No. 21-20269

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DWIGHT RUSSELL; JOHNNIE PIERSON; JOSEPH ORTUNO; MAURICE WILSON; and CHRISTOPHER CLACK,

Plaintiffs-Appellees,

v.

JUDGE HAZEL B. JONES; NIKITA HARMON; ROBERT JOHNSON; KELLI JOHNSON; RANDY ROLL; DASEAN JONES; ABIGAIL ANASTASIO; JASON LUONG; GREG GLASS; FRANK AGUILAR; CHRIS MORTON; JOSH HILL; HILARY UNGER; AMY MARTIN; HERB RITCHIE; RAMONA FRANKLIN; JESSE MCCLURE, III; GEORGE POWELL; BROCK THOMAS; COLLEEN GAIDO; and ANA MARTINEZ,

Movants-Appellants.

On Appeal from the United States District Court
for the Southern District of Texas
Case No. 4:19-cv-00226-LHR

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 29.2, I hereby certify that I am aware of no persons or entities, besides those listed in the party briefs, that have a financial interest in the outcome of this litigation. In addition, I hereby certify that I am aware of no persons with any interest in the outcome of this litigation other than the signatories to this brief and their counsel, and those identified in the party and *amicus* briefs filed in this case.

Dated: December 15, 2021

/s/ Brianne J. Gorod
Brianne J. Gorod

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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, public interest law firm, and action center 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

Plaintiffs allege that officials in Harris County operate an unconstitutional pretrial detention system, under which individuals are detained solely because they are unable to pay a predetermined bail amount, without individualized findings about the necessity of their confinement. ROA 21-20269.1943-45. They allege that defendants unconstitutionally confine felony arrestees in substandard and overcrowded facilities, *id.* at 21-20269.1930-31, often for weeks on end, *id*. at 21-20269.1932-33, solely because they do not have the money to pay bail, *id*. at 21-20269.1903. This system deprives detainees of their rights to liberty and often their lives: since 2009, 125 individuals have died while in pretrial custody in Harris County. *Id*. at 21-20269.1929.

[1] *Amicus* states that 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 the brief's preparation or submission. All parties consent to the filing of this brief.

During discovery, Plaintiffs served subpoenas on 26 felony judges in Harris County, seeking video depositions and documents pertaining to the County's detention system. According to Plaintiffs, they need this information because the felony judges issue the orders that defendant officials rely upon when making detention decisions, supervise hearings and hearing officers, determine the bail policies and practices that govern the bail hearings in their own courtrooms, and formulate the policies and bail schedules that result in allegedly unconstitutional detention orders. ROA 21-20269.9595-98.

Most of the felony judges—Appellants here—moved to quash the subpoenas, asserting that the Eleventh Amendment, which provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State," U.S. Const. amend. XI, prohibits discovery against state officials, even if they are not parties to the case. ROA 21-20269.9579. The court below denied in part the motion to quash, though it narrowed the scope of the subpoenas to balance the judges' "sovereignty interests" with the "need for relevant fact discovery." *Id.* at 21-20269.9588. The judges appealed. Drawing on cases involving federal and tribal immunity, they argue that "third-party subpoenas are 'suits' to which sovereign immunity attaches." Appellants' Br. 9-10.

Appellants are wrong. To start, their reading of the Eleventh Amendment is at odds with the 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. The Amendment does not, by its terms, apply to a subpoena directed at a non-party witness, as Founding-era cases, treatises, and dictionaries make clear. This makes sense, given that the "very object and purpose" of the Eleventh Amendment was to allay the concern that states would be "summoned as defendants to answer to complaints of private persons," *Ex parte Ayers*, 123 U.S. 443, 505-06 (1887), not that state officials might be involved in lawsuits as witnesses.

Second, the "historical record" also suggests 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). This record makes clear that, to the extent that members of the Founding generation envisioned a sovereign immunity doctrine that extended beyond the scope of the Eleventh Amendment's text, they sought to protect sovereign states from the "suit of an individual without its consent," *id*. at 752 (quoting *The Federalist No. 81*, at 487 (C. Rossiter ed., 1961) (Hamilton)), not the service of a third-party subpoena.

Indeed, 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 common-law courts, subpoenas were "writ[s] of compulsory obligation . . . which the witness [was] bound to obey" without a valid excuse. *Bull v. Loveland*, 27 Mass. 9, 14 (1830). As one treatise writer explained, a court could issue a subpoena to the "Prince of Wales, Archbishop of Canterbury, and the Lord High Chancellor" if their testimony was relevant to a legal dispute, even one "about a halfpennyworth of apples." 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)). Courts and commentators did not lightly undertake exemptions from the "public dut[y]" to testify, *Blair v. United States*, 250 U.S. 273, 279 (1919*)*, but if Appellants' understanding of sovereign immunity were correct, the Framers would have exempted state officials from this obligation without any trace of discussion in the historical record. That is simply not what happened. Indeed, there are several Founding-era examples of federal courts allowing subpoenas of state officials without a single immunity-related objection.

Finally, Appellants rely on cases involving federal or tribal officials, but those cases are not relevant here because federal and tribal immunity come from different sources than state sovereign immunity, and they serve distinct purposes.

In short, 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. This plain text makes clear that the Eleventh Amendment poses no bar to the third-party subpoenas at issue in this case.

A third-party subpoena, and any proceeding that arises from it, is not a "suit" within the meaning of the Eleventh Amendment.[2] In the late eighteenth-century,

[2] In addition, the Amendment only bars suits in cases involving diverse plaintiffs. *PennEast Pipeline Co., LLC v. New Jersey*, 141 S. Ct. 2244, 2264 (2021) (Gorsuch, J., dissenting) (This text "means what it says. It eliminates federal judicial

legal thinkers understood a "suit" to be a proceeding in which a court adjudicates legal claims made by a plaintiff against a defendant. 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); 2 Joseph Story, *Commentaries on the Constitution* § 1646 (1851) (describing "a suit in law or equity" as a case "instituted according to the regular course of judicial proceedings" that arises when a legal question "is submitted to the courts by a party who asserts his rights in the form prescribed by law").

Likewise, jurists in the early nineteenth-century explained that a "suit" was a "proceeding[] . . . in which legal rights were to be ascertained and determined," *Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. 433, 447 (1830) (interpreting the Seventh Amendment's reference to "suits at common law"), which allowed the "prosecut[ion]" and "defense" of a "cause of action," *Mellen v. Baldwin*, 4 Mass. 480, 481 (1808); *see also 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.").

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power over one set of cases: suits filed against states, in law or equity, by diverse plaintiffs." (citing William Baude & Steven Sachs, *The Misunderstood Eleventh Amendment*, 169 U. Pa. L. Rev. 609, 612 (2021))). Here, Plaintiffs-Appellees and the judges that they are subpoenaing are all citizens of Texas.

In *Cohens*, the Supreme Court explained that the term "suit" 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 objected that it was immune from suit under the Eleventh Amendment. *Id.* at 378. The Court rejected this objection, explaining that a writ of error is not a suit because it involves no "claim" or "demand" against the state. *Id*. at 411. Its only "effect . . . is simply to bring the record into Court, and submit the judgment of the inferior tribunal to reexamination." *Id*. at 410.

In more recent cases, the Supreme Court has confirmed that the Eleventh Amendment 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*, the Supreme 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, in a Commission proceeding that "walks, talks, and squawks very

much like a lawsuit," *id*. at 757 (citation omitted). Most importantly, the proceeding would force the state to defend itself against legal claims, and the state would relinquish the opportunity to "litigate the merits" of a defense before a court, *id.* at 762-73 (noting that a state must "defend itself in front of the [Commission] or substantively compromise its ability to defend itself at all").

When they limited the scope of the Eleventh Amendment to "suit[s] in law or equity," the Framers of the Amendment did not include discovery proceedings addressed at third-party witnesses, including subpoenas for documents, depositions, or testimony. Subpoenas had deep roots in English common 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 (noting that a party can seek "books and papers . . . [i]n the hands of third persons . . . by adding a clause of requisition to the writ of subpoena, which is then called a *subpoena duces tecum*"); *id.* at *369 (describing the "subpoena *ad testificandum*," by which witnesses could be "command[ed] . . . to appear at the trial"); *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").

Courts and legislatures in the Founding Era described subpoenas as "writs" or "proceedings"—not suits. *See, e.g.*, *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 authority to execute "all such process," except for "writs of subpoena"); Act of Feb. 20, 1789, N.Y. Laws 61, 63 (1789) (giving "any court of common pleas" the power "to issue process of subpoena, requiring the attendance of any witness or witnesses"). Legal dictionaries made clear that these instruments were ancillary to 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." Most significantly, these writs 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*, *116.[3]

[3] Appellants point to out-of-circuit authorities to argue that the term "suit" encompasses any "judicial process," including a third-party subpoena. Appellants' Br. 13 (citing *Bonnet v. Harvest (U.S.) Holdings, Inc*., 741 F.3d 1155 (10th Cir. 2014)). This argument is wrong. Nineteenth-century authorities distinguished between the "process of subpoena" for a witness and the judicial processes that facilitated suits against a defendant or its property, and only the latter were considered "suits" and thus barred by sovereign immunity. *See supra* at 8-10. Notably, in concluding that a non-party tribe is immune from the obligations of a subpoena duces

In sum, the Amendment's Framers would not have used the word "suit" to refer to subpoenas directed at witnesses because subpoenas did not involve the resolution of a plaintiff's "claim" or "demand," *Cohens*, 19 U.S. at 411. The Amendment's plain text cannot be stretched to prevent a state official's participation in third-party discovery. And the historical record supports this reading of the text, as the next Section discusses.

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

The Supreme Court has explained that the Eleventh Amendment does not "memorializ[e] the full breadth of the sovereign immunity retained by the States when the Constitution was ratified," *Fed. Mar. Comm'n*, 535 U.S. at 753, making the "historical record" especially important, *id.* at 755. But this record only confirms what the Amendment's text clearly states: in the Founding era, the doctrine of

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tecum, the Tenth Circuit in *Bonnet* relied on cases that did not involve third-party subpoenas, but instead involved immunity from other forms of "process." *See United States v. Murdock Mach. & Eng'g Co. of Utah*, 81 F.3d 922, 932 (10th Cir. 1996) (federal government immune from "injunctive process" involved in automatic stay provisions of Bankruptcy Rules 401 and 601, so was not liable for terminating contracts during the stay period); *Belknap v. Schild*, 161 U.S. 10, 16-17 (1896) (patent-holder not entitled to injunction against defendant officers' use of patented material on naval property because "the exemption from judicial process extends to the property of the United States . . . [and] there is no distinction between suits against the government directly and suits against its property"); *Buchanan v. Alexander*, 54 U.S. 20, 20 (1846) (plaintiffs could not use "process of attachment" against defendant federal officers because the process would "divert public money from its legitimate and appropriate object").

sovereign immunity did not strip courts of the power to issue third-party subpoenas to state officials.

A. In debates preceding the ratification of the Constitution, the Founders expressed concerns about a state being amenable to suit as "a party." 3 *Debates on the Federal Constitution* 555 (Jonathan Elliot ed., 1836) (quoting John Marshall as saying that "I hope that no gentleman will think that a state will be called at the bar of the federal court" given that there were cases where "the legislature of Virginia is a *party*, and yet the state is *not sued*" (emphasis added)); *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)).

Similarly, in the debates that preceded the ratification of the Eleventh Amendment, the Framers of that provision focused on a state's amenability to suit. 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 v. Maine*, 527 U.S. 706, 719 (1999). The decision "fell upon the country with a profound shock," leading to the quick adoption of the Eleventh Amendment. *Id*. at 720. Significantly, the outrage that prompted the Amendment's passage concerned the prospect of states

defending 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); Appellees' Br. 24-25 (citing state proceedings in the "run-up to the Eleventh Amendment"). 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) (quoting Attorney General Lee).

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 the essential processes of discovery.

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 attend trial when summoned, *id.*, and it was "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 "already in familiar use" in American courts. *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* Simon Greenleaf, *Treatise on the Law of Evidence* § 309 (1848) (describing the court's "inherent power to call for all adequate proofs of the fact in controversy, and to that end 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 understood that the ability to compel witnesses was an integral component of a court's power to "call for all adequate proofs of the facts

in controversy," Greenleaf, *supra*, § 309, and therefore "necessary to the administration of justice," *Blair*, 250 U.S. at 281. Indeed, "it would be 'utterly impossible to carry on the administration of justice'" without the power to compel testimony and evidence from third parties. *Hale v. Henkel*, 201 U.S. 43, 73 (1906) (quoting *Summers v. Moseley*, 2 C. & M. 477, 489 (1834)). Because of this, there were few exceptions to the compulsion of 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, called upon to avow a just debt or confess themselves liable to a just claim, 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.").

C. Consistent with this history, the practice of Founding-era courts confirms that third-party subpoenas directed toward state officials were not "anomalous and unheard of when the Constitution was adopted." *Hans*, 134 U.S. at 18. 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. John Wigmore, *A Treatise on the System of Evidence in Trials at Common*

Law § 2370 (1905); *see id.* ("[An official]'s temporary duties as an official cannot override his permanent and fundamental duty as a citizen and debtor to justice.").

In 1795, a federal court subpoenaed Pennsylvania state judges as witnesses, noting 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 judges objected to the subpoena on the ground that 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 any type of immunity. *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) (annotation entitled "witnesses who are privileged"), including "officers of the government," Gordon, *supra*, at 168; *see id.* (citing *Caldwell* to observe "a subpoena will lie (it seems) to the officers of the government from the highest to the lowest").

Furthermore, in the decades after the Eleventh Amendment's ratification, jurists observed that other state officials—even a state's "chief magistrate"—might be served with a subpoena despite the "dignity conferred on them." *United States v. Burr*, 25 F. Cas. 30, 34 (C.C.D. Va. 1807). In several cases, federal 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, 676-677 (1835) (describing the "common practice" of issuing subpoenas duces tecum to state clerks); *see* Appellees' Br. 27-28 (compiling common-law and state authorities).

In sum, constitutional history provides no more support for Appellants' position than does constitutional text. Nor do the cases on which they rely support the conclusion that there should be immunity here, as the next Section discusses.

III. The Federal and Tribal Sovereign Immunity Cases on Which Appellants Rely Do Not Support Barring the Subpoenas Here.

Perhaps recognizing that constitutional text and history do not support their argument, Appellants turn to case law concerning federal and tribal sovereign immunity in an attempt to bolster their claim. Appellants' Br. 12-17. But these cases do not help them. The doctrines of federal and tribal sovereign immunity are not

coextensive with state sovereign immunity. To the contrary, those immunities 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"). And because the tribes did not participate in the Constitutional Convention, they did not voluntarily surrender their inherent sovereignty, *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 781-82 (1991). 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 v. Georgia*, 31 U.S. 515, 559 (1832). 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, and having a right to all the lands within those boundaries." *Id*. at 557 (emphasis added).

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. 114-178, § 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).

Tribal sovereign immunity is "a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes of the Fort Berthold Rsrv. v. Wold Eng'g, P.C.*, 476 U.S. 877, 890 (1986); *see Bishop Paiute Tribe v. County of Inyo*, 291 F.3d 549, 556 (9th Cir. 2002), *judgment vacated on other grounds by Inyo County v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony*, 538 U.S. 701 (2003) (explaining that tribal sovereign immunity helps promote the federal government's "policy of leaving Indians free from state jurisdiction and control" (quotation marks omitted)). 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, Senate Judiciary Comm., Const. Rights of the Am. Indian: Summary Rep. of Hearings and Investigations Pursuant to S. Res. 194, 89th Cong., 2d Sess. 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.

Thus, unlike the Eleventh Amendment which was adopted in response to very specific concerns about states being haled into courts as defendants by private individuals, *see supra* at 10-12, tribal sovereign immunity serves different purposes, ensuring that tribes' self-determination and economic development is not undermined by a constitutional system in which they did not consent to participate. Indeed, in

one of the cases on which Appellants rely, the court noted these concerns in concluding that tribal sovereign immunity barred third-party discovery. *See Alltel Commc'ns, LLC v. DeJordy*, 675 F.3d 1100, 1104 (8th Cir. 2012) ("permitting broad third-party discovery in civil litigation threatens to contravene federal policies of tribal self determination, economic development, and cultural autonomy" (quotation marks omitted)). These same concerns simply do not apply in the context of third-party discovery directed at state officials.

Thus, even if tribal sovereign immunity does bar third-party discovery, *but see* Appellees' Br. 34 (discussing the "shaky reasoning" of the cases on which Appellants rely), that provides no reason to conclude that state sovereign immunity should also bar third-party discovery.

B. Federal sovereign immunity is not explicitly mentioned in the Constitution, but instead derives from the inherent sovereignty of the United States. *See United States v. Mitchell*, 463 U.S. 206, 212 (1983) ("It is axiomatic that the United States may not be sued without its consent . . . .").

Federal sovereign immunity principally addresses two sets of concerns, neither of which is implicated by a federal court authorizing a third-party subpoena against state officials. First, the Supreme Court has held that federal sovereign immunity 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 raise questions about 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 authorizing a subpoena against another branch, the issuance of a subpoena to *state* officials simply does not raise those same concerns.

Second, subpoenas issued against the federal government in state court raise concerns under the Supremacy Clause, U.S. Const. art. VI, cl. 2, which was adopted to ensure that federal law is supreme over state law, *The Federalist No. 44*, at 283 (C. Rossiter ed., 1961) (Madison) (arguing that without a supreme federal power overseeing the states, our system of government would be an "inversion of the fundamental principles of all government; it would have seen the authority of the whole society every where subordinate to the authority of the parts; it would have seen a monster, in which the head was under the direction of the members"). *See Exxon Shipping Co. v. U.S. Dep't of Int.*, 34 F.3d 774, 778 (9th Cir. 1994) ("The limitations on a state court's subpoena and contempt powers stem from the sovereign immunity of the United States and from the Supremacy Clause." (quotation marks omitted)). Again, the issuance of a subpoena to a state official does not raise these concerns

because the Supremacy Clause safeguards federal law from infringement by state law, not the other way around.

If anything, the importance of ensuring the supremacy of federal law underscores why sovereign immunity should not bar the third-party subpoenas at issue here. Because this discovery is being sought to help plaintiffs vindicate their rights under the federal Constitution, holding that these subpoenas are barred on immunity grounds would undermine—rather than promote—the supremacy of federal law. Indeed, in one of the cases on which Appellants rely, the Eighth Circuit suggested that federal courts could choose not to apply tribal sovereign immunity when "it would conflict with more important federal interests." *Alltel Commc'ns, Inc.*, 675 F.3d at 1105; *see id.* (suggesting that in the "private civil litigation" at issue in that case "no competing federal interests [were] present other than the general benefits of discovery").

Thus, even if federal sovereign immunity bars third-party discovery, *but see Exxon Shipping Co.,* 34 F.3d at 778 (holding that federal sovereign immunity does not bar third-party discovery because doing so would abdicate "judicial control over the evidence in a case . . . to the caprice of executive officers" (quotation marks omitted)); *Linder v. Calero-Portocarrero*, 251 F.3d 178, 181 (D.C. Cir. 2001) ("[S]overeign immunity is not a defense to a third-party subpoena."), that does not support the conclusion that state sovereign immunity also bars third-party discovery.

* * *

The plain text of the Eleventh Amendment makes clear that it does not bar subpoenas to third-party witnesses. And the history of the ratification of the original Constitution and the Eleventh Amendment underscores the inapplicability of sovereign immunity to cases where states are not "sued as defendant[s]," *Cunningham*, 109 U.S. at 451, and makes clear that subpoenas to state officials were permitted "when the constitution was adopted," *Hans*, 134 U.S. at 18. Nothing in the cases involving tribal and federal sovereign immunity on which Appellants rely supports disregarding this constitutional text and history, and the subpoenas at issue here should be permitted.

CONCLUSION

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

Respectfully submitted,

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Dated: December 15, 2021

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on December 15, 2021.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed this 15th day of December, 2021.

/s/ Brianne J. Gorod
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 5,830 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that the attached *amicus* 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 14-point Times New Roman font.

Executed this 15th day of December, 2021.

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