Nos. 24-1021 & 24-1113

In the Supreme Court of the United States

CEDRIC GALETTE, PETITIONER,
v.
NEW JERSEY TRANSIT CORP., ET AL.

NEW JERSEY TRANSIT CORP., ET AL., PETITIONERS,
v.
JEFFREY COLT AND BETSY TSAI

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA AND THE NEW YORK COURT OF APPEALS

BRIEF OF *AMICI CURIAE* THE STATE OF MISSOURI AND HIGHER EDUCATION LOAN AUTHORITY OF THE STATE OF MISSOURI SUPPORTING NEW JERSEY TRANSIT CORP.

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INTEREST OF *AMICI CURIAE*[*]

The Higher Education Loan Authority of the State of Missouri (MOHELA) is a government corporation established by the Missouri General Assembly to perform "essential public function[s]," including assuring that all eligible postsecondary education students have access to student loans and creating financial-aid programs that provide grants and scholarships to students. Mo. Rev. Stat. §§ 173.360, 173.415, 173.385(19). As this Court has recognized, MOHELA is "[b]y law and function" an "instrumentality of Missouri." *Biden* v. *Nebraska*, 600 U.S. 477, 491 (2023); *see* Mo. Rev. Stat. § 173.415 (describing MOHELA as a "public instrumentality of the state"). It is run by a board comprising "two state officials and five members appointed by the Governor and confirmed by the [Missouri] Senate," all of whom the Governor may remove for cause. *Biden*, 600 U.S., at 490 (citing Mo. Rev. Stat. § 173.360). It is "assigned" to the Missouri Department of Higher Education and Workforce Development, to which it must provide annual reports of its income, expenditures, and indebtedness. Mo. Rev. Stat. § 173.445. It is subject to Missouri open-meeting laws and must "comply with all statutory requirements respecting the conduct of public business by a public agency." *Id.*, § 173.365. And "[i]ts profits help fund education in Missouri: MOHELA has provided $230 million for development projects at Missouri colleges and universities and almost $300 million in grants and scholarships for Missouri students." *Biden*, 600 U.S., at 490.

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[*] No counsel for any party authored this brief in whole or in part, and no person or entity aside from *amici* and their counsel funded the brief's preparation or submission.

MOHELA is currently subject to lawsuits for damages in several federal districts. Because "[b]y law and function, MOHELA is an instrumentality of Missouri," and any "harm to MOHELA is also a harm to Missouri," *id.*, at 491, Missouri and MOHELA have a significant interest in how this Court determines whether an entity is an arm of the state for purposes of sovereign immunity. To date, courts have divided over whether MOHELA is an arm of Missouri. Compare, *e.g.*, *Carlotta* v. *Higher Educ. Loan Auth.*, 2025 WL 905628, at *6 (S.D. Ohio Mar. 25, 2025) (concluding MOHELA is an arm of Missouri), with *Pellegrino* v. *Equifax Info. Servs., LLC*, 709 F. Supp. 3d 206, 219 (E.D. Va. 2024) (concluding it is not). In connection with these consolidated cases, this Court is currently holding a petition for certiorari filed by MOHELA seeking review of a decision by the U.S. Court of Appeals for the Tenth Circuit denying MOHELA sovereign immunity on the ground that it is not an arm of the state. *See Higher Educ. Loan Auth. of Mo.* v. *Good*, No. 24-992 (U.S. Mar. 12, 2025).

The State of Missouri and MOHELA file this brief to explain the importance of formulating and applying the arm-of-the-state test in a manner that protects States' ability to structure their governments as they believe best enables them to pursue their public-policy goals. Such an approach is essential to ensuring that private lawsuits do not interfere with the ability of instrumentalities to perform the public functions for which States created them, and ultimately to protecting States' sovereign dignity—the "preeminent purpose" of state sovereign immunity. *Fed. Mar. Comm'n* v. *S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002).

SUMMARY OF ARGUMENT

This Court has considered whether an entity is an arm of the state for purposes of sovereign immunity on several occasions. *See Hess* v. *Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994); *Lake Country Ests., Inc.* v. *Tahoe Reg'l Planning Agency*, 440 U.S. 391 (1979); *Mt. Healthy City Bd. of Educ.* v. *Doyle*, 429 U.S. 274 (1977). Yet there remains "no standard test" for making this determination, *Kohn* v. *State Bar of Cal.*, 87 F.4th 1021, 1026 (CA9 2023) (en banc), and the "jurisprudence over how to apply the arm-of-the-state doctrine is, at best, confused," *Mancuso* v. *N.Y. State Thruway Auth.*, 86 F.3d 289, 293 (CA2 1996).

The instant cases present an opportunity for the Court to dispel this confusion and ensure the arm-of-the-state analysis "accord[s] the States the respect owed them as joint sovereigns"—the "central purpose" of state sovereign immunity. *Fed. Mar. Comm'n*, 535 U.S. at 765 (cleaned up). As the New Jersey Transit (NJ Transit) Petitioners explain in their brief, the Court principally considers three factors to determine whether an entity is an arm of the State: (1) the textual and structural evidence that bears on the State's intent to structure the entity as one of its arms; (2) the control the State exercises over the entity; and (3) the State's overall financial relationship with the entity. Petrs. Br. 2. In analyzing and applying these factors, this Court should ensure that the arm-of-the-state test protects States' sovereign rights to define their own public policies, to structure their governments as they believe appropriate to pursue those policies, and to do so free from "the mandates of judicial tribunals without their consent, and in favor of individual interests." *Alden* v. *Maine*, 527 U.S. 706, 750 (1999) (cleaned up).

First, in evaluating New Jersey's intent to structure NJ Transit to share its sovereignty, the Court should

respect States' sovereign prerogatives to identify new public functions, and to perform those functions through the structures they deem appropriate. As this Court has recognized, "a static concept of government denies its essential nature" because the "science of government … is the science of experiment." *New York* v. *United States*, 326 U.S. 572, 579–80 (1946) (cleaned up). This is particularly true of State governments, which over the Nation's history have assumed responsibilities previously left to private actors in order to meet society's changing needs. *See infra* Part I.A. In view of States' evolving functions, this Court has twice abandoned efforts to base constitutional doctrines on distinctions between "governmental" and "proprietary" state functions, and between "traditional" and "nontraditional" state functions. And it should reject similar invitations by Respondents here to draw distinctions, for immunity purposes, between governmental and commercial functions. *See infra* Part I.B.

Second, in evaluating New Jersey's control over NJ Transit, the Court should apply a standard of control that respects States' prerogatives to afford their agencies and instrumentalities degrees of independence and autonomy greater than those possible in the federal government. Respondents here argue for a rigid approach to analyzing control, grounded in separation-of-powers principles applicable to federal agencies and hostile to the corporate form States often use for special-purpose public authorities. That approach stifles experimentation, infringes States' sovereign dignity, and ignores the reality that even some federal instrumentalities enjoy significant operational autonomy but plainly remain part of the federal government. This Court should reject Respondents' cramped approach to assessing state control. *See infra* Part II.

Finally, in analyzing New Jersey's financial relationship with NJ Transit, the Court should treat this factor as neither dispositive nor predominant. The "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*, 535 U.S., at 760. Sovereign immunity thus "bars suits against States and state entities *regardless* of the nature of the relief requested." *Hess*, 514 U.S., at 60 (O'Connor, J., dissenting). A State's financial responsibility for an entity may be "a *sufficient* condition" for sovereign immunity, but it should not be "a *necessary* condition." *Id.*, at 59. In any event, judgments against a state instrumentality may have "overall effects on the state treasury," *Puerto Rico Ports Auth.* v. *Fed. Mar. Comm'n*, 531 F.3d 868, 874 (CADC 2008) (Kavanaugh, J.), even if the State is not financially responsible for the instrumentality. *See infra* Part III.

ARGUMENT

I. Arm-of-the-state analysis should respect States' autonomy to define new functions for State governments and to perform those functions through instrumentalities.

A. States enjoy autonomy to perform a wide range of important functions through instrumentalities.

1. States enjoy autonomy in deciding which functions to pursue. "The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal …." *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985). As James Madison recognized in The Federalist No. 45, state

powers are "numerous and indefinite," "extend[ing] to all the objects" that "concern the lives, liberties and properties of the people; and the internal order, improvement and prosperity of the State." *See also* The Federalist No. 39 (Madison) (discussing States' "residuary and inviolable sovereignty"). The Tenth Amendment made this reservation explicit. All powers "not delegated to the United States" belong to "the states respectively, or to the people." U.S. Const. amend. X. This creates a straightforward "default rule." *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 847–48 (1995) (Thomas, J., dissenting). "As far as the Federal Constitution is concerned, … the States can exercise all powers that the Constitution does not withhold from them." *Id.*

States also enjoy autonomy in deciding how to pursue these functions. No less than the federal government, States may use "all means which are appropriate, which are plainly adapted to that end, [and] which are not prohibited" when exercising their reserved powers. *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819); *see*, *e.g.*, *Nebbia* v. *New York*, 291 U.S. 502, 537 (1934) (when a State adopts a policy "to promote the public welfare," it may "enforce that policy by legislation adapted to its purpose"). That stands to reason. If States are to "serve as laboratories for social and economic experiment," *Garcia*, 469 U.S., at 546, then they must have room to "lear[n] by trial and error," *Conn. Light & Power Co.* v. *Fed. Power Comm'n*, 324 U.S. 515, 530 (1945).

2. States have exercised this autonomy to expand both the range of functions they perform and the types of entities they use to perform them. "Whereas state governments historically served a limited number of purposes, they are ubiquitous today. They deliver innumerable services; spur economic and housing

development; rebuild crumbling infrastructure; and regulate industry, land use, and the environment." Alex E. Rogers, *Clothing State Governmental Entities with Sovereign Immunity: Disarray in the Eleventh Amendment Arm-of-the-State Doctrine*, 92 Colum. L. Rev. 1243, 1244 (1992). Such "changes in the historical functions of States … have resulted in a number of once-private functions like education being assumed by the States and their subdivisions." *Garcia*, 469 U.S., at 543–44. Indeed, "[m]any governmental functions of today have at some time in the past been nongovernmental. The genius of our government provides that, within the sphere of constitutional action, the people—acting not through the courts but through their elected legislative representatives—have the power to determine as conditions demand, what services and functions the public welfare requires." *Helvering* v. *Gerhardt*, 304 U.S. 405, 427 (1938) (Black, J., concurring).

States often pursue important public functions by establishing instrumentalities specifically for the task. Consider state universities. In 1839, for example, the Missouri General Assembly "created a public corporation for educational purposes—a State university." *Head* v. *Curators*, 47 Mo. 220, 225 (1871), *aff'd sub nom. Head* v. *Univ. of Mo.*, 86 U.S. 526 (1873). This "corporation and body politic," *id.*, at 224—the first public higher-educational institution west of the Mississippi River—was "an agency of [the State's] own, through which it proposed to accomplish certain educational objects." *Id.*, at 225. Today, the University of Missouri enrolls more than 27,000 students, *see* University of Missouri, *MU Analytics*, bit.ly/UM_Enrollment, and its healthcare system competes with for-profit and nonprofit healthcare systems throughout the State. *See also Arkansas* v. *Texas*, 364 U.S. 368, 370 (1953) (treating the similarly situated University

of Arkansas as part of Arkansas for original-jurisdiction purposes).

Or take public authorities, which "operate in the public interest but in the manner of a self-supporting business." Jerry Mitchell, *Policy Functions and Issues for Public Authorities*, *in* Public Authorities and Public Policy 3 (Jerry Mitchell, ed. 1992). As States have taken on more responsibilities, they have increasingly established public authorities to "augment[] their revenue-generating capacity" by using "creative revenue sources beyond raising income and sales taxes." Rogers, *supra*, at 1248; *see also id.*, at 1250 (explaining that public authorities can "remain free from the debt limits imposed by state constitutions on state and local government borrowing"). The Puerto Rico Ports Authority, created to develop and operate the commonwealth's "air and marine transportation facilities and services," is a good example. P.R. Laws Ann. Tit. 23, § 336; *see also P.R. Ports Auth.*, 531 F.3d, at 872 (noting that "special-purpose public corporations (like PRPA) established by States to perform specific functions" are a common subject of arm-of-the-state analysis). Instead of tackling that function on its own (or delegating it to the Department of Transportation and Public Works), Puerto Rico's Legislative Assembly established a "government controlled corporation" to act as an "arm of the commonwealth." *P.R. Ports Auth.*, 531 F.3d, at 871. It then entrusted that body with "promot[ing] 'the general welfare'" and "increas[ing] 'commerce and prosperity' for the benefit 'of the people of Puerto Rico'" by, among other things, "redevelop[ing] San Juan's waterfront and harbor." *P.R. Ports Auth.*, 531 F.3d, at 871, 875, 880 (quoting P.R. Laws Ann. Tit. 23, § 348(a)).

And then there's MOHELA itself. Missouri "recognizes higher education as a governmental function,"

Todd v. *Curators of Univ. of Mo.*, 147 S.W.2d 1063, 1064 (Mo. 1941), so the State's legislature sought to "assure that all eligible postsecondary education students have access to student loans," Mo. Rev. Stat. § 173.360. To that end, it created a "nonprofit government corporation to participate in the student loan market." *Biden*, 600 U.S., at 489. This "public instrumentality" is "empowered by the State to invest in or finance student loans" and "may also service loans and collect reasonable fees for doing so." *Id.*, at 490 (citing Mo. Rev. Stat. § 173.385.1 (cleaned up)). MOHELA uses the profits from this "public function" to support another "public function": funding "grants and scholarships for Missouri students" and "development projects at Missouri colleges and universities." *Id.*

B. This Court has repeatedly abandoned efforts to distinguish traditional and nontraditional State functions, and it should shun such an approach here.

1. This Court has twice experimented with judge-made tests that required courts to draw lines between State functions. The Court abandoned both efforts. In *New York* v. *United States*, the "untenab[ility]" of distinguishing "governmental" from "proprietary" functions led the Court unanimously to discard that effort. 326 U.S., at 583. And in *Garcia* v. *San Antonio Metro Transit Authority*, less than a decade after embarking on a new line-drawing project, the Court gave up on distinguishing between "traditional" and "nontraditional" State functions. 469 U.S., at 530.

a. Eighty years ago, this Court abandoned a decades-long effort to draw judge-made lines between "governmental" and "proprietary" State functions. *Id.*, at 542. The project began with *Collector* v. *Day*, 78 U.S. (11 Wall.) 113 (1870), which held that the Constitution

prohibits Congress from "taxing the salary of the judicial officer of a State" because such taxation threatened to interfere with "one of [the State's] most important functions, the administration of the laws." *Id.*, at 124, 126. Justice Bradley dissented, warning that the Court's decision was "founded on a fallacy" and would be "very difficult [to] control." *Id.*, at 129. "Where are we to stop in enumerating the functions of the State governments, which will be interfered with by Federal taxation?" *Id.*

Seeking a limiting principle, the Court later distinguished "state agencies and instrumentalities … of a strictly governmental character" (exempt) from those "used by the state in the carrying on of an ordinary private business" (taxable). *South Carolina* v. *United States*, 199 U.S. 437, 461 (1905). Yet this line proved difficult to apply. When States began using their police power to control liquor sales, the Court splintered over whether State dispensary systems served a "governmental" function. *Id.*, at 463; *id.*, at 472 (White, J., dissenting). And while the Court initially denied that supplying public water was an "essential governmental functio[n]," *Flint* v. *Stone Tracy Co.*, 220 U.S. 107, 172 (1911), it later reversed course, citing "the needs of the modern city," *Brush* v. *Comm'r*, 300 U.S. 352, 370 (1937).

The Court ultimately abandoned these distinctions. *See New York*, 326 U.S., at 580–83. As Justice Frankfurter observed, the "fiscal and political factors" involved in the Court's line-drawing project did not "lend themselves to judgment by criteria and methods of reasoning that are within the professional training and special competence of judges." *Id.*, at 581. Chief Justice Stone concurred, calling "the distinction between 'governmental' and 'proprietary' interests" "untenable." *Id.*, at 586 (Stone, C.J., concurring in result,

joined by Reed, Murphy, and Burton, JJ.). And even the dissenting Justices rejected the Court's line-drawing efforts, reasoning that "[a] State's project is as much a legitimate governmental activity whether it is traditional, or akin to private enterprise, or conducted for profit." *Id.*, at 591 (Douglas, J., dissenting, joined by Black, J.).

b. More recently, the Court rejected a similar judge-made distinction between "traditional" and "nontraditional" State functions. *See Garcia*, 469 U.S., at 530. In *National League of Cities* v. *Usery*, 426 U.S. 833, 852 (1976), the Court held that the Commerce Clause does not permit Congress to regulate States' "integral operations in areas of traditional governmental functions." The majority "did not offer a general explanation of how a 'traditional' function is to be distinguished from a 'nontraditional' one," *Garcia*, 469 U.S., at 530, or grapple with the Court's experience drawing lines between governmental and proprietary functions.

Nine years later, the Court discarded the *National League of Cities* standard as "no more fruitful" than the judge-made distinction rejected in *New York*. *Id.*, at 543. The Court began by surveying the inconsistent results that followed *National League of Cities*, "find[ing] it difficult, if not impossible, to identify an organizing principle" to explain which State functions were protected and which were not. *Id.*, at 538–39 (collecting lower-court decisions). It then explained why no historical test was up to the task. For one thing, such a test could not "accomodat[e] changes in the historical functions of states," which now perform "a number of once-private functions." *Id.*, at 543–44. Still more, "courts would have to decide by fiat precisely how longstanding a pattern of state involvement had to be" to qualify as traditional. *Id.*, at 544. Indeed, any judge-made test about State functions "invites an

unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes." *Id.*, at 546. "[J]udicial appraisal" of that sort not only "disserves principles of democratic self-governance" but also "breeds inconsistency precisely because it is divorced from those principles." *Id.*, at 547.

2. This Court should decline to revisit its line-drawing efforts here. Mr. Colt's brief in opposition argued (at 23) that "immunity is not proper for state-created entities engaging in purely commercial behavior." But that test would resurrect the very distinctions *New York* and *Garcia* abandoned, and is no more workable or sound today.

For one thing, distinguishing "purely commercial behavior" (whatever that means) from other State activity is no small task. Many government agencies and instrumentalities generate revenue through what can be described as commercial activity. For example, Congress "brought the Government into the commercial sale of goods and services," *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 388 (1995), by authorizing the Tennessee Valley Authority, a public corporation, to sell "surplus power," 16 U.S.C. § 831*i*. Likewise, the General Services Administration leases vacant government buildings to private individuals and businesses. 40 U.S.C. § 581(h), *see* GSA, *Outleasing*, bit.ly/Outleasing (last updated Jan. 30, 2025) (listing available properties). And the Defense Commissary Agency runs supermarkets on military bases to provide servicemembers with "groceries and household supplies at the lowest practical price." 32 C.F.R. § 383a.3(a)(1). But these revenue-raising efforts are simply the means "deemed appropriate, and prescribed, for the pursuit of" a broader governmental function. *MCI Telecomms. Corp.* v. *AT&T Co.*, 512 U.S. 218, 231 n.4 (1994). Mr. Colt's test would force judges

to disentangle means from ends—a task even more "unsound in principle and unworkable in practice" than those the Court abandoned in *New York* and *Garcia*. 469 U.S., at 546.

But even if Mr. Colt's test were administrable, it would still "disserve principles of democratic self-governance" by forcing States to "pay an added price" whenever they entrust public functions to self-funding instrumentalities. *Id.*, at 546–47. Instead of taxing all citizens, States have opted to entrust certain State functions to instrumentalities that cover at least some of their own costs. Our constitutional system leaves States, as separate sovereigns, broad latitude to perform such "economic experiment[s]"—and "an unelected federal judiciary" should not burden those experiments by restricting immunity only to supposedly traditional government organs pursuing traditional public functions. *Id.*

II. Arm-of-the-state analysis should respect a State's sovereign right to determine how to structure its government to perform its sovereign functions.

Under the Constitution, States retain the sovereign right to determine the structure of their state government, as long as it is republican in form. *See* U.S. Const. art. IV, § 4. Given that the "preeminent purpose of state sovereign immunity" is to ensure States enjoy "the dignity that is consistent with their status as sovereign entities," *Fed. Mar. Comm'n*, 535 U.S., at 760, the arm-of-the-state analysis must respect this right and ensure that a State's sovereign immunity extends to all forms of state-controlled instrumentalities that perform public functions.

1. A "State defines itself as a sovereign" through "the structure of its government, and the character of those

who exercise government authority." *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991). "How power shall be distributed by a [S]tate among its governmental organs is commonly, if not always, a question for the [S]tate itself." *Highland Farms Dairy, Inc.* v. *Agnew*, 300 U.S. 608, 612 (1937). And because the "concept of separation of powers embodied in the United States Constitution is not mandatory in state governments," *Sweezey* v. *New Hampshire*, 354 U.S. 234, 255 (1957), the instrumentalities state governments employ may differ from those of the federal government.

In fact, differences are bound to exist given the diversity of state constitutional provisions. A "comparison between the 50 state constitutions on the one side and the federal constitution on the other reveals lots of structural distinctions." Jeffrey S. Sutton, *Administrative Law in the States: An Introduction to the Symposium*, 46 Harv. J. L. & Pub. Pol'y 307, 318 (2023). Start with the ease of amending state constitutions. "Forty-six require a mere majority vote once an amendment reaches the ballot, a marked contrast to the federal requirement that three-quarters of the States approve an amendment." *Id.* As a result, state constitutions "have evolved far more than the U.S. Constitution since 1776 and 1789." *Id.*, at 318–19 (citing, among other examples, that some states have divided the executive power, creating "plural [elected] positions of the executive branch," and some let citizens vote to directly enact laws "through the initiative and referendum").

The fact that State governments can deviate from the federal-government model benefits the nation as a whole. This Court has "long recognized the role of the States as 'laboratories devising solutions' to difficult problems." *Oregon* v. *Ice*, 555 U.S. 160, 171 (2009) (cleaned up). As Justice Brandeis famously recognized,

"[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). If the experiment works out well, other States can adopt it. Or not.

"Uniformity isn't everything." Jeffrey S. Sutton, *21st Century Federalism: A View from the States*, 46 Harv. J. L. & Pub. Pol'y 31, 40 (2023). There "are many areas of public policy where there are legitimate reasons" for States to follow "different path[s]." *Id.* It is a virtue of our federal system that each State has the sovereign right to choose the path that is best for its citizens.

2. Many courts, however, are reluctant to afford sovereign immunity to state instrumentalities unless they are under the direct control of a governor or other elected official who can veto their decisions or fire their leaders without cause. The Tenth Circuit's analysis of MOHELA in *Good* v. *Department of Education*, 121 F.4th 772 (2024), pet. for cert. pending, No. 24-992, is a case in point.

The Tenth Circuit found that the language of MOHELA's organic statute "indicates that, as a matter of Missouri law, MOHELA qualifies as a state agency." *Id.*, at 799. The statute repeatedly describes MOHELA as a "public instrumentality of the State of Missouri" that "performs a public function." *Id.* (citing Mo. Rev. Stat. §§ 173.360, 173.415). In addition, the statute assigns MOHELA to the Missouri Department of Higher Education and Workforce Development. *Id.*, at 785. And MOHELA's "proceedings and actions ... shall comply with all statutory requirements respecting the conduct of public business by a public agency." *Id.*, at 800 (quoting Mo. Rev. Stat. § 173.365).

Even though MOHELA is an instrumentality of Missouri under Missouri law, however, the Tenth Circuit held that Missouri is not immune from private suits in federal court because it has too much autonomy from the Governor and because the State is not directly liable for its debts.

On the autonomy factor, the Tenth Circuit acknowledged this Court's finding that MOHELA is under the State's "supervision and control" because it is governed by a board of state officials and individuals whom the Governor appoints and may remove for cause, it "must provide annual financial reports to the Missouri Department of Education," and state law "sets the terms of its existence." *Biden*, 600 U.S., at 490–91; *see Good*, 121 F.4th, at 803–04. But the Tenth Circuit in essence rejected that finding, holding that the Governor's "power to appoint" MOHELA's board "is not the power to control." 121 F.4th, at 803. In the Tenth Circuit's view, MOHELA was subject only to "*some* degree of gubernatorial and legislative control," which was "undercut" by the fact that the Governor "lacks veto power" over MOHELA's decisions, and that MOHELA's board can hire an executive director and employees who are paid from MOHELA's funds and are not "subject to the State's merits system for hiring or the State's retirement plan." *Id.*, at 804–05 (emphasis in original). The Tenth Circuit further found—again, contrary to this Court's decision in *Biden*—that MOHELA's ability to own property, enter contracts, set its own policies, and sue and be sued weighed against arm-of-the-state status. *See id.*, at 805–08. *Contra Biden*, 600 U.S., at 492 (observing that, while every government corporation "has a legal personality separate from the State …, with the powers to hold and sell property and to sue and be sued," "such an instrumentality—created and operated to fulfill a public

function—nonetheless remains (for many purposes at least) part of the Government itself" (cleaned up)).

3. Mr. Colt makes a similar argument in this case, saying the Governor's "power of remov[al] is also 'essential' to establishing control" over New Jersey Transit. Br. in Opp. at 18 (quoting *Seila Law LLC* v. *CFPB*, 591 U.S. 197, 214 (2020)). That is incorrect. A State's sovereign immunity is not conditioned on its adherence to the same separation-of-powers principles that apply to federal agencies. *See supra* at 13–15; *see also Dreyer* v. *Illinois*, 187 U.S. 71, 84 (1902) ("Whether the legislative, executive, and judicial powers of a state shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the state."). And States often give their governmental organs, including public authorities, greater independence precisely because they believe that "depoliticiz[ing] governing by employing professional managers" and "avoid[ing] civil service requirements" better enables such entities to fulfill their public functions. Rogers, *supra*, at 1250 n.31.

Moreover, courts have held that federal agencies share the United States' sovereign immunity from suit even when Congress has given them similar levels of independence and discretion. For example, members of the Board of Governors of the Federal Reserve System may only be "removed for cause by the President." 12 U.S.C. § 242. The Board may hire employees who are paid with the Board's funds and are not covered by federal civil-service laws. *Id.*, §§ 244, 248(*l*). And the Board is a "nonappropriated fund instrumentality that receives no funding through congressional appropriations." *Albrecht* v. *Comm. on Emp. Benefits*, 357 F. 3d

62, 67 (CADC 2004). Yet the Board of Governors "enjoys sovereign immunity." *Id.*

4. In denying immunity to NJ Transit, the Court of Appeals of New York was influenced by the fact that "New Jersey's government does not direct the day-to-day operations of NJT." Pet. App. 16a (citing NJ Transit's power to "make and alter bylaws for its organization," "transact in real and personal property," "set fares and collect revenue for its operations, and enter into agreements and contracts"). The Tenth Circuit applied similar reasoning in denying immunity to MOHELA because it "has a fair degree of operational autonomy—particularly in its ability to make contracts, own property, manage its day-to-day affairs, and select its leadership." *Good*, 121 F.4th, at 820.

Those attributes, however, are incident to MOHELA and NJ Transit's status as public corporations, a form States frequently use for instrumentalities established to perform specific governmental functions. *See*, *e.g.*, *Kohn*, 87 F.4th, at 1032–33; *P.R. Ports Auth.*, 531 F.3d, at 872. They do not negate the fact that the entity is an arm of the state that exists to pursue state governmental functions under the State's control.

As noted above, this Court has recognized that "[e]very government corporation has such a distinct personality; it is a corporation, after all, with the powers to hold and sell property and to sue and be sued. Yet such an instrumentality—created and operated to fulfill a public function—[may] nonetheless remain[] '(for many purposes at least) part of the Government itself.'" *Biden*, 600 U.S., at 492 (cleaned up). As this Court observed regarding a federal public corporation, "the form which Government takes—whether it appears as the Secretary of the Treasury, the Secretary of War, or the Inland Waterways Corporation—is

wholly immaterial." *Inland Waterways Corp.* v. *Young*, 309 U.S. 517, 523 (1940).

Indeed, this Court found that when Congress reorganized the Postal Service to give it similar corporate powers to increase its efficiency and "reduce political influences on its operations," that "did not strip it of its governmental status." *U.S. Postal Serv.* v. *Flamingo Indus. (USA) Ltd.*, 540 U.S. 736, 740, 744 (2004).

The Postal Service has existed in varying forms since the founding of the country under the Articles of Confederation. *Id.*, at 739. At some times, the Postmaster reported directly to the President. At other times, the Postal Service was subordinate to the Treasury Department, or was recognized by Congress as "an executive department of the Federal Government" named "the Post Office Department." *Id.*, at 739–40.

In 1970, Congress removed the Post Office Department from the Cabinet, changed its name to "the United States Postal Service," and made it "an independent establishment of the executive branch of the Government of the United States." *Id.*, at 740 (quoting 39 U.S.C. § 201). The Postal Service is overseen by an 11-member Board of Governors. 39 U.S.C. § 202. Nine governors are appointed by the President with the advice and consent of the Senate and are removable only for cause. *Id.* The other two governors are the Postmaster General ("who also serves as the chief executive officer of the Postal Service, and who is appointed by the other nine") and the Deputy Postmaster General ("who is appointed by the other nine together with the Postmaster General"). *Flamingo Indus.*, 540 U.S., at 740 (describing board structure set out in 39 U.S.C. § 202). The reorganized Postal Service "retains its monopoly over the carriage of letters" and has "significant governmental powers, consistent with its status as an independent establishment of the Executive Branch,"

including "powers to contract, to acquire property, and to settle claims." *Id.*, at 741. It also has the power "to sue and be sued in its official name." 39 U.S.C. § 401(1).

This Court has interpreted the sue-and-be-sued clause as a broad waiver of the Postal Service's sovereign immunity. *See Loeffler* v. *Frank*, 486 U.S. 549 (1988); *Franchise Tax Bd.* v. *U.S. Postal Serv.*, 467 U.S. 512 (1984). But it never questioned that the Postal Service was an arm of the United States that is entitled to immunity unless waived by Congress. Quite the contrary: the Court held that the Postal Service retains its "governmental status" even though Congress waived its immunity from suit. *Flamingo Indus.*, 540 U.S., at 744.

The same should be true for state instrumentalities that have attributes of corporate form, are under state control, and are used to perform governmental functions. They, too, are arms of the State that are entitled to share the State's immunity from suit in federal court or the courts of other states. And that remains true even where the state instrumentality has a sue-and-be-sued clause. To respect the sovereign rights of States, this Court has held that a State "does *not* consent to suit in federal court merely by consenting to suit in the courts of its own creation" or "merely by stating its intention to 'sue and be sued.'" *Coll. Savs. Bank* v. *Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676 (1999) (emphasis added) (citing *Smith* v. *Reeves*, 178 U.S. 436, 441–45 (1900), and *Fla. Dept. of Health & Rehab. Servs.* v. *Fla. Nursing Home Assn.*, 450 U.S. 147, 149–50 (1980) (per curiam)).

III. A State instrumentality can be an arm of the State even if the State has not agreed to be liable for judgments against the entity.

The New York Court of Appeals also erred in giving dispositive weight to the fact that New Jersey lacks "legal liability or ultimate financial responsibility for a judgment" against NJ Transit. Pet. App. 18a. The court's suggestion that the suit "would not be an affront to New Jersey's dignity because a judgment would not be imposed against the State," *id.*, is based on a cramped view of the sovereign rights at stake.

1. "The generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity." *Alden*, 527 U.S., at 715. As Hamilton wrote in The Federalist No. 81, it "is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*." *Id.*, at 716 (emphasis in original).

"The founding generation thus took as given that States could not be haled involuntarily before each other's courts." *Franchise Tax Bd.* v. *Hyatt*, 587 U.S. 230, 239 (2019). The Eleventh Amendment was ratified to confirm that the Constitution does not permit any suits "against the States that were 'anomalous and unheard of when the Constitution was adopted.'" *Id.*, at 243 (quoting *Hans* v. *Louisiana*, 134 U.S. 1, 18 (1890)).

The States' immunity from suit is not limited to situations in which there could be a judgment against the state treasury. This Court has made clear that state sovereign immunity does "not exist solely in order to 'prevent federal-court judgments that must be paid out of a State's treasury.'" *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 58 (1996) (quoting *Hess*, 513 U.S., at 48). Sovereign immunity is more than just "a defense

to monetary liability or even to all types of liability." *Fed. Mar. Comm'n*, 535 U.S., at 766. It provides "an immunity from suit," *id.*, thus avoiding "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.'" *Seminole Tribe*, 517 U.S., at 58 (quoting *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)). Indeed, sovereign immunity's "central purpose is to accord the States the respect owed them as joint sovereigns." *Fed. Mar. Comm'n*, 535 U.S., at 765 (cleaned up).

2. A State's dignity and sovereign rights are harmed when one of its instrumentalities is hauled into court without its consent, even if the State is not directly liable for any resulting judgments. Defending lawsuits is costly and time-consuming. And to comply with adverse judgments, the entity will have to expend valuable resources and/or alter the way it operates, impairing its ability to perform the public functions for which the State created it. That is an affront to the State's dignity and sovereign rights, and can cause financial harm to the State, even if the State treasury is not legally obligated to pay the judgment. MOHELA provides a good example.

As this Court has recognized, MOHELA is a "public instrumentality" of Missouri, established to "perform the 'essential public function' of helping Missourians access student loans needed to pay for college." *Biden*, 600 U.S at 490 (quoting Mo. Rev. Stat. § 173.360). To fulfill MOHELA's "public function," Missouri empowers it to issue bonds and to purchase, finance, and service student loans, activities for which MOHELA can charge fees and earn revenues. Mo. Rev. Stat. § 173.385.1(6)–(8), (12), (18). MOHELA's "profits help fund education in Missouri." *Biden*, 600 U.S., at 490. MOHELA does so in several ways.

First, MOHELA is required by statute to give $350 million to the Lewis and Clark Discovery Fund—a fund in the state treasury that the legislature uses to fund capital projects at public colleges and universities and to help colleges and universities identify opportunities to commercialize technologies. Mo. Rev. Stat. §§ 173.385.2, 173.392. More than $100 million of that obligation is outstanding. *Am. Fed. of Teachers* v. *Higher Educ. Loan Auth. of the State of Mo.*, No. 1-24-cv-02460-TSC (D.D.C.), Dkt. 26-1, ¶ 8.

Second, MOHELA makes annual direct contributions to the State treasury to fund line items in the State's budget for financial aid and scholarship programs such as the Academic Scholarship Fund, the Access Missouri Financial Assistance Fund, and the A+ Schools Fund. *Id.*, ¶¶ 4–7. The amount of contributions varies depending on MOHELA's financial ability to make them. In 2024, MOHELA contributed $6 million to fund these line items in the State's budget. *Id.*, ¶ 7. But in 2011, MOHELA transferred $30 million because the State's budget "banked on MOHELA making the money transfer." *MOHELA to Provide $30M in Scholarships*, Columbia Daily Tribune (June 11, 2011), tinyurl.com/44xvvfzb.

Third, earlier this year, the Missouri General Assembly required MOHELA to support a new "Teacher Recruitment and Retention State Scholarship Program" by purchasing and holding loans made under the program to encourage college students to become teachers. *See* S.B. 68, 103d Gen. Assemb., 1st Reg. Sess. (Mo. 2025) (codified at Mo. Rev. Stat. § 173.232.1, .6(a)). For every year the loan recipient teaches, a portion of the loan is forgiven. *Id.*

Fourth, MOHELA has established the Missouri Scholarship Loan Foundation (Foundation) to help make higher education more accessible and affordable

for Missouri families. MOHELA established the Foundation pursuant to its statutory authority to create or contribute to "any type of financial aid program that provides grants and scholarships to students." Mo. Rev. Stat. § 173.385.1(19); *see also id.*, § 173.360 (deeming MOHELA's exercise of its authorities as "the performance of an essential public function"). The Foundation's mission is to provide innovative products and services to help Missouri students, particularly those with insufficient financial resources, prepare for, enter into, and successfully complete higher education at Missouri institutions. *See* Mo. Scholarship & Loan Found., *About Us*, tinyurl.com/3run8s5p (last visited Sept. 8, 2025).

Working with MOHELA, the Foundation offers the Missouri Family Education Loan program to provide borrowing options for Missouri students who have financial need but may not meet the traditional credit requirements for private loans. The Foundation is the lender, and MOHELA the servicer, for these loans.

The Foundation also provides a number of grant and scholarship programs for Missouri students, including:

- *Finish Line Degree Completion Grant* to assist Missouri students who either have left school with an outstanding balance or who are in their final semester and have exhausted all federal financial-aid options.
- *My Missouri "MyMO" Scholarship Program* to assist Missouri students on their pathway to college starting in their 9th-grade year.
- *Purdy Emerging Leaders Scholarship Program* to provide scholarships to emerging leaders who are outstanding students and who need additional funding for higher education.

- *Show-Me to College Scholarship* for students with a Student Aid Index of 12,000 or less, a GPA of 3.5 or higher at a Missouri high school, and a proven record of community service, extracurricular participation, and/or work experience.

Litigation that causes financial harm to MOHELA will reduce its ability to provide these resources to Missouri students and universities. Thus even though MOHELA's operating funds and revenues are not deposited in the state treasury, and Missouri is not legally liable for MOHELA's debts, litigation that causes financial harm to MOHELA harms the State of Missouri "that created and controls MOHELA." *Biden*, 600 U.S., at 494. Missouri established MOHELA to increase the amount of money available to support higher education in the State, and it treats MOHELA's assets as state assets available for that purpose.

Because "money is fungible," *Knox* v. *Serv. Emps. Int'l Union*, 567 U.S. 298, 317 n.6 (2012), MOHELA's resources make funds in the state treasury available to serve other public functions, and, more to the point, judgments against MOHELA require Missouri either to redirect treasury funds to the higher-education programs dependent on MOHELA in order to maintain the same level of support, or else settle for fewer resources for this essential public purpose. Ignoring this reality and opening MOHELA to suit, as the Tenth Circuit did, exposes Missouri to the very risk the Eleventh Amendment aims to guard against: It subjects "the course of [Missouri's] public policy and the administration of [its] public affairs" to "the mandates of judicial tribunals without [its] consent, and in favor of individual interests." *Alden*, 527 U.S., at 750 (cleaned up).

CONCLUSION

The Court should affirm the Pennsylvania Supreme Court's judgment in *Galette* and reverse the New York Court of Appeals' judgment in *New Jersey Transit*.

Respectfully submitted,

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