No. 22-506

IN THE

Supreme Court of the United States

JOSEPH R. BIDEN, PRESIDENT OF THE UNITED STATES, ET AL.,

PETITIONERS,

V.

STATE OF NEBRASKA, ET AL.,

RESPONDENTS.

On a Writ of Certiorari to the U.S. Court of Appeals for the Eighth Circuit

BRIEF OF THE LIBERTY JUSTICE CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF THE AMICUS CURIAE[1]

The Liberty Justice Center is a nonprofit, nonpartisan, public-interest litigation firm that seeks to protect economic liberty, private property rights, free speech, and other fundamental rights. The Liberty Justice Center pursues its goals through strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights.

The Liberty Justice Center has two interests in this case: first, the Center generally represents plaintiffs challenging illegal government action, such that it is interested that this Court not make it harder to establish standing; and, second, the Center opposes governments' use of COVID-19 as an "emergency" excuse to exceed their statutory or constitutional authorities.

SUMMARY OF ARGUMENT & INTRODUCTION

The Biden Administration attempts to defend its illegal bribe to younger voters in two ways. First, it throws up a procedural hurdle and asks this Court to declare that States cannot sue on behalf of their own legislative creations. Second, it pretends that the country is still in the grip of an economic emergency. Both arguments should be rejected.

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[1] Rule 37 statement: No counsel for any party authored any part of this brief, and no person or entity other than Amicus funded its preparation or submission.

ARGUMENT

I. Missouri has standing to sue on behalf of a public instrumentality.

Petitioners and *amici* Samuel L. Bray and William Baude ("the Bray *amici*") argue that Missouri cannot bring this suit because the harmed public entity in Missouri has "financial and legal independence from the State of Missouri." Petitioners Br. 28-29; Bray Br. 7. The party in question, the Higher Education Loan Authority of the State of Missouri ("MOHELA"), is a creation of the Missouri state legislature and is not in fact so financially and legally separate that the state cannot sue on its behalf.

MOHELA performs "an essential public function." Mo. Rev. Stat. § 173.360. As Petitioners acknowledge, it is "a state-created entity." Petitioners Br. 26. Petitioners mischaracterize MOHELA as solely a "body corporate," Petitioners Br. 28, citing Mo. Rev. Stat. § 173.360. In fact, that provision states in full that MOHELA is "constituted *a public instrumentality* and body corporate."

A. This Court established states' right to sue on behalf of their quasi-public instrumentalities in *Hopkins Fed. Sav. & Loan Asso. v. Cleary*.

This Court has addressed a similar situation once before. In the 1930s, a number of states erected savings and loan associations as quasi-public corporations. When Congress passed a law permitting an association to switch from a state status to a national or federal bank status, and one Wisconsin association

chose to do so, the State (through its banking commission) sued to stop this encroachment on its creation. *Hopkins Fed. Sav. & Loan Asso. v. Cleary*, 296 U.S. 315 (1935). This Court recognized that a "quasi-public" corporation is "organized by government to accomplish certain ends" that are in some sense public "though for other purposes of classification the corporation is described as private." *Id.* at 336. In this instance, MOHELA is public in most respects, but private in its separate ability to be sued. This Court continued, "The state, which brings them into being, has an interest in preserving their existence, for only thus can they attain the ends of their creation. They are more than business corporations. They have been organized and nurtured as quasi-public instruments. . . . How they shall be formed, how maintained and supervised, and how and when dissolved, are matters of governmental policy . . ." *Id.*

The Court then specifically addressed the right of the State of Wisconsin to act to preserve its authority over its creation: "Given the encroachment, the standing of the state to seek redress as suitor is not to be gainsaid, unless protest without action is the only method of resistance." *Id.* at 339. "In its capacity of quasi-sovereign, the state repulses an assault upon the quasi-public institutions that are the product and embodiment of its statutes and its policy." *Id.* at 340. The Court acknowledged "the direct interest of the state in the preservation of agencies established for the common good." *Id.* Just like the State of Wisconsin in that case, the State of Missouri in this case has a direct interest in its agency's ability to execute the public duties which the legislature has assigned it.

B. The multi-factor tests used to determine whether an entity is an arm of the state support standing here.

Although MOHELA has the power to sue and be sued, that does not make it an independent organization and should not prevent Missouri from being able to sue to protect its interests. The ability to sue and be sued is only one of several factors used to determine whether an entity is an arm of the state. *See Fitchik v. New Jersey Transit Rail Operations, Inc.,* 873 F.2d 655, 659 (3rd Cir. 1989). And it's not just the courts that think this; Petitioners' own Internal Revenue Service thinks so too. IRS Rev. Rul. 57-128.[2]

Other factors include the degree of the entity's "independence from the State," *Public Sch. Ret. Sys. of Mo. v. State St. Bank & Trust Co.*, 640 F.3d 821, 827 (8th Cir. 2011), "whether the sovereign has immunized itself from responsibility for the agency's debts," *Fitchik,* 873 F.2d at 659, "whether [the entity] is used for a governmental purpose," "whether performance of its function is on behalf of one or more states," and "if express or implied statutory or other authority is necessary for the creation and/or use of such an instrumentality," IRS Rev. Rul. 57-128.

MOHELA is not independent from the State of Missouri. MOHELA enjoys only the powers granted to it by statute. The governor of Missouri appoints the majority of MOHELA's board and may remove any board

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[2] *See also What are Government Entities and Their Federal Tax Obligations,* IRS (Mar. 29, 2022), https://www.irs.gov/government-entities/federal-state-local-governments/government-entities-and-their-federal-tax-obligations.

member for cause. Missouri controls aspects of MOHELA's finances, including limiting MOHELA's investment choices and requiring MOHELA to contribute to the Lewis and Clark Fund. Therefore, although MOHELA "operates financially independent from the state in certain situations," it is not independent enough to support a finding that it is not an arm of the state. *Good v. U.S. Dep't of Educ.,* No. 21-cv-2539, 2022 U.S. Dist. LEXIS 107902, *6-7 (D. Kan. June 16, 2022).

Good is one of numerous cases that the Eighth Circuit opinion collects that are divided on the issue of whether MOHELA is an arm of the state. J.A. 163-64. But the two cases to find that MOHELA is not an arm of the state rest on arguments that are not convincing here. (Both cases dealt with whether MOHELA had Eleventh Amendment immunity, not whether Missouri could sue on MOHELA's behalf.)

The first case determined that MOHELA is not an arm of the state because the state is not "functionally liable for any judgments against MOHELA" and because "a delay in payment would not impact the general revenue of the state." *Dykes v. Mo. Higher Educ. Loan Auth.,* No. 21-CV-83, 2021 U.S. Dist. LEXIS 141246 (E.D. Mo. July 29, 2021). But it does not matter that Missouri is not liable for judgments against MOHELA, as the Bray *amici* also suggest (Bray Br. 7-8). Perhaps that could bar Missouri from representing MOHELA in a lawsuit *against MOHELA*. But here Missouri's threatened interest is not the risk of a lawsuit against MOHELA. As stated above, MOHELA is obligated to make distributions to the Lewis and Clark Fund, which is used by Missouri to fund capital projects at state universities. Mo. Rev. Stat. § 173.392.

Dykes split hairs about which fund would be affected—as though it should matter how Missouri has chosen to portion out its treasury. But states have a right to make their own internal arrangements, *Berger v. N.C. State Conference of the NAACP*, 142 S. Ct. 2191, 2214 (2022), and funding capital projects through MOHELA proceeds relieves the state of the need to do so from general revenues. "Money is fungible" after all. *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 79 (2011). So much for *Dykes,* cited at length in the Bray *amici* brief. Bray Br. 7-8.

The other case is even further afield, arising out of a Texas district court and applying Fifth Circuit law. The "paramount" factor under that analysis is whether "the state is the source of the entity's funds, or . . . the state treasury would be liable for a potential judgment against the entity." *Perkins v. Equifax Info Services, LLC,* No. SA-19-CA-1281-FB, 2020 U.S. Dist. LEXIS 262873, *6 (W.D. Tex. May 1, 2020). That court ultimately found that MOHELA could not be considered an arm of the state based on its fiduciary relationship with Missouri because it is no longer obligated to pay into the Lewis and Clark Fund, *id.* at *9, but the Eighth Circuit has observed that MOHELA's obligation remains unfulfilled. J.A. 164. The discrepancy between these two holdings appears to rest on the Texas court's misreading of a provision requiring "the distribution of the entire three hundred fifty million dollars of assets by the authority to the Lewis and Clark discovery fund [to] be completed no later than September 30, 2013." Mo. Rev. Stat. § 173.385. The Texas court misread this provision to suggest that if MOHELA has not repaid the funds by the date specified, it is no longer obligated to do so; the Eighth Circuit disagrees.

And it is notable that Petitioners do not dispute the Eighth Circuit's observation that MOHELA "has not yet met its statutory obligation" to fill the Lewis and Clark Fund. Indeed, Petitioners seem to acknowledge that, *contra* the *Perkins* court, MOHELA still has an "obligation to pay a fixed sum to the state treasury." Petitioners Br. 28. They simply argue—because they must—that their actions *might* not interfere with MOHELA's obligations, as implausible as that is.

Petitioners' arguments should be rejected. Missouri has standing to sue on behalf of its creation.

II. No "emergency" exists to justify Petitioners' actions.

Petitioners rest their justification for their illegal action on the existence of "a national emergency," specifically the COVID-19 pandemic and concurrent economic downturn. Petitioners Brief 2, 5, 7-11, 58-59. But judging by the Biden Administration's actions elsewhere, no such emergency existed when the Department of Education decided on this policy.

First, the COVID-19 emergency is over. President Biden himself said as much in September 2022: "Biden: 'The pandemic is over.'"[3] Vaccines are widely available. Hospitalizations and deaths are substantially reduced. As President Biden himself has stated, "[o]ver 99% of our schools are open again. Business are open again."[4] In the President's words, in November

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[3] Kate Sullivan, *Biden: 'The pandemic is over,'* CNN.com (Sept. 18, 2022), https://www.cnn.com/2022/09/18/politics/biden-pandemic-60-minutes/index.html.

[4] https://twitter.com/POTUS/status/1509240289415905284.

2022, "After 20 months of hard work, the pandemic no longer controls our lives."[5] And yet he claims that his actions are necessary to confront an emergency he publicly celebrates himself for having ended?

Given that most current hospitalizations and deaths are among the elderly who have chosen to forgo the most recent vaccines[6]—in other words, people who have made a personal medical decision entirely out of the Administration's hands—it is unsurprising that most COVID restrictions have long since ended. For example, the Biden Administration's public transportation mask mandate was abandoned in April 2022 after a district court loss.[7] The U.S. Department of Agriculture ended its mask mandate on meat processing facilities in March 2022.[8] The Centers for Disease Control released updated guidance in August 2022 that acknowledged, "We're in a stronger place today as a nation, with more tools—like vaccination, boosters,

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[5] Courney Buble, *Coronavirus Roundup: Biden Says the Pandemic 'No Longer Controls Our Lives,'* Gov't Executive (Nov. 10, 2022), https://www.govexec.com/management/2022/11/coronavirus-roundup-biden-says-pandemic-no-longer-controls-our-lives/379614/.

[6] Spencer Kimball, *Biden Administration Extends Covid Public Health Emergency as Highly Infectious Omicron XBB.1.5 Spreads,* CNBC (Jan. 11, 2023, 10:19 AM) https://www.cnbc.com/2023/01/11/biden-extends-covid-public-health-emergency-as-omicron-xbbpoint1point5-spreads.html.

[7] David Shepardson et al., *U.S. Will No Longer Enforce Mask Mandates on Airplanes, Trains After Court Ruling,* Reuters (Apr. 19, 2022, 4:22 AM), *available at* https://www.reuters.com/legal/government/us-judge-rules-mask-mandate-transport-unlawful-overturning-biden-effort-2022-04-18/.

[8] Cancellation of FSIS Notice 34-21 FSIS Actions At Establishments That Do Not Follow Mask Requirements, U.S.D.A. (Mar. 1, 2022), https://www.fsis.usda.gov/policy/fsis-notice/09-22.

and treatments—to protect ourselves, and our communities, from severe illness from COVID-19. . . . This guidance acknowledges that the pandemic is not over, but also helps us move to a point where COVID-19 no longer severely disrupts our daily lives."[9] In September, the U.S. Department of Health & Human Services decided to ditch its mask mandate on pre-kindergarten Head Start students and staff.[10]

In other words, starting in spring 2022, the Biden Administration began withdrawing its mask mandates. By fall 2022, the President had declared the pandemic over, and both he and the CDC sought a "new normal" where COVID no longer "disrupts our daily lives." So when it was convenient for reasons of politics to end unpopular mask mandates or declare the pandemic over a few weeks before the mid-term elections, the President did so. But when it is convenient to exercise incredible power by invoking a national emergency related to the pandemic to cancel student debt, the same administration will do so. This Court cannot let the White House have it both ways—it should not "exhibit a naiveté from which ordinary citizens are free." *DOC v. New York*, 139 S. Ct. 2551, 2575 (2019).

Second, just as "the pandemic is over," any economic emergency related to the pandemic is over. Just

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[9] *CDC streamlines COVID-19 guidance to help the public better protect themselves and understand their risk*, CDC (Aug. 11, 2022), https://www.cdc.gov/media/releases/2022/p0811-covid-guidance.html.

[10] Dana Goldstein, *At Head Start, Masks Remain On, Despite C.D.C. Guidelines*, N.Y. Times (Sept. 7, 2022), https://www.nytimes.com/2022/09/07/us/head-start-masks-toddlers.html.

a few weeks before the student debt announcement, the President rejected any suggestion the nation was in a recession. He pointed to record low unemployment, record high business investment, and "the strongest rebound in American manufacturing in over three decades."[11]

In his remarks on August 25, 2022, announcing the student debt cancellation, President Biden said his administration "responded aggressively to the pandemic to minimize the economic impact of the harm that COVID imposed on individuals, families, and businesses."[12] He said, "America's economic recovery was faster and stronger than any other advanced nation in the world." "[W]e've made incredible progress advancing America's economic recovery."

The very next day, the White House put out a statement from the President saying "Last month [personal] incomes were up, and overall prices were down."[13] A week later, the White House Council of Economic Advisors reported, "the economy added 315,000 jobs in August," following similar growth in June and July, with unemployment at 3.7 percent and nominal

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[11] Remarks by President Biden on the Inflation Reduction Act of 2022, July 28, 2022, https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/07/28/remarks-by-president-biden-on-the-inflation-reduction-act-of-2022/.

[12] Remarks by President Biden Announcing Student Loan Debt Relief Plan, Aug. 25, 2022, https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/08/25/remarks-by-president-biden-announcing-student-loan-debt-relief-plan/.

[13] Statement by President Biden on PCE Inflation Data, Aug. 26, 2022, https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/26/statement-by-president-biden-on-pce-inflation-data/.

wage growth over 5 percent.[14] Looking at the same data, the Secretary of Labor pushed the same line: "With 9.7 million jobs added since President Biden took office and an average of 378,000 per month over the past three months, the economy continues to transition from a historically powerful recovery into steady and stable progress that benefits working families."[15] A few weeks later, White House Press Secretary Karine Jean-Pierre took credit for "last year's historic economic growth" and "the most stable growth, strongest growth that we have seen in modern history."[16]

The happy talk has continued, with the President declaring on Twitter "the economy is growing[, a]nd incomes are rising faster than inflation,"[17] "When I ran for president, the economy was flat on its back. . . [Now], more Americans are working than ever before,"[18] "the unemployment rate is near a record low. We're delivering historic results for the American people,"[19] and "inflation is moderating, our economy is growing at a strong pace, gas prices are down, and GDP is up."[20] All of these statements were made *after*

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[14] The Employment Situation in August, Sept. 2, 2022, https://www.whitehouse.gov/cea/written-materials/2022/09/02/the-employment-situation-in-august-2/.
[15] Marty Walsh, *August 2022 Jobs Report: Benefitting America's Families*, Sept. 2, 2022, https://blog.dol.gov/2022/09/02/august-2022-jobs-report-benefitting-americas-families#:~:text=With%209.7%20million%20jobs%20added,progress%20that%20benefits%20working%20families.
[16] Press Briefing by Press Secretary Karine Jean-Pierre, Sept. 23, 2022, https://www.rev.com/blog/transcripts/press-briefing-by-press-secretary-karine-jean-pierre-9-23-22-transcript.
[17] https://twitter.com/POTUS/status/1601388743000195073.
[18] https://twitter.com/POTUS/status/1613570248476692481.
[19] https://twitter.com/POTUS/status/1599893880702378009.
[20] https://twitter.com/POTUS/status/1598738108572471305.

the Eighth Circuit published its opinion last November.

The Biden Administration cannot have it both ways. It cannot tout historic economic successes, record investment, and strong job growth, and at the same time proclaim an economic crisis that justifies emergency relief for student debt borrowers. The HEROES Act authorizes action to ensure borrowers are "not placed in a worse position financially" because of a "national emergency." 20 U.S.C. § 1098bb(a)(1), (2)(A). By fall 2022, when the cancellation was announced, the President was saying the pandemic was over and that the economic repercussions of the pandemic were over. The Court should take the President at his word.

CONCLUSION

For the foregoing reasons, the opinion of the Eighth Circuit should be affirmed.

Respectfully submitted,

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