No. 24-1610

In the United States Court of Appeals for the Eighth Circuit

BRYAN S. MICK,

Plaintiff-Appellee,

v.

BARRETT GIBBONS, ET AL.,

Defendant-Appellees,

NEBRASKA STATE PATROL,

Third-Party Appellant.

On Appeal from the
United States District Court for
the District of Nebraska

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* states that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC has a strong interest in ensuring meaningful access to the legal system, in accordance with constitutional text and history, and therefore has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the winter of 2020, Print Zutavern's wife and parents called law enforcement because they "wanted law enforcement to help him" during a mental health emergency. App. 27, R. Doc. 1, ¶ 48. Instead, "law enforcement shot him." *Id*. Now, Bryan Mick, Zutavern's personal representative, seeks information from the Nebraska State Patrol (NSP) to understand what happened on that fateful February day. Invoking the Eleventh Amendment, NSP argues that sovereign immunity bars one of the subpoenas that Mick requested. But as this Court has already held, "[t]here is simply no authority for the position that the Eleventh Amendment shields government entities from discovery in federal court." *In re Missouri Dep't of Nat. Res.*, 105 F.3d 434, 436 (8th Cir. 1997). That precedent is

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to its preparation or submission. Counsel for all parties have consented to the filing of this brief.

binding on this panel, *see, e.g.*, *Mader v. United States*, 654 F.3d 794, 800 (8th Cir. 2011) (en banc), and in any event, the result it reached is the only one consistent with the text and history of the Eleventh Amendment.

To start, NSP's argument is at odds with the Eleventh Amendment's plain text, which prohibits federal courts from hearing "suit[s] in law or equity, commenced or prosecuted against" a state, U.S. Const. amend XI. As Founding-era cases, treatises, and dictionaries all make clear, the Amendment does not, by its terms, apply to a subpoena directed at a non-party witness. Such a subpoena is not a "suit in law or equity," because it does not involve the resolution of a party's claim or demand against a defendant.

This understanding is consistent with the Amendment's history and purpose. Indeed, the historical record makes clear that the "sovereign immunity embedded in our constitutional structure" does not prevent state officials from participating in discovery. *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 754-55 (2002). As an initial matter, the "very object and purpose" of the Eleventh Amendment was to address the risk of states being "summoned *as defendants* to answer to complaints of private persons," *Ex parte Ayers*, 123 U.S. 443, 505-06 (1887) (emphasis added), not state officials participating in lawsuits as witnesses. *See also Fed. Mar. Comm'n*, 535 U.S. at 752 (Eleventh Amendment adopted to protect sovereign states from the "suit of an individual" (quoting *The Federalist*

No. 81, at 487 (C. Rossiter ed., 1961) (Hamilton)).

Moreover, both the Eleventh Amendment and the Constitution as originally drafted were adopted against the backdrop of the "fundamental principle that 'the public has a right to every man's evidence." *Trump v. Vance*, 140 S. Ct. 2412, 2420 (2020) (citing 12 *The Parliamentary History of England* 693 (1812)). For centuries, subpoenas were "writ[s] of compulsory obligation . . . which the witness [was] bound to obey." *Bull v. Loveland*, 27 Mass. 9, 14 (1830). As one treatise writer explained, a court could issue a subpoena to anyone whose testimony was relevant to a legal dispute, including the "Prince of Wales, Archbishop of Canterbury, and the Lord High Chancellor." William Best, *Treatise on the Principles of Evidence* 141 n.b (1849) (quoting Jeremy Bentham, *Draught of a New Plan for the Organization of a Judicial Establishment in France* 34 (1790)). And courts and commentators did not lightly allow exemptions from the "public dut[y]" to testify. *Blair v. United States*, 250 U.S. 273, 279 (1919). Under NSP's view, the Framers simply excused state officials from this obligation without a hint of discussion in the historical record. That is simply not what happened.

NSP's other arguments are similarly without merit. NSP emphasizes that compliance with Mick's subpoena would affect the state's "dignity, autonomy, and treasury," NSP Br. 42, but even assuming this is true, it is irrelevant. The Supreme Court has held that a proceeding's impact on a state's treasury or dignity is a

relevant touchstone when determining whether *a suit* is "against the sovereign." *Dugan v. Rank*, 372 U.S. 609, 620 (1963). When a proceeding is not a *suit* at all, its effect on a state's dignity—to the extent that there is any effect at all—is doctrinally insignificant. After all, "not every offense to the dignity of a State constitutes a denial of sovereign immunity." *Virginia Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 258 (2011). NSP's reliance on cases involving federal or tribal officials, *see* NSP Br. 15-16; 40-41, is also inapposite. The doctrines of federal and tribal immunity differ from state sovereign immunity in terms of both their sources and functions.

In sum, the plain text of the Eleventh Amendment makes clear that it does not bar subpoenas to third-party witnesses. And the historical record provides further support for this understanding of the Amendment's text. Subpoenas to state officials were permitted "when the constitution was adopted," *Hans v. Louisiana*, 134 U.S. 1, 18 (1890), and they should also be permitted here.

ARGUMENT

I. The Eleventh Amendment's Text Makes Clear that It Does Not Bar Third-Party Subpoenas to State Officials.

The Eleventh Amendment provides that the "judicial power of the United States" does not "extend to any suit, in law or equity, commenced or prosecuted against one of the United States by Citizens of another State." U.S. Const. amend.

XI. The Eleventh Amendment does not bar Mick's subpoena, because a witness subpoena, and any proceeding that arises from it, is not a "suit."

A. In the late eighteenth- and early nineteenth centuries, legal thinkers understood a "suit in law or equity" to be a proceeding in which a court adjudicated a plaintiff's rights. *See, e.g.*, 2 Joseph Story, *Commentaries on the Constitution* § 1646 (1851) ("some subject is submitted to the courts by a party who asserts his rights in the form prescribed by law"). Blackstone, for example, defined "suit" as an "instrument whereby [a] remedy is obtained" for a legal injury. 3 William Blackstone, *Commentaries on the Laws of England* 116 (1768); *see also Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. 433, 447 (1830) (defining "suits at common law" as "proceedings. . . in which legal rights were to be ascertained and determined"); *Weston v. City Council of Charleston*, 27 U.S. 449, 464 (1829) ("[I]f a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought, is a suit.").

In *Cohens*, the Supreme Court explained that the term "suit in law or equity" in the Eleventh Amendment refers to a "process sued out by [an] individual against the State for the purpose of establishing some claim against it by the judgment of a Court." *Cohens v. Virginia*, 19 U.S. 264, 408 (1821); *id*. at 408 (noting that a "suit" is a "lawful demand of one's right" (quoting 3 Blackstone, *supra*, at 116)). In that case, after selling tickets to the national lottery in Virginia, Philip and

Mendes Cohen were convicted and fined under a state law that criminalized the sale of out-of-state lottery tickets. *Id.* at 376. The Cohens secured a writ of error to the Supreme Court, and Virginia invoked the Eleventh Amendment. *Id.* at 378. The Court rejected Virginia's objection, explaining that a writ of error is not a suit because it involves no "claim" or "demand" against the state. *Id*. at 411; *id.* at 410 (adding that the writ "simply [brought] the record into Court").

In more recent cases, the Supreme Court has confirmed that the term "suit in law or equity" refers to proceedings in which claims are resolved against states in contexts that "bear a remarkably strong resemblance to civil litigation in federal courts." *Fed. Mar. Comm'n*, 535 U.S. at 757. In *Federal Maritime Commission*, for example, the proceeding at issue would have forced the state to defend itself and to relinquish the opportunity to "litigate the merits" of a defense before a court. *Id.* at 762 (a state must "defend itself in front of the [Commission] or substantially compromise its ability to defend itself at all"). Thus, the Court held that state sovereign immunity barred the Federal Maritime Commission from "adjudicating complaints filed by a private party against a nonconsenting State," *id*. at 760, because the Commission proceeding "walks, talks, and squawks very much like a lawsuit," *id*. at 757 (citation omitted).

B. When the Eleventh Amendment was drafted, discovery proceedings addressed to third-party witnesses, including subpoenas for documents,

depositions, or testimony, were understood to be writs that aided the adjudication of suits—rather than a "suit in law or equity" itself. Subpoenas had deep roots in English law, where a subpoena *ad testificandum* could be used to "cause witnesses to appear and give testimony," 2 Richard Burn, *A New Law Dictionary* 355 (1792), and a subpoena *duces tecum* would "compel the witness to bring with him some writing or other evidence necessary to be produced in the cause," *id*. at 356; *see* 3 Blackstone, *supra*, at 382 (describing the subpoena *duces tecum*); *id.* at 369 (describing the subpoena *ad testificandum*); *see Carpenter v. United States*, 138 S. Ct. 2206, 2247 (2018) (Alito, J., dissenting) (noting that subpoenas for evidence "were well known to the founding generation").

For English courts, witness subpoenas solved a specific problem: previously, parties would retaliate against trial witnesses by seeking legal retribution, alleging that they gave unsolicited or biased testimony. *See* 3 John Wigmore, *A Treatise on the System of Evidence in Trials at Common Law* § 2190 (1905) ("anybody who was not somehow concerned as a party or a counsel in the cause ran the risk, if he came forward to testify to the jury, of being afterwards sued"). In a slow and "creative" response to this situation, English courts began to summon witnesses under subpoena, which would provide a defense if the witness were later sued for testifying. *Id.*; 9 William Holdsworth, *A History of English Law* 184 (1926) (describing the adoption of the subpoena by equity and then common-law courts).

Because subpoenas were simply tools to facilitate witness testimony, courts and legislatures in the Founding era described subpoenas as instruments that were ancillary to lawsuits, rather than suits themselves. *See, e.g.*, *id.*; *Ex parte Bollman*, 8 U.S. 75, 83-84 (1807) (including subpoenas among "writs [that] might, in the course of proceedings, be found necessary for enabling the courts to exercise their ordinary jurisdiction"); 1 Des. Eq. 68, 71 (1817) (excerpting An Act for Establishing a Court of Chancery, S.C. Pub. L. 338, March 21, 1784, which gave the Sheriff the authority to execute "all such process," except for "writs of subpoena"). Legal dictionaries made clear that such writs were distinct from a "suit in law or equity." They "touch[ed] a suit or action," 2 Burn, *supra*, at 735 (defining "writ"), and arose "in the course of proceedings," *Bollman*, 8 U.S. at 83, but they were not themselves "suits." This, of course, makes sense, because witness subpoenas did not require a state to "defend itself," *Fed. Mar. Comm'n*, 535 U.S. at 762, against a plaintiff's "lawful demand of [her] right," 3 Blackstone, *supra*, at 116.

C. Moreover, writs of subpoena, in addition to being ancillary to lawsuits, were always understood to be "order[s] of the judge," rather than commands from private parties. 9 Holdsworth, *supra*, at 185 (quoting 3 Wigmore, *supra*, § 2190).

Even today, the subpoena is the "lawfully issued mandate of the court issued by the clerk thereof." *Fisher v. Marubeni Cotton Corp*., 526 F.2d 1338, 1340 (8th

Cir. 1975); Fed. R. Civ. P. 45 advisory committee's note to 1991 amendment ("[T]he attorney acts as an officer of the court in issuing and signing subpoenas, [and faces] increased responsibility and liability for the misuse of this power."); *cf. Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 821 (1987) (Scalia, J., concurring) (describing the subpoena as an "order[] necessary to the conduct of a trial"). The ability to compel witnesses is part of the *court*'s "inherent power" to "call for all adequate proofs of the facts in controversy." *See* Simon Greenleaf, *Treatise on the Law of Evidence* § 309 (1848); 3 Wigmore *supra*, § 2194 ("The duty to give testimony is a duty to the State"). Thus, even if subpoenas could be considered "suit[s]" against nonconsenting states, they are not "commenced or prosecuted . . . *by Citizens of another State*," U.S. Const. amend. XI (emphasis added); *see Alden v. Maine*, 527 U.S. 706, 748 (1999) (explaining that the "founding generation" was concerned about requiring states to answer the "complaints of private persons" (internal quotation marks omitted) (quoting *Ayers*, 123 U.S. at 505)).

* * *

The Eleventh Amendment's plain text cannot be stretched to encompass third-party subpoenas. These writs are ancillary to suits—rather than "suit[s] in law or equity" themselves—and stem from the federal court's authority rather than

a plaintiff's. History also supports this reading of the Amendment's text, as the next Section discusses.

II. The Historical Record Confirms that Sovereign Immunity Does Not Bar Third-Party Subpoenas Directed at State Officials.

History confirms what the Eleventh Amendment's text makes clear: in the Founding era, the doctrine of sovereign immunity did not strip courts of the power to issue third-party subpoenas to state officials. *See Fed. Mar. Comm'n*, 535 U.S. at 755 (noting the importance of the "historical record" in evaluating Eleventh Amendment claims). While members of the Founding generation invoked sovereign immunity during the framing of the Constitution and the Eleventh Amendment, these invocations focused on states *as defendants*, not third-party witnesses. *Id.* at 760.

A. As the debates preceding the ratification of the Constitution make clear, the Founding-era concerns that prompted the ratification of the Eleventh Amendment were ones about states being amenable to suit as "a party." 3 *Debates on the Federal Constitution* 555 (Jonathan Elliot ed., 1836) (John Marshall) (referencing the state being "a party" and being "sued"); *The Federalist No. 81*, *supra*, at 488 (Hamilton) (a sovereign is not "amenable to the *suit* of an individual without its consent" (emphasis added)); *see also* 3 Elliot, *supra*, at 533 (describing Madison's assessment that federal jurisdiction could not extend to a case against a state unless it "condescend[ed] to *be a party*" (emphasis added)). *See generally*

Alden, 527 U.S. at 720 (emphasizing the "ratification debates" as a source of understanding of the scope of the Eleventh Amendment).

The Framers of the Eleventh Amendment were similarly focused on the unique dangers posed by requiring states to be parties in litigation. As the Supreme Court has explained, the Amendment was drafted in response to the Supreme Court's decision in *Chisholm v. Georgia*, 2 U.S. 419 (1793), in which the Court adjudicated a debtor's claim against the State of Georgia. *Alden*, 527 U.S. at 719. The decision "fell upon the country with a profound shock," leading to the quick adoption of the Eleventh Amendment. *Id*. at 720. During this period, outraged Americans focused on the prospect of states being forced to defend themselves against the claims of out-of-state plaintiffs. For example, lawmakers in the Georgia House of Representatives approved a bill providing that any person who attempted to levy a "debt, pretended debt, or *claim against the said state of Georgia*; shall . . . suffer death, without the benefit of the clergy." Clyde E. Jacobs, *The Eleventh Amendment and Sovereign Immunity* 57 (1972) (emphasis added). And shortly after the Amendment's ratification, Virginia's attorney general argued in *Hollingsworth v. Virginia* that the Amendment prevented jurisdiction over existing federal cases between states and citizens of other states because the "power to sue a state" had been "revoked and annulled." 3 U.S. 378, 381 (1798) (statement of Attorney General Lee); *Commonwealth v. Beaumarchais*,

7 Va. 122, 169 (1801) (observing in reference to *Chisholm* that state sovereignty "was surely invaded by calling [the states] *into a defence* in any foreign Court" (emphasis added)).

Finally, while the Supreme Court has held that states enjoy a "residuum of sovereignty" beyond the Eleventh Amendment's plain text, it has always explained that this sovereignty prevents states from being "summoned *as defendants* to answer the complaints of private persons." *Alden*, 527 U.S. at 748 (quoting *Ayers*, 123 U.S. at 505) (emphasis added). Both before and after the ratification of the Eleventh Amendment, courts observed that "the nature of sovereignty" prevented a state's participation in cases where judicial process was used to "compel the party's *appearance to answer the plaintiff's demand*," *Nathan v. Commonwealth of Virginia*, 1 U.S. 77 n.79 (Pa. Com. Pl. 1781) (invalidating a writ of attachment issued against goods belonging to the Commonwealth of Virginia), or to "require it to make pecuniary satisfaction for any liability," *In re State of New York*, 256 U.S. 490, 501 (1921) (extending the sovereign immunity doctrine to admiralty suits); *see Cunningham v. Macon Brunswick R. Co*., 109 U.S. 446, 451 (1883) (rejecting a suit based on a state-endorsed bond because "neither a State nor the United States can be *sued as defendant* . . . without their consent" (emphasis added)); *Hans*, 134 U.S. at 10, 16 (holding that a state cannot be "sued as a defendant by one of its

own citizens," because "[t]he *suability* of a State, without its consent, was a thing unknown to the law" (emphasis added)).

This history makes clear that any sovereign immunity "the states enjoyed before the ratification of the Constitution" was immunity "from suit," *Alden*, 527 U.S. at 713, not from compliance with testimonial obligations.

B. It would have been odd for the Framers to silently protect state officials from participating in discovery because, when both the original Constitution and the Eleventh Amendment were ratified, courts and commentators broadly accepted the "fundamental principle that 'the public has a right to every man's evidence." *Vance*, 140 S. Ct. at 2420 (citing 12 *The Parliamentary History of England* 693 (1812)). As the Supreme Court has recounted, "[l]ong before the separation of the American Colonies from the mother country, compulsion of witnesses to appear and testify had become established in England." *Blair*, 250 U.S. at 279. By 1600, English statutes required witnesses to testify in civil trials when summoned by subpoena, Wigmore, *supra*, § 2190 (quoting the "notable statute of Elizabeth," dated 1562-63), and it became "the undoubted legal constitutional right" of every subject of the realm, who has a cause depending, to call upon a fellow subject to testify," Leonard McNally, *The Rules of Evidence on Pleas of the Crown* 255 (1802) (reporting a decision of the Irish Court of Chancery).

The right to "every man's evidence," *Vance*, 140 S. Ct. at 2420, carried with it a corresponding judicial power over witnesses. By the Founding, subpoenas for documents and witnesses were "in familiar use" in American courts. *See supra* at 6-8; *Blair*, 250 U.S. at 280. The service of a subpoena commanded a witness to appear, "laying aside all pretences and excuses." 2 Burn, *supra*, at 355; *Bull*, 27 Mass. at 14 (noting that "the witness [wa]s bound to obey without a "lawful or reasonable excuse"); *see* Greenleaf, *supra*, § 309 (describing the court's "inherent power to . . . summon and compel the attendance of witnesses before it"); Thomas Gordon, *A Digest of the Laws of the United States* 170 (1827) ("Any person may be compelled to appear and depose . . . [and] to appear and testify in court."); Best, *supra*, at 141 ("The law allows no excuse for withholding evidence which is relevant in a cause, and is not protected from disclosure.").

Common-law authorities recognized that the ability to compel evidence was "necessary to the administration of justice." *Blair*, 250 U.S. at 281; *Hale v. Henkel*, 201 U.S. 43, 73 (1906) ("it would be 'utterly impossible to carry on the administration of justice' without [the subpoena duces tecum]" (quoting *Summers v. Moseley*, 2 C. & M. 477, 489 (1834)). As a result, there were few exceptions to the obligation to comply with a third-party subpoena. Many courts held that a non-party witness was not even "exempted from giving evidence" that could be "used against him in a civil suit," *In re Kip*, 1 Paige Ch. 601, 611-12, (N.Y. Ch. 1829), or

would "adversely affect his pecuniary interest," *Bull*, 27 Mass. at 14; *Planters' Bank v. George*, 6 Mart. 670, 675 (La. 1819) ("[I]t is difficult to conceive why . . . witnesses . . . should be authorized to conceal the truth to the injury of others, merely because they may eventually be exposed to pay what they justly owe."); 3 Wigmore, *supra*, § 2223.

C. Consistent with this history, Founding-era courts enforced third-party subpoenas directed toward state officials. *Cf. Hans*, 134 U.S. at 18 (describing a presumption that state sovereign immunity applies to proceedings that were "anomalous and unheard of when the constitution was adopted"). Because the "testimonial duty to disclose knowledge needed in judicial investigations is of universal force," government officials were not exempt from the public duty to give evidence. 4 Wigmore, *supra*, § 2370; *see id.* ("[An official]'s temporary duties as an official cannot override his permanent and fundamental duty as a citizen and debtor to justice.").

While NSP and its *amici* provide many examples of Founding-era objections to states participating in suits *as defendants*, they point to no evidence of Founding-era objections to states participating in federal lawsuits as third-party witnesses. This is no surprise, because during and immediately after the drafting of the Eleventh Amendment, state officials participated as witnesses in court proceedings without any trace of opposition based on sovereign immunity. In

1795, for example, a federal court subpoenaed Pennsylvania state judges as witnesses, prompting Justice Paterson, a prominent Framer of the Constitution, to note that "[t]he law operates equally upon all; the high and low." *U.S. v. Caldwell*, 2 U.S. 333, 334 n.1 (C.C.D. Pa. 1795). Although the state judges objected to the subpoena because they had judicial business in another county, they did not—even in the midst of the country's "profound shock" over the *Chisholm* decision, *Alden*, 527 U.S. at 720—mention sovereign immunity. *See Caldwell*, 2 U.S. at 334. After the Eleventh Amendment's ratification, authorities continued to cite the case for the proposition that "there is no respect to persons in regard to a subpoena," 1 Richard Peters, *Condensed Reports of Cases of the Supreme Court* 286 (1844), and that officers of the government, "from the highest to the lowest," could be subpoenaed as witnesses, Gordon, *supra*, at 168.

Indeed, as John Marshall observed just twelve years after the Eleventh Amendment was ratified, a state's "chief magistrate" might be served with a subpoena despite the "dignity conferred on them" by their state office. *United States v. Burr*, 25 F. Cas. 30, 34 (C.C.D. Va. 1807).[2] In several cases, federal

[2] In a similar case, the Fifth Circuit acknowledged that *Burr* "does provide some evidence for plaintiffs' position," but concluded that it was "not enough to tip the scales," because the case involved the Sixth Amendment. *Russell v. Jones*, 49 F.4th 507, 519 (2022). But *Burr*'s conclusion about state governors was not qualified by reference to the Sixth Amendment. *See Burr*, 25 F. Cas. at 34 ("[I]t is not known ever to have been doubted, but that the chief magistrate of a state might be served with a subpoena ad testificandum."). Indeed, the Fifth Circuit ignored

judges considered using subpoenas against state officials, and made no reference to state immunity. *See, e.g.*, *Polk's Lessee v. Windel*, 19 Fed. Cas. 940, 941 (C.C.D. Tenn. 1817), *rev'd sub nom. Polk's Lessee v. Wendell*, 18 U.S. 293 (1820) (noting that the "original books" might have been produced on a subpoena duces tecum" to a state "secretary" and reproducing counsel's references to the "Secretary of North Carolina"); *Welsh v. Lindo*, 29 F. Cas. 684 (1808) (reproducing attorney's discussion of a subpoena "to the court [of Woodford County] in Kentucky," a state trial court); *Craig v. Richards*, 6 Fed. Cas. 731, 731 (1802) (noting that the court considered subpoenaing a clerk of Virginia district court, but that the court "could not compel the clerk to bring his records out of Virginia"); *Winn v. Patterson*, 34 U.S. 663, 676-77 (1835) (describing the "common practice" of issuing subpoenas duces tecum to state clerks).

And despite the fact that states' immunity from suit in state courts was "well established" in the Founding era, *Alden*, 527 U.S. at 741, state officials were routinely summoned as witnesses in state courts. *Gripe's Lessee v. Baird*, 3 Yeates 528 (Pa. 1803) (Pennsylvania judge and surveyor); *Marks v. Bryant*, 14 Va. 91, 96-

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entirely *Burr*'s statement that the "chief magistrate of the state" might be served with a subpoena despite the "dignity conferred on them." Furthermore, *Burr*'s conclusions are equally applicable to civil subpoenas, as subpoenas were used exclusively in civil proceedings until the early eighteenth century, and the constitutional guarantee of compulsory process was seen as granting to criminal defendants what was "already in custom possessed both by parties in civil cases and the prosecution in criminal cases." 3 Wigmore, *supra*, § 2190-91.

97 (1809) (clerk of a Virginia state court); *Torrey v. Fuller*, 1 Mass. 524, 525 (1805) (Massachusetts state treasurer); *Seekright ex. Dem. Wright v. Bogan*, 2 N.C. 176, 178 (N.C. Super. L. & Eq. 1795) (per curiam) (North Carolina Secretary of State); *Delaney v. Reguls. of City of Phila.*, 1 Yeates 403, 403-04 (Pa. 1794) (per curiam) (Pennsylvania surveyor general).

To be sure, members of the Founding generation suggested, as John Marshall did, that a "sovereign power should [not] be dragged before a court." *See* States Br. 5 (citing 3 Elliot, *supra*, at 555 (John Marshall)). But none of these statements addressed the unique circumstance of a third-party subpoena, only the risk of "making a state defendant" against its will, 3 Elliot, *supra*, at 556 (John Marshall); *see supra* at 15-16.

D. Disregarding this history, NSP argues that the Eleventh Amendment encompasses any court order that affects a state's finances and "the administration of [its] public affairs." NSP Br. 12 (quoting *Ayers*, 123 U.S. at 505). But NSP misreads *Ayers* and its progeny. In *Ayers*, the Supreme Court held that sovereign immunity barred a suit against officers of Virginia because it was, in effect, a suit against the state. 123 U.S. at 506. Central to this holding was the Court's conclusion that the plaintiffs sought an order directing the officers to comply with a contract between the state and the plaintiffs, which would "effectively operate[]" as an order against the state. *Id*. at 505-06. The Court explained that a suit against

a state officer implicates state sovereign immunity if it directs the performance of the state's public affairs, even when the state is not named as a party. *Id.* at 505 (concluding that the amendment applies to "not only *suits* brought against a state by name, but those also against its officers" (emphasis added)); *see also Dugan*, 372 U.S. at 620 (describing the "general rule . . . that *a suit* is against the sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration" (emphasis added) (internal quotations omitted)). The Court did not address situations like this one, where there is no "judgment sought," *id.* (quoting *Land v. Dollar*, 330 U.S. 731, 738 (1947)), nor "suit" at all. In these cases, *Ayers*'s concern about interference with states' public affairs is irrelevant.

NSP and its *amici* also contend that the Eleventh Amendment protects states from subpoenas because it prevents them from being "amenable to process" of any court. *See* NSP Br. 12 (quoting *Franchise Tax Bd. of Cal. v. Hyatt,* 587 U.S. 230, 238 (2019)); States Br. 5 (quoting Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 Harv. L. Rev. 1559, 1574-79 (2002)). But the sources that NSP and its *amici* cite focus on a specific category of "compulsory process": the process used "to try to coerce the defendant's appearance" at the start of a lawsuit. Nelson, *supra*, at 1569; *see id*. at 1571 ("To begin suit . . . the plaintiff would need to . . . issue 'process of subpoena against the defendant, to

compel him to answer upon oath to all the matter charged in the bill.'" (quoting 3 Blackstone, *supra*, at 442)). And NSP does not explain why third-party subpoenas should have the same jurisdictional consequences as these orders.

In fact, witness subpoenas were different. Blackstone, for example, distinguished between the "original process," which was "the means of compelling the defendant to appear," and "intermediate process," which courts could issue "pending the suit, upon some collateral interlocutory matter, as to summon juries, witnesses, and the like." Blackstone, *supra*, at 279; *see also Picquet v. Swan*, 19 F. Cas. 609, 611 (C.C.D. Mass. 1828) (distinguishing between "original as well as final process" and "subpoenas for witnesses"). And when creating the federal judiciary, members of Congress differentiated between the federal courts' power to subpoena witnesses and their ability to summon defendants by "original process." *Compare* Act of Mar. 2, 1793, ch. 23, § 6, 1 Stat. 333, 335 (permitting "subpoenas for witnesses" to run into any district, so long as out-of-district witnesses lived within 100 miles of the court from which the subpoena was issued), *with* Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 79 (providing that "no civil suit shall be brought . . . by any original process in any other district than that whereof he is an inhabitant").

And there were many reasons to distinguish subpoenas for witnesses from other forms of "process." Witness subpoenas were "merely procedural" devices, 1

Holdsworth, *supra*, at 227 (describing the "writ ad testificandum"), stemming from the court's inherent authority over evidence rather than the plaintiff's legal claim, *see supra* at 8-9; Nelson, *supra*, at 1574 (positing that "sovereigns . . . could not be haled into court, *at least at the behest of individuals*" (emphasis added)). Thus, to the extent the Eleventh Amendment prohibits making states "amenable to process," it is the original process that hales a party into court, not the process attendant to third-party subpoenas, that the Amendment addresses.

* * *

In sum, history provides no more support for NSP's position than constitutional text. Nor, as the next Section explains, do the cases on which NSP relies.

III. The Federal and Tribal Sovereign Immunity Cases on Which NSP Relies Are Inapposite.

Perhaps recognizing that constitutional text and history do not support their argument, NSP turns to case law concerning tribal and federal sovereign immunity. NSP Br. 11-17 (citing *Alltel Commc'ns, LLC v. DeJordy*, 675 F.3d 1100, 1103-05 (8th Cir. 2012), and out-of-circuit authority involving federal officials). But these cases do not help it. The doctrines of federal and tribal sovereign immunity are not coextensive with state sovereign immunity. Instead, they come from different sources and serve distinct purposes.

A. Tribal sovereignty long predates the Eleventh Amendment and even the United States itself. *Johnson v. McIntosh*, 21 U.S. 543, 544-45 (1823) (explaining that when Europeans first came to North America, "the whole of the territory . . . was held, occupied, and possessed in full sovereignty, by various independent tribes or nations of Indians, who were the sovereigns of their respective portions of the territory"). Because tribes did not participate in the Constitutional Convention, they did not voluntarily surrender their inherent sovereignty. *Cohen's Handbook of Federal Indian Law* § 4.01 (Nell Jessup Newton ed., 2023) ("Indian tribes consistently have been recognized . . . as 'distinct, independent political communities,' qualified to exercise powers of self-government, not by virtue of any delegation of powers, but rather by reason of their original tribal sovereignty." (quoting *Worcester v. Georgia*, 31 U.S. 515, 559

(1832)). As the Supreme Court recognized as early as 1832, "[t]he Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial." *Worcester*, 31 U.S. at 559. Consistent with this history, the federal government has not only "acknowledged," but "guarant[eed]," that the tribes were and would remain "distinct political communities, having territorial boundaries, within which their authority is exclusive." *Id*. at 557.

As the Supreme Court has long recognized, "both the tribes and the Federal Government are firmly committed to the goal of promoting tribal self-government." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983). The federal government's obligation to protect and promote tribal sovereignty is a result, in part, of the "United States overc[oming] the Indians and [taking] possession of their lands, sometimes by force." *Bd. of Cnty. Comm'rs v. Seber*, 318 U.S. 705, 715 (1943). In the early years of the Republic, the government also made "specific commitments" to tribes through "treaties and agreements securing peace, in exchange for which Indians have surrendered claims to vast tracts of land, which provided legal consideration for permanent, ongoing performance of Federal trust duties," Indian Trust Asset Reform Act, Pub. L. 114-78, § 101(4), 130 Stat. 432, 433 (2016) (codified at 25 U.S.C. § 5601(4)), including "a duty to

promote tribal self-determination regarding governmental authority and economic development," *id.* § 102 (codified at 25 U.S.C. § 5602).

"[T]ribal sovereign immunity 'is a necessary corollary to Indian sovereignty and self-governance.'" *Cohen's Handbook*, *supra*, § 7.05 (quoting *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014)). The Supreme Court has recognized that tribal sovereign immunity helps promote tribal autonomy in at least two ways. First, resolving disputes involving tribes in a "forum other than the one they have established for themselves . . . undermine[s] the authority of the tribal court and hence infringe[s] on the right of the Indians to govern themselves," *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978) (quotation marks omitted and alterations adopted), and undermines decades of joint efforts aimed at "strengthening . . . tribal government and its courts," *Williams v. Lee*, 358 U.S. 217, 222 (1959); *see* Subcomm. on Const. Rights, S. Comm. on the Judiciary, 89th Cong., *Const. Rights of the Am. Indian: Summary Rep. of Hearings and Investigations Pursuant to S. Res. 194*, at 12 (Comm. Print 1966) (displacing tribal courts would lead to "a consequent loss of the contribution to self-government such courts may make"). Second, tribal sovereign immunity helps to avoid imposing "serious financial burdens on already financially disadvantaged tribes," *Santa Clara Pueblo*, 436 U.S. at 64 (quotation marks omitted), especially given

that federal district courts are "in many instances located far from the reservations," *id.* at 65 n.19.

These unique features of tribal immunity make clear why this Court in *DeJordy* explicitly acknowledged that "tribal immunity is not congruent with that which the Federal Government, or the States, enjoy." *DeJordy*, 675 F.3d at 1104 (quoting *Three Affiliated Tribes of Fort Berthold Reservation v. World Eng'g*, 476 U.S. 877, 890 (1986)). As this Court explained, tribal immunity furthers the "federal policies of tribal self determination, economic development, and cultural autonomy," *id*. (citation omitted), unlike the Eleventh Amendment's explicit concern with protecting states from suits by private individuals, *see supra* at 15-16. Indeed, this Court recognized in *DeJordy* that enforcing a third-party subpoena against a tribal official would "contravene" these policies by forcing the official to reveal information that would likely be used against the tribe and its allies. *Id*. (noting that the subpoena sought "information Alltel could then use" to undermine tribal sovereignty). As *DeJordy* instructs, tribal sovereign immunity—unlike the immunity granted by the Eleventh Amendment—is ultimately a matter of "comity" rather than constitutional text, and should be applied at courts' discretion to balance the importance of discovery against the risk that a tribe's self-determination and economic development will be undermined by a constitutional system in which they did not consent to participate. *Id.* at 1105.

B. The doctrine of federal sovereign immunity principally addresses two concerns, depending on whether it is being applied in federal or state courts. Neither of these concerns is implicated by the authorization of a third-party subpoena against state officials.

First, the Supreme Court has held that federal sovereign immunity in federal courts guards against separation of powers concerns, preventing the judiciary from controlling the political branches "in the use and disposition of the means required for proper administration of government." *The Siren*, 74 U.S. 152, 154 (1868); *see* Jennifer Lynch, *The Eleventh Amendment and Federal Discovery: A New Threat to Civil Rights Litigation*, 62 Fla. L. Rev. 203, 235 (2010) (explaining that suits against the federal government implicate the judicial branch's authority to "enact a judgment over either the executive or legislative branches"). Whatever separation of powers concerns might be raised by one branch of the federal government issuing a subpoena against another branch, they are not raised by a federal court's subpoena to *state* officials. *Cf. Lapides v. Bd. of Regents of Univ. Sys. of Georgia*, 535 U.S. 613, 623 (2002) (distinguishing Eleventh Amendment immunity from cases where the United States seeks the "protection of its own courts").

Second, subpoenas issued against the federal government in state court bear upon the Supremacy Clause, U.S. Const. art. VI, cl. 2, which was adopted to ensure the supremacy of federal law over state law. Lynch, *supra*, 235-36; *cf.*

Boron Oil Co. v. Downie, 873 F.2d 67, 71 (4th Cir. 1989) (compelling a federal agency official to testify contrary to the agency's duly enacted regulations would "violate[] both the spirit and the letter of the Supremacy Clause"); *South Carolina v. Baker*, 485 U.S. 505, 518 (1988) (unlike state tax immunity, "federal immunity arises from the Supremacy Clause"). These concerns are also inapplicable when a state official raises immunity in federal court.

If anything, the importance of ensuring the supremacy of federal law explains why sovereign immunity should not bar the subpoena at issue here. Because responding to the subpoena would facilitate the vindication of Print Zutavern's constitutional rights, quashing it on immunity grounds would undermine—rather than promote—the supremacy of federal law. *Cf. DeJordy*, 675 F.3d at 1105 (noting that in certain cases tribal sovereign immunity could give way to "more important federal interests").

* * *

The Eleventh Amendment's text makes clear that it does not bar subpoenas to third-party witnesses. History underscores the inapplicability of sovereign immunity to cases where states are not "sued as defendant[s]," *Cunningham*, 109 U.S. at 451, and demonstrates that subpoenas to state officials were permitted "when the constitution was adopted," *Hans*, 134 U.S. at 18. Finally, nothing in the

cases involving tribal and federal sovereign immunity on which NSP relies supports disregarding constitutional text and history. This Court should affirm.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the district court.

Respectfully submitted,

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Dated: September 4, 2024

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 6,494 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing document using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: September 4, 2024

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