.C. § 2403.

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The April 29, 2021 opinion of the Eleventh Circuit denying rehearing. [USCA11 Case: 20-11607-BB] [Pet. App. Pg 2]

The February 4, 2021 opinion of the Eleventh Circuit, before Circuit Judges WILSON, ROSENBAUM, and GRANT, is unpublished. [USCA11 Case: 20-11607-BB] [Pet. App. Pgs 2-8]

The April 3, 2020 decision of the District Court denying subject matter jurisdiction. The Judges overseeing this case were Charlene Edwards Honeywell and Sean P. Flynn. [District Court, Middle District Of Florida, Tampa Division Case No. 8:19-cv-1951-T-36SPF] [Pet. App. Pgs 8-17]

CORPORATE DISCLOSURE

Petitioner has no corporate disclosures

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## GLOSSARY OF ABBREVIATIONS

7 <sup>th</sup>	Seventh
11 <sup>th</sup>	Eleventh
14 <sup>th</sup>	Fourteenth
Arm-of-the-State	Arm of a State
BROWN	Petitioner Roger Brown
Circuit Court	Eleventh Circuit Court of Appeals
CPIC	Respondent Citizens Property Insurance Corporation
District Court	District Court, Middle District Of Florida, Tampa Division
Doc	Document number in District Court
[EA]	Emphasis Added
Fla. Stat.	Florida Statutes
Pet. App.	Petitioner's Appendix
Pg	Page(s)
THACKER	Thacker v Tennessee Valley Authority
TVA	Tennessee Valley Authority
US	United States



## **I. JURISDICTION**

Jurisdiction for this case is based upon both “diversity jurisdiction” and “federal question jurisdiction”.

Diversity of citizenship, 28 U.S.C. §1332, and the amount in controversy exceeds \$75,000.00 exclusive of interest and costs exists in this case. Diversity jurisdiction provides a neutral forum for parties from different States.

Federal question jurisdiction exists herein and affords BROWN a federal forum in which to vindicate federal rights. And this court has subject matter jurisdiction over federal question matter pursuant to 28 U.S.C. §1331. Federal Law determines if and how an Arm-of-the-State entity is entitled to immunity under the Eleventh Amendment.

## **II. STATEMENT OF THE CASE**

### **A. INTRODUCTION**

1. This is a ten year old “*David versus Goliath*” ongoing case which now presents constitutional issues including an Eleventh Amendment jurisdictional issue concerning a State’s Arms-of-the-State entity that conducts commercial activities.

### **B. PARTIES**

2. Petitioner: Roger Brown [BROWN], a non-lawyer acting in Pro Se, is now a seventy-three [73] year old senior citizen. BROWN was residing in Texas at the

time he filed an action in the Federal District Court in Tampa, Florida. BROWN claims CPIC is not an “Arm-of-the-State” for purposes of the Eleventh Amendment. BROWN has had no help in all of his pleadings and briefs.

3. Respondent: Citizens Property Insurance Corporation [CPIC] was created as a corporate entity by the Florida Legislature in 2002 with a “sue and be sued” clause and claims “Arm-of-the-State” status under the Eleventh Amendment. CPIC operates independently and financially separate as a mutual property insurance company by selling and servicing property insurance to citizens of Florida and citizens of other states who own property in Florida. CPIC is a massive multiple billion dollar self-supporting property insurance company in the market place with around 1250 employees and hundreds of thousands of policyholders in Florida and other states.

#### **C. TIME LINE OF EVENTS IN CASE**

4. BROWN’s Initial Event: BROWN filed a timely and valid property insurance claim on a covered event under a fully paid up insurance contract with CPIC on January 20, 2011. CPIC inspected the property. Thereafter BROWN’s claim was wrongfully and intentionally denied by CPIC on July 28 of 2011.

5. BROWN In State Lawsuit: BROWN, a Texas resident, after years of trying, finally obtained Florida legal counsel, on a contingency basis, to file a Florida State lawsuit against CPIC. After an

inspection by a contractor for the legal team, the validity of BROWN's claim was proven. The lawsuit was then filed in April of 2014.

6. Settlement Contract: The lawsuit later produced a settlement contract on August 8 of 2014. Said contract provided another inspection, jointly approved by both parties, to be made by a third party contractor who would determine if the claim was valid. If the claim was valid the costs would be determined by approved contractors on the amounts CPIC would have to pay. The claim was found to be valid.

7. Florida Supreme Court Impairs Contract Rights: BROWN's federal and state contract rights with CPIC were unconstitutionally and retroactively impaired by the Florida Supreme Court on May 14, 2015 in the case CPIC v Perdido Sun. CPIC had been granted unconstitutionally the right to use "bad faith" at will and without accountability or legal consequences.

8. CPIC's Egregious Acts Increase: On May 29, 2015, just fifteen [15] days after the CPIC v Perdido Sun ruling, CPIC begins more egregious activity against BROWN. BROWN was now barred from suing CPIC in state court for ongoing grievous "bad faith" acts. Afterwards BROWN tried for almost four [4] years to get CPIC to properly honor the settlement contract. CPIC, backed by the newly approved "bad faith" exemption, acted egregious and intentionally

continued to refuse to properly pay BROWN on his many verbal and written requests to do so.

9. Thacker v TVA: Justice Kagan's unanimous opinion, on April 29, 2019, reversed the Eleventh Circuit and stated that TVA, an Arm-of-the-State entity, is subject to suits challenging any of its commercial activities. The decision placed TVA in the same position as a private corporation.

10. BROWN In US District Court: For several years BROWN had tried to retain Counsel without success. BROWN, a non-lawyer acting in Pro Se and still a Texas resident, filed a Federal diversity and federal question lawsuit on August 7 of 2019 against CPIC, with the US District Court. BROWN stated that CPIC does not benefit from Eleventh Amendment Immunity and that Brown's Amended Complaint sufficiently alleged continuing harm.

11. US District Court Decision: The District Court, after eight [8] months dismissed the action on April 3, 2020 when it decided that CPIC was an "Arm-of-the-State" and subject to immunity under the Eleventh Amendment.

12. Notice of Appeal: BROWN timely filed a notice of appeal with the District Court for an appeal with the US Circuit Court of Appeals on April 28, 2020.

13. US Circuit Court Appeal: BROWN, still a non-lawyer acting in Pro Se, filed a timely Appeal with the Circuit Court. BROWN's Appellant Brief was



filed on June 24, 2020, and his Appellant Reply Brief was filed on September 14, 2020.

14. Florida Supreme Court Impairs Contract Rights Again: Prior to the Circuit Court's opinion, the Florida Supreme Court further retroactively impaired BROWN's federal and state contract rights on January 21, 2021 in the case of Citizens Prop. Ins. Corp. v. Manor House when it decided that CPIC was not subject to consequential damages.

15. US Circuit Court Decision: The three [3] Panel Court affirmed the "Arm-of-the-State" decision of the District Court on February 4, 2021.

16. US Circuit Court Rehearing Petition: BROWN timely filed a Petition for Rehearing and a suggestion for an En Banc Hearing of the full fifteen [15] Judge Panel. The Courthouse door was closed for BROWN when both were denied on April 29, 2021.

17. And Now A Petition for Writ of Certiorari: This petition seeks review of an Eleventh Circuit decision and a District Court opinion both granting "Arm-of-the-State" status to CPIC under the Eleventh Amendment, despite BROWN citing:

- A. Eleventh Circuit Splits with the US Supreme Court's THACKER and others.
- B. Eleventh Circuit Splits within its own Circuit.
- C. Eleventh Circuit Splits with other Circuits.
- D. Eleventh Circuit's incorrect application of their four prong test.

E. Secondary Issues of Unconstitutional  
Florida Laws.

**III. MAIN ISSUE**

This case is before this Court because the courthouse doors have been shut on BROWN by both the Federal District Court and the Circuit Court. BROWN opines that both the lower Courts erred by granting CPIC immunity under the Eleventh Amendment.

The main issue now before this Court boils down to whether a State's "sue and be sued" corporation, CPIC, qualifies as an "Arm-of-the-State" under the Eleventh Amendment when conducting commercial activities.

**IV. SUMMARY Of ARGUMENTS**

BROWN argues that:

**A.** Federal Law control when determining if any State entity is deserving of a valid Arm-of-the-State status under the Eleventh Amendment.

**B.** The US Supreme Court precedent in THACKER controls this case.

**C.** If THACKER is not dispositive, CPIC still does not qualify as an Arm-of-the-State under the Eleventh Circuit's four prong test.

**D.** CPIC's entire insurance activities with BROWN were strictly commercial and BROWN had a right to assert claims against CPIC in federal court .

E. There are Splits among the Circuits and within the Eleventh Circuit on the issue of Arm-of-the-State determinations.

F. Florida's Unconstitutional Laws That Unfairly Benefit CPIC.

## **V. ARGUMENTS DISCUSSED**

**A. Federal Law controls when determining if any State entity is deserving of a valid Arm-of-the-State status under the Eleventh Amendment.** Federal Courts must look only to Federal Laws and Decisions to determine if any State entity is deserving of a valid Arm-of-the-State status. *"The issue of whether an entity is an "arm of the State" for Eleventh Amendment purposes is ultimately a question of federal law."* Manders v Lee, 338 F.3d at 1328.

Federal Courts are not persuaded by political pressure like state courts. Local entities are challenges for "Arm-of-the-State" analysis and present distinct situations where a State's own assessment of sovereign status should carry no weight. State Legislators are notorious about enacting laws that exempt themselves and allows their offspring to break real laws with impunity. **A rule of absolute immunity is in danger of becoming an instrument of injustice.**

A valid Federal "Arm-of-the-State" test must ensure that a state's immunity extends to an entity only where that entity is so closely aligned with the

sovereign that a suit against the entity is in practical effect a suit against the state itself.

CPIC filed a twenty-one [21] page shotgun motion to dismiss. If CPIC thought it was entitled to the Eleventh Amendment immunity then nineteen [19] extra pages were not necessary. Obviously CPIC needed the extra pages because it was unsure about having immunity under the Eleventh Amendment.

The District Court took eight [8] months to decide lack of subject matter jurisdiction. During those eight [8] months the case proceeded through multiple events and filings by both parties. Either the District Court erred in allowing eight [8] months of activities or CPIC waived jurisdiction by active participation in the case.

CPIC alleged that BROWN beared the burden to prove that jurisdiction existed. The District Court erred and should have concluded that even assuming that immunity is a question of subject matter jurisdiction, that does not necessarily put the burden on BROWN. Such placement would effectively assume the truth of CPIC's assertion that it should be immune from suit in the same way as the State itself is. "Arm-of-the-State" cases requires courts to decide first, whether CPIC can claim sovereign immunity. The District Court erred on this issue. CPIC beared the burden of showing it was an "Arm-of-the-State", but did not and the Circuit Court ignored it.

*"governmental entity invoking Eleventh Amendment bears burden of demonstrating that it qualifies as an arm of the state entitled to share its immunity." Woods v. Rondout Valley Central School District Board of Education, 466 F.3d 232, 237 (2d Cir. 2006)* "[T]he circuits that have considered similar assertions of arm-of-state status have uniformly concluded that it is an affirmative defense to be raised and established by the entity claiming to be an arm of the state." United States ex rel. Oberg v. Pa. Higher Educ. Assistance Agency, 745 F.3d 131, 147 (4th Cir. 2014). *"Eleventh Amendment immunity "should be treated as an affirmative defense" and "must be proved by the party that asserts it". ITSI TV Productions, Inc. v. Agric. Ass'ns, 3 F.3d 1289, 1291 (9th Cir. 1993)*

**B. The US Supreme Court precedent in THACKER controls this case.** Both the District and the Circuit Court completely ignored THACKER in their analysis. THACKER was decided on April 29, 2019 and this case was filed with the District Court three months later on August 7, 2019. THACKER should have been dispositive in this case. The District Court issued its opinion on April 3, 2020. The District Court's analysis consisted of quoting older cases [prior to THACKER] that cited Arm-of-the-State status for CPIC, without any real analysis. **Why THACKER was not addressed by the District Court in its opinion after almost a year is troubling.**

BROWN raised the commercial issue to the District Court in his Amended Complaint: “.... *by entering the domain of commerce and entering into a commercial contract, in this case, the Defendants [CPIC] waived any right to claim sovereign immunity against suit.*”

**What is more troubling is that, the Circuit Court did not even consider THACKER**, despite BROWN citing THACKER in all three briefs. And of course the Appellee stayed away from mentioning THACKER. THACKER is a precedent that is dispositive in this case:

*“When the TVA or similar body operates in the marketplace as private companies do, it is as liable as they are for choices and judgments. The possibility of immunity arises only when a suit challenges governmental activities — the kinds of functions private parties typically do not perform. And even then, an entity with a sue-and-be-sued clause may receive immunity only if it is “clearly shown” that prohibiting the “type of suit [at issue] is necessary to avoid grave interference” with a governmental function’s performance. Burr, 309 U. S., at 245. That is a high bar.” Thacker v TVA. [EA]*

Note the plain meaning of the words **or similar body**, by that quote the **Supreme Court** was **reaffirming Burr and setting a precedent** that their analysis can be **applied to any** Arm-of-the-State determinations and **not** just to TVA; otherwise those words would **not** have been necessary. **THACKER**

directed that Courts must first decide if an entity's activity is commercial or governmental. Both District Court and the Circuit Panel ignored and split with THACKER.

*"To determine if the TVA has immunity, the court on remand **must first decide whether the conduct alleged to be negligent is governmental or commercial in nature. If it is commercial, the TVA cannot invoke sovereign immunity.** If it is governmental, the court might decide that an implied limitation on the clause bars the suit, but only if it finds that prohibiting the "type[ ] of suit [at issue] is necessary to avoid grave interference" with that function's performance. Burr, 309 U. S., at 245. Pp. 10-11." Thacker v TVA. [EA]*

The Circuit Court should have examined the commercial activity of CPIC in the analysis of whether CPIC acts as an "Arm-of-the-State", just as the U.S. Supreme Court set forth in their unanimous decision in the THACKER case, which over-rules previous Eleventh Circuit opinions. *"TVA is subject to suits challenging any of its commercial activities. The law thus places the **TVA in the same position as a private corporation** supplying electricity. But the TVA might have immunity from suits contesting one of its governmental activities, of a kind not typically carried out by private parties..... **a suit challenging a commercial act will not "grave[ly]" or, indeed, at all—interfere with the "governmental functions"**" Thacker v TVA. [EA]*

THACKER specifically denies Eleventh Amendment immunity to the State of Florida's "Arm-of-the-State" entity CPIC when conducting commercial activities. The THACKER Court interpreted BURR to hold that a "sue and be sued" clause waives sovereign immunity except in a situation in which immunity from tort liability is required to avoid "grave interference" with the performance of a governmental function. CPIC conducted no governmental function in this case!

Justice Kagan's unanimous opinion reversed the Eleventh Circuit, which had sided with the long standing Sixth Circuit precedent treating many TVA functions as immune from suit. The Court stated TVA is subject to suits challenging any of its commercial activities. The law thus placed TVA in the same position as a private corporation supplying electricity. **If TVA can be stripped of immunity and sued when it acts like a business, then CPIC should be treated likewise.** THACKER should be controlling and dispositive against CPIC.

Accordingly, actions by a so-called Arm-of-the-State are divided into two functions:

1. Governmental
2. Commercial

CPIC has not provided any specific governmental functions that it performs. CPIC does not possess any powers and responsibilities reserved to sovereign actors. There are few, if any, functions that CPIC performs that are not also performed by the many



privately-owned companies that participate in the property insurance market.

Allowing law suits against CPIC in Federal Court does not create grave interference with CPIC's performance of its governmental functions, if any. Just as in THACKER, the question, would be where to draw a line between protecting CPIC's liability as an Arm-of-the-State, if it is such, when it is engaged in quintessential government functions versus holding CPIC accountable when it acts in a manner similar to other commercial enterprises. CPIC's activities surrounding commercial activities have no real connection to any governmental functions.

It is noteworthy that CPIC's brief made no mention of THACKER, nor did the District Court or even the Circuit Panel. TVA does engage in some quintessential governmental activity such as exercising eminent domain to expand property holdings and appointing employees as law enforcement agents. CPIC has no such eminent domain nor law enforcement powers.

If TVA's activities are: "*commercial—the kind of thing any power company might do—the TVA can not invoke sovereign immunity.*" CPIC's activities are commercial, the kind of thing any property insurance company might do, thus CPIC should not be able to invoke sovereign immunity. *But even if the conduct is governmental, it must be "clearly shown" that immunizing TVA from suit is necessary to prevent a "grave interference" with a governmental function.*

*This, the court cautioned, is a "high bar."* This decision should affirm the breadth of tort liability not only for the TVA, but also for CPIC and any other government corporations and agencies that are engaged in commercial activities.

The effect of BROWN's case does not present a substantial obstacle to CPIC's governmental functions, if any, nor does it impose an undue burden on the operation of CPIC's property insurance business. Nor is it a genuine threat to the dignity of Florida in allowing BROWN to pursue constitutional, contract, and tort claims against CPIC in federal court. CPIC should be subject to suits challenging any of its commercial activities.

C. If Thacker is not dispositive, CPIC still does not qualify as an Arm-of-the-State under the Eleventh Circuit Court's four prong test. Both the District Court and the Circuit Court ignored these issues in their analysis.

1. CPIC's Characteristics: CPIC is not the State of Florida; it is a corporate entity, financially separate and distinct from the State of Florida itself. CPIC operates in much the same way as an ordinary business corporation, under the control of its officers, and not under that of an agency.

CPIC sells and services property insurance contracts. CPIC issues its own bonds. CPIC generates no revenues for the State. CPIC's employees are not paid with taxpayer money. Florida provides no funds

to satisfy judgments or settlements for CPIC. CPIC does not have "inherent authority" to make law or any rule-making authority. CPIC has no sovereign powers of eminent domain, police power, or taxing power. As a corporation CPIC operates commercially only for a select few property owners who are citizens of Florida and other states [Interstate Commerce], and who are private owners. CPIC sells Contracts of Insurance, contracts are not made by CPIC by virtue of its powers of sovereignty, but in its capacity as a commercial corporation. **The supply of insurance contracts is no more a duty of sovereignty than electricity.**

CPIC can sue and be sued in its own name. In 2006 **CPIC sued the State of Florida** in its own name. Such actions proves that CPIC was not closely connected to the State and suggests a lack of state control, and thus not an Arm-of-the-State.

CPIC is not supported by the Full Faith and Credit of the State of Florida. New Applications effective January 1, 2012, with all CPIC's policies had this disclaimer. *"I also understand that Citizens Property Insurance Corporation is not supported by the full faith and credit of the state of Florida."*

2. Court Action: The District Court's analysis consisted of quoting older cases [prior to THACKER] that cited Arm-of-the-State status for CPIC, without any real analysis. The Circuit Panel applied their four prong test but applied it wrongfully.

The District Court Opinion ignored CPIC's Real Creation and stated:

*"Citizens was created by the Florida Legislature to ensure that there is an orderly market for property insurance for residents and businesses of this state." § 627.351(6)(a)1., Fla. Stat. The statute states that Citizens is "a government entity that is an integral part of the state, and that is not a private insurance company." Id. Consistent with this statement, courts **regularly recognize Citizens' status as a state government entity.**" [EA]*

Just because a state statute or a court decides one way or the other on immunity for a State's Arm-of-the-State entity, it has no real legal bearing upon the determination by a Federal court. A state's determination of sovereign immunity does not substitute for an independent analysis under federal standards. **An unlawful or unauthorized exercise of power does not become legitimated or authorized by reason of habitude.**

The Florida Legislature created CPIC, it did not make it a new executive department, but it said it can sue and be sued in its own name. They cast it aside and said it can fend for itself. And to just say, well, it performs some functions, it is governmental, but when you start making that distinction this is the exact error that the District Court made.

3. Florida Attorney General's Legal Opinion: CPIC never had "Arm-of-the-State" status. As proof the

Florida Attorney General is the State's chief legal officer [*Florida Constitution Article IV, Section 4*] and he stated the real truth about CPIC's creation:

*"..... CS/SB 1418 renames the JUA as the Citizens Property Insurance Corporation. While the legislation removes language which states that this **entity is not a state agency** and restructures the association as a corporation with its governing board appointed by the Treasurer, much of **the purpose and function of the corporation is the same as that of the JUA**. Under the proposed legislation, the corporation **would not perform a traditional governmental function**. Its revenues would not be subject to legislative appropriation and **would be held solely for the purpose of satisfying insurance claims**. Though created by the Legislature, in practical effect **the corporation would operate like a private insurance company**." [Florida] Advisory Legal Opinion- AGO 2002-21 [EA]  
[myfloridalegal.com/ago.nsf/Opinions/9ADA2CD70F68DC5385256B740067BC9C](http://myfloridalegal.com/ago.nsf/Opinions/9ADA2CD70F68DC5385256B740067BC9C)*

4. State Treasury: The State of Florida made it perfectly clear in 2012 that CPIC was totally independent by requiring CPIC to state so on all CPIC insurance applications. New Applications effective January 1, 2012, with all CPIC's policies had this disclaimer. "*I also understand that Citizens Property Insurance Corporation is **not supported by the full faith and credit of the state of Florida**.*"

[EA] That means that Florida is not responsible for any of CPIC's activities, financially or otherwise. The fact that CPIC does not have the full faith and credit backing of the state of Florida, that bonds, debts, employees, and judgement against CPIC would not be paid out of the state treasury are major clear markers that CPIC is not an "Arm-of-the-State".

The very impetus for the Eleventh Amendment was prevention of federal-court judgments that must be paid out of a State's treasury. This case does not affect the State of Florida's treasury. The Eleventh Amendment's core concern is not implicated in this case. The State of Florida does not have a "legal obligation" to pay, out of the state's treasury, any funds for CPIC's general debts, contracts, obligations or judgments. Suit against CPIC does not expose the State treasury to any risk.

5. State Control: Florida has no veto power over CPIC's 1250 employees who conduct the day to day commercial insurance activities. In 2006 **CPIC sued the State of Florida** in its own name. CPIC acted of its own volition, for its own benefit, and not as an Arm-of-the-State. Such actions proves that CPIC was not closely connected to the State and suggests a lack of state control, and thus not an Arm-of-the-State.

Likewise, the statement in New Applications effective January 1, 2012, with all CPIC's policies had this disclaimer. *"I also understand that Citizens Property Insurance Corporation is **not supported by the full faith and credit of the state of Florida.**"*

[EA] That means that Florida does not control any of CPIC's activities, financially or otherwise.

6. CPIC's Sue and Be Sued Clause: Both the District Court and the Circuit Court ignored these issues in their analysis. Florida decided that CPIC could "sue-and-be-sued in its corporate name." Fla. Stat. § 627.351(2)(b)(6)(b) says, "*Any entity created under this subsection, or any entity formed for the purposes of this subsection, may sue and be sued . . .*"

Courts have held that "sue and be sued" statutes waive sovereign immunity. [See also THACKER]. Since its inception CPIC has represented itself in litigation by attorneys of its own choosing and no Court at any level has ever questioned CPIC's right to do so. In 2006 CPIC sued the State of Florida in its own name. The Courts have repeatedly recognized CPIC's responsibility for its own litigation.

This case meshes with this US Supreme Court's holdings on public corporations chartered with "sue-and-be-sued" clauses. The State of Florida by launching a state entity into the commercial world, and including a sue-and-be-sued clause in its charter, Florida effectively cast off the entity's "cloak of sovereignty" and gave it the status of a private commercial enterprise.

*"sue and be sued clauses **wave sovereign immunity** and should be liberally construed."*

FDIC v. Meyer, 114 S. Ct. 996, 1003 (1994)

[EA]. "*federal agencies **launched into***

*commercial world with power to "sue and be sued" are not entitled to sovereign immunity."* Loeffler v. Frank, 486 U.S. 549, 554-55 (1988). [EA] As the Supreme Court explained in Loeffler, by "launching '[a federal instrumentality] into the commercial world,' and including a sue-and-be-sued clause in its charter, Congress 'cast[s] off [the instrumentality's] cloak of sovereignty and gives it the status of a private commercial enterprise. 486 U.S. at 556 (quoting Library of Congress v. Shaw, 478 U.S. 310, 317 n.5 (1986)). See also THACKER.

7. State Dignity: Some Courts have embarked on a path of sacrificing legal rights of individuals in favor of what it calls "dignity" of states. There is nothing dignified in claims of immunity that seek to avoid accountability for unlawful discrimination and violations of constitutional rights. As peoples' representatives, Courts have a responsibility to protect individuals' rights and keep the government accountable. **There is ample dignity in adherence to the rule of law. CPIC is not the State of Florida nor does CPIC's actions exhibit dignity.**

8. Political Subdivisions: Not all entities created by states are eligible to share state sovereignty. CPIC is defined as a political subdivision."(t) *For the purposes of s. 199.183(1), the corporation shall be considered a political subdivision of the state and*



*shall be exempt from the corporate income tax."*  
627.351,(6)(S1)(t). [EA]

The Supreme Court has long held that under the Eleventh Amendment, the states and their political subdivisions are separate entities. While suits against a state may not be brought in Federal court without the state's consent, no consent is necessary for suits against counties, municipalities, and other such "independent" political subdivisions.

*"**Political subdivisions** of States--counties, cities, **or whatever** - never were and never have been considered as sovereign entities. ...."*  
Waller v. Florida, 397 U.S. 387 (1970) *"(local school district not an arm of the state based on (1) its designation in state law as a political subdivision,...."* Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977) *"[T]he Court has consistently refused to construe the [Eleventh] Amendment to afford protection to political subdivisions ...."* Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391,401 (1979) *"... towns, counties and other **political subdivisions of the state cannot invoke sovereign immunity in federal...."*** Northern Insurance Co. v. Chatham County, 547 U.S. 189, 193 (2006) [EA]

9. More Analysis: For a complete analysis on how the Circuit Panel erred in applying their four prong test to CPIC see [Pet. App. Pgs **33-40**].

**D. CPIC's entire insurance activities with BROWN were strictly commercial.** BROWN sought property insurance by way of an application and payment of monies for years. CPIC accepted both BROWN's applications and monies and issued BROWN insurance contracts. BROWN filed a claim provided by the property insurance contract. CPIC inspected the property claim. CPIC denied the claim. BROWN obtained counsel and sued CPIC. CPIC settled with a contract and proved the validity of the claim. CPIC never properly paid BROWN. BROWN begged CPIC to pay up for years. CPIC refused to pay. BROWN sued CPIC in Federal District Court.

How was any of those ongoing activities considered a governmental function? The obvious answer is none. They were all commercial activities. CPIC acts like any other company selling and servicing property insurance. Immunity under the Eleventh Amendment should not apply to CPIC's commercial insurance activities.

**E. There are Splits among the Circuits and within the Eleventh Circuit on the issue of Arm-of-the-State determinations.** The Circuit Court ignored these issues in their analysis. For BROWN's analysis about splits on the issue of Arm-of-the-State determinations see [**Pet. App Pgs 23-24,33-35**].

**F. Florida's Unconstitutional Laws That Unfairly Benefit CPIC.** If the Court Pleases, for judicial economy please consider these obstacles that Brown

faces on his journey to justice with a jury. These Federal issues were raised in District Court.

BROWN seeks a Jury trial and has identified unconstitutional laws and practices in Florida that will create impediments for all such litigants in seeking justice. Florida is openly violating the 14<sup>th</sup> Amendment's unequal protection of the laws provision. An act passed by a state legislature or a decision by the courts that directs a discriminatory result is state action and would violate the first section of the 14<sup>th</sup> Amendment.

CPIC has a nefarious philosophy, mind-set, and even formal procedure regarding the settlement of claims that is fueled by **moral hazard**. CPIC will seldom put forth a reasonable offer to settle any claim. That is their plan, **delay and never pay. Everything that happens in an insurance company is the result of a calculated move.** If CPIC paid claims quickly and fairly, Petitioner would not be here. CPIC knows that most individuals, **unrepresented by counsel**, will succumb to the "take it or leave it" approach. CPIC had rather pay attorney fees than to fairly settle a claim. CPIC unfairly benefits from Florida's unconstitutional laws, most of which benefit only CPIC to further its nefarious philosophy.

All of the below issues are violations of BROWN's constitutional rights. **These secondary issues need to be remedied.**

1. Contract Rights: There is a vast record of thousands and thousands of plaintiffs being unfairly denied a remedy for a wrong committed by CPIC as regards due process and the impairment of their contract rights. States cannot deny due process nor impair the obligation of contracts. The 14<sup>th</sup> Amendment to the U.S. Constitution, which overrules the Eleventh Amendment, has changed constitutional federalism in many ways, and provides that a State cannot deprive a person of due process of law nor deny equal protection under the laws. In Florida, there is widespread and consistent problems affecting due process, impairment of contracts, and equal protection. Petitioner is claiming CPIC, the State Legislature of Florida, and the Florida Supreme Court, by and through its unconstitutional laws, have impaired contracts, plus denied Petitioner, and thousands and thousands of other plaintiffs, the right of due process and equal protection, because unconstitutional laws allow injuries to occur without remedies. The idea that the state can violate the law and nowhere be held accountable is inconsistent with the most basic notions of justice and with the view that federal courts exists to enforce the Constitution and laws of the US.

*“contract rights are property that may not be taken by the government without just compensation under the **Fifth Amendment**.”*  
*“Contracts between individuals or corporations are impaired within the meaning of the Constitution (article 1, 10, cl. 1) whenever the right to enforce them by legal process is taken*

*away or materially lessened."* Lynch v. United States 292 US 571, 579. [EA]

Wisely feeling that the **state governments could not be trusted** to respect economic rights, the Constitution's Framers sought in Article 1, Section 10 to restrict state authority in several respects. Foremost among these limitations on state power was the Contract Clause. As Justice Hugo L. Black pointed out, the Contract Clause was "*one of the few provisions [explicitly limiting states' powers] which the Framers deemed of sufficient importance to place in the original Constitution.*"

Two of BROWN's contract rights of seeking damages for "bad faith" and "consequential damages" have been wrongfully and retroactively impaired by the Florida's Supreme Court which unfairly benefits CPIC at BROWN's disadvantage, as well as thousands of other litigants.

BROWN had two commercial contracts with CPIC; an insurance contract in January of 2011 and a settlement contract in August of 2014. Both of BROWN's commercial contracts were in effect prior to the Florida Supreme Court's rulings in CPIC v Perdido Sun (May 14, 2015) and Citizens Prop. Ins. Corp. v. Manor House (January 21, 2021). Both of these cases impairs contracts, violates the U.S. Constitution's Article I, Section 10, the Florida Constitution Article I, Section 10, and even violates the Florida Constitution Article I, Section 21 by unfairly denying redress of any injury.

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BROWN raised contract impairment issues with the District Court on several occasions and with the Circuit Court in his Appellant Brief and again in his Reply Brief. This "bedrock constitutional right" is being destroyed by the laws in Florida.

(a) Contract Right of Bad Faith Damages Impaired: The Florida Supreme Court on May 14, 2015 in the case CPIC v Perdido Sun granted CPIC unconstitutionally **the right to use "bad faith" at will and without accountability or legal consequences**. This ruling impaired all of CPIC's contracts by eliminating the cause of action for bad faith against CPIC. Due process was denied and eliminated the right to petition the government for a redress of grievances of wrongdoings of bad faith by CPIC and its employees. It certainly does not follow the law's concern for holding bad actors accountable for their actions. If you can not sue for bad faith violations, then how do you get the bad faith to stop? CPIC v Perdido Sun granted CPIC immunity and the right to aggressively commit bad faith acts with malice and without any accountability. Said ruling just encouraged CPIC to delay and never pay. Everything that happens in an insurance company is the result of a calculated move. See also [**Pet. App. Pgs 77-80**]

(b) Contract Right of Consequential Damages Impaired: On January 21, 2021, in the case of Citizens Prop. Ins. Corp. v. Manor House, the Florida Supreme Court barred consequential damages by

holding that extra-contractual damages are only available in a separate bad faith action. But they are not recoverable against CPIC because CPIC is statutorily immune from first-party bad faith claims. [See § 627.351(6)(s)1., Fla. Stat. (2019)]. **The ruling now invites CPIC to delay and deny claims with impunity.** It certainly does not follow the law's concern for holding bad actors breaching contracts accountable for the foreseeable results of their actions. CPIC v Manor House granted CPIC the right to aggressively commit breach of contract with malice, forethought, and without any accountability for causing consequential damages. The Florida Supreme Court's decisions handed CPIC a license to steal from thousands and thousands of their policyholders without any legal responsibility or legal accountability. Said ruling just encouraged CPIC to be bold and be more aggressive in delaying and never paying. Everything that happens in an insurance company is the result of a calculated move and CPIC now had immunity from all nefarious calculated actions.

2. Jury Trial Punitive Damages Capped: This issued was raised in District Court by BROWN and in the Circuit Court by CPIC and addressed in Circuit Court by BROWN. The Florida Legislature by creating caps to punitive damages [Fla. Stat. §768.73] and punitive damage mini-trials [Fla. Stat. §768.72(1)] before presentation to the jury both violates Florida's Constitution Article I, Section 22 [*The right of trial by jury shall be secure to all and remain inviolate*], as well as the U.S. Constitution's



7th Amendment *[the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined]*. See also Henderson by & Through Hartsfield v Alabama Power Co. (1993, Ala) 627 So 2d 878 *[Limitation of punitive damages ... violates state constitution's guarantee of trial by jury. ... It is improper for legislature to substitute itself for jury and to fix arbitrary limit.]* See also BROWN's Reply Brief Section X Punitive Damages. [**Pet. App. Pgs 81-83**] **This "bedrock constitutional right" is being destroyed by the laws and Courts in Florida, and unfairly reduces penalties for CPIC when found guilty.**

3. Pro Se Fee Prohibition: This issued was raised in District Court. Pro Se Fees are not awarded in Florida courts. CPIC gains by not having to pay legal fees when it loses. The refusal to grant Pro Se Fees to a litigant who can not obtain legal counsel is a violation of the U.S. Constitution, Article I, Section 9. *[No title of nobility shall be granted]*, the U.S. Constitution, Article I, Section 10. *[No state shall ...grant any title of nobility]*, the U.S. Constitution Amendment V. *[nor shall private property be taken for public use, without just compensation]*, the U.S. Constitution Amendment XIII Section 1. *[nor involuntary servitude ....shall exist within the United States, or any place subject to their jurisdiction]*, and the U.S. Constitution Amendment XIV, Section 1. *[nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws]*.

Attorney fees are awarded in some situations. The denial of Pro Se Fees in lieu of attorney fees is a sanction or penalty when an individual, without counsel, is forced to protect his constitutional rights. The Courts, both Federal and State, are converting a liberty of exercising an individual's constitutional rights to seek relief from violations of the U.S. Constitution and other causes, by converting a right to legal fees into a license where only a select group of preferred individuals can obtain that right. Thus the denial of legal fees to a Pro Se Litigant denies equal protection under the laws to certain lower income individuals. Pro Se Litigants' time is just as valuable as an attorney's, and more so in that the knowledge once acquired to bring a suit has a limited life span, since the Litigant can not use that knowledge in any other meaningful economic endeavor. Time is irreplaceable and time expended to seek justice is lost if wrongful defendants are rewarded with less damages just because the plaintiff can not afford the price of an attorney. Consider a senior citizen, the time is more valuable as there is less of it. Equal protection applies to awards in Jury trials, and legal fees whether by an attorney or a Pro Se Litigant, are a cost that is either paid in money or in expending personal energy and effort.

Awarding legal fees to a plaintiff in one case with an attorney and not awarding legal fees in an identical case with a Pro Se plaintiff is not equal damages for the same offense. Besides, defendants have usually

withheld money from plaintiffs in an effort to deny plaintiffs with the ability to obtain counsel. To reward defendants with less costs, despite that their very actions are what denies plaintiffs an attorney, is not equal protection under the laws. Denying Pro Se fees unjustly enriches guilty defendants.

And finally the benefit to the public deriving from a plaintiff's claim to seek Pro Se fees would encourage other low income individuals to seek their own justice, which is currently being denied. When the court must force compliance, then Pro Se fees should be levied against wrongful acts. It has been argued that Litigants who incur no legal expenses do not assume that burden and, therefore, attorney fees awards to Pro Se litigants are inappropriate. Such views totally ignore the reality. If a Pro Se litigant is providing the work of a lawyer, then the Courts should consider that work just as valuable as an attorney. Furthermore, requiring plaintiffs to retain attorneys as a condition for recovering attorney fees contradicts the court's express purpose to facilitate public access to the courts.

## **VI. QUESTIONS ANSWERED**

A. Do the decisions in Thacker v TVA apply to a similar "sue and be sued" body in determining Eleventh Amendment immunity for a State's "Arm-of-the-State" corporate entity when conducting commercial activities? **YES**.

Both the District Court and the Circuit Court never addressed the governmental versus commercial

activity issue in their analysis nor mention THACKER. For BROWN's analysis on how THACKER applies to State's "Arm-of-the-State" entities under the Eleventh Amendment see [Pet. App. Pgs 37-39].

How can CPIC's commercial activities of selling insurance, paying commissions, issuing policies, canceling policies, collecting premiums, paying expenses, denying claims, adjusting claims, settling claims, issuing bonds, borrowing money, entering into commercial contracts, suing and being sued, breaching contracts, settling contract breaches, committing willful torts, settling willful torts, taking and holding property in its own name, hiring contractors, hiring outside attorneys, hiring employees and suing the State of Florida be considered governmental functions? They are not!

CPIC is not an Arm-of-the-State in these commercial functions. Whether CPIC performs a "real" state function is in dispute and takes a lot of stretching around corners to determine that CPIC is an "Arm-of-the-State", given all the reasons it is not.

B. Does the commercial versus governmental activity test in Thacker v TVA over ride or modify the Eleventh Circuit's four [4] prong test in determining Eleventh Amendment immunity for a State's "Arm-of-the-State" corporate entity? **YES**.

The District Court and the Circuit Court ignored the separating of governmental versus commercial

functions set down in the THACKER precedent. The new standard is to determine first if the action being considered is commercial or governmental. If it is commercial then immunity does not apply. If it is governmental then the four prong test is then applied.

C. Did the Eleventh Circuit err by applying their four prong test in the abstract and too narrowly? **YES**.

For BROWN's analysis on how the Circuit Court Panel erred in applying their own four prong test see [Pet. App. Pgs 40-48].

D. Do Florida laws impairs contracts? **YES**.

Florida's laws violate the Contract Clause in the US Constitution Article 1, Section 10, the Florida Constitution Article I, Section 10, and even the Florida Constitution Article I, Section 21.

E. Is Florida's limit on punitive damages unconstitutional? **YES**

Florida's punitive caps violates the Florida's Constitution Article I, Section 22, as well as the U.S. Constitution's 7th Amendment.

F. Are lack of pro se fee awards unconstitutional? **YES**

Florida's prohibition of pro se fee awards violates the U.S. Constitution, Article I, Section 9, the U.S.

Constitution, Article I, Section 10, and the U.S. Constitution Amendment XIII Section 1.

## **VII. SUMMARY**

### **A. Main Issue In This Case**

The main issue before this Court boils down to whether a State's "sue and be sued" corporation, CPIC, qualifies as an "Arm-of-the-State" under the Eleventh Amendment when conducting commercial activities.

### **B. Party of Record**

CPIC is a corporation which is a different "person" from those who are its stockholders. The State of Florida itself is not a party to this suit, nor so far has it sought to express views in this litigation as a party or amicus. CPIC is the party of record and a corporate entity having been designated with a "sue and be sued" provision under which BROWN sued. CPIC is attempting to wrongfully cloak itself in the State's Eleventh Amendment immunity.

BROWN did not sue the State of Florida, he sued CPIC over commercial contract related activities. CPIC engages in commercial activity. If it is commercial, then CPIC can not invoke sovereign immunity. Nothing suggests that a state entity, particularly a state corporation, must be free from any form of legal accountability for commercial decisions.

### **C. CPIC Has No Arm-of-the-State Status Under Lower Court's Analysis**

Both the District and the Circuit Court applied the wrong legal test, and thus reached the wrong result. The District Court used no test and just cited older cases. The Circuit Court used their four prong test in the abstract and not its function or role in a particular context, which split with another of their own decisions. "*The pertinent inquiry is not into the nature of [an entity's] status in the abstract, but its function or role in a particular context.*" Shands Teaching Hosp. & Clinics v. Beech St. Corp., 208 F.3d 1308, 1311 (11<sup>th</sup> Cir. 2000).

Even without THACKER, BROWN demonstrated that under the Circuit's four prong test, CPIC still should have been denied "Arm-of-the-State" status. CPIC's activity of hiring employees, paying employees with non-taxpayer money, borrowing money, issuing bonds, handling policyholder claims, denying claims, suing and being sued in its own name, seeking insurance premiums, entering into Commercial Contracts and generating no revenue for the State does not establish an effect upon the state treasury and does not reflect an activity by an "Arm-of-the-State". In light of BROWN's analysis of the four prong test, BROWN asks this Court to confirm that CPIC's "Arm-of-the-State" status under the Eleventh Amendment is denied.

D. CPIC Has No Arm-of-the-State Status Under THACKER

In the U.S. legal system, stare decisis represents the "doctrine of precedent, under which a court must follow earlier decisions when the same points arise

again in litigation." Both the District and the Circuit Court totally ignored THACKER, and cases therein that were reaffirmed. THACKER basically established that commercial activities are not immune from suit in federal court. Suits based on a public corporation's commercial activity may proceed as they would against a private company; only suits challenging the entity's governmental activity may run into an implied limit on its sue-and-be-sued clause. The problem is not who is doing the State's business, but what business the State's Arm-of-the-State is doing. It is not the identity of the actor but the nature of the action that creates the challenge. If this analysis is correct, then the appropriate fix rests on proper classification not of the actor, but of the conduct, a process that the Supreme Court has undertaken in THACKER. So why did both the District Court and the Circuit Court ignore THACKER?

In light of THACKER, BROWN asks this Court to confirm and thus clarify the immunity rules under the Eleventh Amendment that govern commercial activities of entities with "Arm-of-the-State" status and sue and be sued clauses.

**E. Courthouse Doors Need To Be Opened**

The Circuit Court closed the courthouse doors to BROWN by this final statement: *"We have sympathy for Brown's apparent predicament. But because CPIC is an arm of the state, Eleventh Amendment immunity bars him from bringing his claims in federal court. We therefore AFFIRM the district*



*court's judgment."* Eleventh Circuit Court of Appeals Decision February, 4, 2021[Pet. App. Pg 9]. Please open the courthouse doors before I die.

BROWN requests this Court to open the courthouse doors by holding that, contrary to the lower courts' decisions, the District Court did have subject-matter jurisdiction to hear claims against CPIC because the Eleventh Amendment does not apply to CPIC when conducting commercial activities.

The anguish and pressure of solely going up against a powerful entity with scores of in-house legal talents, as well as outside legal experts, is extremely frightening, and emotionally stressful.

*"There is, no doubt, some truth to Learned Hand's comment that a lawsuit should be 'dread[ed]' . . . beyond almost anything else short of sickness and death."* Association of the Bar of the City of New York, Lectures on Legal Topics 105 (1926). Clinton v. Jones, 117 S. Ct. 1636, 1650 n.40 (1997).

#### **F. Ideal Case For a Supreme Court Decision**

Unfortunately, the current state of Eleventh Amendment jurisprudence among the circuit courts provides little certainty. States and Litigants should have some degree of certainty that THACKER applies to both Federal and State Arm-of-the-State entities when conducting commercial activities. States are persuaded by political pressure, Federal Courts are not. State entities are therefore challenges for "Arm-of-the-State" analysis and

present distinct situations where a State's own assessment of sovereign status should carry no weight. Even more troubling is the wide divergence of tests utilized by the circuits that wrongfully make some States more sovereign than others. Perhaps more importantly, the circuits differ over the relevant weight to be accorded the various factors. **A rule of absolute immunity is in danger of becoming a State's instrument of injustice unless this Court rules otherwise.**

**This case presents an ideal vehicle to provide guidance and uniformity with respect to a confusing yet new fundamental aspect of Arm-of-the-State sovereign immunity.**

### **VIII. CONCLUSION**

If the Court pleases: BROWN requests this Court to consider and correct all the wrongs cited herein including the main issue, secondary issues, and any others that this Court recognizes.

In light of this Court's THACKER precedent, BROWN asks this Court to confirm that CPIC's commercial activities are not subject to Eleventh Amendment immunity and thus clarify the immunity rules under the Eleventh Amendment that govern commercial activities of State entities with "Arm-of-the-State" status and sue and be sued clauses.

In the alternative, assuming that THACKER does not apply to State's commercial entities with "Arm-of-the-State" status and sue and be sued clauses, and

in light of BROWN's analysis of the Eleventh Circuit's four prong test, BROWN asks this Court to confirm that CPIC's "Arm-of-the-State" status under the Eleventh Amendment is denied.

BROWN requests this court to again open the courthouse doors by holding that, contrary to the lower courts' decisions, the District Court did have subject-matter jurisdiction to hear claims against CPIC because the Eleventh Amendment does not apply to CPIC.

BROWN requests this Court to grant any and all other relief to which the Petitioner may be or appear to be entitled.

The lower courts' analyses are mistaken and should be vacated.

The Court should grant this petition for a writ of certiorari.

Respectfully submitted,  
Roger Brown

  
Date: August 7, 2021

I swear under penalty of perjury that the statements made here in this Petition are true to the best of my knowledge and recollection.

Sign: /s/ Roger Brown, Petitioner

