No. 24-992

IN THE

Supreme Court of the United States

HIGHER EDUCATION LOAN AUTHORITY OF THE STATE OF MISSOURI,

Petitioner,

v.

JEFFREY GOOD, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR RESPONDENT JEFFREY GOOD

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QUESTION PRESENTED

Whether the Higher Education Loan Authority of the State of Missouri is an arm of the state that can raise a sovereign immunity defense to a private action under the Fair Credit Reporting Act.

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INTRODUCTION

Petitioner Missouri Higher Education Loan Authority (MOHELA) is in the business of servicing student loans nationwide on behalf of the U.S. Department of Education. In connection with its servicing responsibilities, MOHELA furnishes information about borrowers to credit reporting agencies. As a furnisher of credit report information, it is subject to duties under the Fair Credit Reporting Act (FCRA).

Respondent Jeffrey Good filed this action against MOHELA for violating its FCRA duties by failing to correct erroneous information on his credit report. Below, the Tenth Circuit concluded that MOHELA could not invoke state sovereign immunity to escape accountability for its actions. After conducting a comprehensive examination of the relationship between MOHELA and Missouri, the court concluded that MOHELA enjoyed substantial financial and operational independence from the state and, therefore, that it was not an arm of the state entitled to share in the state's constitutional immunity.

Further review is not warranted. The Tenth Circuit's analysis of MOHELA's independence under Missouri law faithfully adhered to this Court's guidance on the factors that courts should consider in the arm-of-the-state analysis. Nonetheless, MOHELA argues that the Court should jettison its past guidance in light of the decision in *Biden v. Nebraska*, 600 U.S. 477 (2023), that Missouri had standing to sue for harms to MOHELA. As the Tenth Circuit correctly recognized, however, the arm-of-the-state inquiry entails different considerations than standing analysis. No court of appeals has held otherwise.

The Tenth Circuit is also the first appellate court to consider MOHELA's status as an arm of the state. Its decision, therefore, does not conflict with the decision of any other court of appeals. Although MOHELA speculates that other circuits would reach a different outcome, the decisions on which it relies involve entities that have attributes that MOHELA does not share. Moreover, review *in this case* is not needed to resolve a hypothetical future conflict on MOHELA's status, especially because (1) this case is a poor vehicle for addressing the question presented, and (2) MOHELA's status as an arm is currently being litigated in circuits that MOHELA claims use an arm-of-the-state standard that differs from the one used below. Unless and until an actual conflict develops, the Court need not step in.

The Court should deny MOHELA's petition even if it takes up pending petitions regarding the status of the New Jersey Transit Corporation (NJ Transit). Unlike MOHELA, the NJ Transit petitioners raise a true conflict between two state supreme courts. Those cases, however, concern interstate sovereign immunity, not Eleventh Amendment immunity. The Court thus may resolve the conflict presented as to NJ Transit without revising the arm-of-the-state standard more generally. Resolution of those petitions is therefore likely to shed no light on the proper disposition of this case.

STATEMENT

1. MOHELA services respondent Jeffrey Good's student loans, and both it and the U.S. Department of Education furnished information about those loans to credit reporting agencies. After Mr. Good noticed errors on his credit report, he submitted disputes to

the three major credit reporting agencies, MOHELA, and the Department of Education. Although two of the credit reporting agencies corrected the information, the third, TransUnion, as well as MOHELA and the Department of Education, failed to do so. Pet. App. 2a–3a.

Mr. Good filed this action against TransUnion, MOHELA, and the Department of Education, seeking damages under the FCRA. *Id.* at 3a. TransUnion settled with Mr. Good. *Id.* at 3a n.1. MOHELA, however, moved for judgment on the pleadings under Federal Rule of Civil Procedure 12(c), arguing that it was immune to suit as an arm of Missouri. And the Department of Education moved to dismiss under Federal Rule of Civil Procedure 12(b)(1), invoking federal sovereign immunity. *Id.* at 84a, 95a. The district court granted both motions.

With respect to MOHELA, the court considered whether it was an arm of Missouri by weighing the Tenth Circuit's "*Steadfast*" factors. *See Steadfast Ins. Co. v. Agric. Ins. Co.*, 507 F.3d 1250 (10th Cir. 2007). Those factors are "(1) the character of the defendant under state law; (2) the autonomy of the defendant under state law; (3) the defendant's finances; and (4) whether the defendant is concerned primarily with state or local affairs." Pet. App. 86a (citing *Steadfast*, 507 F.3d at 1253). The district court concluded that three of the four factors supported MOHELA's status as an arm of the state, while the finances factor weighed against that finding. *Id.* at 90a–91a. The

court then concluded that MOHELA was entitled to immunity as an arm of the state. *Id.* at 92a–93a.[1]

2. The Tenth Circuit reversed. *Id.* at 10a. At the outset, the court explained that *Biden v. Nebraska* did not resolve the question presented. *Id.* at 29a. *Biden* held that economic harm to MOHELA caused by a federal student-loan forgiveness program sufficed to provide Missouri standing under Article III to challenge that program. *Biden*, 600 U.S. at 489. Noting *Biden*'s observation that "a public corporation can count as part of the State for some but not other purposes," *id.* at 493–94 n.3 (internal quotation marks omitted), the Tenth Circuit explained that *Biden* did not speak to "whether MOHELA is *so interconnected* with Missouri that it could be considered an arm of the state for purposes of the Eleventh Amendment." Pet. App. 29a. The court therefore concluded that it had to "undertake a full arm-of-the-state analysis to resolve this appeal." *Id.* at 31a.

To do so, the court applied the framework previously set out in *Hennessey v. University of Kansas Hospital Authority*, 53 F.4th 516, 524 (10th Cir. 2022), which in turn followed this Court's guidance in *Hess v. Port Authority Trans-Hudson Corp.* 513 U.S. 30 (1994). Under the *Hennessey* framework, "the burden falls on the entity asserting that it is an arm of the state." Pet. App. 15a (quoting

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[1] With respect to the Department of Education, the district court held that the FCRA did not waive federal agencies' sovereign immunity. Pet. App. at 95a. The Tenth Circuit reversed in light of this Court's decision in *Department of Agriculture Rural Development Rural Housing Service v. Kirtz*, 601 U.S. 42 (2024), which held that the FCRA waives federal agencies' immunity to suit. Pet. App. 8a.

Hennessey, 53 F.4th at 524). To determine if the entity has met its burden, the court considers the *Steadfast* factors, which are dispositive if they "point in the same direction." *Id.* at 19a–20a. If they do not, the court evaluates "the twin reasons underlying the Eleventh Amendment—avoiding an affront to the dignity of the state and the impact of a judgment on the state treasury"—to resolve whether the entity is an arm of the state. *Id.* at 20a (cleaned up).

The Tenth Circuit concluded that the first *Steadfast* factor—the character of the entity under state law—supported MOHELA's assertion of immunity. *Id.* at 33a. The court explained that Missouri law characterizes MOHELA as a "public instrumentality" that performs an "essential public function." *Id.* (emphasis removed, quoting Mo. Rev. Stat. § 173.360). The court also observed that MOHELA is "assigned" to an executive department of the state, *id.* at 34a, must comply with requirements respecting the conduct of public business by a public agency, *id.* at 35a (quoting Mo. Rev. Stat. § 173.365), and is exempt from taxation, *id.* Although the court recognized that MOHELA is incorporated as a "body politic and corporate," Mo. Rev. Stat. § 173.360, and that such separate corporate bodies "may not always qualify as arms of the state," the court found that consideration insufficient to "weigh[] against arm-of-the-state status." *Id.* at 37a.

In reaching this conclusion, the Tenth Circuit declined to consider the Missouri Supreme Court's decision in *Menorah Medical Center v. Health & Education Facilities Authority*, 584 S.W.2d 73 (Mo. 1979). *See* Pet. App. 38a. In that case, the state supreme court had held that a similar agency, the Missouri Health and Educational Facilities Authority

(MOHEFA), was an "entity apart from the state" under the state's constitution. 584 S.W.2d at 82. The Tenth Circuit did not consider that decision's application to MOHELA because the court concluded that Mr. Good had "effectively waived" reliance on that case by not presenting it to the district court. Pet. App. 39a.

As to the second *Steadfast* factor, the Tenth Circuit found that it "weigh[ed] *against* arm-of-the-state status." *Id.* This factor evaluates the entity's "autonomy" and encompasses a "broad range of considerations." *Id.* (quoting *Hennessey*, 53 F.4th at 536). The court recognized that "some ties and oversight will always remain between the state and an entity created by the state." *Id.* at 40a (quoting *Hennessey*, 53 F.4th at 536). But the "key inquiry is whether, in light of the entire relationship between the entity and the state, the entity retains substantial autonomy or if it operates with guidance or interference from the state." *Id.* (cleaned up). Here, the court found that "MOHELA has a substantial degree of autonomy." *Id.* at 41a.

Specifically, although MOHELA's board is appointed by the governor, *id.*, the Tenth Circuit recognized that that "the power to appoint is not the power to control," *id.* at 42a (quoting *Hennessey*, 53 F.4th at 537). The governor may only remove a board member for cause and may not veto or block MOHELA's actions. *Id.* at 42a, 44a. "MOHELA's board—not the Governor—appoints its leadership," sets compensation for officers, and can delegate hiring and other powers to the executive director. *Id.* at 44a. In addition, MOHELA's employees are not classified as state employees. *Id.* at 45a. They are not "subject to the State's merits system for hiring or the State's

retirement plan." *Id*. Their salaries are determined by MOHELA, not the state, and their compensation is not paid out of the state's coffers. *Id*.

Moreover, the Tenth Circuit further observed that MOHELA enjoys "relatively unfettered ability to own property." *Id*. at 46a. Although a state agency would need to approve of the sale of student loan notes that are guaranteed by the state, the court recognized that this restriction was only a "carveout from the general rule that MOHELA has substantial autonomy with regard to the acquisition and disposition of property," *id*. at 47a, and, in any event, that the restriction "protects the State's interest as guarantor more than it operates as a substantive restraint on MOHELA's autonomy," *id*. at 48a. Further, MOHELA's authority to enter into contracts "overwhelmingly favor[ed]" the autonomy factor *Id*. (quoting *Hennessey*, 53 F.4th at 540).

The Tenth Circuit also noted that MOHELA could set policy without state oversight and control. *Id*. MOHELA adopts its own bylaws, has exclusive control over its assets, and appoints its own executive director. *Id*. at 48a–49a. The court recognized that Missouri law imposes "relatively small exception[s] to the general rule of autonomy," such as the conditional requirement to contribute to the state's Lewis and Clark Discovery Fund, which supports capital projects and technology development at colleges in the state, *id*. at 50a–51a (citing Mo. Rev. Stat. §§ 173.385.2, 173.392.1–.2), and "minor" limitations on its financial operations, *id*. at 51a. The court concluded, however, that those restrictions did not prevent MOHELA from exercising independent "control over matters of substance." *Id*. (quoting *U.S. ex rel. Oberg v. Pa.*

Higher Educ. Assistance Agency, 804 F.3d 646, 675–76 (4th Cir. 2015)) (*Oberg III*).

The court also noted that MOHELA's authority under Missouri law "[t]o sue and be sued and to prosecute and defend, at law or in equity, in any court having jurisdiction of the subject matter and of the parties," Mo. Rev. Stat. § 173.385.1(3), further "weighs in favor of MOHELA's autonomy." *Id.* at 52a.

"After reviewing the various subfactors described above in their totality, [the court concluded] that, in light of the entire relationship between MOHELA and the State of Missouri, MOHELA retains substantial autonomy in its operations, and operates with little, if any guidance or interference from the State." *Id.* (cleaned up).

Turning to the third *Steadfast* factor, the Tenth Circuit next considered MOHELA's financial independence. The court concluded that this factor too "weighs against arm-of-the-state status." *Id.* at 54a. As MOHELA conceded, it "receives no direct financial assistance" from Missouri. *Id.* at 55a. In addition, MOHELA "can generate its own revenue," and "its ability to collect this revenue is not subject to any meaningful degree of State oversight." *Id.* Through fees from servicing student loans, investments, and bond issuances, MOHELA raises money from "multiple relevant revenue streams." *Id.* MOHELA's bonds are its sole responsibility; they are not backed by the state. *Id.* at 60a.

In addition, MOHELA's "revenues and assets are not considered to be public funds," *id.* at 61a, and aside from amounts that may be contributed to the Lewis and Clark Discovery Fund, "MOHELA retains exclusive control over its assets," *id.* at 62a. And the

Discovery Fund contributions, which MOHELA has the right to delay, are "a discrete exception to the general wall of separation between the finances of MOHELA and the State." *Id.* at 63a.

Missouri also is not responsible for MOHELA's debts. Under Missouri law, "MOHELA is not authorized to create any debt for which the State would be responsible." *Id.* at 64a (citing Mo. Rev. Stat. §§ 173.385.1(6), 173.410). And MOHELA has "concede[d] that the State would not be liable for a judgment against it." *Id.*

Given these indicia of MOHELA's financial independence, the Tenth Circuit concluded that the third *Steadfast* factor "weighs strongly against arm-of-the-state status." *Id.* at 69a.

Finally, the court addressed the fourth *Steadfast* factor: "whether the entity in question is concerned primarily with local or state affairs." Id. at 70a (quoting *Hennessey*, 53 F.4th at 528). The court concluded that this factor supported arm-of-the state status because MOHELA was established to address statewide, not local, concerns and, in the court's view, its nationwide student-loan operations did not counterbalance its statewide focus. *Id.* at 70a–72a.

Because the four *Steadfast* factors did not all point in the same direction, the court proceeded to the second step of the *Hennessey* analysis and considered "the Eleventh Amendment's twin reasons for being: protecting a state's dignitary interests and protecting a state treasury." *Id.* at 73a. Addressing the second reason first, the court explained that "Missouri does not bear legal liability for a judgment against MOHELA," and where "there is no risk to the State's treasury, … the foremost reason for sovereign

immunity points strongly away from considering MOHELA to be an arm of the state." *Id.* at 74a–75a.

The court determined that a "focus on protecting the State's dignitary interests" leads to "the same conclusion." *Id.* at 75a. The court recognized that "[s]afeguarding the dignity of the states is a critically important function of the Eleventh Amendment." *Id.* Here, the court explained, the state law sent "'mixed signals' as to whether a suit against MOHELA would truly be a suit that implicates the State's dignity," given MOHELA's significant financial and operational independence from Missouri. *Id.* at 76a. Again, the court's analysis did not take account of the state supreme court's decision in *Menorah Medical Center*, 584 S.W.2d at 78, that had held that MOHEFA was not part of Missouri under the state constitution.

Thus, after a careful application of the established factors to Missouri law, the court of appeals concluded that MOHELA had failed to satisfy its burden of proving that it was an arm of Missouri entitled to share in the state's sovereign immunity.

REASONS FOR DENYING THE WRIT

The Tenth Circuit's decision was correct, and it does not conflict with the decision of another court of appeals or of this Court. This Court should deny review.

I. The decision below faithfully applies settled arm-of-the-state principles.

This Court has recognized that not every "state instrumentality may invoke the State's immunity." *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997). Rather, the question whether a particular entity is entitled to immunity requires an inquiry

"into the relationship between the State and the entity in question." *Id.* Federal law determines whether an entity has "independent status" or "instead is an arm of the State" entitled to immunity. *Id.* at 429 n.5. That inquiry, in turn, requires an examination of the "nature of the entity created by state law." *Id.* at 429 (quoting *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 280 (1977)).

The court of appeals faithfully followed these principles, guided by this Court's precedents. *See* Pet. App. 19a–20a & n.10; *Hennessey*, 53 F.4th at 528; *see also Hess*, 513 U.S. at 44–51 (describing factors that informed the Court's conclusion that a bi-state entity was not entitled to immunity). Applying its *Steadfast* framework, the court reviewed Missouri law to evaluate MOHELA's character under state law, its autonomy, its financial independence, and its geographic reach, Pet. App. 19a, and the "twin reasons underlying the Eleventh Amendment—avoiding an affront to the dignity of the state and the impact of a judgment on the state treasury," *id.* at 20a (cleaned up); *see Hess*, 513 U.S. at 47 ("When indicators of immunity point in different directions, the Eleventh Amendment's twin reasons for being remain our prime guide.").

MOHELA does not contend that the court below ignored any evidence that it asked the court to consider. Rather, MOHELA argues that the court erred in conducting such a fact-intensive examination of the nature of the relationship between MOHELA and Missouri. According to MOHELA, an entity should be considered an arm of the state whenever "a State uses a state-controlled instrumentality to perform public functions." Pet. 4; *see id.* at 28. This Court's precedents, however, have recognized that an

entity's status as an arm-of-the-state requires a searching inquiry into "the relationship between the State and the entity." *Regents*, 519 U.S. at 429 & n.5; *see Hess*, 513 U.S. at 44 (referring to "indicators of immunity or the absence thereof); *Mt. Healthy*, 429 U.S. at 280 (considering multiple attributes of a school board to conclude that it was not an arm of the state). MOHELA identifies no arm-of-the-state precedent of this Court, or any court, that supports its expansive conception of the types of entities that can share the state's immunity.

Rather than rely on arm-of-the-state precedent, MOHELA focuses on *Biden*'s holding that Missouri had Article III standing to litigate economic harm to MOHELA. Pet. 23–30. But *Biden* itself recognized that "a public corporation can count as part of the State for some but not other purposes." 600 U.S. at 494 n.3 (internal quotation marks omitted). Accordingly, the Court's conclusion that "harm to MOHELA is also a harm to Missouri," *id.* at 490, does not answer the question whether "MOHELA is *so interconnected* with Missouri that it could be considered an arm of the state for purposes of the Eleventh Amendment." Pet. App. 29a. As this Court stated in *Regents*, "the question whether a money judgment against a state instrumentality … would be enforceable against the State is of considerable importance to any evaluation of the relationship between the State and the entity … being sued." 519 U.S. at 430. That question, though, was not important to the standing determination in *Biden*. It would also not be important under the "control" test that MOHELA now advances, because MOHELA's test would automatically treat a judgment against the entity as one "against the State." *See* Pet. 25. The court below was plainly correct in concluding

that *Biden* did not address whether MOHELA qualified as an arm of the state. Pet. App. 27a–31a. No other court has read *Biden* differently.

MOHELA also misreads the Tenth Circuit's analysis when it asserts that the decision below rests "primarily" on Missouri's lack of responsibility for a judgment against MOHELA. Pet. 2. The Tenth Circuit noted that the "foremost" reason for immunity is to protect the state treasury from judgments, Pet. App. 20a, citing *Hess*'s observation that protection of the state treasury is the "most salient" consideration, *id.* at 20a n.11 (quoting *Hess*, 513 U.S. at 48). But although an important consideration, the court below also made clear that "whether a judgment would impact the state treasury is not dispositive." Pet. App. 21a n.11.

Moreover, the Tenth Circuit recognized its duty to consider Missouri's dignitary interest in resolving MOHELA's status. *See* Pet. App. 75a, 80a. MOHELA disagrees with the court's conclusion that the limits imposed on it are "relatively minor" in relation to the significant operational and financial autonomy it has. Pet. 29 (quoting Pet. App. 51a). But this Court's review is not warranted to redo the lower court's fact-bound analysis of MOHELA's "independent status." *Regents*, 519 U.S. at 429 n.5.

Finally, although MOHELA asserts that Missouri has "broad latitude" as to how to structure entities, Pet. 30, the Tenth Circuit correctly stated that the "arm-of-the-state inquiry is ultimately a matter of federal law." Pet. App. 15a; *see Regents*, 519 U.S. at 429 n.5. As this Court's cases attest, federal law constrains the class of entities that qualify as arms of the state. Here, the Tenth Circuit, applying settled

law, correctly held that MOHELA failed to satisfy its burden that it fell within that class.

II. The decision below does not conflict with the decision of any court of appeals.

The Tenth Circuit is the first court of appeals to consider whether MOHELA is an arm of Missouri. Its entity-specific decision therefore does not conflict with the decision of any court of appeals. Nor has any court of appeals adopted the "control" test that MOHELA now advances in this Court. Rather, following *Hess*, *Regents*, and this Court's other arm-of-the-state precedents, lower courts uniformly evaluate the extent of a state's control over an entity as one of several factors relevant to the question whether the entity shares the state's immunity.

To be sure, lower courts have categorized those factors in different ways. But those differences in expression do not signify "meaningful difference[s]" in approach. *See* Pet. App. 18a (explaining that, in various cases, "how we have framed the arm-of-the-state test—*viz.*, how many factors there are and the precise contours of each factor—is simply cosmetic"). Instead, contrary to MOHELA's suggestion, Pet. 30–32, courts reach different outcomes for different entities because of the immense variation in how entities relate to the state whose immunity they seek to invoke—not because of semantic differences in the way courts articulate the arm-of-the-state standard. The decision below, for instance, rested on the court of appeals' fact-specific examination of the relationship between MOHELA and Missouri. That other courts have found different entities that are structured differently to be arms of their respective states does not represent a conflict among the courts of appeals.

A. MOHELA is incorrect in asserting that the decision below conflicts with *Puerto Rico Ports Authority v. Federal Maritime Commission*, 531 F.3d 868 (D.C. Cir. 2008). In that case, the D.C. Circuit divided the relevant arm-of-the-state factors into three categories: "(1) the State's intent as to the status of the entity, including the functions performed by the entity; (2) the State's control over the entity; and (3) the entity's overall effects on the state treasury." *Id.* at 873. Applying that framework, the court concluded that the Puerto Rico Ports Authority (PRPA) was an arm of Puerto Rico. *Id.* at 881.

To start, the D.C. Circuit considered the same types of facts and factors as the Tenth Circuit does. Although the D.C. Circuit, unlike the Tenth, does not list as a separate factor "whether the entity in question is concerned primarily with local or state affairs," *Steadfast*, 507 F.3d at 1253 (describing the fourth factor), it includes the same consideration within the first factor. *See P.R. Ports Auth.*, 531 F.3d at 875 (looking to "whether PRPA performs functions typically performed by state governments, as opposed to functions ordinarily performed by local governments or non-governmental entities").

Nonetheless, MOHELA argues that the Tenth Circuit's analysis here conflicts with the D.C. Circuit's analysis in *Puerto Rico* because the D.C. Circuit declined to focus "largely if not entirely on the entity's financial impact on the state treasury and whether the State must pay judgments against the entity." Pet. 16 (quoting *P.R. Ports Auth.*, 531 F.3d at 873). But MOHELA is wrong to characterize the Tenth Circuit's analysis as so heavily focused on finances. In fact, the Tenth Circuit considered many non-financial factors in assessing the relationship between MOHELA and

Missouri. *See* Pet. App. 32a–53a, 70a–72a, 75a–79a. Moreover, the D.C. Circuit did not conclude that financial impact on Puerto Rico had no influence in the arm-of-the-state analysis. To the contrary, the "overall effects on the state treasury" is one of factors expressly included in that court's framework. *See P.R. Ports Auth.*, 531 F.3d at 873–74 ("[W]e must apply the three-factor arm-of-the-state test and look to state intent, state control, and overall effects on the state treasury."). Indeed, the D.C. Circuit's conclusion that PRPA was an arm of Puerto Rico rested on threats to the Puerto Rican treasury: Puerto Rico was "legally liable for some of PRPA's actions," and "judgments in those suits [would come] out of the Commonwealth's coffers." *Id.* at 880. And, also unlike here, Puerto Rico could be "substituted for PRPA and directly responsible for PRPA's actions in certain cases." *Id.* The D.C. Circuit thus found it "factually incorrect" to suggest that "PRPA's actions do not affect the state treasury." *Id.*

MOHELA is also incorrect in suggesting that *Puerto Rico* "attached no weight" to the entity's operational independence, such as its authority to enter contracts and sue and be sued. Pet. 23. Although the D.C. Circuit found other factors more probative, it did not declare those factors irrelevant to an arm-of-the-state analysis. For instance, PRPA exercised "regulatory authority" over pilot services, navigation, marine trade, and ship inspections. *Id.* at 875. PRPA was subject to Puerto Rico's "Administrative Procedures Act and Public Service Personnel Act." *Id.* at 876. Four of the five members of PRPA's board are high-ranking government officials who hold their board seats *ex officio* as part of their governmental duties, and the governor may remove all four from

their offices "*at will*." *Id.* at 877. PRPA's executive director, moreover, was Puerto Rico's secretary of state. *Id.* at 878. And there was record evidence of the governor exercising *de facto* control over PRPA. *Id.* By contrast, MOHELA has not introduced or identified analogous evidence of legal or actual control by the state.

MOHELA notes that the First Circuit has held that PRPA is not an arm of Puerto Rico. Pet. 16–17 (citing *Grajales v. P.R. Ports Auth.*, 831 F.3d 11 (1st Cir. 2016)). But that conflict with the D.C. Circuit's conclusion as to the same entity arose primarily out of the two courts' different views of the significance of Puerto Rico law governing PRPA. *See Grajales*, 831 F.3d at 21–23 (emphasizing that PRPA is described under commonwealth law as an entity "separate and apart" from the "Government"); *id.* at 26 (interpreting Puerto Rico's potential liability as a "limited exception to the general fiscal independence that PRPA enjoys"). That disagreement relates solely to PRPA and does not suggest that either court would disagree with the Tenth Circuit's conclusion—reached without taking account of the Missouri Supreme Court's decision in *Menorah Medical Center*—that MOHELA is not an arm of Missouri.

B. The decision below also does not conflict with *Kohn v. State Bar of California*, 87 F.4th 1021 (9th Cir. 2023) (en banc), *cert. denied*, 144 S. Ct. 1465 (2024). In *Kohn*, the Ninth Circuit reaffirmed its long-standing conclusion that the California State Bar has immunity from suit, while "updat[ing]" its arm-of-the-state test to reflect recent case law. *Id.* at 1023. That court's prior test had "placed the greatest weight on … whether a money judgment would be satisfied out of state funds." *Id.* at 1027. Agreeing with the D.C.

Circuit that the financial impact on the state treasury was "relevant," but not "dispositive," the Ninth Circuit adopted the D.C. Circuit's framework for assessing an entity's arm-of-the-state status. *Id.* at 1030 (quoting *P.R. Ports Auth.*, 531 F.3d at 874).

Kohn's analysis of the California state bar's status does not suggest that the Ninth Circuit would regard MOHELA as an arm of Missouri. The court emphasized that California state bar is "codified in the California Constitution," and California courts regarded the state bar as an "administrative arm" of the judiciary. 87 F.4th at 1032 (internal quotation marks omitted). The state bar exercises state regulatory authority in licensing and regulating lawyers, *id.* at 1033, and does so subject to "significant control" exercised by the California Supreme Court, *id.* at 1035.

MOHELA contends that *Kohn* gave no weight to the state bar's authority to "sue and be sued" and to hold property in its own name, and its status as a corporation. Pet. 22–23. But although *Kohn* stated that sue-and-be-sued authority had "limited relevance," *id.* at 1028, it did not ignore that authority. Instead, it held that, in the context of state bar proceedings, "the most reasonable construction of the 'sue and be sued' provision is as part of [California's] statutory scheme to establish the conditions under which the State Bar may be sued in *state* court," particularly as to matters of attorney admissions and discipline. *Id.* at 1034 & n.10. *Kohn* likewise considered the status of State Bar property in connection with its overall analysis of whether the state exercised "control" over the Bar and whether it was "a financially self-sustaining, independent entity." *Id.* at 1036. By contrast, the Tenth Circuit

found that MOHELA enjoys "relatively unfettered discretion to own property," Pet. App. 46a, and can generate revenue without "any meaningful degree of State oversight," *id.* at 55a, and that its "revenues and asset are not considered to be public funds," *id.* at 61a. Finally, neither *Kohn* nor the Tenth Circuit found the entity's corporate status to be a significant factor in its arm-of-the-state analysis. *See Kohn*, 87 F.4th at 1032–33 (finding "public corporation" designation to be "inconclusive"); Pet. App. 37a (giving no weight to MOHELA's corporate status).

C. The Third Circuit cases on which MOHELA relies also turned on facts not present here. *See* Pet. 19. In *Karns v. Shanahan*, 879 F.3d 504 (3d Cir. 2018), the Third Circuit held that NJ Transit was an arm of the state. *Id.* at 510. In reaching that conclusion, the Third Circuit considered "(1) whether the payment of the judgment would come from the state; (2) what status the entity has under state law; and (3) what degree of autonomy the entity has." *Id.* at 513 (quoting *Bowers v. NCAA*, 475 F.3d 524, 546 (3d Cir. 2007)). Although the Third Circuit had earlier given the state-treasury factor the greatest weight, *id.* at 513, it had later altered its approach so that "each case must be considered on its own terms, with courts determining and then weighing the qualitative strength of each individual factor in the unique factual circumstances at issue." *Id.* at 514 (citing *Maliandi v. Montclair State Univ.*, 845 F.3d 77, 84 (3d Cir. 2016)).

In concluding that NJ Transit was an arm of New Jersey, the court emphasized several facts not analogous to those present here: NJ Transit can exercise the state's eminent domain powers, as well as "the official police powers of the state." *Id.* at 517. State courts have regarded NJ Transit as a state

agency in a variety of contexts. *Id.* at 517–518. And "[t]he Commissioner of Transportation, an Executive Branch official who is the chairman of the NJ Transit governing board, has the power and duty to review NJ Transit's expenditures and budget," and "[t]he Governor can veto any action taken by NJ Transit's governing board." *Id.* at 518.

Similarly, the Third Circuit's decision in *Maliandi* suggests no conflict among the circuits. There, after conducting a "fact-intensive" analysis, the court of appeals concluded that a state university was an arm of New Jersey. 845 F.3d at 84 (quoting *Bowers*, 475 F.3d at 545). Among other things, the court noted the state's role in defending the university in litigation, *id.* at 94, the university's authority to exercise the state's power of eminent domain, *id.* at 95, the requirement to comply with the state's Administrative Procedure Act for disciplinary or employment proceedings and the availability of judicial review, *id.*, and the application to the university of the state's civil-service laws and state employee benefits programs, *id.* In addition, the governor had the "sole power" to negotiate collective bargaining agreements for the university, *id.* at 97, and the Secretary of Higher Education possessed extensive oversight, rulemaking, and planning authority over the entity, *id.* at 97–98. While MOHELA does not share any of these characteristics, the Third Circuit's analysis reflects the same considerations that guided the Tenth Circuit in this case.

D. MOHELA points to the Fifth Circuit's arm-of-the-state analysis as articulated in *In re Entrust Energy*, Inc., 101 F.4th 369 (5th Cir. 2024). In *Entrust*, the court held that the impact on the state treasury tipped the scales against immunity where the

relevant considerations were evenly split. *Id.* at 383. That case, however, does not suggest that the treasury factor would play an outsized role in the arm-of-the-state analysis if other factors predominantly support a different outcome. And MOHELA does not contend that the decision below would have been different in the Fifth Circuit. *Entrust* thus does not suggest that review is warranted in this case.

III. This case is a poor vehicle for review of the question presented.

This case comes to this Court on MOHELA's motion for judgment on the pleadings. The Tenth Circuit held, and MOHELA does not dispute, that MOHELA bore the burden of demonstrating that it is an arm of Missouri. *See* Pet. App. 15a. MOHELA, however, elected not to present evidence that would buttress its claim that it functions as an arm of Missouri, choosing instead to rest solely on Missouri statutes. The effect of that litigation choice is to deprive this Court of a complete factual record for evaluating MOHELA's contention that it is an arm of Missouri. *Cf. U.S. ex rel. Oberg v. Pa. Higher Educ. Assistance Agency*, 745 F.3d 131, 140 (4th Cir. 2014) (noting need for discovery "on the question whether [student-loan entity] is truly subject to sufficient state control to render it a part of the state." (cleaned up)).

Moreover, the court below found several gaps in the MOHELA's arguments concerning its relationship with Missouri. For instance, MOHELA asserted that a lawsuit against it would offend Missouri's dignitary interests, but the court of appeals found this argument to be "underdeveloped." Pet. App. 78a. The court also found that MOHELA could have developed, but did not, its argument that Missouri's litigation stance in

Biden should be taken into account in determining MOHELA's status as an arm of the state. *Id.* at 79a. Although Missouri has now filed an amicus brief in this Court, the state did not participate in proceedings before the district court or the court of appeals, as amicus or otherwise.

The Tenth Circuit also declined to consider Mr. Good's argument that entities like MOHELA are not considered part of the state under the state's constitution. Although this information would be relevant to the federal law question whether MOHELA shares Missouri's constitutional immunity, the court held that Mr. Good could not rely on it because he did not rely on the state supreme court's *Menorah Medical Center* decision in the district court. *See* Pet. App. 38a. While Mr. Good disagrees with the court's waiver analysis, the court's refusal to consider the state supreme court's decision did not lead to an incorrect outcome. If that outcome were subject to further review by this Court, however, it would be inappropriate to ignore a state supreme court decision so directly relevant to the status of MOHELA under state law. Yet the petition ignores *Menorah Medical Center*, and Missouri's amicus brief likewise fails to grapple with that decision in attempting to explain why MOHELA had to be created "separate from the treasury and the legislature" to comply with the state's constitution. *See* Mo. Amicus Br. 7.

This Court is one of "review, not of first view." *Moody v. NetChoice, LLC*, 603 U.S. 707, 726 (2024) (internal quotation marks omitted). Given the gaps in the record and the briefing below that the Tenth Circuit identified, this case is not well suited for this Court's review of MOHELA's status as an arm of Missouri.

Buttressing that conclusion is the pendency of other cases outside of the Tenth Circuit that may provide the Court a more complete record on which to address MOHELA's status. *See Coffey v. Higher Ed. Loan Auth. of Mo.*, No. 25-10946 (11th Cir.); *Am. Fed. of Teachers v. Higher Ed. Loan Auth. of Mo.*, No. 1:24-cv-2460 (D.D.C.); *Maldonado v. Higher Ed. Loan Auth. of Mo.*, No. 3:24-cv-7850 (N.D. Cal.). Notably, the latter two cases are pending in district courts in the D.C. Circuit and Ninth Circuits, respectively. Given MOHELA's position that those circuits apply an arm-of-the-state analysis that meaningfully differs from the analysis that the Tenth Circuit conducted (and Mr Good's position that they do not), this Court's review would benefit from decisions by the D.C. and Ninth Circuit's applying their standards to MOHELA. Moreover, Missouri has filed amicus briefs in *American Federation of Teachers* and *Maldonado*, so the lower courts in those cases will have an opportunity to consider the state's views as part of their factual analyses. ECF 31, *Am. Fed. of Teachers*, *supra*; ECF 22, *Moldonado*, *supra*. By denying the petition, the Court would give these courts an opportunity to tackle the question of MOHELA's status, thereby providing a better foundation for determining whether this Court's review might be warranted (and, if so, what the proper outcome should be).

IV. The Court should decline review here regardless of whether it grants review in the NJ Transit cases.

The pending petitions in *Galette v. New Jersey Transit Corp.*, No. 24-1021, and *New Jersey Transit Corp. v. Colt*, No. 24-1113, seek review of decisions of the highest state courts of Pennsylvania and New

York, respectively. Those courts have issued conflicting decisions on whether NJ Transit is entitled to interstate sovereign immunity, *i.e.*, immunity to suit in the state courts of other states. *See Franchise Tax Bd. of Cal. v. Hyatt*, 587 U.S. 230 (2019). The Court should decline review here regardless of whether it takes up the NJ Transit cases.

To begin with, the arm-of-the-state analysis applicable in the NJ Transit cases is not necessarily the analysis that applies in this case. Rather, those cases concern, and the state courts in those cases disagreed on, whether the arm-of-the-state analysis used to evaluate interstate sovereign immunity is the same analysis that applies in the Eleventh Amendment context. The New York Court of Appeals indicated that it thought the same analysis applied. No. 24-1113 Pet. App. 8a–10a. By contrast, the Pennsylvania Supreme Court stated that the arm-of-the-state factors "must be weighed differently in the context of interstate sovereign immunity … as compared to the immunity associated with the Eleventh Amendment." No. 24-1021 Pet. App. 17a. Resolving that disagreement would not impact this case.

Moreover, the NJ Transit petitions concern a situation not presented here: conflicting rulings by two appellate courts about a particular entity's entitlement to immunity. The Court may thus resolve the status of NJ Transit by applying established arm-of-the-state factors to the elements of state law that delineate NJ Transit's relationship to New Jersey. That analysis would not require the Court to consider—as MOHELA asks the Court to do in this case, *see* Pet. 4, 25–28—whether to fashion a novel test

for assessing an entity's status as an arm-of-the-state based on *Biden v. Nebraska*.

Finally, denying MOHELA's petition would not prevent MOHELA from raising the issue again in the lower courts. This litigation has not moved past the district court's grant of a judgment on the pleadings for MOHELA. MOHELA will accordingly have an opportunity to raise its Eleventh Amendment immunity defense, accompanied by evidence, on a motion for summary judgment and, if it does not prevail, to seek appellate or Supreme Court review. *See, e.g.*, *Oberg III*, 804 F.3d at 653 (noting that the defendant had first moved to dismiss, arguing that it was an arm-of-the-state, and later moved for summary judgment on that same basis). There is thus no reason to delay further progress of this lawsuit by holding MOHELA's petition pending the outcome of a decision in the NJ Transit cases.

This Court "generally await[s] final judgment in the lower courts before exercising … certiorari jurisdiction." *Va. Mil. Inst. v. United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting denial of certiorari). For the reasons outlined above, there is good reason to adhere to that policy here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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