No. 24-992

IN THE

Supreme Court of the United States

THE HIGHER EDUCATION LOAN AUTHORITY OF THE STATE OF MISSOURI,

Petitioner,

v.

JEFFREY GOOD, AND THE UNITED STATES DEPARTMENT OF EDUCATION,

Respondents.

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

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

SCHOLARLY AUTHORITIES

INTRODUCTION

This case presents an excellent vehicle for resolving two questions about the arm-of-the-state test that divide the lower courts. Both questions presented involve pure legal issues that were fully briefed and squarely decided below. And there are no alternative holdings or potential jurisdictional defects that would frustrate this Court's review.

Respondent is thus left to argue that courts' different formulations of the arm-of-the-state test have no real-world impact. In Respondent's telling, each decision rests on the fact-specific application of multi-factor balancing tests to different state entities that have their own unique structure and characteristics. Yet that argument is belied by the fact that lower courts, applying different tests, have reached different conclusions about the same state entities, including about MOHELA itself. See *infra* § I.

Even if that were not the case, this Court's review would still be required. To allow lower courts to continue to apply different tests is "effectively to conclude that uniformity is not a particularly important objective with respect to the legal question at issue." Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1179 (1989). In contrast, a decision by this Court adopting "as soon as possible, a clear, general principle of decision" would have the "obvious advantage" of enhancing predictability. *Id.*

As Missouri and 19 other States explain, the States have a paramount interest in clarity and predictability regarding when their sovereign immunity covers the entities they create to perform important public functions. Such clarity allows state legislatures to make informed decisions when they create and revise state instrumentalities. See Br. of Amici Curiae the States, at

2. And it allows state instrumentalities and the state officials who oversee them to meaningfully assess the legal risks of their actions. *Id.* The uncertainty caused by the present state of affairs is thus causing real harm to Missouri and other States. For that reason, and because the decision below fails to respect Missouri's dignity and sovereign right to decide how to structure its instrumentalities to perform its public functions, the petition for writ of certiorari should be granted.

ARGUMENT

I. THE DECISION BELOW IMPLICATES TWO CIRCUIT SPLITS.

Respondent acknowledges that the circuit courts have developed different arm-of-the-state tests, but claims the differences "do not signify meaningful differences in approach." BIO 14 (cleaned up). Respondent is mistaken.

1. In the decision below, the Tenth Circuit acknowledged that circuit courts are divided on whether a state treasury's liability for an entity's judgments is the most important factor in determining whether the entity is an arm of the state. Several circuits, including the Tenth, treat such liability as the "foremost" factor. Pet. App. 20a n.11. But the D.C., Ninth, and Third Circuits "have jettisoned arm-of-the state tests that give any special weight to the question of impact on the state treasury." *Id.*

That circuit split is directly implicated in this case, and cannot be dismissed on the ground that the Tenth Circuit considered "many non-financial factors" and was not "heavily focused on finances." BIO 15. The fact that Missouri is not statutorily liable for MOHELA's debts and judgments influenced the court's

determinations at both steps of its analysis. Pet. 14-15. At the first step, it was a reason the "finances factor" weighed "strongly against arm-of-the-state status." Pet. App. 69a; see also *id.* at 54a; 64a-70a. At the second step, it was why the "foremost reason for sovereign immunity"—protection of the state treasury from liability—pointed "strongly away from considering MOHELA to be an arm of the state," *id.* at 74a-75a, and was partly why the court thought it would not be an "affront to Missouri's sovereign dignity to permit this action to proceed," *id.* at 77a-78a (cleaned up).

Nor can the circuit split be dismissed as mere "semantic difference[]" with no real-world impact. BIO 14. To downplay the material difference *among* the circuits, Respondent misleadingly cites the Tenth Circuit's description of its *own* various formulations of the test as not "signify[ing] meaningful difference[s]" in approach. *Id.* (quoting Pet. App. 18a). And more fundamentally, Respondent's contention is belied by the fact that courts on opposite sides of the split repeatedly have reached different conclusions about the same entities.

The First Circuit and D.C. Circuit have reached different conclusions about the Puerto Rico Ports Authority. See Pet. 13-14, 16-17. That is not simply due to "the two courts' different views of the significance of Puerto Rico law governing PRPA." BIO 17. It is because the First Circuit treated the treasury factor as "dispositive," holding that PRPA was not an arm of Puerto Rico because the Commonwealth would not, "as a legal matter, be liable for a judgment against PRPA in this case." *Grajales* v. *P.R. Ports Auth.*, 831 F.3d 11, 18, 29 (CA1 2016). The D.C. Circuit reached the opposite conclusion after rejecting the contention that "there is no sovereign immunity if the State is not

obligated to pay a judgment in the particular case at issue." *P.R. Ports Auth.* v. *Fed. Mar. Comm'n*, 531 F.3d 868, 879 (CADC 2008) ("that approach would inappropriately convert a *sufficient* condition for sovereign immunity into the single *necessary* condition for arm-of-the-state status").

The different treatment of the treasury factor has also caused courts to reach different conclusions about the New Jersey Transit Corporation (NJ Transit). Compare *Galette* v. *N.J. Transit*, 2024 WL 5457879, at *10 (Pa. Mar. 12, 2025) (holding that NJ Transit is an arm of the state and declining to give the treasury factor "significant weight"), pet. for cert. docketed No. 24-1021; *Colt* v. *N.J. Transit Corp.*, 2024 WL 4874365, at *7 (N.Y. Nov. 24, 2024) (holding that New Jersey's lack of legal lability outweighs factors that lean toward arm-of-the-state status), pet. for cert. docketed No. 24-1113. Indeed, the Third Circuit itself switched from holding that NJ Transit was not an arm of the state to holding that it was after it changed its "analytical framework" and no long ascribed "primacy to the state-treasury factor." *Karns* v. *Shanahan*, 879 F.3d 504, 513 (CA3 2018).

Finally, the different treatment of the treasury factor has led courts to reach different conclusions about MOHELA itself. In line with the decision below, a court that believed the factor to be "the most salient factor in Eleventh Amendment determinations" held that MOHELA is not an arm of Missouri, even though MOHELA performs an "essential public function" and is "generally treated as a state agency" under state law. *Pellegrino* v. *Equifax Info. Servs. LLC*, 709 F. Supp. 3d 206, 213, 219 (E.D. Va. 2024). A court that believed the factor "is not determinative of whether a governmental entity should enjoy Eleventh

Amendment immunity" reached the opposite conclusion. *Gowens* v. *Capella Univ., Inc.*, 2020 WL 10180669, at *4 (N.D. Ala. June 1, 2020).

2. The circuit courts are also divided on whether normal incidents of corporate status, such as the capacity to sue and be sued, own property, enter contracts, and make by-laws, are relevant to determining whether a public corporation established to perform public functions is an arm of the state. Pet. 20-23.

Respondent's claim that neither the Ninth Circuit in *Kohn* nor the Tenth Circuit below found "corporate status to be a significant factor in its arm-of-the-state analysis" attacks a straw man. BIO 19. The question presented is not about the entity's corporate status; it is about whether normal *incidents* of that status should be viewed as an indication that the entity is not an arm of the state even if it was established to perform a public function and is governed by a board of state officials and individuals appointed by the governor and confirmed by the state senate. The Tenth Circuit repeatedly cited incidents of MOHELA's corporate status as indicating that it is not an arm of Missouri. See Pet. 20-21; Pet. App. 46a-53a (citing MOHELA's ability to form contracts, own property, set policies, and sue and be sued). The Ninth Circuit rejected that approach. See *Kohn* v. *State Bar of Cal.*, 87 F.4th 1021, 1027-29 (CA9 2023) (jettisoning prior test that considered "whether the entity may sue or be sued" and "whether the entity has the power to take property in its own name or only the name of the state").

Respondent also claims that there is no conflict between the Tenth Circuit and the D.C. Circuit on this issue. In Respondent's telling, both courts considered the entity's ability to enter contracts and sue and be sued, but the D.C. Circuit simply "found other factors

more probative." BIO 16. The opinion belies that claim. The D.C. Circuit did not say that PRPA's ability to form its own contracts "overwhelmingly favors [it] having autonomy from the state," as the Tenth Circuit said about MOHELA. Pet. App. 48a-49a. Nor did the D.C. Circuit view PRPA's sue-and-be-sued clause as "[y]et another consideration … supporting a finding that [it] is autonomous" and not an arm of the state. *Id.* at 51a-52a. The D.C. Circuit simply listed these attributes without indicating that they bore any significance in determining whether PRPA was an arm of Puerto Rico. See *P.R. Ports Auth.*, 531 F.3d at 879.

Here, too, differences in how courts weigh incidents of corporate status have affected their conclusions about whether MOHELA is an arm of the state. As in the decision below, the *Pellegrino* court held that MOHELA is not an arm of Missouri because it viewed incidents of MOHELA's corporate status as "substantial evidence showing that MOHELA operates autonomously." 709 F. Supp. 3d at 216. In so doing, the court declined to follow two decisions holding that MOHELA has immunity, finding them "not persuasive" because they did not view the ability to sue and be sued and to make and execute contracts as "indicative of autonomy." *Id.* at 218 n.11.

II. THE DECISION BELOW IS OUT OF STEP WITH THIS COURT'S PRECEDENTS.

As the differences among the circuits attest, the Tenth Circuit's arm-of-the-state test is not some straightforward application of this Court's sovereign-immunity precedents. Contra BIO 10-14.

1. This Court's precedents do not hold that the "'foremost' reason for immunity is to protect the state treasury from judgments." BIO 13 (quoting Pet. App. 20a).

To the contrary, "[t]he preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities." *Fed. Mar. Comm'n* v. *S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002); see also *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 58 (1996) ("The Eleventh Amendment … serves to avoid the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties."). Respondent never grapples with—let alone cites—these cases.

Instead, Respondent, like the Tenth Circuit, quotes *Hess* out of context to say that protection of the state treasury is the "most salient" consideration. BIO 13. But *Hess* was describing the emphasis various *circuit courts* had previously placed on "the vulnerability of the State's purse." *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994). *Hess* said that "the Eleventh Amendment's *twin* reasons for being" include both "the States' solvency and dignity," *id.* at 47, 52 (emphasis added), with the "solvency" interest understood broadly, see *P.R. Ports Auth.*, 531 F.3d at 873-74. And in light of the Court's more recent emphasis on the importance of protecting state dignity, several circuits have changed their approach and no longer give saliency to protection of the treasury. See Pet 16-19; Pet. App. 20a n.11.

2. Respondent wrongly dismisses the significance of this Court's findings that Missouri established MOHELA as a "public instrumentality" to "perform the 'essential public function' of helping Missourians access student loans needed to pay for college"; that MOHELA remains "subject to the State's supervision and control"; and that "harm to MOHELA is also a harm to Missouri." *Biden* v. *Nebraska*, 600 U.S. 477, 490 (2023). These facts plainly show that subjecting

MOHELA to suit "exposes Missouri to the very risk the Eleventh Amendment aims to guard against." Pet. 26.

To be sure, *Biden* was addressing Missouri's standing to sue, not MOHELA's immunity. BIO 12-13. Petitioner's point is simply that the facts indicative of Missouri's standing to sue over an injury to MOHELA *also indicate* that the State did not shed its sovereignty in establishing MOHELA as a public corporation. The Tenth Circuit determined otherwise only because its six-factor, two-step test has wrongly extrapolated from this Court's precedents and failed to respect Missouri's right to determine how to structure its government to perform its public functions. See Pet. 27-30.

III. THIS CASE IS AN IDEAL VEHICLE TO RESOLVE THE CIRCUIT SPLITS.

1. Respondent's vehicle arguments lack merit. This Court does not need discovery or a different factual record to decide whether a state treasury's liability is the most important factor in determining whether a state instrumentality is an arm of the state, or whether normal incidents of corporate status are relevant to that analysis. Contra BIO 21. These are legal questions that can be resolved by this Court on the same record on which they were resolved in the Tenth Circuit.

Nor does the Court have to guess about MOHELA's "relationship with Missouri." *Id.* That relationship is established by extensive statutory provisions, and the State's "official position" is that "MOHELA is an instrumentality of the State and should be afforded sovereign immunity." Missouri Br. 3.

The fact that the Tenth Circuit declined to consider Respondent's arguments based on *Menorah Medical Center* v. *Health & Educational Facilities Authority*,

584 S.W.2d 73 (Mo. 1979) is also not a reason to deny certiorari. BIO 22. The Tenth Circuit found that Respondent forfeited that argument. Respondent cites no case holding that a *petitioner* should be saddled with an adverse decision because the *respondent* forfeited alternative arguments he could have made in support of that decision in the lower courts.

Finally, there is no reason to wait for more circuit court decisions addressing whether MOHELA is an arm of the state. BIO 23. The Court grants certiorari to clarify federal law, and there is already an entrenched circuit split on both questions presented. See Pet. 11-23. Forcing MOHELA to litigate the issue further would do nothing but perpetuate the affront to Missouri's sovereign dignity. See *id.* at 23-30. Cf. *P.R. Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 n.5 (1993) ("The Eleventh Amendment is concerned not only with the States' ability to withstand suit, but with their privilege not to be sued.").

2. MOHELA's petition offers the cleanest vehicle for resolving the questions presented. Because MOHELA's petition seeks review of a federal court decision, there are none of the jurisdictional questions posed by *Galette* v. *New Jersey Transit*, No. 24-1021 and *New Jersey Transit* v. *Colt*, No. 24-1113, both of which seek review of nonfinal state court decisions.

Galette invokes the first and second exceptions to the finality rule in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975). But it is not clear that either exception applies. After being injured in a car crash, Galette sued his driver and NJ Transit for negligence, seeking a single $50,000 judgment for "pain and suffering." Compl. ¶¶ 5-7, *Galette* v. *N.J. Transit* (Pa. Ct. Comm. Pl. May 26, 2021). It may be that Galette's "case is for all practical purposes concluded" because

the entry of default judgment against the driver is "preordained." *Id.* at 479; see Pet. for Writ of Cert. at 15 n.1, *Galette* v. *N.J. Transit*. Yet if the case is concluded with a judgment placing liability on the driver, the question of NJ Transit's immunity could be moot. In that scenario, the immunity question would not "survive and require decision." *Cox*, 420 U.S. at 480.[1]

In its own petition, NJ Transit invokes the fourth *Cox* exception. Pet. for Writ of Cert. at 18-19, *New Jersey Transit* v. *Colt*. But it does not address one of the necessary conditions—that "a refusal immediately to review the state court decision might seriously erode federal policy." 420 U.S. at 483. In any event, this Court could vindicate federal interests by granting MOHELA's petition, which NJ Transit agrees raises the same question posed by its own petition. See Pet. for Writ of Cert. at 20, *N.J. Transit* v. *Colt*. And NJ Transit could always ask the state courts to stay proceedings in the meantime.

3. Regardless, if the Court grants one of the petitions involving NJ Transit, it should also grant (or at least hold) MOHELA's petition. Granting MOHELA's petition would allow the Court to fully resolve the methodological conflict. *Galette* and *Colt* involve interstate sovereign immunity in state court, so this Court would

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[1] NJ Transit does not address this issue, perhaps because it, too, wants the Court to grant the petition and resolve the dispute about its immunity. But in the lower courts, NJ Transit claimed the accident was "solely and exclusively" the driver's fault. Answer ¶¶ 5-7, *Galette* v. *N.J. Transit* (Pa. Ct. Comm. Pl. June 15, 2021). If Galette obtains a default judgment against the driver for the "full extent of [his] actual damages," *Thomas ex rel. Thomas* v. *Duquesne Light Co.*, 545 A.2d 289, 295 (Pa. Super. Ct. 1988), he could not recover damages from anyone else. See Pa. Const. Stat. §5506 (barring double recovery).

have no opportunity to pass on the Eleventh Amendment analysis if it granted *Galette* or *Colt* alone. Nor could it clarify "whether the arm-of-the-state analysis used to evaluate interstate sovereign immunity is the same analysis that applies in the Eleventh Amendment context"—a question Respondent himself acknowledges has split courts. BIO 24. Still more, neither of the petitions involving NJ Transit asks this Court to consider whether incidents of corporate status should bear on the sovereign-immunity analysis—an issue whose importance, given the widespread use by States of public corporations for many important public purposes, Respondent never disputes. Only MOHELA has squarely presented that question—and granting *Galette* or *Colt* alone would leave it unanswered.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition should be granted.

Respectfully submitted,

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