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

BRIEF OF *AMICI CURIAE* THE STATES OF KANSAS, ALABAMA, ALASKA, ARKANSAS, FLORIDA, GEORGIA, IDAHO, INDIANA, IOWA, LOUISIANA, MONTANA, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, TENNESSEE, TEXAS, UTAH, AND VIRGINIA IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae the States of Kansas, Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Louisiana, Montana, Nebraska, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah, and Virginia are sovereigns within the Union's federal system. Accordingly, they enjoy immunity—*sovereign* immunity—from private suits, unless their immunity has been properly waived or abrogated. Practically, this immunity protects limited public funds. But more importantly, sovereign immunity protects the States' dignity, meaning it reflects and respects their sovereignty and unique role in our constitutional structure.

The States' immunity extends to their "arms"—state-created entities that serve myriad public purposes. These entities differ in structure, function, and funding, reflecting the specific (sometimes niche) problems and policies that spurred the creation of each. This variation means courts often struggle to consistently articulate and apply a predictable, uniform test for determining whether a state-created entity shares in the State's sovereign immunity. And in many cases, the test inevitably employed by the court places the monetary benefits of immunity over the dignitary benefits—an incorrect, underinclusive, and speculative approach.

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[1] *Amici* provided timely notice to the parties of their intent to file this brief. *See* Rule 37.2.

The States have a paramount interest in clarity and certainty on when their sovereign immunity covers the entities created by and within them to serve their citizens. Indeed, there is perhaps no greater "state interest" than the one presented here. Accordingly, this Court's fulsome consideration of the issue is warranted.

SUMMARY OF THE ARGUMENT

Amici, more than anyone else, understand the need for certainty on state sovereign immunity. A viable and predictable test benefits everyone. It allows potential plaintiffs to judge the likelihood of a successful suit, enables defendants to knowingly assess their options, and furthers consistency among the courts in their rulings. Beyond the courtroom, such a test allows state legislators to make informed decisions when they create and revise state arms and instrumentalities. And it allows the entities which possess colorable claims of state sovereign immunity—and the state officials to whom these entities are ultimately accountable—to meaningfully assess the legal risks of their actions and to know their place within our constitutional system.

But there is currently no uniform, workable test that ensures state dignity—a recognition of the sovereignty inherent in the States—is paramount in the application of immunity. Arm-of-the-state jurisprudence has split the circuits and state high courts. While the Union may consist of 51 imperfect solutions, it contains only one court with the final say over state sovereign immunity, a matter of federal

constitutional law. Thus, it is imperative that this Court provide certainty.

A definitive answer that reflects the driving force behind state sovereign immunity—state dignity—is necessary. To be sure, protecting the state treasury is important. And when an adverse judgment against an entity would definitively and directly impact state funds, that is a telltale sign the entity is "close enough" to the State that immunity applies. But even more important is protecting the States' dignity, a reflection of their sovereignty that generally excuses them from private suits. Although this Court has repeatedly recognized the importance of protecting state dignity, it should use this case to make dignity central to arm-of-the-state jurisprudence.

Clarity that upholds dignity is a practical necessity. As the sovereigns closest to many of the problems that impact their citizens, the States often meet issues with innovation. The States create entities with specific, limited purposes, ranging from furthering educational opportunity and research to promoting economic development to protecting cultural institutions. While certain "traditional" entities (like a department of revenue) may squarely fall within the State's sovereign immunity, others (like a student-loan servicer) may be in a gray area despite being created by the State, overseen by the State, and imbued with some of the State's authority.

Because this case presents an excellent vehicle through which to ground arm-of-the-state jurisprudence in state dignity, the Court should grant the petition for a writ of certiorari.

ARGUMENT

When the States entered the Union, they retained certain aspects of their sovereignty. *See Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 751–52 (2002). One "integral component" of their retained sovereignty "is their immunity from private suits." *Id.*; *see also id.* at 752 ("[T]he Convention did not disturb States' immunity from private suits, thus firmly enshrining this principle in our constitutional framework."); *Franchise Tax Bd. of Cal. v. Hyatt*, 587 U.S. 230, 238 (2019) (recognizing state sovereign immunity "was well established and widely accepted at the founding"); *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991) (recognizing state sovereignty limits "the judicial authority in Article III"). "In short, at the time of the founding, it was well settled that States were immune under both the common law and the law of nations." *Hyatt*, 587 U.S. at 241.

Although sovereign immunity protects the States from having to satisfy an adverse judgment, that is not its main goal. Rather, immunity serves the "preeminent purpose" of protecting the States' dignity. *Fed. Mar. Comm'n*, 535 U.S. at 760; *see also Alden v. Maine*, 527 U.S. 706, 714 (1999) (recognizing the Constitution "preserves the sovereign status of the States" by "reserv[ing] to them a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status"); *Ex parte Ayers*, 123 U.S. 443, 505–06 (1887) (discussing importance of sovereign immunity for

"prevent[ing] the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties").

Sovereign immunity extends to the arms of the States, those entities that perform public services and are "so closely bound up with" a State that they are entitled to share in the State's immunity. *See* Kelsey Joyce Dayton, Comment, *Tangled Arms: Modernizing and Unifying the Arm-of-the-State Doctrine*, 86 U. Chi. L. Rev. 1603, 1605 (2019); *see also Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977) (recognizing an entity that is "an arm of the State" enjoys state sovereign immunity). There is no bright line to determine whether an entity qualifies for immunity as an arm of the State, so while "[s]ome state agencies" will be entitled to immunity, "other agencies and boards won't." Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 Harv. J.L. & Pub. Pol'y 931, 1001 (2014). Putting it mildly, "arm-of-the-state jurisprudence 'is, at best, confused.'" *Id.* at 1002 (quoting *Mancuso v. N.Y. State Thruway Auth.*, 86 F.3d 289, 293 (2d Cir. 1996)).

In finding that the Higher Education Loan Authority of the State of Missouri ("MOHELA") is not, in fact, an arm of the State of Missouri, the United States Court of Appeals for the Tenth Circuit only added to the confusion. It held fast to an incorrect test that, at the end of the day, weighs the direct and (allegedly) certain fiscal consequences of a potential adverse judgment above all else, despite this Court's

recognition that state dignity is the preeminent purpose of sovereign immunity. *See, e.g.*, App. 20a & n.11, 73a–75a. And the court faulted MOHELA for having some traits that differentiate it from traditional governmental entities (*i.e.*, slightly more autonomy), *see, e.g.*, App. 76a, failing to recognize the States' inherent and constitutional discretion to craft their arms to efficiently, effectively, and economically serve the public. Compounding its miscues, the Tenth Circuit determined MOHELA did not qualify for sovereign immunity despite this Court's recognition that "[b]y law and function, MOHELA is an instrumentality of Missouri," with the connection between the two so close that an injury to MOHELA is an injury to Missouri. *See Biden v. Nebraska*, 600 U.S. 477, 491, 494 (2023).

The opinion below leaves every state-created entity vulnerable to the gauntlet of private litigation in the Tenth Circuit simply because every dollar of its budget does not definitively flow from the state treasury. Indeed, the long and rocky road laid by the court relegates state sovereignty to a legislative line item.

The Tenth Circuit has offered this Court a prime opportunity to delineate arm-of-the-state jurisprudence in a manner that centers state dignity and accounts for the creative ways in which the States tackle policy issues. The Court should accept this opportunity by granting the petition.

I. There is a pressing need for clarity and predictability on when state-created entities are entitled to sovereign immunity.

Arm-of-the-state jurisprudence is far from clear, and the Tenth Circuit's decision did nothing to alleviate the situation. As noted above and in the petition, this Court's voice on the issue is necessary. There is widespread uncertainty among the circuits and state high courts about how to determine whether sovereign immunity applies to state-created entities and which state interest (fiscal or dignitary) carries the day in evaluating immunity.

In *Mt. Healthy*, this Court recognized that state sovereign immunity extends to any entity that is considered "an arm of the State." 429 U.S. at 280. Since then, arm-of-the-state jurisprudence remains unsettled. Indeed, there have been "scores of lower court precedents classifying a limitless variety of entities as arms of their respective states shielded with their state's sovereign immunity, or else not, with outcomes varying not only circuit by circuit but state by state within a given circuit." Jameson B. Bilsborrow, Comment, *Keeping the Arms in Touch: Taking Political Accountability Seriously in the Eleventh Amendment Arm-of-the-State Doctrine*, 64 Emory L.J. 819, 829–30 (2015); *see also* Volokh, *supra*, at 1001–02; Dayton, *supra*, at 1627 ("In light of the Court's general lack of clarity regarding what factors courts should consider, the circuits have developed

their own various arm-of-the-state tests."). This trend is unsustainable.

The problem has only continued to grow. And even the Tenth Circuit conceded the split. *See* App. 20a n.11. In a recent recognition (that later became an illustration) of the issue, the New York Court of Appeals collected the various tests employed by the regional federal circuit courts, concluding that the courts "have identified . . . an array of multifactor and multistep tests" for determining arm-of-the-state status. *Colt v. N.J. Transit Corp.*, No. 72, --- N.E.3d ----, 2024 WL 4874365, at *4 (N.Y. Nov. 25, 2024). And with this disagreement, it observed that this Court "has not yet endorsed any particular Circuit's formulation of the arm-of-the-state test." *Id.* at *5. As *Colt* illustrates, the need for guidance extends into state courts. There, the court determined the New Jersey Transit Corporation is not an arm of New Jersey and so it is not entitled to sovereign immunity. *Id.* at *7. Only a few months later, the Supreme Court of Pennsylvania reached the *opposite conclusion for the same entity*, aligning itself with a decision by the Third Circuit. *Galette v. NJ Transit*, No. 4 EAP 2024, --- A.3d ----, 2024 WL 5457879, at *9–11 (Pa. Mar. 12, 2025); *see also Karns v. Shanahan*, 879 F.3d 504, 519 (3d Cir. 2018).[2]

[2] A petition for a writ of certiorari has been filed in *Galette*, *see Galette v. N.J. Transit Corp.*, No. 24-1021 (U.S. Mar. 19, 2025), and one is forthcoming in *Colt*, *see generally N.J. Transit Corp. v. Colt*, No. 24A797 (U.S. Feb. 19, 2025). Given the need for this Court's guidance, it may be worthwhile for the Court to hear the New Jersey Transit cases with this case.

To some extent, uncertainty over what is an arm of a State is to be expected. After all (and as explained more below), the States create various entities that serve any number of public policy purposes. Indeed, "[t]he expansion of state services, the emphasis on privatization, revenue-sharing, and decentralization by the states, and the emergence of specialized authorities and agencies created by the states have led to increasingly complex, multi-factor tests" for determining arm-of-the-state status. Joseph Beckham, *The Eleventh Amendment Revisited: Implications of Recent Supreme Court Interpretations on the Immunity of Public Colleges and Universities*, 27 Stetson L. Rev. 141, 147 (1997). But this "problem"—the States creatively structuring themselves—is a consequence of our constitutional system that vests significant discretion over governance in the States. This reality heightens the need for this Court to provide concrete guidance for lower courts.

One of the worst kept secrets in American jurisprudence is the incessant uncertainty over what qualifies as a "State" for the purposes of state sovereign immunity. This indecisiveness has led to different courts reaching different conclusions over the same entity, an occurrence that should be an aberration but instead has become a normality. Indeed, the Tenth Circuit effectively disagreed with this Court on MOHELA's relationship with the State of Missouri. And the judicial uncertainty continues to play out; in the past few weeks alone, district courts have reached contrary conclusions over MOHELA's

status as an arm of Missouri. *Compare Coffey v. MOHELA*, No. 5:24-CV-270-MMH-PRL, 2025 WL 770396, at *9 (M.D. Fla. Mar. 11, 2025) (applying the Eleventh Circuit's test and determining MOHELA *is not* entitled to sovereign immunity), *with Carlotta v. MOHELA*, No. 1:24-CV-73, 2025 WL 905628, at *6 (S.D. Ohio Mar. 25, 2025) (applying the Sixth Circuit's test and determining MOHELA *is* entitled to sovereign immunity).

This Court should grant the petition to definitively outline the appropriate arm-of-the-state test.

II. This Court should leave no doubt that state dignity is central to the arm-of-the-state inquiry.

Inherent in the disagreement over arm-of-the-state jurisprudence is the split on the driving force behind state sovereign immunity. The Tenth Circuit held true to its belief that protecting the States from monetary harm is the primary rationale for immunity. *See* App. 20a & n.11, 73a–75a. In other words, in any case that does not have a "clear" outcome, an entity is an arm of a State if any adverse judgment against it would for certain be paid from the state treasury. This approach is wrong.

The Tenth Circuit ignored this Court's directive that state dignity is the paramount purpose of state sovereign immunity. Although dignity has always permeated sovereign immunity jurisprudence, *see, e.g.*, *Ex parte Ayers*, 123 U.S. at 505–06, in recent

decades this Court has solidified dignity's leading role.

Beginning in the early 1990s with *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993), this Court held that the States and entities claiming to be arms of the States could invoke the collateral order doctrine to immediately appeal the denial of immunity. The Court recognized the "ultimate justification" for prompt appellate resolution in these situations is to "ensur[e] that the States' dignitary interests can be fully vindicated." *Id.* at 146.

But in *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 48–51 (1994), the Court, without fully grappling with the Eleventh Amendment's text[3] and the history and tradition of state sovereign immunity, asserted that protecting the state treasury is the "core concern" of immunity. Four justices, led by Justice O'Connor, dissented because they recognized that dignitary concerns must trump fiscal concerns when state sovereign immunity is at issue.

Justice O'Connor took the Court to task for transforming "a *sufficient* condition" for immunity—certain and direct financial harm to the State—"into a *necessary* condition." *Id.* at 59 (O'Connor, J., dissenting). Not only did this approach

[3] While the Eleventh Amendment does not capture the entirety of state sovereign immunity, it is an important recognition of the traditional immunity enjoyed by the States. *See Alden*, 527 U.S. at 722 (recognizing importance of "[t]he text and history of the Eleventh Amendment").

"underprotect[] the state sovereignty at which the Eleventh Amendment is principally directed," she believed it was also "belied by the text of the Amendment itself," which prevents both legal and equitable suits against the States. *Id.* at 59–60. Ultimately, a fiscal-centric test would be underinclusive and would deprive "state governments the critical flexibility in internal governance that is essential to sovereign authority." *Id.* at 61–62.

Recognizing the wisdom in Justice O'Connor's reasoning, the Court soon began correcting course:

- *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 58 (1996), rejected the notion that state sovereign immunity "exist[s] solely" to protect state funds.

- *Regents of the University of California v. Doe*, 519 U.S. 425, 430–31 (1997), recognized that sovereign immunity applies even if a third party (like an indemnifier), not the State, would pay any adverse judgment against a state instrumentality. In that situation, the State "would not cease to be 'one of the United States"; in other words, a state arm can invoke immunity even though the State would not suffer a fiscal consequence from an adverse judgment. *Id.* at 431 (quoting U.S. Const. amend. XI).

- *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 268 (1997), recognized that sovereign

immunity "is designed to protect" "the dignity and respect afforded a State."

- *Alden*, 527 U.S. at 712–27, 748–49, thoroughly considered the understanding of state dignity and sovereignty at the Founding that became part of the Constitution. It recognized that "immunity from private suits [is] central to sovereign dignity" retained by the States. *Id.* at 715.

And in *Federal Maritime Commission*, 535 U.S. at 760, this Court relegated *Hess* to a jurisprudential blip when it affirmed that "[t]he preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities." Building on *Ayers*, *Puerto Rico Aqueduct*, *Seminole Tribe*, and *Alden*, the Court characterized the argument that immunity turns on the "threat to the financial integrity of States" as "a fundamental misunderstanding of the purposes of sovereign immunity." *Id.* at 760, 765.

This Court has emphasized state dignity is at the core of sovereign immunity. The Tenth Circuit (and courts with similar approaches) erred in placing monetary harm above dignitary harm in determining whether immunity applies. In its decision, the Tenth Circuit even recognized this Court's focus on state dignity, yet it declined to modify its approach, believing it was tied by *Hess*. *See* App. 20a n.11. But when this Court has spoken on the question at issue—like whether fiscal or dignitary interests carry the day—lower courts are bound to follow its

determination. *Federal Maritime Commission* repudiated *Hess* and its focus on the state treasury, yet the Tenth Circuit still did not apply it. That was wrong.

This Court should erase any doubts about whether protecting state dignity is the paramount purpose of state sovereign immunity. Because it is.

III. The States' prerogative to creatively and flexibly structure their governmental functions should not be undermined by underinclusive arm-of-the-state tests.

The States are known as the laboratories of democracy for good reason. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Because of their inherent sovereignty, their police power, and their limited federal constitutional constraints, the States have significant flexibility to innovate in their governance. *See generally* Jeffrey S. Sutton, *Who Decides?: States as Laboratories of Constitutional Experimentation* (2022). Among other advantages, the Union's "federalist structure of joint sovereigns . . . allows for more innovation and experimentation in government." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991); *see also* Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for A Third Century*, 88 Colum. L. Rev. 1, 9 (1988) ("Many scholars point to the continued existence of strong state governments as a principal source of governmental innovations.").

The flexibility enjoyed by the States to creatively structure governmental functions is an important mechanism for serving the public. As the Federal Farmer (a leading Anti-Federalist) observed, the Framers formulated a governing document that "preserve[s] decentralized decision making because smaller units of government are better able to further the interests and general welfare of the people." Michael W. McConnell, *Federalism: Evaluating The Founders' Design*, 54 U. Chi. L. Rev. 1484, 1493 (1987).

And this design is worth preserving. Sovereign immunity must protect the "critical flexibility in internal governance that is essential to sovereign authority." *Hess*, 513 U.S. at 62 (O'Connor, J., dissenting). In other words, sovereign immunity must protect state dignity. After all, this Court's "conceptualization of state dignity is inextricably linked with its recognition of a state's continuing status in our constitutional system of federalism as an independent sovereign entity which retains certain inherent rights that the federal government is required to honor." *Goldman v. Se. Pa. Transp. Auth.*, 57 A.3d 1154, 1182 (Pa. 2012) (citing *Federal Maritime Commission*, *Alden*, and *Puerto Rico Aqueduct*). This includes the right to structure governmental functions as the States see fit.

Instead of recognizing that this flexibility—employed by Missouri in creating MOHELA—is an integral part of our constitutional system, the Tenth Circuit used it against MOHELA (and by extension,

Missouri) in two important but related ways: by faulting MOHELA for its autonomy and by focusing on a speculative impact to the state treasury.

a. Protecting the States' dignity means protecting their flexibility in structuring governmental functions.

The Tenth Circuit dinged MOHELA for enjoying more autonomy than traditional state agencies, despite MOHELA remaining subject to Missouri's oversight and control. *See* App. 41a–53a. In doing so, the court punished Missouri for exercising its prerogative to creatively and effectively structure its governmental functions. Because this autonomy is the natural result of the inherent and constitutional flexibility afforded to the States, *see Gregory*, 501 U.S. at 458, it cannot foreclose immunity. It is a bedrock constitutional principle that "[h]ow power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself." *Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612 (1937).

The Tenth Circuit's approach fundamentally weakens state sovereignty because it limits state governance. This is tantamount to a federal court micromanaging the States by directing them to structure their governmental functions in a particular manner, lest state entities lose sovereign immunity. *Cf.* Merritt, *supra*, at 41 (recognizing that the Constitution "grants states control over their internal governmental machinery"). While the legislative

branch may properly abrogate state sovereign immunity, the judicial branch may not. *Cf. Alden*, 527 U.S. at 754–56 (discussing the limited circumstances in which state sovereign immunity may be abrogated). The Court should rebuke this improper federal intrusion into state affairs.

The States often create entities to efficiently and effectively implement their policies. MOHELA is just one example among many. (And not even the only state-created student-loan authority.) Others often arise in the context of public colleges and universities, which "vary in the nature of their origins, finance, and governance structure." Beckham, *supra*, at 148. Even athletics departments become entangled in arm-of-the-state jurisprudence. *E.g.*, *Can. Hockey, L.L.C. v. Tex. A&M Univ. Athletic Dep't*, No. 20-20503, 2022 WL 445172, at *6 (5th Cir. Feb. 14, 2022) (concluding Texas A&M's athletic department was entitled to state sovereign immunity).

Often intertwined with the role of specialized entities in higher education is their role in public health. For example, the Kansas Legislature recognized "specialized management and operation" of the University of Kansas's hospital was necessary to continue effectively treating the public while providing meaningful teaching, training, and research opportunities, so it created "an independent public authority" to run the hospital. *See* Kan. Stat. Ann. § 76-3302. Like MOHELA, the Authority has many attributes of a state arm; most of its directors are nominated by the governor and confirmed by the

state senate (the others are leaders of the University or the Authority), and it is subject to the Kansas Open Records Act. *Id.* §§ 76-3304–05. Ensuring access to quality care in a teaching and research hospital is an important public purpose that necessarily requires flexibility and autonomy to navigate the realities of modern healthcare. Other entities, like MOHELA, also require this flexibility to operate in spheres often dominated by the private sector and non-profits, who can act without the restraints imposed on traditional government agencies. Yet under the Tenth Circuit's approach, an entity may be punished for its necessary autonomy by not being able to access sovereign immunity, which will in turn punish the State and its citizens by causing the entity to devote time, money, and resources to defending against any and all private suits. *See Nebraska*, 600 U.S. at 494. And, above all, the State's dignity will be undermined because the entity *it* created to serve *its* citizens will be subject to private suits without its consent.

Beyond higher education and hospitals, special and limited purpose state-created entities abound. From port and turnpike authorities to state fair boards and agricultural commissions, the States have recognized that certain entities—because of the problems they address, the policies they further, and the sectors in which they operate—need more flexibility and freedom than other state agencies and departments. And it is the prerogative of the States to make this determination. *See Highland Farms Dairy*, 300 U.S. at 612.

Defending state dignity includes respecting the States' authority to serve their citizens. *See Hess*, 513 U.S. at 62 (O'Connor, J., dissenting). This Court should ensure arm-of-the-state jurisprudence does not punish the States for engaging in basic governance.

b. Heavily weighing any impact on the state treasury is an improper, underinclusive, and speculative approach for evaluating state sovereign immunity.

The Tenth Circuit also focused too much on the source of funds that would pay any adverse judgment against MOHELA. *See* App. 73a–75a. By effectively requiring that any judgment must come from the state treasury for sovereign immunity to apply, it did exactly what Justice O'Connor warned against: endorse a simplistic and inherently underinclusive approach.

State dignity (and the immunity inherent in it) cannot be relegated to a line item in a state budget. Indeed, making dispositive the source of a hypothetical adverse judgment is an "anachronistic approach" in light of "[t]he growth and decentralization of modern state governments." Alex E. Rogers, Note, *Clothing State Governmental Entities with Sovereign Immunity: Disarray in the Eleventh Amendment Arm-of-the-State Doctrine*, 92 Colum. L. Rev. 1243, 1247 (1992).

As previously noted, the States often create entities with varying degrees of autonomy. One aspect

of the increased autonomy for these special or limited purpose public entities is often the source of funds. Instead of receiving yearly appropriations from the state legislature, these entities may be reliant on fees, bonds, investments, assessments, and other sources of revenue. While these funding mechanisms may eliminate the need for state budget allocations, they also often mean (either as a natural consequence or as an express statutory determination) that the entities will be directly responsible for adverse judgements rendered against them. And, the Tenth Circuit's reasoning proceeds, because satisfying any judgment against such an entity would not come from the State's general fund, there is no need for state sovereign immunity. Again, this oversimplifies matters.

A State's dignity is not tied to its fiscal resources, a truth repeatedly recognized by this Court. While protecting limited public funds is important, that was not the foremost consideration of sovereign immunity when the States entered the Union. Rather, it was to ensure the States did not have to answer to private suits, the right of every sovereign. *See Alden*, 527 U.S. at 712–27, 748–49. Thus, any test for whether state sovereign immunity applies that places the fiscal need for immunity above the dignitary need misconstrues history, the significance of sovereignty, and this Court's precedent. The need to protect state dignity exists whether or not the state treasury will ultimately directly pay any resulting adverse judgment. If the State creates an entity to serve a limited public purpose and specifically vests that

entity with autonomy to fulfill that purpose, then the State's dignity is harmed if the entity is hampered or constrained in its mission. And a private suit does just that by taking up the entity's time and resources by requiring the entity to defend itself. Indeed, if the entity is found liable, then satisfying the adverse judgment may very well mean it has fewer resources to fulfill the State's policies. That is an affront to the State's dignity, and it undermines the State's ability to serve its citizens.

This reality also illustrates why any eventual impact on the state treasury cannot determine state sovereign immunity. Even if an entity that does not generally receive a legislative appropriation directly pays a judgment, the State's finances may be affected. The entity will likely have less money to serve its public purpose, which may necessitate the state legislature making an appropriation to cover the shortfall. This consequence may not be apparent when a court assesses whether sovereign immunity applies, which will occur at the earliest possible stage of litigation. Thus, an inquiry that focuses on the state treasury is overly simplistic and premature, and it necessitates a litany of hypotheticals:

- What if the plaintiff wins his suit against the entity?
- What if the entity has to pay a monetary judgment to the plaintiff?

- What if the entity pays the judgment from funds derived from sources outside the state treasury?
- What if the monetary judgment causes the entity to be unable to perform its core public function?
- What if the state legislature covers the entity's shortfall through an appropriation from the state general fund?

This question chain illustrates why the fiscal impact of an adverse judgment cannot be determinative, if only as a practical matter. While it is easier to say whether the State's dignitary interest will be offended at the front end of a lawsuit (because its arm must undergo the burdens of civil litigation), it is often a tall task to say whether the State's fiscal interest will likewise be offended. Indeed, even if the State may not directly cover any adverse judgment, the State will likely suffer adverse fiscal consequences. For example, state attorneys general are often tasked with defending state entities, either through direct representation or by supervising the work of outside counsel. Depriving these entities of immunity means the States will likely direct resources toward the necessary legal defense. Given these uncertainties and the complexities of state government, while a definitive impact on the state treasury may point toward arm-of-the-state status (*e.g.*, a statute says the state general fund will pay any adverse judgment against the entity), the lack of a

definitive impact cannot be determinative. *See Hess*, 513 U.S. at 59 (O'Connor, J., dissenting).

This Court has affirmed that the preeminent purpose of state sovereign immunity is protecting a State's dignity, not its purse. As a legal matter *and as a practical matter*, a test that prioritizes the latter over the former cannot stand.

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The States entered the Union with most of their sovereignty intact, including their general immunity from private suits. While state sovereign immunity may save state funds, it goes beyond fiscal matters by protecting state dignity.

The Tenth Circuit erred in evaluating MOHELA's relationship with Missouri. The court punished the State for exercising its inherent and constitutional prerogative to govern, and it relegated state dignity to a secondary consideration. Because other courts follow a similarly misguided trail, this Court's intervention is necessary.

CONCLUSION

For the foregoing reasons, this Court should grant MOHELA's petition for a writ of certiorari.

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