No. 07-15048

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ELENA M. DEL CAMPO, LOIS ARTZ, MIRIAM CAMPOS, LISA JOHNSTON, AND ASHORINA MEDINA, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

v.

AMERICAN CORRECTIVE COUNSELING SERVICES, INC.,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of California

BRIEF FOR APPELLEES

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JURISDICTIONAL STATEMENT

This case presents a jurisdictional question of first impression in this Circuit: May a private, for-profit corporation take an immediate appeal from a non-final order denying its motion to dismiss on the basis of state sovereign immunity?

The Supreme Court has held that the collateral order doctrine permits immediate appeals from the denial of "claims of Eleventh Amendment immunity made by *States and state entities* possessing a claim to share in that immunity." *P.R. Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993) (emphasis added). Appellant American Corrective Counseling Services, Inc. (ACCS), however, is not a State or state entity, but a private, for-profit corporation. The law is settled in this Circuit that private corporations are not entitled to Eleventh Amendment immunity. *See United States ex rel. Ali v. Daniel, Mann, Johnson & Mendenhall*, 355 F.3d 1140, 1147 (9th Cir. 2004) ("[W]e decline the invitation to expand state sovereign immunity dramatically by extending it to corporate actors").

This Court has never permitted an interlocutory appeal by a private corporation claiming state sovereign immunity. In *Penman v. Korper*, the

Court rejected a similar attempt to extend the collateral order doctrine to permit an appeal by a private corporate contractor and its employees from an order denying them qualified immunity. 977 F.2d 590, 1992 WL 276462 (9th Cir. 1992) (unpublished). The Court acknowledged that "[p]ublic officials . . . may appeal from the denial of a qualified immunity defense under the 'collateral order' doctrine," but held that private parties could not similarly invoke that doctrine because the law was "settled that private parties are not entitled to qualified immunity." *Id.* [1]

Congress has strictly limited appeals as of right within the federal courts to appeals from "final decisions of the district court." 28 U.S.C. § 1291. The Supreme Court has nonetheless permitted appeals under the collateral order doctrine in a "small category" of trial court orders in which

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[1] Following *Penman*, the Supreme Court decided *Richardson v. McKnight*, 521 U.S. 399 (1997), which held that employees of a private contractor that operated a prison could not assert qualified immunity, but declined to announce a *per se* rule. The next year, in *Ace Beverage Co. v. Lockheed Information Management Services*, 144 F.3d 1218 (9th Cir. 1998), this Court was confronted with an appeal by a private contractor seeking qualified immunity. Although the Ninth Circuit's cases decided before *Richardson* had "adopted a general rule that private parties are not entitled to qualified immunity," the Court heard the appeal, and, in a per curiam opinion, rejected the immunity claim on the basis of *Richardson*. *Id.* at 1219 n.3. This Court has never accorded qualified immunity to a private party under *Richardson* and has not since permitted an interlocutory appeal raising such a claim.

no final or partial final decision has been entered. *Swint v. Chambers County Comm'n*, 514 U.S. 35, 42 (1995). In recent years, the Court has "repeatedly stressed that the 'narrow' exception should stay that way." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994). In 1990 and 1992 amendments to the Rules Enabling Act, 28 U.S.C. § 2071, Congress permitted the Court to use its rulemaking powers to specify which decisions may be considered collateral orders. The Court has taken this as a strong signal that the collateral order doctrine should not be further expanded by judicial fiat: "The procedure Congress ordered for such changes . . . is not expansion by court decision, but by rulemaking under § 2071." *Swint*, 514 U.S at 48; *see also Cunningham v. Hamilton County*, 527 U.S. 198, 210 (1999).

This Court should not extend the collateral order doctrine to permit appeals from the denial of immunity claims by private corporations because such an extension would allow a wide array of corporations to bring appeals solely for the purpose of delay. As the Supreme Court explained last year, unless the collateral order doctrine is limited to its present scope, "the underlying doctrine will overpower the substantial finality interests § 1291 is meant to further"—"judicial efficiency" and "the

sensible policy of avoiding the obstruction to just claims" that results from permitting appeals from non-final orders. *Will v. Hallock*, 126 S.Ct. 952, 957 (2006) (internal citations and quotation marks omitted). That risk of obstruction is illustrated by ACCS's motion to stay all proceedings pending appeal (DN 350), which is now pending in the district court. Although a decision declining to extend the collateral order doctrine may not make any practical difference in this case—given that the case is already on appeal—it would certainly prevent such attempts at delay and obstruction in future cases.

STATEMENT OF THE ISSUES

1. Should state sovereign immunity be extended to private, for-profit corporations?

2. Even assuming private corporations are eligible for state sovereign immunity, is ACCS shielded by state sovereign immunity when it operates bad-check collection programs through business partnerships with local, rather than state, governments?

STATEMENT OF THE CASE

A. Nature of the Case

This interlocutory appeal arises from a class action brought on behalf of California consumers targeted by American Corrective Counseling Services, Inc. (ACCS), a private, for-profit corporation that operates bad-check collection programs in partnership with local prosecutors nation-wide, including county district attorneys in California. The suit challenges ACCS's collection practices under state and federal law, including the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C § 1692 *et seq*., and seeks damages and declaratory and injunctive relief. [RE-44]. Plaintiffs allege that ACCS's practices systematically violate several provisions of the FDCPA, including prohibitions against harassing, oppressive, or abusive conduct, 15 U.S.C. § 1692d, the use of false or deceptive misrepresentations and threats, *id.* § 1692e, the collection of fees not permitted by state law, *id.* § 1692f(1), and the failure to provide proper notice of consumers' rights, *id.* § 1692g. [RE 39 at 21-23].

ACCS appeals from the district court's order denying its motion to dismiss the lawsuit on the ground that ACCS is an arm of the State of

California and is therefore entitled to state sovereign immunity under the Eleventh Amendment. [RE-135].

B. Overview of ACCS's Collection Operations

ACCS operates bad-check collection programs under business partnerships with local prosecutors nationwide. [RE 17, 19]. Through these programs, ACCS collects debt owed to businesses that have received dishonored checks, most of which are large retail merchants, such as Walmart, Costco, and Safeway. [RE 26]. Participating businesses refer the checks directly to ACCS for collection. [RE 26]. Upon receiving the checks—and without any review by a prosecutor or a determination that any crime has been committed—ACCS mails out a series of collection demands on a prosecutor's official letterhead, using escalating threats of arrest, prosecution, and jail to coerce payment. [RE 21-24, 25, 29, 46-65].

All communication between the "program" and consumers is through ACCS and its commission-earning collections employees, who work out of a central collections facility. [RE 26-28]. Consumers who telephone the program believe they are speaking with neutral employees of the prosecutors' offices. [RE 27]. They are not informed that they are speaking with employees of a private company, or that no prosecutor has

reviewed their case. [*Id.*]. Consumers who explain that a check was returned because of a mistake by the check writer or the bank are told they must pay nonetheless. [RE 27].[2]

ACCS's programs are entirely self-funded. Its revenues are derived from substantial collection fees, which are often many times the face amounts of the checks. For example, a low-income California consumer who mistakenly writes a dishonored check in the amount of $10 would, if the check is referred to ACCS, be faced with an ACCS collection demand for $180—the face amount of the check, plus $170 in collection fees. [RE 27-28, RE 48]. ACCS keeps the lion's share of these fees for itself and gives a portion to the prosecutors in exchange for use of their name and authority. [RE 73-74]. In marketing its programs, ACCS promises to generate revenue for local prosecutors:

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[2] The FDCPA prohibits the use of false representations to collect a debt, including false threats of criminal prosecution. 15 U.S.C. § 1692e(7). The Federal Trade Commission's Staff Commentary construes this prohibition to mean that that "[a] debt collector may not make a misleading statement of law, falsely implying that the consumer has committed a crime, or mischaracterize what constitutes an offense by misstating or omitting significant elements of the offense. For example, a debt collector may not tell the consumer that he has committed a crime by issuing a check that is dishonored, when the statute applies only when there is a 'scheme to defraud.'" 53 Fed. Reg. 53 Fed. Reg. 50097-02, 50106 (1988).

- "All of our services are designed to ***reduce*** currents levels of both administrative and financial costs. . . . ACCS has the capacity to ***extend*** your department's existing resources."[3]

- "Perhaps the most significant aspect of ACCS programs is that all of our services are provided under contract at no taxpayer expense!"[4]

ACCS's collection tactics have attracted the criticism of courts, regulators, the press, and consumer advocates.[5] In DeKalb County, Georgia, for example, ACCS's contract was canceled after an investigation revealed that the company was "charging a $125 fee to check bouncers to attend an 'educational class'" that was never held; "records show[ed] all but a handful of the hundreds of letters it sent to demand payment were for amounts" it was not authorized to collect; and the company made demands for payment "without first allowing check writers to make the check good," as Georgia law required. Soto, *DeKalb DA's Bad Check Plan*

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[3] http://accs-inc.com/checks_balances.html.

[4] http://accs-inc.com/history.html.

[5] *See*, *e.g.*, Singletary, *Bad Check Isn't Grounds for Abuse*, Seattle Post-Intelligencer, May 13, 2006 (2006 WLNR 8426232); Gelles, *Bad check prompts chaos*: *Prosecutor's restitution program deceiving*, Orlando Sentinel, June 11, 2006 (2006 WLNR 9978358); Anderson, *Bounced-Check Collector Sued: Private Company Allegedly Disguised Itself as District Attorney, Threatened Arrest*, Santa Rosa Democrat, April 5, 2006 (2006 WLNR 12147760); Gregory, *Firm That Tracks Bad Checks Is Under Fire, Critics Say Tactics Are Heavy-Handed*, Chicago Tribune, Feb. 2, 2001 (2001 WLNR 10640499).

Bounces, Atlanta Journal-Constitution, May 14, 2001 (2001 WLNR 3945839). In Illinois, a state court appointed a special prosecutor to investigate ACCS. Schenk, *Illinois Court Determines San Clemente, Calif., Company Is Collection Agency*, News Gazette, Nov. 26, 2002 (2002 WLNR 9053480). ACCS has also been prosecuted by state regulatory agencies and investigated by state attorneys general. *See* Goodrich, *Bad Check Collection Firm Needs License, State Officials Say: Agency Files Complaint Against Company*, St. Louis Post-Dispatch, Feb. 14, 2001 (2001 WLNR 11350836); Dalmer, *Bad check cases bring warnings, little action: The small number of prosecutions may affect lawsuits against a collection agency*, Des Moines Register, May 20, 2001.

C. The Statutory Framework in California

1. The Criminal Prohibition of Fraudulent Check Writing

In California, writing a check that is returned for insufficient funds, without more, is not a crime; it is a crime only if the check writer intended to defraud the recipient. Cal. Penal Code § 476a. The courts have long described "intent to defraud the person to whom the check was delivered" as "the gist of the offense," *People v. North*, 182 Cal. Rptr. 126, 128 (Cal. Ct. App. 1982), for which "no presumption of law will suffice," *People v. Becker*, 137 Cal.App. 349, 352 (Cal. Ct. App. 1934). This intent requirement is crucial

because it marks the line between criminal activity and civil debt.[6] If the intent requirement is eliminated or ignored, a bad-check statute becomes "no more than a device to force payment of debt."[7] Courts have long taken note of the abuses that arise when financially interested parties are permitted to have a hand in enforcement and when the salutary practice of pretrial criminal diversion—which ordinarily occurs only after the filing of criminal charges—is twisted into a tool for civil debt collection.[8]

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[6] *Harris v. State*, 378 So. 2d 257, 260-61 (Ala. Crim. App. Ct. 1979) ("The rationale is that the statute punishes the crime of intent to defraud rather than the inability to pay the debt.").

[7] *People v. Vinnola*, 494 P.2d 826, 831 (Colo. 1972). Courts have long warned that the use of bad check statutes "should be closely scrutinized," *id.* at 828, because they "lend themselves to use by the unscrupulous who seek only payment of debts and have no interest in criminal prosecution other than as a means of collecting money allegedly due them." *Tolbert v. State*, 321 So.2d 227, 232 (Ala. 1975) ("This court has repeatedly condemned the use of threat of prosecution as a means of collection of worthless checks."). These concerns are not new. *See*, *e.g.*, *Burnham v. Commonwealth*, 15 S.W.2d 256, 258 (Ky. 1929) (statute lacking intent requirement was "palpably designed merely to enforce the collection of debts"); *see generally* Comment, *Imprisonment for Debt and the Constitution*, 1970 L. & Soc. Order 659 (1970).

[8] *See State v. Orth*, 359 S.E.2d 136, 141 (W.Va. 1987) (declaring that "[t]he prosecutorial services of the state are not for private use in civil debt collection," that prosecutors "are not authorized to divert cases prior to bringing formal charges where there is probable cause to believe the accused is guilty," and that the "threat of prosecution for the failure to make the required payments smacks of the generally discredited practice of imprisonment for debts"); *Moody v. Mississippi*, 716 So.2d 562, 567 (Miss.

As this Court observed last year in a bad-check case, although a creditor may always "try to collect its money . . . using the debt collection procedures it would employ for any other" debt, the mere failure to pay an obligation "is not a crime; the days of imprisoning insolvent debtors are long gone." *Goldyn v. Hayes*, 444 F.3d 1062, 1069 (9th Cir. 2006) (citing U.S. Const., amend. XIII). "Perhaps some would say that [the check writer's] innocence is a mere technicality, but that would miss the point. In a society devoted to the rule of law, the difference between violating or not violating a criminal statute cannot be shrugged aside as a minor detail." *Id.* at 1070.

2. Legislative Authorization for County "Bad Check Diversion" Programs in California

In 1985, California's Legislature enacted legislation to permit county district attorneys, with the approval of their county board of supervisors, to establish local pretrial diversion programs for fraudulent check crimes. Cal. Penal Code § 1001.60 (district attorney may create program only "[u]pon

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1998) ("Allowing the District Attorney, the county's chief law enforcement officer, to process civil debt as a criminal proceeding, flies in the face of our constitution . . . [W]hen the District Attorney's bread and butter depends upon, or is enriched by, the fees collected in bad check cases, the special interests arising therefrom cannot be ignored."); *see generally* Josephine R. Potuto, *A Review of the Bad Check Offense and the Law Enforcement Debt Collector*, 65 Neb. L. Rev. 242 (1986).

the adoption of a resolution by the board of supervisors"). The statute permits the programs to be conducted by the district attorney's office itself or "by a private entity under contract with the district attorney." *Id.*[9]

When it authorized pretrial diversion programs, the Legislature "did not intend to mandate a statewide misdemeanor diversion program or to require every locality to adopt such a program." *Davis v. Municipal Court*, 46 Cal. 3d 64, 75 (Cal. 1988). Instead, "the Legislature made plain its intention to leave to local entities and officials both the decision whether to implement such a program and the authority to fashion a misdemeanor program to meet local needs and resources." *Id.* The effect of this language is to "leave to local option the decision whether or not to establish diversion for misdemeanor defendants." *People v. Superior Court of Santa Clara County (Skoblov)*, 195 Cal. App. 3d 1209, 1213-14 (Cal. Ct. App. 1987). The statute "delegates this authority to the county board of supervisors in so many words; there is no ambiguity. With similar directness the statute requires the district attorney's approval of a program." *Id.*

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[9] Ordinarily, "[p]retrial diversion refers to the procedure of postponing prosecution of an offense filed as a misdemeanor either temporarily or permanently at any point in the judicial process from the point at which the accused is charged until adjudication." Cal. Penal Code § 1001; *see generally* Note, *Pretrial Diversion from the Criminal Process*, 83 Yale L.J. 827 (1981).

The statute places strict limits on how counties may operate their bad check diversion programs. Although ACCS's check collection programs in California are premised on the statute, the ACCS business model violates the statute in several respects.

Probable Cause. The statute limits diversion programs to cases in which "there is probable cause to believe that there has been a violation of Section 476a." *Id.* § 1001.60. Although a county may choose a private contractor to administer the program, only "[t]he district attorney may refer a bad check case to the diversion program." *Id.* §§ 1001.61, 1001.62. Under the ACCS business model, however, checks are delivered directly from the participating business to ACCS for collection without ever crossing a prosecutor's desk. [RE 26-29].

Limits on Fees. The statute authorizes the diversion programs to collect fees, but "[t]he amount of the fee shall not exceed thirty-five dollars ($35) for each bad check in addition to the actual amount of any bank charges incurred by the victim as a result of the offense." *Id.* § 1001.65. Fees for bank charges are also authorized, but must be "paid to the victim," and "[i]n no event shall exceed ten dollars ($10) per check." *Id.* ACCS, however, routinely demands fees of $170 per check. [RE 22-24].

Only A Court, After Determining Ability to Pay, May Assess Class Fees. The statute permits district attorneys to charge fees for educational classes, but only *after* a criminal complaint is filed following a check writer's failure to comply with the terms of the diversion program. In that event, "the court, *after conviction* . . . shall make inquiry into the financial condition of the defendant and, upon a finding that the defendant is able in whole or part to pay the expense of the education class, the court may order him or her to pay for all or part of that expense." *Id.* § 1001.65 (emphasis added). Nevertheless, ACCS routinely charges a $150 "class fee" for *all* consumers that it targets, without regard for whether a complaint has been filed and without regard for their ability to pay. [RE 28].

D. The Santa Clara County Contract

One of ACCS's programs collects dishonored check debt for merchants in Santa Clara County, California under contract with the Santa Clara County District Attorney. Like the collection notices, the Santa Clara County contract is a standard-form ACCS contract. [RE 19]. The contract confirms that ACCS's contractual relationship is with the County, not the State of California, and provides ACCS with substantial autonomy for its collection operations. [RE 69-83].

ACCS Acts As An Independent Contractor, Not An Agent, of the County. The only parties to the contract are ACCS and the Santa Clara County District Attorney; the State is not a party. [RE 71]. The contract provides that the program "shall be operated by ACCS under the *administrative authority* of the District Attorney." [RE 71] (emphasis added). ACCS is defined as an independent contractor, not an agent, of the County:

> **16. <u>INDEPENDENT CONTRACTOR</u>** - ACCS shall be an independent contractor and as such, shall have no authority, expressed or implied, to bind the District Attorney, County, or subdivision thereof, to any agreement, settlement, liability, or understanding whatsoever, and agrees not to perform any acts as agent for same.
>
> . . .
>
> Nothing within this agreement shall be construed as creating a relationship of employer and employee, or principal and agent, between the County of Santa Clara and ACCS, or any of ACCS's agents or employees. ACCS assumes exclusive responsibility for the acts of its employees, or agents as they relate to the services to be provided during the course and scope of their employment.

[RE 81].

ACCS Assumes Exclusive Responsibility for Judgments and Indemnifies the County. ACCS "assumes exclusive responsibility" for its actions while performing the contract. [RE 182]. The contract also contains a broad indemnity clause, under which ACCS agrees to "defend,

indemnify and hold the County harmless against and from any and all claims, suits, losses, damages and liability for damages" that "are claimed to or in any way arise out of are connected with ACCS's services, operations or performance" under the contract. [RE 82].

The Contract's Insurance Provisions Are Created for and Regulated by the County. The contract's insurance provision states that ACCS must provide insurance to protect the County, not the State, and must follow County, not State, insurance requirements. Although the provision meticulously describes County supervision of every aspect of the insurance process—from obligating ACCS to receive authorization from County officials to requiring ACCS to use County forms—it never mentions the State of California, its procedures, or its officials. [RE 78].[10]

[10] "Without limiting ACCS indemnification of Santa Clara County," the contract requires ACCS to meet "specified County insurance requirements." [RE 78]. The contract obligates ACCS to provide evidence of coverage "on the County's own form, or form provided by the County's Insurance Manager." [*Id.*]. It prohibits ACCS from commencing work until "such insurance has been approved by the County." [*Id.*]. It gives the County's Insurance/Risk Manager the power to approve the insurer, and it permits insurance to be changed or cancelled only upon notice to the County. [*Id.*].

The contract gives the County, not the State, the power to require ACCS to purchase additional personal injury coverage and requires ACCS to "notify the County Project Manager promptly of all losses or claims over

ACCS Is Subject To Audit By The County Treasurer. The records, disclosure and auditing provisions all make clear that ACCS's operation of the program is under the authority of the County, not the State. For instance, ACCS's books are specifically made subject to inspection or audit by the District Attorney or the County Treasurer-Controller. [RE 75-76]. (The provision permits these two County officials to assign some "other designated State or County auditor," but does not name any such officials; notably, this provision is the only one in the contract that refers to a State official.) The contract also sets conditions—underpayment or failure to maintain records—under which the "full cost of said audit, determined by the County Treasurer-Controller or designated agent shall be borne by ACCS." [RE 76]. "Otherwise, the County shall bear the cost of said audit. Upon request of the County Treasurer-Controller, ACCS shall promptly provide, at its own expense, all necessary data to enable the County to fully

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$25,000." [RE 79]. It gives the County, not the State, the power to waive certain coverage and the County, not the State, "the right to withhold payments to ACCS in the event of material non-compliance." [*Id.*]. Although the contract specifically notes that "[i]nsurance afforded by this policy shall also apply to the County of Santa Clara and member[s] of the Board of Supervisors of the County of Santa Clara, and the officers, agents and employees of the County of Santa Clara," it never once suggests that the insurance will apply to a state agency or official. [RE 79].

comply" with any requests for information from the state or federal governments. [*Id.*].

The ACCS Programs Are Self-Funded. Neither the District Attorney nor the County pays for any aspect of the programs' operations. ACCS agrees to "furnish all personnel, supplies, equipment, furniture, insurance, utilities, and facilities necessary for its business operation," and absent prior authorization may "not use County supplies or equipment for any purpose, except as authorized by the District Attorney." [RE 82].

The contracts provide for the division of collection-fee revenue between ACCS and the District Attorney and ACCS agrees to operate the programs solely in consideration for its share of that revenue. [RE 73-74]. Specifically, the contract authorizes ACCS to keep for itself (1) a $100 "class fee," (2) 60% of "administrative fee revenue," (3) a $25 installment-payment fee, (4) a $25 failure-to-appear fee, and (5) a $10 late fee. [RE 74]. No provision in the contract or in the statutory provision to which the contract refers (Cal. Penal Code § 1001.65) suggests that the State of California will receive any share of the revenue.

ACCS Is Responsible for All Day-to-Day Management. Under the contract, ACCS is responsible for the "daily management" of "all" clerical,

accounting, collection, and financial functions of the programs, including generating and mailing the demand letters; the collection of all money; the disbursement of payments to merchants; financial reporting; and the maintenance of all physical files, financial records, documentation reports, and computer files. [RE 72-73].

As for the day-to-day role of the County and the District Attorney, the contracts say very little. The District Attorney agrees to "assist and direct ACCS with the planning and development" of policies and procedures, but collection operations are left entirely to ACCS. [RE 73]. The only specific responsibilities of the District Attorneys are to (1) "designate a staff member to serve as Liason with ACCS" in organizing the program, (2) receive bad check complaints that are forwarded to ACCS and (3) review cases for prosecution only *after* ACCS has exhausted its collection attempts. [RE 73].

STANDARD OF REVIEW

"Under the law of this circuit, an entity invoking Eleventh Amendment immunity bears the burden of asserting and proving those matters necessary to establish its defense." *In re Lazar*, 237 F.3d 967, 974 (9th Cir. 2001); *see ITSI T.V. Prods., Inc. v. Agric. Ass'ns*, 3 F.3d 1289, 1291-92 (9th Cir.

1993). "The existence of sovereign immunity is a question of law reviewed de novo." *United States ex rel. Ali v. Daniel, Mann, Johnson & Mendenhall*, 355 F.3d 1140, 1144 (9th Cir. 2004). Because this is an appeal from the denial of a motion to dismiss, "[a]ll allegations of material fact are accepted as true and should be construed in the light most favorable to Plaintiffs." *Hydrick v. Hunter*, 466 F.3d 676, 686 (9th Cir. 2006).

SUMMARY OF ARGUMENT

American Corrective Counseling Services—a private, for-profit debt collector—asks this Court to take the extraordinary step of immunizing it from suit in federal court on the theory that it is an arm of the state when it does business under contract with county district attorneys in California. ACCS's request fails because state sovereign immunity shields only states; it does not extend to private corporations and it does not extend to counties.

The arguments that ACCS makes in favor of immunity are the same arguments that were rejected by this Court in *United States ex rel. Ali v. Daniel, Mann, Johnson & Mendenhall*, 355 F.3d 1140 (9th Cir. 2004) ("*DMJM*"). Specifically, *DMJM* (1) rejected the same type of common-law

agency argument on which ACCS chiefly relies, (2) demonstrated that a private contractor cannot meet this Court's test for arm-of-the-state status even if one assumes that the contractor is performing a central government function, (3) recognized that extending immunity would produce the anomalous result that private corporations would be immune while political subdivisions of the state, such as counties and cities, would not, and (4) relied on the Supreme Court's rejection, in *Richardson v. McKnight*, 521 U.S. 399 (1997), of qualified immunity for private government contractors that carry out major administrative tasks for profit. In addition being at odds with *DMJM* and *Richardson*, a decision extending state sovereign immunity to private corporations would also conflict with the law of other circuits and disregard the twin purposes of the Eleventh Amendment: the protection of the state's treasury and dignity.

Because a defense like the one raised here could be invoked as a de-laying tactic by a wide array of private government contractors—from private corporations that operate state prisons to contractors that process parking tickets—this Court should reaffirm its prior precedent and

categorically reject the invitation to expand state sovereign immunity dramatically by extending it to private corporations.

Even assuming that private corporations are eligible for state sovereign immunity, ACCS's defense fails because it cannot satisfy any of the five factors considered under the Court's test for determining arm-of-the-state status. Indeed, ACCS does not even attempt to satisfy four of those five factors, but instead asks the Court to find immunity by examining only *one* factor: whether ACCS performs a central government function. ACCS, in effect, urges this Court to adopt the same purely functional approach—an attempt to extend immunity based solely on whether a private entity performs a government function or administers a government program—that the Supreme Court rejected in *Richardson*. In *DMJM*, this Court held that a private corporation could not enjoy state sovereign immunity *even assuming* that it was performing a central government function. In any event, ACCS cannot satisfy even the one factor on which it relies because debt collection is not a central government function and because, as the district court correctly concluded, ACCS's collection programs are purely local programs.

ARGUMENT

I. State Sovereign Immunity Does Not Extend to Private Corporations.

The Eleventh Amendment 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 (emphasis added). Thus, "an important limit to the principle of sovereign immunity is that it bars suits against States but not lesser entities." *Alden v. Maine*, 527 U.S. 706, 756 (1999). More precisely, "only States and arms of the States possess immunity from suits authorized by federal law." *Northern Ins. Co. of N.Y. v. Chatham County, Ga.*, 126 S. Ct. 1689, 1693 (2006). Thus, counties, municipal corporations, and other political subdivisions of a state—state-created government entities that exercise a significant "slice of state power"—do not enjoy state sovereign immunity, because they are not the State itself. *Id.* (quoting *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 400-02 (1979)).

It should therefore come as no surprise that neither the Supreme Court nor this Court have ever taken the extraordinary step of extending

state sovereign immunity to a private corporation. Just three years ago, in fact, this Court specifically "decline[d] the invitation to expand state sovereign immunity dramatically by extending it to corporate actors." *United States ex rel. Ali v. Daniel, Mann, Johnson & Mendenhall*, 355 F.3d 1140, 1147 (9th Cir. 2004) ("*DMJM*").[11] Four aspects of *DMJM*'s reasoning, discussed below, are particularly relevant in this case: (1) it rejected the same type of common-law agency argument on which ACCS chiefly relies, *id.* at 1445-46; (2) it demonstrated that a private contractor can't meet the traditional test for arm-of-the-state status even if one assumes that the

[11] Prior precedent in this Court has observed the same basic public-private distinction. *See*, *e.g.*, *Sparta Surgical Corp. v. National Ass'n of Securities Dealers, Inc.*, 159 F.3d 1209, 1214 (9th Cir. 1998) ("As a private corporation, the Exchange does not share in the SEC's sovereign immunity[.]"); *Haisten v. Grass Valley Med. Reimbursement Fund, Ltd.*, 784 F.2d 1392, 1402 (9th Cir. 1986) ("[T]here exists no threat that sovereign immunity will bar enforcement of a California judgment against the Fund, since the Fund is a purely private corporation."); *Lehner v. United States*, 685 F.2d 1187, 1190 (9th Cir. 1982) ("[T]he doctrine of sovereign immunity does not affect Lehner's claim against . . . a private corporation."); *accord Foster v. Day & Zimmermann, Inc.*, 502 F.2d 867, 874 (8th Cir. 1974) ("The doctrine of sovereign immunity may not be extended to cover the fault of a private corporation, no matter how intimate its connection with the government."). The California courts have taken the same approach. *See*, *e.g.*, *Courtesy Ambulance Svc. v. Superior Court*, 11 Cal. Rptr. 2d 161, 167 (Cal. App. 1992) ("The Government Code contains a number of other immunities and protections which it would be patently unfair and illogical to apply to an organization such as SCIF, which in its purpose and everyday function is indistinguishable from a private corporation.").

contractor is performing a central government function, *id.* at 1147-48; (3) it recognized that extending immunity would produce the anomalous result that private corporations would be immune while local governments would not, *id.* at 1146, and (4) it relied on the Supreme Court's rejection of qualified immunity for private government contractors that carry out major administrative tasks for profit, *id.* at 1147.

This Court should reaffirm *DMJM* and—to prevent the inevitable delay caused by the assertion of groundless immunity defenses and interlocutory appeals—should underscore that a private, for-profit corporation, by definition, cannot be "one of the United States" within the meaning of the Eleventh Amendment.

A. This Court Has Already Rejected ACCS's Agency Argument.

ACCS asks the Court to apply common law agency doctrine to determine that ACCS is an "agent" of the state and therefore shares in its sovereign immunity. ACCS Br. 35-39. *DMJM* squarely rejected just such a request. There, a former employee brought a qui tam action against the construction firm DMJM, alleging that it had submitted false claims for federal emergency funds while managing the reconstruction of earthquake-

damaged buildings at California State University. The district court's theory was the same as ACCS's: It held that the corporation was "acting as an agent of the state" and, for that reason, was entitled to share in the state's sovereign immunity from suit. 355 F.3d at 1144. This Court reversed.

The Court first rejected the district court's conclusion that, because DMJM's employees were "'agents and representatives of [the university] acting for the state within the scope of their official duties,'" they were in effect government employees and thus DMJM was "entitled to immunity for their actions." *Id.* at 1145. The fact that DMJM employees were performing on-site work on state property under the supervision of state officials did not "transform" them into officers of the state; rather, they were "employees of a private, for-profit contractor, they were not government officials for immunity purposes." *Id.*

Next, the Court criticized the district court's reliance on "common law agency principles" to determine DMJM's entitlement to immunity, explaining that agency law has little if any "bearing on sovereign immunity." *Id.* at 1146. The district court had reasoned by analogy to cases in which federal courts use agency law to determine the federal government's liability for the acts of its contractors under the Federal Tort Claims

Act. *Id.* (citing *Logue v. United States*, 412 U.S. 521, 526-27 (1973)). But in the state sovereign immunity context, that analysis—like ACCS's proposed approach—"would lead to the surprising result that private corporate contractors acting on behalf of the state are immune . . . while local governments performing government functions are not." *Id.* The agency-law approach would also make "the extent of state control," which is only one factor in the traditional arm-of-the-state analysis, "determinative of sovereign immunity." *Id.* Thus, ACCS's chief argument (at 35-39)—that the Court should apply California's common law of agency to determine that ACCS is an agent, and hence an arm, of the state—cannot be reconciled with and, indeed, has already been flatly rejected by, *DMJM*.[12]

Even aside from *DMJM*, ACCS's agency argument would fail on its own terms because ACCS has no agency relationship with the State of California. First, ACCS's contracts are not with the State, but with *county*

[12] *DMJM* also rejected a closely-related argument that ACCS has not made here—that state sovereign immunity should be extended to private corporations based on an analogy to the federal-contractor defense. The Court dismissed that suggestion because, even with respect to federal contractors, the "defense does not confer sovereign immunity on contractors" and "[n]either the Supreme Court nor the Ninth Circuit nor any other court of which we are aware has applied the defense to state contractors." *Id.* at 1147 (citing *Boyle v. United Techs. Corp.*, 487 U.S. 500, 505 n.1 (1988)).

prosecutors in their "administrative authority" as *county* prosecutors [RE 71], and the contracts overwhelmingly confirm the local nature of the programs. Second, ACCS's collection operations throughout the nation are conducted from a single ACCS facility, without any supervision or control by local prosecutors, let alone by state officials. [RE 27, 29]. Third, ACCS's contracts specifically preclude ACCS from "perform[ing] any acts as agent" for those prosecutors and provide that the contracts shall not be "construed as creating a relationship of . . . principal and agent." [RE 81].[13]

B. This Court Has Already Demonstrated that Private Corporations Cannot Satisfy the Test for Arm-of-State Status.

As a fallback position, ACCS urges the Court to jettison all but one of the five factors considered under its traditional arm-of-the-state analysis

[13] ACCS concedes (at 37) that the terms of its contract preclude it from acting as the prosecutors' agent, but suggests that it should still be deemed an agent "for purposes of Eleventh Amendment immunity." But ACCS produces no cases in which courts have overridden such unequivocal contract language to find an agency relationship—let alone in a case in which a private corporation made the extraordinary claim that it was entitled to sovereign immunity. In fact, the federal courts have long held that when a private contractor seeks to "cloak itself in the mantle of [the government] and thereby gain governmental immunity with respect to third parties, the relevant contract terms assume an enhanced significance." *United States v. Penn. Envt'l Hearing Bd.*, 584 F.2d 1273, 1278 (3d Cir. 1978); *see also Powell v. United States Cartridge Co.*, 339 U.S. 497, 505 (1950) (relying on contract language stating that a private contractor was "an independent contractor and in no wise an agent of the Government.").

(known as the *Mitchell* test). The *Mitchell* test considers: (1) whether a money judgment would be satisfied out of state funds, (2) whether the entity performs central government functions, (3) whether the entity may sue or be sued, (4) whether the entity has the power to take property in its own name or only in the name of the state, and (5) the corporate status of the entity. *Mitchell v. L.A. Cmty. Coll. Dist.*, 861 F.2d 198, 201 (9th Cir. 1988). The first of these factors is by far the most important, but each one must be assessed to determine whether an entity is really an arm of the state. *Id*. ACCS makes no attempt to satisfy the first, third, fourth, or fifth factors, but instead asks the Court extend immunity to private corporations based solely on whether they are performing a "central government function." Br. 39-43.

Once again, ACCS's argument has already been squarely rejected by *DMJM*. After declining to "expand state sovereign immunity dramatically by extending it to corporate actors," and rejecting various attempts to discard the *Mitchell* test, *DMJM* showed why state sovereign immunity cannot be extended to a private corporation *even assuming* that it is performing a central government function. 355 F.3d at 1147-48. As for the first and "most important factor," the state would have no "legal obligation

to pay any judgment" against a private corporation like DMJM or ACCS. *Id.* Even if the state indemnified the corporation, that would make no difference because "legal liability, rather than a contractual obligation to indemnify is the relevant question." *Id.* (citing *Regents of Univ. of Calif. v. Doe*, 519 U.S. 425, 432 (1997)).[14] And the remaining factors could not be met because "DMJM is a private corporation, it may sue or be sued, and it has the power to take property in its own name." *Id.*

DMJM's analysis demonstrates that, as a practical matter, a private, for-profit corporation cannot qualify for immunity under the *Mitchell* test, unless *Mitchell* is replaced with a purely functional analysis, under which the mere performance of a government function by a private entity is

[14] "Private entities do not share in a state's sovereign immunity," one commentator has explained, because "the crucial question in determining whether an entity is an arm of the state for Eleventh Amendment purposes is whether the state will pay if the entity loses the suit. The state is not the real party in interest in a suit against a private corporation or legally obligated to pay when a private corporation loses. The fact that a state may choose to reimburse the corporation does not change the analysis. The Court looks to the party that is responsible for the judgment in determining if the entity receives Eleventh Amendment protection. Just as an agreement providing that a private party will reimburse the state does not make the Eleventh Amendment inapplicable, a state's contractual choice to reimburse a private party should not bring the Amendment into play." Kritchevsky, *Civil Rights Liability of Private Entities*, 26 Cardozo L. Rev. 35, 73 (2004).

sufficient to confer immunity. As explained below, however, the Supreme Court has rejected just such an approach to analyzing the immunity claims of private contractors.

C. Extending Sovereign Immunity To Private Corporations Would Lead to Anomalous Results.

Extending state sovereign immunity to private corporations would produce two anomalies in immunity law. *First*, as *DMJM* recognized, it "would lead to the surprising result that private corporate contractors acting on behalf of the state are immune," "while local governments performing government functions are not." 355 F.3d at 1146. The Supreme Court "has repeatedly refused to extend sovereign immunity to counties," as well as municipal corporations, local school boards, quasi-governmental corporations, and dual-state entities, "even when such entities exercise a 'slice of state power.'" *Northern Ins. Co.*, 126 S. Ct. at 1693 (explaining the limitation as "[a] consequence of this Court's recognition of preratification sovereignty as the source of immunity from suit").[15] Although the Supreme

[15] *See*, *e.g.*, *Jinks v. Richland County*, 538 U.S. 456, 466 (2003) ("[M]unicipalities, unlike States, do not enjoy a constitutionally protected immunity from suit."); *Lake Country Estates, Inc.*, 440 U.S. at 400-01 ("We cannot accept such an expansive reading of the Eleventh Amendment. By its terms, the protection afforded by that Amendment is only available to

Court hasn't had occasion to confront a state-sovereign-immunity defense raised by a private corporation, it is difficult to imagine a principled basis for granting private, profit-seeking corporations greater immunity from suit under the Eleventh Amendment than political subdivisions of the state itself.

Second, extending state sovereign immunity to private corporations would lead to dissonance between the doctrines of sovereign and qualified immunity. As support for its decision not to "expand state sovereign immunity dramatically by extending it to corporate actors," *DMJM* relied on the Supreme Court's decision in *Richardson v. McKnight,* 521 U.S. 399 (1997), which declined to extend qualified immunity to prison guards employed by a private corporation managing a prison under contract with a state.

Richardson—the only Supreme Court decision addressing the interaction between privatization and immunity—"answered the immunity

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'one of the United States.'"); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280-81 (1977) (holding that a "local school board" was not entitled to Eleventh Amendment immunity because it "is more like a county or city than it is like an arm of the State"); *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890) (rejecting county's claim to Eleventh Amendment immunity because the "eleventh amendment limits the jurisdiction only as to suits against a state").

question" in the context "in which a private firm, systematically organized to assume a major lengthy administrative task (managing an institution) with limited direct supervision by the government, undertakes that task for profit and potentially in competition with other firms." *Id.* at 413. Observing that, "in many areas, government and private industry may engage in fundamentally similar activities," *Richardson* rejected a "purely functional approach" to analyzing the immunity of private entities. *Id.* at 409. The Court explained that it "never has held that the mere performance of a governmental function could make the difference" between liability and immunity, "especially for a private person who performs a job without government supervision or direction." *Id.* at 408-09. Instead, the Court stressed "certain important differences that, from an immunity perspective, are critical," including the "ordinary marketplace pressures" that are present when a "firm is systematically organized to perform a major administrative task for profit." *Id.* at 409. The Court thus held that private guards "resemble those of other private firms and differ from government employees," and therefore should not be entitled to immunity. *Id.* at 410.

Following *Richardson*, this Court has consistently rejected qualified immunity defenses raised by private entities and individuals:

- *Ace Beverage Co. v. Lockheed Info. Mgmt. Servs.*, 144 F.3d 1218, 1219 (9th Cir. 1998) (private government contractor that processed and collected parking ticket fines was not entitled to immunity because it was 'a private firm, systematically organized to assume a major lengthy administrative task . . . with limited direct supervision by the government," "for profit and potentially in competition with other firms") (quoting *Richardson*, 521 U.S. at 413).

- *Halvorsen v. Baird,* 146 F.3d 680, 685-86 (9th Cir. 1998) (private, non-profit corporation that operated a detoxification facility under government contract was "a firm systematically organized to assume a major lengthy administrative task" and therefore was not entitled to immunity).

- *Bibeau v. Pacific Northwest Research Found. Inc.*, 188 F.3d 1105, 1111-12 (9th Cir. 1999) (private research foundation that conducted radiation experiments on inmates at Oregon State Penitentiary was not entitled to immunity; the Court found "no principled distinction between [the research foundation], the private prison guards involved in *Richardson* and the private detoxification facility in *Halvorsen*").

- *Jensen v. Lane County*, 222 F.3d 570, 576 (9th Cir. 2000) (immunity was "categorically unavailable" to a private contract psychiatrist who signed an involuntary commitment order).

- *Gonzalez v. Spencer*, 336 F.3d 832, 834-35 (9th Cir. 2003) (private attorney hired by state entities, whose role "was analogous to that of a state prosecutor," was a "private party, not a government employee" and could demonstrate "'no special reasons significantly favoring an extension of governmental immunity' to private parties in her position.'") (quoting *Richardson*, 521 U.S. at 412).

Under this Court's precedent, private, for-profit contractors like ACCS are not entitled to qualified immunity. ACCS is not materially

different, for example, from the contractor that managed parking-ticket adjudications and collections in *Ace Beverage*. It makes no sense to confer *absolute* sovereign immunity on a private party that is not entitled to invoke even *qualified* immunity.

D. Extending Sovereign Immunity to Private Corporations Would Conflict With the Law of Other Circuits and the Eleventh Amendment's Twin Purposes.

1. In addition to producing anomalies in immunity law and creating tension with *Richardson* and its progeny, extending immunity to private corporations would also conflict with the decisions of other circuits and disregard the twin aims of the Eleventh Amendment. Specifically, a holding that private entities may enjoy state sovereign immunity could not be reconciled with decisions of the First, Fifth, Sixth, Seventh, and Tenth Circuits—all of which have recognized the importance of adhering to the fundamental public-private distinction in rejecting immunity defenses that were stronger than the one in this case. *See United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 716-21 (10th Cir. 2006); *Takle v. Univ. of Wisc. Hosp.*, 402 F.3d 768, 771 (7th Cir. 2005); *United States ex rel Barron v. Deloitte & Touche, L.L.P.*, 381 F.3d 438, 439-42 (5th Cir. 2004); *Fresenius Med. Care Cardiovascular Res., Inc. v. P.R. & Carribean Cardiovascu-*

lar Ctr. Corp., 322 F.3d at 68-75; *Brotherton v. Cleveland*, 173 F.3d 552, 560-61 (6th Cir. 1999); *Mullin v. P & R Educ. Servs., Inc.*, 942 F. Supp. 110 (E.D.N.Y. 1996).

Some of these courts have specifically rejected a purely functional approach that extends immunity solely on the basis that a private entity is administering a state program or performing a state function—the very approach suggested by ACCS and rejected by the Supreme Court in *Richardson*. In *Barron*, for example, the Fifth Circuit explained that the "performance of state functions alone is insufficient to create immunity," based in part on *Richardson*'s "willingness to allow disparate treatment for state and private employees performing the same functions." 381 F.3d at 443 n.7; *see also Fresenius*, 322 F.3d at 64 (citing *Richardson* as support for recognition of the *state*'s interest in the differential treatment of private and public entities performing the same function).

Other circuits have also recognized that conferring immunity on a private or quasi-private entity that retains financial and operational autonomy but performs governmental functions would, as Judge Posner has put it, turn privatization into a "farce":

> The strings that tie the [entity] to the state are found in many cases in which a state decides to privatize a formerly state function. They do not require that privatization be treated as a farce in which the privatized entity enjoys the benefits both of not being the state and so being freed from the regulations that constrain state agencies, and of being the state and so being immune from suit in federal court.

Takle, 402 F.3d at 771; *accord Sikkenga,* 472 F.3d at 721-22; *Fresenius*, 322 F.3d at 64.

The most recent such ruling, by the Tenth Circuit in *Sikkenga*, could have been describing aspects of this very case: ACCS, like the defendant there (a privatized laboratory), "engages in nationwide activity," "earns the bulk of its revenue from operations outside" Santa Clara County, and "its day-to-day operations are independent" of the government. 472 F.3d at 719-20. And ACCS, too, is "self-sustaining, generating operating funds and profit through its commercial activity," and its "substantial surplus flows to the [County] rather than vice-versa;" the bad check program "was designed to be not only self-sustaining, but a commercial 'profit center'" for the County. *Id.* at 721. But the rule announced by the Tenth Circuit would be flatly inconsistent with a finding of immunity here: When the government forms (or, as here, merely contracts with) an "ordinary corporation, with anticipated and actual financial independence, to enter

the private sector and compete as a commercial entity, even though the income may be devoted to support some public function or use, that entity is not an arm of the state." *Id.*[16]

2. A finding of immunity for a private corporation would also disregard what the Supreme Court has described as "the Eleventh Amendment's twin reasons for being"—protection of the state's treasury and dignity. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 47 (1994). *Hess* held that, because "the impetus for the Eleventh Amendment" was "the prevention of federal-court judgments that must be paid out of a State's treasury," the "vulnerability of the State's purse" is properly regarded as "the most salient factor in Eleventh Amendment determinations." *Id.* at 48.

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[16] Only one circuit, the Eleventh Circuit, has ever extended state sovereign immunity to a private corporation—a private administrator of a state employee health insurance program sued by a hospital alleging nonpayment for services provided. *Shands Teaching Hosp. and Clinics, Inc. v. Beech Street Corp.*, 208 F.3d 1308 (11th Cir. 2000). For the reasons already given above, *Shands* was wrongly decided. It is also factually distinct from this case. Although the court "found no case directly on point that has accorded Eleventh Amendment immunity to a private corporation," *id.* at 1311, it extended immunity because state law defined the defendants as "agents" of the state and reserved responsibility for all "day-to-day management" to the state itself, *id.* at 1309, the state retained "virtually complete control" of the program, *id.* at 1311, the program was "funded through annual legislative appropriations," *id.* at 1311, and the contract provided that any judgment was "an obligation of the State," *id.* at 1313.

But to extend immunity to private corporations would be to extend immunity where that "most salient" factor is absent. Similarly, extending sovereign immunity to independent private contractors creates a danger that federal courts will disregard the very dignity interests of the states that the Eleventh Amendment is designed to protect. "The federal courts' consideration of status and autonomy under state law preserves the state's dignity by making its chosen structures controlling." *Carter v. Philadelphia*, 181 F.3d 339, 355 n.53 (3d Cir. 1999). As the First Circuit has put it, "[n]ot all entities created by states are meant to share state sovereignty. Some entities may be part of an effort at privatization, representing an assessment by the state that the private sector may perform a function better than the state." *Fresenius*, 322 F.3d at 64; *see Sikkenga*, 472 F.3d at 721-22; *Takle*, 402 F.3d at 771; *see also Richardson*, 521 U.S. at 409-412 (discussing rationales and economics of privatization).

Conferring immunity on such an entity can have significant consequences that may be undesirable to a state. Among these consequences is "[a] conclusion that the entity is beyond the control of privately enforced Article I legislation enacted by the Congress," such as the FDCPA or federal employment law. *Fresenius*, 322 F.3d at 64. Sovereign immunity

prevents employees of the entity from fully enforcing the Fair Labor Standards Act, Title I of the Americans with Disabilities Act, and the Age Discrimination in Employment Act. *See Alden*, 527 U.S. 706 (FLSA); *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 360 (2001) (ADA); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 82-83 (2000) (ADEA). "A state could adjudge that those effects may be unwanted disincentives to people who might otherwise seek employment with the entity, or that it is unwise to differentiate the entity's employees from those in the private sector." *Fresenius*, 322 F.3d at 64. For this and other reasons, an "erroneous arm-of-the-state decision may frustrate, not advance, a state's dignity and interests." *Id.*

II. ACCS Is Not an Arm of the State of California.

Even assuming that private corporations are potentially eligible for state sovereign immunity on the theory that they may be arms of the state, ACCS cannot qualify as an arm of the State of California because it does not meet any of the five *Mitchell* factors.

A. A Judgment Would Be Satisfied Out of ACCS's Corporate Coffers, Not County or State Funds.

Under the *Mitchell* test, "whether a money judgment would be satisfied out of state funds is the most important factor for sovereign immunity." *DMJM*, 355 F.3d at 1147. ACCS makes no attempt to show that this factor is satisfied. Here, as in *DMJM*, "[t]here is no evidence suggesting that" the State of California—which is not even a party to the contract with ACCS—"would have a legal obligation to pay any judgment against" ACCS. *Id.* at 1147-48; *see Barron*, 381 F.3d at 444. To the contrary, ACCS "assumes exclusive responsibility" for its actions [RE 81-82]. *See In re Reisen*, 2004 WL 764628, *2 (Bankr. N.D. Iowa 2004) ("Any sanctions imposed for the . . . Bad Check Restitution Program's actions are the legal responsibility of American Corrective Counseling Services.").

It would be absurd to confer immunity on ACCS because it is not only "financially self-sustaining," but actually *generates* funds for the local governments with which it does business. *Hess*, 513 U.S. at 53; *id.* at 51 n.21 (observing that it would "heighten 'a mystery of legal evolution' for the courts to 'spread an Eleventh Amendment cover over an [entity] that

consumes no state revenues but contributes to the State's wealth." (quoting Borchard, *Government Liability in Tort*, 34 Yale L. J. 1, 4 (1924)).

B. ACCS Does Not Perform Central Government Functions.

ACCS's only attempt to meet any of the *Mitchell* factors is its argument that it performs a "central governmental function" by assisting local businesses in collecting dishonored-check debt. Br. 43-46. As an initial matter, this Court has never held that a private corporation can satisfy the central-government-function factor, and there are good reasons to categorically reject that possibility.[17] The central-government-function factor examines not only the function performed in the abstract, but also considers the "degree of autonomy" exercised by the entity. *Beentjes v. Placer County Air Pollution Control District*, 397 F.3d 775, 783-84 & n.9 (9th Cir. 2005). The degree of autonomy exercised by a private corporation is entirely incompatible with the level of central government control necessary to satisfy this aspect of the *Mitchell* test. *Id.* at 783.

[17] Contrary to ACCS's suggestion (at 44), *DMJM* merely "assume[d]," without deciding, that a private company's management of the reconstruction of state buildings was a central government function. 355 F.3d at 1147. It was unnecessary to decide the question because the second *Mitchell* factor alone is not sufficient to justify immunity. *Id.* at 1148; *accord Durning v. Citibank, N.A.*, 950 F.2d 1419, 1426 (9th Cir. 1991).

In addition to their autonomy, private corporations' profit motives are also fundamentally incompatible with a finding that they operate primarily for the benefit of the state. Unlike government agencies, which are accountable to the citizens of the state at the ballot box, private corporations are accountable chiefly to their shareholders. *See Barron*, 381 F.3d at 442 (denying state sovereign immunity in part because "private corporations operate for the benefit of their investors, rather than the State"); *see Dodge v. Ford Motor Co.*, 170 N.W. 668, 664 (Mich. 1919) ("There should be no confusion [about] the duties which Mr. Ford conceives that . . . he owe[s] to the general public and the duties which in law he [owes to the stockholders]. A business corporation is organized and carried on primarily for the profit of the stockholders."). The profit motive—a critical consideration in *Richardson*—has special significance in the case of debt collection. As Congress observed when it enacted the FDCPA, independent debt collectors, unlike most businesses, are not "restrained by the desire to protect their good will" or "the consumer's opinion of them." S. Rep. 95-382, at 2 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696 (1977). Rather, "collection agencies generally operate on a 50-percent commission,

and this has too often created the incentive to collect by any means." *Id*. ACCS's primary purpose, by definition, is to maximize its own profits.

Assuming, nevertheless, that it is possible for private corporations to satisfy the second *Mitchell* prong, at least two conditions must be satisfied: (1) the activity or function must be fundamentally *governmental* in nature, *i.e.* a function with a "purely governmental objective," *Durning v. Citibank, N.A.*, 950 F.2d 1419, 1424 (9th Cir. 1991), and (2) it must be a *central*—that is, a *state* as opposed to a local—function, *Streit v. County of Los Angeles*, 236 F.3d 552, 567 (9th Cir. 2001). ACCS's bad-check collection programs fail in both respects: As explained below, (1) ACCS's "function is more similar to private debt collection than a typical government function," *In re Reisen*, 2004 WL 764628, *5 (Bankr. N.D. Iowa 2004) (discussing ACCS), and (2) California has delegated all authority over the bad check programs "to local entities and officials," *Davis v. Municipal Court*, 46 Cal. 3d 64, 75 (Cal. 1998).

1. ACCS Is Engaged in Debt Collection.

ACCS cites *Durning* for the proposition that the Ninth Circuit has "construed central governmental functions 'broadly.'" Br. 43 (citing *Durning*, 950 F.2d at 1423, 1426-28). But *Durning* held only that a

government agency that otherwise qualified as an arm of the state would be entitled to immunity for *all* of its activities, so long as its "primary purpose" is, in fact, "a central government function." 950 F.2d at 1426. *Durning* "construed the second *Mitchell* factor broadly" because the Wyoming Community Development Authority was being sued for securities fraud based on its issuance of bonds, and such "revenue-raising efforts" in themselves are not central governmental functions. *Id.* However, "[u]nder Wyoming law, it is clear that the Authority's primary purpose is to finance and develop public housing—an indisputably governmental activity," and thus, the entity was performing a central government function. *Id. Durning* compels just the opposite conclusion here, however, because ACCS's "revenue-raising efforts" are its only efforts. This Court has never held that a joint business venture between a for-profit corporation and a local government—no matter how much money it might raise for the government—is in itself a "central government function."

Like the district court here [RE 9-10, 147-150], every court that has examined the operations of ACCS and similar bad-check-program contractors has concluded that its functions are really debt collection, not criminal prosecution. As one court put it:

> The Dubuque County Attorney's Bad Check Restitution Program . . . is part of a nationwide program run by the American Corrective Counseling Services. . . . .The Restitution Program . . . is not an instrumentality of the Dubuque County Attorney. The Restitution Program is a collection agency associated with the Dubuque County Attorney's Office as an independent contractor. It was not created by the Dubuque County Attorney's Office . . . [Once a check is referred to ACCS,] [t]he County Attorney has no further control over the Restitution Program's actions unless the Restitution Program's attempts at debt collection fail . . . .
>
> The Restitution Program exists to facilitate the payment of bad checks. It operates under typical debt collection rules [and its] function is more similar to private debt collection than a typical government function.

In re Reisen, 2004 WL 764628, at *2, *5; *see also In re Simonini*, 272 B.R. 604, 614-18 (Bankr. W.D.N.C. 2002) ("The [Clark County District Attorney's Bad Check Diversion Unit's] prosecution is debt collection in sheep's clothing."); *In re Baumblit*, 15 Fed. Appx. 30 (2d Cir. 2001) (The District Attorney's Bad Check Unit (BCU) is not prosecution; it "administers a program that attempts to collect payment of bad checks through the threat of prosecution. A different unit of the District Attorney's Office must make a decision whether to prosecute and a separate criminal complaint must be drafted by the prosecutor if a decision is made to prosecute . . . . [The BCU] threatens prosecution . . . without first making an actual decision to

prosecute. The mere fact that the BCU is a collection program associated with a local district attorneys' office does not make its actions a criminal proceeding.").

In addition, every court to consider the issue thus far has held that ACCS and similar companies are "debt collectors" subject to the FDCPA—a determination that was recently confirmed by Congress. *See, e.g., Liles v. Am. Corrective Counseling Servs.*, 131 F.3d 2d 1114, 1118-20 (S.D. Iowa 2001); *Gradisher v. Check Enforcement Unit, Inc.*, 133 F. Supp. 2d 998, 990 (W.D. Mich. 2001) ("Whether one calls CEU's efforts 'recovery' or 'collection' makes no difference—CEU engaged in the collection of checks which had been paid to merchants and had not cleared the check writer's bank and, if this amount was recovered, forwarded it to the merchant.").[18]

In short, "[n]ot every activity in which government might decide to engage is a function of government in private hands." *Houston Community*

[18] In 2002, the district court in this case concluded that "[a]s a private actor, attempting to take action against Plaintiff, a private individual, in order to compensate a private third-party creditor, partially or completely, for a private debt owed by Plaintiff to that third-party, ACCS is bound by the requirements of the FDCPA . . . . Although the FDCPA exempts from its requirements officers and employees of state governments, ACCS is a private organization with a government contract; it is not a government agency or employee." [DN 23 at 5-6].

Hosp. v. Blue Cross and Blue Shield of Texas, Inc., 481 F.3d 265, 271 (5th Cir. 2007). ACCS's "argument would extend official immunity to all contractual delegations of authority by the government." *Id.*

2. ACCS's Collection Programs Are Local, Not State, Programs.

Even if ACCS's function could be construed as governmental, it is "not a *central* government function, but the administration of a County policy." *Streit*, 236 F.3d at 567 (emphasis added); *see Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1044 (9th Cir. 2003) (this factor "assesses the extent to which *the state* exercises centralized governmental control over the entity.") (emphasis added); *Beentjes*, 397 F.3d at 782-83 (rejecting claim that a county air pollution control district was an arm of the state; even though the districts were "the mechanism through which the State meets and maintains state and federal air quality standards," they were "decentralized" and "perform[ed] primarily local governmental functions").

First, ACCS's attempt to characterize its operations as a state function is belied by the overwhelming confirmation in the contract itself—including ACCS's indemnification of the County [RE 82] and the County's extensive insurance requirements [RE 78-79] and auditing procedures [RE

75-76]—that the challenged program is within the County's, not the State's, authority. Indeed, the contract makes over *forty-five* independent references to the County and only *two* independent references to the State. There is no evidence of state control.

Second, ACCS's arguments are contradicted by the relevant California statute, its legislative history, and the case law interpreting the statute, all of which indicate that the challenged program is a local, not a state, program. Diversion programs in California, including the ACCS check collection programs, are authorized by section 1001 of the Penal Code. Section 1001.60, adopted in 1985, permits a district attorney to create and implement a pretrial diversion program for fraudulent-check writers only "[u]pon the adoption of a resolution by the [county] board of supervisors" and permits the program to be run either "by the district attorney or by a private entity under contract with the district attorney." Cal. Penal Code § 1001.60. The California courts have consistently recognized that the Legislature's intent in Section 1001 was "to leave to local option the decision whether or not to establish diversion." *People v. Superior Court of Santa Clara County (Skoblov)*, 195 Cal. App. 3d 1209, 1213-14 (Cal. Ct. App.

1987) (the statute "delegates this authority to the county board of supervisors in so many words; there is no ambiguity").

The seminal case concerning California diversion programs, *Davis v. Municipal Court*, 46 Cal. 3d 64 (Cal. 1988), involved a constitutional challenge on state separation-of-powers grounds to "one of the central features of these misdemeanor diversion statutes—a provision granting a local district attorney the authority to approve or disapprove a local diversion program," as well as to a "particular local rule" of a diversion program adopted in San Francisco. *Id.* at 69-70. ACCS cites *Davis,* but fails to confront *Davis*'s most salient feature: its emphasis on localism. *Davis* begins by explaining that the first iteration of the diversion statute, passed in 1977, was designed to endorse "experimental local diversion programs" that had been operated by "local police departments and district attorneys in California" without statutory authorization. *Id.* That legislation "did not establish a general, state-mandated diversion program, but rather expressly declared that the Legislature did not intend to preempt the pretrial diversion field"; it "neither compelled a local jurisdiction to establish a diversion program nor limited a local entity's discretion in designing or implementing the eligibility requirements of such a program." *Id.*

Davis recounts that, in 1982, California adopted "two separate but related pretrial diversion statutes," both of which, like section 1001.60, "condition[ed] the implementation of . . . a diversion program on the district attorney's approval." *Id.* at 75. Again, the Legislature "clearly did not intend to mandate a statewide misdemeanor diversion program or to require every locality to adopt such a program," but instead "made plain its intention to leave to local entities and officials both the decision whether to implement such a program and the authority to fashion a misdemeanor diversion program to meet local needs and resources." *Id.*; *see also People v. Padfield*, 136 Cal. App. 3d 218, 230-31 (1982). Rejecting the separation of powers challenge, *Davis* explains that the "district attorney's approval or disapproval of a diversion program can accurately be described as a 'quasi-legislative' policy decision" that falls squarely within the district attorney's executive powers. *Davis*, 46 Cal. 3d at 78 (concluding that in conditioning diversion on "the district attorney's approval of a local diversion program, the Legislature simply chose to retain the district attorney's executive control over the establishment and design of such programs"). The upshot of *Davis*, then, is that diversion programs are local programs and that

district attorneys' role in creating and implementing them is within the scope of their administrative or executive authority as local officials.

Third, ACCS spends much of its brief (22-33) attacking the district court's conclusion that the Santa Clara County district attorney was not entitled to state sovereign immunity in connection with his administrative actions with respect to a county program. Because the district attorney is not a party to this appeal and because, as explained above, ACCS cannot enjoy derivative immunity based on a common-law agency theory, these efforts, even if successful, could not establish ACCS's entitlement to immunity.

In any event, the district court's conclusion with respect to the district attorney was correct. In addition to the contract, the state statute, the legislative history, and the California case law discussed above, the district court's conclusion adhered to Ninth Circuit precedent. In *Ceballos v. Garcetti*, 361 F.3d 1168, 1182 (9th Cir. 2004), *rev'd on other grounds*, 126 S. Ct. 1951 (2006), this Court explained that, ordinarily, "an official designated as an official of a county—as is the District Attorney of County of Los Angeles—is a county official for all purposes." *Ceballos*, 361 F.3d at 1182. The question "whether the District Attorney acted on behalf of the county

or the state turns on whether" the actions alleged "are part of the District Attorney's prosecutorial functions or whether [the prosecutor] was performing *administrative or other non-prosecutorial duties*." *Ceballos*, 361 F.3d at 1183 (emphasis added).

Because the "California courts have not defined the precise characteristics that distinguish a district attorney's prosecutorial function from his other functions," *Ceballos* holds that it is appropriate to look to cases addressing whether a prosecutor was acting in his prosecutorial capacity as opposed to an administrative capacity for purposes of absolute prosecutorial immunity. *Id.* at 1183. Under this approach, a prosecutor is entitled to immunity "when he or she engages in activities 'intimately associated with the *judicial phase* of the criminal process,'" but not for "administrative functions." *Ceballos*, 361 F.3d at 1183 (internal citation omitted). "While the line between the functions is not entirely clear, it is clear that absolute prosecutorial immunity [is justified] only for actions that are connected with the *prosecutor's role in judicial proceedings*, not for every litigation-inducing conduct." *Id.* at 1184 (citations omitted) (emphasis added). "Actions that do not directly relate to the judicial process do not give rise to absolute immunity, even if they occur after a prosecution is initiated." *Id.*

Here, the district attorney was not even arguably engaging in any conduct relating to his role in the "judicial phase of the criminal process." *Id.; see Holder v. Robbins,* 2006 WL 751238, at *2 (E.D. Ky. 2006) *(*"The defendant describes the Madison County Attorney Check Enforcement Program as 'a pretrial diversion program.' Pretrial diversion programs are not 'intimately associated with the judicial phase of the criminal process,' because their very purpose is to avoid the necessity of judicial intervention."). Rather, the district attorney, under the "administrative authority" of Santa Clara County [RE 71], hired an independent contractor to operate a local diversion program—an act that fits "squarely within the District Attorney's administrative function," *id.,* and that has been expressly delegated to the counties by the Legislature. *Skoblov*, 195 Cal. App. 3d at 1218.[19] Indeed, in the district court, ACCS acknowledged that its role was a

[19] The authority ACCS cites for the proposition that the actions at issue here are "prosecutorial conduct" is an isolated passage in *Davis,* 46 Cal. 3d at 77, describing diversion as "a subset of the prosecutor's broad charging discretion." One need only read *Davis* to see that this passage has no bearing on which side of the administrative/prosecutorial line the challenged program falls for Eleventh Amendment purposes. Read in context, the passage is part of a discussion of diversion as falling within a district attorney's "quasi-legislative authority," which the court described as an appropriate component of the "inherent executive authority" of the office. 46 Cal. 3d at 77-78. That language, standing alone, does nothing to

purely administrative one. [RE 112 ("One cannot argue, argue realistically that ACCS is engaging in prosecutorial conduct."); RE 107 (ACCS's "communications with the program participants, the classes, the letters, those are not pure prosecutorial conduct, they're administrative."); RE 117 (describing ACCS as "a mere administrator")].

Finally, ACCS's attempt to cloak itself in the state's immunity based on California's statutory authorization of diversion programs is misplaced because many of the allegations of this lawsuit involve ACCS's *subversion* of state law—from the lack of the required probable cause determination, Cal. Penal Code § 1001.60, to collection fees that are well in excess of the limits set by state law, *id.* §§ 1001.64, 1001.64(b).

C. ACCS Is a Private Corporation, May Sue or Be Sued, and May Take Property In Its Own Name.

The final three *Mitchell* factors are whether the entity may sue or be sued, whether the entity has the power to take property in its own name or

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address whether this "quasi-legislative authority" is exercised on behalf of a county or the state. The rest of the opinion, however, *does* help to answer that question. As explained above, *Davis* holds that the Legislature decided to "leave to *local entities and officials* both the decision whether to implement such a program and the authority to fashion [it] to meet local needs and resources." *Id.* at 75 (emphasis added). ACCS's reading is thus wholly at odds with the holding and reasoning of *Davis*.

only in the name of the state; and the corporate status of the entity. *Mitchell*, 861 F.2d at 201. As in *DMJM*, ACCS cannot meet these factors because it "is a private corporation, it may sue or be sued, and it has the power to take property in its own name." *Id.* at 1148; *see* Cal. Corp. Code § 105 ("A corporation or association may be sued as provided in the Code of Civil Procedure."); Cal. Civ. Code § 671 (allowing any person to "take, hold, and dispose of property, real or personal, within this State"); Cal. Corp. Code § 207 ("a corporation shall have all of the powers of a natural person in carrying out its business activities"). In short, ACCS "is a corporate entity sufficiently independent from the state so as not to be shielded by the Eleventh Amendment." *Durning*, 950 F.2d at 1428.

* * *

As we have just done, one can apply the five *Mitchell* factors to any entity, even a private corporation, to determine on a case-by-case basis whether that entity is an arm of the state. But, as both *DMJM* and this case demonstrate, a private, for-profit corporation can never satisfy the *Mitchell* test unless the test is radically rewritten. The better course, therefore, to prevent delay and obstruction in future cases, is to adopt a categorical rule

precluding private, for-profit corporations from invoking state sovereign immunity.

III. Even Assuming ACCS Is An Arm of the State, the Plaintiffs May Seek Declaratory and Injunctive Relief.

ACCS does not deny that the complaint in this lawsuit seeks, among other things, a declaration that ACCS's current and ongoing collection practices violate federal law and an injunction preventing future violations of federal law. [RE 44]. Nor does ACCS deny that the complaint names as defendants not only ACCS, but also individual ACCS employees, including its founder and longtime president, Don Mealing, as well as ACCS-affiliated corporations that he created. [RE 17-18]. Thus, even if the Court were to deem ACCS an arm of the State of California, there is no reason this case would not satisfy the "straightforward inquiry" to determine whether the suit should go forward as to prospective relief. *See Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) ("In determining whether the doctrine of *Ex Parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.").

ACCS, however, lists two collateral reasons why it believes that the plaintiffs should not be permitted to seek even prospective relief concerning ACCS's ongoing violations of federal law. *First*, ACCS argues that it cannot be sued under *Ex Parte Young* because it is not a state "official." But *Ex Parte Young* relies on a "distinction between the sovereign and its agents," *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 146 n.29 (1984) (Stevens, J., dissenting), and so if ACCS is correct that it is an agent of the state for purposes of enjoying immunity, then it should also be considered an agent of the state for purposes of *Ex Parte Young*. Moreover, plaintiffs have sued not only ACCS, but individual employees of ACCS. So even if one were to view the private corporation as standing in the place of a state *agency* rather than a state *agent*, ACCS still offers no explanation why the individual defendants would not be appropriate defendants under *Ex Parte Young*. Either way, the plaintiffs should be permitted to go forward with their request for prospective relief. To hold otherwise would greatly undermine the availability of relief in federal court to prevent ongoing violations of federal law and would create the absurd result that, collectively, private contractors and their employees would enjoy greater immunity than the state itself and its employees.

Second, ACCS argues that plaintiffs cannot seek prospective relief because, in its view, the FDCPA no longer applies to ACCS as a result of a 2006 amendment to the statute, 15 U.S.C. § 1692p. In *Verizon*, the Supreme Court rejected a very similar argument concerning the applicability of the relevant federal law, explaining that "[t]he inquiry into whether suit lies under *Ex Parte Young* does not include an analysis of the merits of the claim." 535 U.S. at 646. Rather, all that is required is an *allegation* of an ongoing violation of federal law. *Id.* ACCS does not deny that the complaint alleged a continuing violation of the FDCPA. That fact is not changed by the 2006 amendment, which in any event does not alter the substantive requirements of the FDCPA, but only the criteria for its applicability. ACCS presents no authority for the proposition that plaintiffs must amend their complaint simply because a statute under which they seek relief has been amended. Indeed, the 2006 amendment actually confirms a point that ACCS had previously disputed—that the FDCPA applies to the collection practices of companies like ACCS, at least when they threaten prosecution absent a probable-cause determination, fail to provide notice to consumers of their right to dispute the debt, and fail to

comply with limits on fees set by state law, 15 U.S.C. § 1692p—all practices that the complaint in this lawsuit alleges.

CONCLUSION

Because private, for-profit corporations are not entitled to state sovereign immunity, this Court should affirm the decision below.

Respectfully submitted,

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August 6, 2007

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I hereby certify that my word processing program, Microsoft Word, counted 13,073 words in the foregoing brief, exclusive of the portions excluded by Rule 32(a)(7)(B)(iii).

August 6, 2007 Deepak Gupta

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, appellees state that they are unaware of any related cases pending in this Court.

CERTIFICATE OF SERVICE

I hereby certify that on this date I have caused a copy of the foregoing brief to be served by electronic mail on counsel of record for the appellants, Kimberly Kearney, at the following address: kkearney@ clausen.com.

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