ORAL ARGUMENT REQUESTED

No. 22-3286

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JEFFREY GOOD,

Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF EDUCATION, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Kansas
No. 2:21-cv-2539-JAR-ADM
Hon. Julie A. Robinson

BRIEF FOR PLAINTIFF-APPELLANT JEFFREY GOOD

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RULE 28.2(C)(3) STATEMENT

There have been no prior appeals in this case, and counsel is not aware of any other appeals related to this case.

GLOSSARY

ECOA	Equal Credit Opportunity Act
FCRA	Fair Credit Reporting Act
MOHEFA	Health and Educational Facilities Authority of the State of Missouri
MOHELA	Higher Education Loan Authority of the State of Missouri
TILA	Truth in Lending Act
USDOE	United States Department of Education

JURISDICTION

Plaintiff-appellant Jeffrey Good commenced this Fair Credit Reporting Act (FCRA) action in Kansas state court against defendant TransUnion LLC and defendants-appellees Higher Education Loan Authority of the State of Missouri (MOHELA) and United States Department of Education (USDOE). The United States removed the case to the United States District Court for the District of Kansas under 28 U.S.C. § 1442. App. 9–32.[1] MOHELA answered, *id*. at 33–48, and filed a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c), *id*. at 49–52. USDOE filed a motion to dismiss for lack of jurisdiction under Federal Rule of Civil Procedure 12(b)(1). *Id*. at 69–71. On June 16, 2022, the district court issued a memorandum and order granting MOHELA's and USDOE's motions. *Id*. at 187–208. The court issued a final judgment on November 1, 2022. *Id*. at 209. Mr. Good filed a timely notice of appeal on December 30, 2022. *Id*. at 211. This Court has jurisdiction under 28 U.S.C. § 1291.

[1] Citations to "App." refer to pages of the appendix filed by appellant.

ISSUES PRESENTED

FCRA provides that "[a]ny person" may be held civilly liable for negligent or willful violations of their FCRA responsibilities. 15 U.S.C. §§ 1681n and 1681o. FCRA defines "person" to include "any … government or governmental subdivision or agency." *Id*. § 1681a(b).

The district court dismissed Mr. Good's FCRA claims against MOHELA on the ground of state sovereign immunity. The court dismissed his claims against USDOE because it concluded that FCRA did not waive federal sovereign immunity. The issues presented are:

1. Whether MOHELA has satisfied its burden of demonstrating that it is an arm of Missouri that may invoke the state's sovereign immunity.

2. Whether FCRA waives USDOE's sovereign immunity.

STATUTES

Pertinent statutory provisions are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Statutory framework

Congress enacted FCRA to address the significant harms to consumers caused by inaccurate and unfair credit reports: "There is a

need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." 15 U.S.C. § 1681(a)(4). As initially enacted in 1970, FCRA improved the accuracy and fairness of credit reports by imposing various requirements on consumer reporting agencies and users of consumer reports. *See* Pub. L. No. 91-508, tit. VI, §§ 604–615, 84 Stat. 1127, 1129–33 (1970) (1970 Act). In 1996, to further improve the accuracy and fairness of credit reports, Congress amended FCRA to impose duties on "furnishers"—entities that furnish information to consumer reporting agencies. Consumer Credit Reporting Reform Act of 1996, Pub. L. No. 104-208, div. A, tit. II, subtit. D, ch. 1, § 2413, 110 Stat. 3009-426, 3009-447 (1996 Amendment), *codified as amended at* 15 U.S.C. § 1681s-2.

FCRA also sets forth procedures through which consumers can dispute the accuracy of information in their credit reports. Under 15 U.S.C. § 1681i(a)(1)(A), "if the completeness or accuracy of any item of information contained in a consumer's file at a consumer reporting agency is disputed by the consumer and the consumer notifies the agency … of such dispute, the agency shall, free of charge, conduct a

reasonable reinvestigation" to determine the accuracy of the information and take appropriate action. In addition, the consumer reporting agency "shall provide notification of the dispute to any person who provided any item of information in dispute," *i.e.*, the furnisher of the information. *Id.* § 1681i(a)(2)(A). Upon receiving the consumer reporting agency's notice, the furnisher has a duty under FCRA to investigate the dispute, review all relevant information provided by the consumer reporting agency, report the results of the investigation to the consumer reporting agency, and take other actions to correct inaccurate, incomplete, or unverifiable information. *Id.* § 1681s-2(b)(1).

FCRA imposes civil liability on any "person" who negligently or willfully fails to comply with its requirements. Under 15 U.S.C. § 1681o, "[a]ny person who is negligent in failing to comply with any requirement imposed under [FCRA] with respect to any consumer is liable to that consumer" for actual damages, costs, and attorney's fees. The statute authorizes the consumer to recover actual damages or statutory damages, punitive damages, costs, and attorney's fees from "[a]ny person who willfully fails to comply with any requirement imposed under [FCRA]." *Id.* § 1681n(a). As this Court has recognized, a furnisher's

failure to satisfy its duties under § 1681s-2(b) upon receiving notice of a consumer's dispute can give rise to civil liability under sections 1681o and 1681n. *See Llewellyn v. Allstate Home Loans, Inc.*, 711 F.3d 1173, 1178–79 (10th Cir. 2013).

Since its enactment in 1970, FCRA has defined the term "person" to include governmental entities. Specifically, FCRA defines "person" to mean "any individual, partnership, corporation, trust, estate, cooperative, association, *government or governmental subdivision or agency*, or other entity." 15 U.S.C. § 1681a(b) (emphasis added). FCRA states that this definition and other defined terms "are applicable for the purpose of this subchapter," which comprises the entirety of FCRA, including the statute's remedial provisions. *Id*. § 1681a(a).

Originally, FCRA's civil liability provisions extended only to a "consumer reporting agency or user of information." 1970 Act §§ 616 & 617, 84 Stat. at 1134. In 1996, along with imposing duties on furnishers, Congress amended sections 1681n and 1681o to extend FCRA's civil liability provisions to "[a]ny person" that fails to comply with its FCRA responsibilities. 1996 Amendment § 2412, 110 Stat. at 3009-446.

B. Proceedings below

1. Mr. Good submitted disputes to each of the three major credit reporting agencies—Experian, Equifax, and TransUnion—asserting that his credit reports contained errors relating to his student loans. App. 11. Specifically, he informed the agencies that the credit reports improperly included "two delinquent tradelines" for each of his four separate student-loan accounts. *Id.* at 12. Experian and Equifax corrected the errors that he identified, but TransUnion did not. *Id.*

Mr. Good filed suit, called in the state court a "petition for damages," under FCRA in the District Court of Johnson City, Kansas. *Id.* at 9–32. In addition to TransUnion, he named MOHELA and USDOE as defendants. *Id.* MOHELA services student loans, including Mr. Good's student loans, on behalf of USDOE. *Id.* at 11–12, 21, 36. Mr. Good alleged that MOHELA and USDOE violated their duties as furnishers because they negligently or willfully "failed to conduct a reasonable re-investigation, failed to consider all information, failed to employ procedures to assure accuracy in credit reporting, and failed to correct the inaccurate information on his credit report." *Id.* at 188 (Dist. Ct. Op. 2); *see also id.* at 15–16, 18–19 (pet. for damages). He sought damages,

fees, and costs under FCRA sections 1681n and 1681o, *id.* at 17, 20, asserting that the alleged FCRA violations reduced his credit score and resulted in lost employment and refinancing opportunities, as well as emotional and mental pain, anguish, and embarrassment, *id.* at 13.

2. After the United States removed the action to the United States District Court for the District of Kansas, *see* Dist. Ct. ECF 1, MOHELA moved for judgment on the pleadings under Federal Rule of Civil Procedure 12(c). App. 49–52. MOHELA argued that it is an arm of Missouri and, as such, immune from suit in federal court under principles of state sovereign immunity. *Id.* at 54.

USDOE moved to dismiss under Federal Rule of Civil Procedure 12(b)(1) for lack of subject-matter jurisdiction and, alternatively, under Rule 12(b)(6) for failure to state a claim. *Id.* at 69. With respect to the Rule 12(b)(1) argument, USDOE asserted that the court lacked jurisdiction because USDOE was entitled to federal sovereign immunity. *Id.* at 89. USDOE argued that FCRA did not waive such immunity by extending civil liability under sections 1681n and 1681o to any "person" and defining "person" to include any "government or governmental subdivision or agency." *Id.* (quoting 15 U.S.C. § 1681a(b)).

The district court granted MOHELA's and USDOE's motions. *Id*. at 187–209 (Dist. Ct. Op. 1–22).

a. The district court recognized that MOHELA bore the "burden of proof" to demonstrate that it was an arm of Missouri entitled to invoke the state's sovereign immunity. *Id*. at 190 (Dist. Ct. Op. 4). Relying on *Steadfast Insurance Co. v. Agricultural Insurance Co*., 507 F.3d 1250 (10th Cir. 2007), the district court considered four factors in conducting its arm analysis: "(1) the character of the defendant under state law; (2) the autonomy of the defendant under state law; (3) the defendant's finances; and (4) whether the defendant is concerned primarily with state or local affairs." App. 190 (Dist. Ct. Op. 4).

The district court found that the third factor—MOHELA's finances—did not support treating MOHELA as an arm. *Id*. at 194 (Dist. Ct. Op. 8). Although the court concluded that various characteristics of MOHELA's finances pointed in different directions, it concluded that MOHELA's concession that a judgment against it would be paid out of its coffers rather than the state treasury was a "particularly important" consideration that tipped the scales against it on the third *Steadfast*

factor. *Id.* at 193–94 (Dist. Ct. Op. 7–8) (quoting *Sturdevant v. Paulsen*, 218 F.3d 1160, 1164 (10th Cir. 2000)).

The district court found, however, that the other three *Steadfast* factors supported MOHELA's argument, although the second factor—MOHELA's autonomy—did so only "slightly." *Id.* at 191–92, 195 (Dist. Ct. Op. 5–6, 9). The court then balanced the factors and concluded that "[o]verall, … the factors weigh in favor of finding MOHELA an arm of the State of Missouri." *Id.* at 195 (Dist. Ct. Op. 9). The court accordingly held that state sovereign immunity barred Mr. Good's FCRA claims against MOHELA. *Id.*

b. The district court concluded that FCRA did not waive USDOE's sovereign immunity. *Id.* at 198 (Dist. Ct. Op. 12). The court recognized that FCRA defines "person" to include any "government or governmental subdivision or agency," *id.* at 199 (Dist. Ct. Op. 13) (quoting 15 U.S.C. § 1681a(b)), and that "[t]he sovereign immunity issue 'centers on the meaning of the word "person" in § 1681n and § 1681o, specifically whether the federal government is a "person" for purposes of FCRA's general civil liability provisions,'" *id.* (quoting *Robinson v. U.S. Dep't of Educ.*, 917 F.3d 799, 802 (4th Cir. 2019)). The court observed that four

courts of appeals (at the time) were equally divided on that question. *Id.* at 199–205 (Dist. Ct. Op. 13–19); *compare Mowrer v. U.S. Dep't of Transp.*, 14 F.4th 723, 728–30 (D.C. Cir. 2021), and *Bormes v. United States*, 759 F.3d 793, 795–97 (7th Cir. 2014) (finding waiver of immunity), *with Robinson*, 917 F.3d at 806, and *Daniel v. Nat'l Park Serv.*, 891 F.3d 762, 769–74 (9th Cir. 2018) (finding no waiver of immunity).

The district court decided to "follow[] the Ninth and Fourth Circuits" in concluding that a federal agency is not a "person" under sections 1681n and 1681o. App. 205 (Dist. Ct. Op. 19). The court concluded that statutory text was "not clear" because, "to find a waiver here, the [c]ourt would have to piece different statutory provisions together," that is, it would need to interpret the term "person" in sections 1681n and 1681o in accordance with FCRA's definition of "person" in section 1681a(b). *Id.* Although the court recognized that "construing different statutory provisions together is the method for interpreting statutes," *id.*, it expressed concern that applying the definition of "person" to *other* provisions of the FCRA would "lead to absurd results," *id.* at 205–06 (Dist. Ct. Op. 19–20).

The district court cited two other reasons for concluding that FCRA did not waive federal sovereign immunity. First, the court found the absence of a "reference [to] the United States" in sections 1681n and 1681o significant. *Id*. Second, the court believed that the waiver of sovereign immunity contained in 15 U.S.C. § 1681u(j)—which provides a cause of action against federal agencies that improperly obtain or disclose consumer information—would be unnecessary if the general civil-liability provisions in sections 1681n and 1681o were interpreted as a waiver. *Id*. at 206–07 (Dist. Ct. Op. 20–21).

SUMMARY OF ARGUMENT

I.A. State sovereign immunity precludes federal courts from exercising jurisdiction over nonconsenting states in suits brought by private parties. The state's immunity also extends to entities that, while not the state itself, are "arms of the state."

This Court has developed a two-step process for evaluating whether an entity is an arm of the state. Under the first step, the Court considers four "*Steadfast*" factors: (1) the entity's character under state law, (2) its autonomy, (3) its finances, and (4) whether the entity focuses on local or state affairs. Second, when weighing of these factors is not dispositive,

the Court then considers whether the two principles underlying state immunity—avoiding an affront to the dignity of the state and protecting the state's treasury—would be implicated by a lawsuit against the entity. The burden is on the entity seeking immunity to demonstrate that it is an arm of the state that may share in the state's immunity.

B.1. Here, the *Steadfast* factors weigh against a finding that MOHELA is an arm of the state of Missouri. As to the first factor, MOHELA was established as a "body politic and corporate," a form that renders it structurally separate from the state itself. The Missouri legislature has declared MOHELA to be a "separate" instrumentality of the state. And the Missouri supreme court has held that a body with a form and structure similar to MOHELA's is not part of the state for purposes of certain provisions of Missouri's constitution. Given MOHELA's corporate form and status under state law, the facts on which the district court relied—MOHELA's tax-exempt status and the state's involvement in appointing MOHELA's board— provide insufficient bases to support the conclusion that the first *Steadfast* factor favors arm status.

With respect to the second *Steadfast* factor, MOHELA enjoys substantial autonomy from the state. MOHELA's officials and employees

are named or hired by MOHELA, and they are paid salaries determined by MOHELA, not by the state. MOHELA owns and controls its own property, has the authority to enter into its own contracts, can sue and be sued, can adopt its own bylaws, and can issue its own bonds. Although MOHELA's board is appointed by the governor, MOHELA determines its own leadership and appears to set its own priorities and manage its day-to-day activities without state interference.

The third *Steadfast* factor, MOHELA's finances, also supports the conclusion that MOHELA is not an arm of the state. MOHELA does not receive state funding; instead, it pays its own expenses from the revenues it derives from the business of servicing student loans. MOHELA's debts are not state debts, its bonds are backed by its own revenues rather than state assets, and its assets are not state assets. Finally, and most importantly, a judgment against MOHELA would not be paid out of Missouri's treasury; it would be satisfied out of MOHELA's own coffers. The district court correctly concluded that the third *Steadfast* factor weighs against arm-of-the-state status.

The fourth factor—whether the entity is concerned primarily with state affairs—does not clearly favor either party. On the one hand,

MOHELA has a separate corporate form akin to that of municipal corporations and services loans throughout the country; on the other hand, its funding of capital projects is state focused.

Balancing these factors requires reversal of the district court's decision. At least three of the four factors weigh *against* the conclusion that MOHELA has satisfied its burden of proving that it is an arm of the state.

2. The second step of the analysis confirms the outcome of the *Steadfast* balancing: MOHELA is not an arm of Missouri. Immunity is not necessary to protect Missouri's dignitary interest in avoiding being haled into federal court against its consent, because the Missouri legislature clothed MOHELA with a corporate form that is structurally separate from the state and granted MOHELA the authority to sue and be sued. MOHELA has failed to provide any evidence that a lawsuit against it would require—or has ever required—bringing the state into federal court against its will.

Immunity is also not necessary to protect the state treasury from an adverse judgment against MOHELA. As the district court found, such a judgment would be satisfied out of funds in MOHELA's coffers, not the

state fisc. Given that the risk to the state treasury is the most critical factor in evaluating an entity's arm status, the absence of such risk here confirms that MOHELA has failed to demonstrate that it may successfully assert sovereign immunity as a defense in this case.

II.A. As a sovereign entity, the federal government must give its consent before it can be sued. Congress has authority to provide such consent by statute and does so when it enacts legislation authorizing the government to be named as a defendant in a lawsuit. Congress need not express its intent to waive immunity in any particular way; the only requirement is that the waiver be unambiguous after traditional interpretive tools have been applied.

Congress unambiguously waived the federal government's sovereign immunity in FCRA. FCRA provides that a "person" that negligently or willfully fails to carry out its statutory responsibilities may be held liable to consumers. Although the term "person," when left undefined, presumptively excludes the sovereign, FCRA expressly defines "person" to include "any … government or governmental subdivision or agency." The plain meaning of the definition leaves no doubt that a federal agency like USDOE is a "person" that may be sued

under FCRA for violating its statutory responsibilities. Indeed, provisions of FCRA that use the term "person" while creating exceptions for persons that are federal agencies make sense only because "person[s]" includes federal agencies to begin with.

Moreover, FCRA's definition of "person" mirrors similar definitions in closely related statutes, which define the term "creditor" to include government agencies. Those statutes expressly exempt government creditors from certain types of liabilities, confirming that, absent such exemptions, the statutory definition and civil liability provisions would encompass governmental entities. That context confirms that Congress understood the definition of "person" in FCRA would be sufficient to waive federal sovereign immunity.

FCRA is also explicit that the statutory definition of "person" applies to the whole statute and, thus, to the statutory provisions at issue in this case that allow governmental "persons" to be sued. As the Supreme Court has consistently instructed, courts must apply statutorily defined terms as written, absent a showing that doing so would undermine the regulatory scheme or the purpose of the statute. No such showing can be made here, where treating the government as a "person"

would advance FCRA's goal of improving the fairness and accuracy of consumer credit reports.

The statutory history confirms the importance of recognizing that "person" includes federal agencies. The text at issue in this case stems from a 1996 amendment to FCRA in which Congress sought to improve the quality of consumer reports by imposing new responsibilities on persons that furnish information to consumer reporting agencies. Congress required furnishers to investigate consumer disputes; and, to ensure that furnishers are held accountable if they fail to do so, extended FCRA's civil liability provisions to all "person[s]"—a term that had always been defined to encompass "any … governmental … agency." Excluding federal agencies from the definition of "person" would undermine the goals of the 1996 amendment by excluding a major furnisher of information from this process.

B. The district court's reasons for refusing to apply the statutory definition of "person" are unpersuasive.

The district court concluded that FCRA did not unambiguously waive sovereign immunity because, to find a waiver, sections 1681n and 1681o must be read in conjunction with the definition of "person" in

section 1681a(b). Congress, however, is not required to codify a waiver of sovereign immunity in a single statutory provision. The need to interpret sections 1681n and 1681o in accordance with FCRA's definitions does not create ambiguity in Congress's waiver of sovereign immunity.

The district court expressed concern that application of the definition of "person" to *other* provisions of FCRA would produce absurd results. But the court (correctly) did not find application of the definition to sections 1681n and 1681o—the provisions at issue here—absurd. The possibility that a court might decline to apply the definition to other FCRA provisions does not justify the court's refusal to apply the definition where it would be sensible to do so.

The district court's remaining rationales lack merit. Congress is not required to mention the United States by name to waive sovereign immunity, particularly where the language Congress did use unambiguously encompasses the federal government. Nor does finding a waiver here render the separate waiver of sovereign immunity in 15 U.S.C. § 1681u(j) redundant. Section 1681u(j) predated the waiver of sovereign immunity applicable to other FCRA violations and establishes elements for civil liability and remedies that differ from FCRA's general

civil-liability provisions. Section 1681u(j) thus creates no ambiguity in the waiver of sovereign immunity set out in sections 1681n and 1681o.

STANDARD OF REVIEW

The district court granted MOHELA's motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c). The Court reviews such orders "under the standard of review applicable to a Rule 12(b)(6) motion to dismiss." *Tomlinson v. El Paso Corp.*, 653 F.3d 1281, 1285 (10th Cir. 2011) (quoting *Nelson v. State Farm Mut. Auto. Ins. Co.*, 419 F.3d 1117, 1119 (10th Cir. 2005)). That standard is "de novo, accepting factual allegations as true and considering them in the light most favorable to the plaintiff." *Id.* at 1286. The underlying question whether the defendant may invoke state sovereign immunity is reviewed de novo. *Hennessey v. Univ. of Kan. Hosp. Auth.*, 53 F.4th 516, 536 (10th Cir. 2022); *see also Colby v. Herrick*, 849 F.3d 1273, 1276 (10th Cir. 2017).

The district court granted USDOE's motion to dismiss under Federal Rule of Civil Procedure 12(b)(1). Such orders are reviewed de novo, *Baker v. USD 229 Blue Valley*, 979 F.3d 866, 871 (10th Cir. 2020), as is the underlying question whether FCRA waives USDOE's sovereign immunity, *Shaw v. United States*, 213 F.3d 545, 548 (10th Cir. 2000).

ARGUMENT

I. MOHELA failed to meet its burden of demonstrating that it is an arm of Missouri entitled to sovereign immunity.

A. Only entities that are arms of the state share in the state's sovereign immunity.

State sovereign immunity, embodied in the Eleventh Amendment to the Constitution, bars federal courts from "hear[ing] a suit brought by any person against a nonconsenting State." *Torres v. Texas Dep't of Pub. Safety*, 142 S. Ct. 2455, 2462 (2022); *see also Sturdevant*, 218 F.3d at 1164. Not all entities associated with a state may invoke the state's sovereign immunity. For example, sovereign immunity "does not extend" to a "municipal corporation or other political subdivision" of a state. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977). Similarly, a "state instrumentality" is not automatically entitled to immunity; instead, a court must "inquire[] into the relationship between the State and the entity in question" to determine "whether it should 'be treated as an arm of the State.'" *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429–30 (1997) (quoting *Mt. Healthy*, 429 U.S. at 280).

In *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994), the Court concluded that a bistate entity, *id.* at 42—one created by two

or more states pursuant to the Constitution's Compact Clause—could not invoke sovereign immunity. The Court considered various "[i]ndicators of immunity or the absence thereof" in evaluating the entity in question. *Id.* at 44. The Court explained that, "[w]hen indicators of immunity point in different directions, the Eleventh Amendment's twin reasons for being remain [its] prime guide." *Id.* at 47. Those twin reasons are protecting the state's "dignity," *id.*, and avoiding "federal-court judgments that must be paid out of a State's treasury," *id.* at 48; *see also id.* at 39–40.

This Court has explained that the "principles set forth in *Hess*" for bistate entities are also "applicable to the analysis of an intrastate entity created by a single state." *Hennessey*, 53 F.4th at 528 n.3. Although some cases describe the test in different terms, this Court has generally applied a four-factor inquiry. *See id.* at 528; *Couser v. Gay*, 959 F.3d 1018, 1026 (10th Cir. 2020).[2] First articulated in *Steadfast*, the four factors are (1) the character ascribed to the entity under state law"; (2) "the

[2] In earlier cases, the Court has described the factors somewhat differently, but the substance of the Court's consideration is similar in each case. *See Colby*, 849 F.3d at 1276 (identifying "five potential factors"); *Watson v. Univ. of Utah Med. Ctr.*, 75 F.3d 569, 574–75 (10th Cir. 1996) (describing "two general inquiries").

autonomy accorded the entity under state law"; (3) "the entity's finances"; and (4) "whether the entity in question is concerned primarily with local or state affairs." *Steadfast*, 507 F.3d at 1253. The "initial" step of applying these factors is "sometimes dispositive." *Hennessey*, 53 F.4th at 528; *see*, *e.g.*, *Couser*, 959 F.3d at 1030 (finding that all four *Steadfast* factors support finding that Kansas sheriffs are not arms of the state).

"If these factors are in conflict and point in different directions, a court should proceed to the second step and consider the 'twin reasons' underlying the Eleventh Amendment—avoiding an [affront] to the dignity of the state and the impact of a judgment on the state treasury." *Hennessey*, 53 F.4th at 528 (quoting *Duke v. Grady Mun. Schs.*, 127 F.3d 972, 978 (10th Cir. 1997) (quoting *Hess*, 513 U.S. at 47)). "Of these twin reasons, the 'foremost' reason for sovereign immunity is avoiding state liability for any judgment against the entity." *Id.* (citation omitted); *see also DuPage Reg'l Off. of Educ. v. U.S. Dep't of Educ.*, 58 F.4th 326, 340 (7th Cir. 2023) ("Notably, most circuits identify legal liability for money judgments as the most significant factor or subfactor in the analysis."). "Where it is clear that the state treasury is not at risk, then the control exercised by the state over the entity does not entitle the entity to

Eleventh Amendment immunity." *Hennessey*, 53 F.4th at 529 (quoting *Fresenius Med. Care Cardiovascular Res., Inc. v. P.R. & Caribbean Cardiovascular Ctr. Corp.*, 322 F.3d 56, 65 (1st Cir. 2003)).

As *Hennessey* confirms, the "burden falls on the entity asserting it is an arm of the state" to prove that it is entitled to invoke the state's sovereign immunity. *Hennessey*, 53 F.4th at 524. As the Court explained, although all parties may have ready access to state laws applicable to an entity seeking immunity, only the entity "is in possession of key evidence regarding its finances, day-to-day operations, and operating procedures." *Id.* at 530. It therefore "makes sense to assign the burden" to the entity to prove that it should be treated as an arm of the state. *Id.*

B. MOHELA has not proven that it is an arm of Missouri.

In seeking judgment on the pleadings, MOHELA relied solely on Missouri statutes to satisfy its burden of proving that it is an arm of the state. *See* App. 55–57, 61–65. Those statutes show, however, that although the *Steadfast* factors do not all point in one direction, they weigh more heavily *against* arm status. Moreover, the second step of the arm analysis, which the district court did not undertake, confirms that immunizing MOHELA from suit implicates neither of the twin principles

underlying state sovereign immunity—state dignity and protection of the state treasury.

1. The *Steadfast* factors weigh against arm status.

a. The first *Steadfast* factor is "the character ascribed to the entity under state law." *Steadfast*, 507 F.3d at 1253. Consideration of this factor entails "a formalistic survey of state law to ascertain whether the entity is identified as an agency of the state." *Id*.

Missouri law establishes MOHELA as a "body politic and corporate," as well as a "public instrumentality and body corporate" performing "an essential public function." Mo. Rev. Stat. § 173.360. The district court wrongly concluded that these elements of MOHELA's formal structure and purpose supported MOHELA's argument that it is an arm of Missouri. App. 191 (Dist. Ct. Op. 5). The establishment of a separate corporate body does not suggest that such a body is a state arm. *Hess*, 513 U.S. at 44–45 (stating that "body corporate and politic" in the organic documents of an interstate compact authority does "not type the Authority as a state agency"); *see*, *e.g.*, *Moor v. County of Alameda*, 411 U.S. 693, 719 (1973) (holding that a California county was not an arm where it was "given corporate powers" and "designated a body corporate

and politic" (cleaned up)); *Elam Constr., Inc. v. Reg'l Transp. Dist.*, 129 F.3d 1343, 1346 (10th Cir. 1997) (per curiam) (holding that the statutory designation of a regional transportation district as a "public body politic and corporate" and a "political subdivision" supported the conclusion that the district was not an arm of Colorado). Indeed, Missouri law classifies "bodies politic and corporate" as "person[s]" alongside "partnerships and other unincorporated associations." Mo. Rev. Stat. § 1.020(12); *see also Boyd v. Kansas City Area Transp. Auth.*, 610 S.W.2d 414, 416 (Mo. Ct. App. 1980) (stating "when the [Kansas City Area Transportation Authority] was created as a body corporate and politic it became, in fact, a corporation").

Any doubt on the matter is dispelled by the Missouri legislature declaration that MOHELA is "a *separate* public instrumentality of the state." Mo. Rev. Stat. § 173.415 (emphasis added). The district court emphasized the phrase "*of* the state," App. 191 (Dist. Ct. Op. 5), but state instrumentalities do not automatically qualify as arms, *Regents*, 519 U.S. at 429. Here, by designating MOHELA as a "separate" instrumentality of the state, the legislature signaled that MOHELA should not be "identified as *an agency* of the state." *Steadfast*, 507 F.3d at 1253

(emphasis added); *see also Fresenius*, 322 F.3d at 68 (finding that an entity was not an arm of the state where its organic statute specified that it would be "independent and separate" from other parts of the Puerto Rican government); *cf. Hess*, 513 U.S. at 45 (concluding that a bistate entity was not an arm of the state even though state courts "repeatedly have typed the [entity] an agency of the States rather than a municipal unit or local district").

Although Missouri courts have not addressed MOHELA's status under state law, the Missouri Supreme Court has held that a similarly structured entity was not part of the state. The state constitution prohibits the general assembly from lending or pledging the state's credit to any individual, person, "association, municipal or other corporation," Mo. Const. art. III, § 39, and requires "[a]ll revenue collected and money received by the state" to "go into the treasury," subject to "appropriations made by law," *id.* § 36. In *Menorah Medical Center v. Health & Educational Facilities Authority*, 584 S.W.2d 73 (Mo. 1979), the state supreme court addressed whether these constitutional restrictions applied to Missouri's Health and Educational Facilities Authority (MOHEFA). Like MOHELA, MOHEFA was established as a "body politic

and corporate" and a "public instrumentality" exercising authority in "the performance of an essential public function." Mo. Rev. Stat. § 360.020. In rejecting the constitutional challenge to MOHEFA's operations, the Missouri Supreme Court held that MOHEFA is "not the state," 584 S.W.2d at 78, but "an entity apart from the state," *id.* at 82. The court noted that "[s]imilar bodies" have long "been adjudged as 'separate entities' from the state" under Missouri law. *Id.* at 78. This Court should reject the notion that MOHELA can be an arm of the state for purposes of claiming the state's sovereign immunity when it would be considered an "entity apart from the state" under the state's constitution. *Cf. Steadfast*, 507 F.3d at 1253 ("We give deference to state court decisions regarding whether a given entity is an arm of the state, but we do not view these rulings as dispositive."); *Sturdevant*, 218 F.3d at 1167 (looking at Colorado law to evaluate the significance of a "body corporate" created by the state).

The district court considered two other characteristics in assessing the first *Steadfast* factor. First, the court noted that MOHELA was exempt from state taxation. App. 191 (Dist. Ct. Op. 5) (citing Mo. Rev. Stat. § 173.415). Tax-exempt status, of course, is a characteristic shared

by many private entities that are not state arms. *See* Mo. Dep't of Rev., Maintain Non Profit Organizations, https://dor.mo.gov/taxation/business/registration/small-business/maintain/non-profit.html (noting that sales-tax exemption is available to "[a]ny social, civic, religious, political subdivision or educational organization"); *see also Ward v. St. Anthony Hosp.*, 476 F.2d 671, 675–76 (10th Cir. 1973) ("Our court has expressly held … that tax exemptions alone do not vest a private institution with state authority." (citing *Browns v. Mitchell*, 409 F.2d 593 (10th Cir. 1969)). The legislature's policy decision to exempt MOHELA from state taxes—something that is unnecessary for traditional state agencies that are not "person[s]" or "corporations," *see* Mo. Rev. Stat. §§ 137.075 (property tax on persons), 143.071 (corporate income tax)—does not undermine the conclusion that MOHELA is an entity separate from the state.

Second, the district court observed that "MOHELA's board members are all designated by the state." App. 191 (Dist. Ct. Op. 5) (citing Mo. Rev. Stat. § 173.360). But MOHEFA's board was also designated by the state, *see* Mo. Rev. Stat. § 360.020, yet it remains "an entity apart from the state" under state law. *Menorah Med. Ctr.*, 584

S.W.2d at 82. Furthermore, unlike MOHEFA's board, MOHELA's board members do not represent state interests exclusively. By law, three of its seven board members serve private interests: two members represent "lending institutions in Missouri" and one represents a private higher education institution. Mo. Rev. Stat. § 173.360. Two other members represent public stakeholders other than the state itself, with one member coming from a public higher education institution and one representing "the public." *Id*. The remaining two members are state officials who hold their board seats ex officio. *Id*. Thus, a majority of MOHELA's board represents private interests or non-state public interests. Accordingly, the district court erred in concluding that MOHELA had carried its burden under the first *Steadfast* factor.

b. The second *Steadfast* factor, "the autonomy accorded the entity under state law," looks at "the degree of control the state exercises over the entity." *Steadfast*, 507 F.3d at 1253. This factor "is the most complex of the four factors because it spans a broad range of considerations." *Hennessey*, 53 F.4th at 536. These considerations include: "(1) control of the entity by the governor and legislature, (2) classification of the entity's employees, (3) the entity's ownership and control over property, (4) the

entity's ability to form contracts, (5) the entity's ability to set policies, and (6) the ability of the entity to sue and be sued." *Id.* at 536 n.9. The Court must look at the "entire relationship" between MOHELA and the state to assess whether MOHELA "retains substantial autonomy in its operations" and "operates with little, if any[,] guidance or interference" from the state. *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 720–21 (10th Cir. 2006), *abrogated on other grounds*, *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S. Ct. 1507 (2019). To the extent MOHELA's autonomy can be gleaned from state statutes (the only evidence offered by MOHELA), the weight of these considerations strongly indicates that MOHELA is not an arm of Missouri.

To begin with, MOHELA's employees appear to be classified differently from state employees. Unlike state executive officers, *see*, *e.g.*, Mo. Rev. Stat. §§ 105.005 & .950, MOHELA's board members "receive no compensation for services," only reimbursement for expenses; and such reimbursements come out of MOHELA's own coffers, not from the state's treasury, *id.* § 173.365. MOHELA's executive director, secretary, and treasurer are all appointed by the board and (if not also board members)

"receive such compensation" as determined by the board. *Id.* § 173.370. The executive director, with the board's approval, has discretion to "hire such additional employees as may be needed," and the board alone determines the compensation that such employees "shall receive." *Id.* MOHELA's employees, thus, are apparently not required to "partake in state retirement and benefit programs" and are not "subject to a state merit system for purposes of hiring." *Hennessey*, 53 F.4th at 538.

MOHELA also enjoys "ownership and control over property," *id.* at 539; can "form its own contracts," *id.* at 540; and can "sue and be sued," *id.* at 541. With respect to property, MOHELA has the power to "maintain an office at such place or places in the state of Missouri as it may designate," "accept appropriations, gifts, grants, bequests, and devises and … utilize or dispose of the same to carry out its purpose," and "acquire, hold and dispose of personal property." Mo. Rev. Stat. §§ 173.385(5), (10), (14). The "assets of [MOHELA]" must "remain under [its] exclusive control and management," except for amounts required to be transferred to the Lewis and Clark Discovery Fund, a state fund for capital projects and technology commercialization opportunities at

colleges and universities. *Id.* § 173.425; *see also id.* §§ 173.385(9), 173.392.

MOHELA also may "make and execute contracts, releases, compromises, and other instruments necessary or convenient for the exercise of its powers, or to carry out its purpose," *id.* § 173.385(11), and "enter into agreements or other transactions with any federal or state agency, any person and any domestic or foreign partnership, corporation, association or organization," *id.* § 173.385(15). In addition, MOHELA may "sue and be sued and … prosecute and defend, at law or in equity, in any court having jurisdiction of the subject matter and of the parties." *Id.* § 173.385(3).

As the district court noted, App. 192 (Dist. Ct. Op. 6), MOHELA enjoys other aspects of autonomy from the state. MOHELA may "adopt bylaws for the regulation of its affairs and the conduct of its business." Mo. Rev. Stat. § 173.385(2). It may also "issue bonds or other forms of indebtedness to obtain funds to purchase student loan notes or finance student loans, or both," *id.* § 173.385(6); use the proceeds to "purchase student loan notes or finance student loans, or both," *id.* § 173.385(7); "sell or enter into agreements to sell student loan notes," *id.* § 173.385(8);

"collect reasonable fees and charges" for its services, *id*. § 173.385(12); and exercise other powers associated with the business of student-loan servicing.

Despite all this, the district court concluded that the second *Steadfast* factor "slightly" favors arm status because of certain elements of "control that the state exercises over MOHELA." App. 192 (Dist. Ct. Op. 6). In particular, the district court seized upon MOHELA's governor-appointed board, along with the governor's power to remove board members for cause, as an indication of control. *Id.* at 191–92 (Dist. Ct. Op. 5–6) (citing Mo. Rev. Stat. § 173.360). But as this Court has explained, the appointment power alone "is not sufficient to establish that the autonomy factor favors an arm-of-the-state finding." *Hennessey*, 53 F.4th at 537; *see also Fresenius*, 322 F.3d at 71 ("The governor's appointment power over the board is not enough in itself to establish that [the entity at issue] is an arm of the state."); *cf. Auer v. Robbins*, 519 U.S. 452, 456 n.1 (1997) (stating that the governor's appointment of four of five board members was insufficient to cause the St. Louis Board of Police Commissioners to be an arm of the state). The appointment power is an especially weak indication of control here, given the requirement that a

majority of the board represent either private interests or the interests of public stakeholders other than the state itself. *See supra* pp. 28–29. Likewise, because the governor has the authority to remove board members only for cause, the state lacks the control it would enjoy if the governor could remove board members at will.

Moreover, courts must consider whether the governor has the "power to block or veto action taken by the board of the entity." *Hennessey*, 53 F.4th at 537. Here, neither MOHELA nor the district court identified any power of the governor or any other state official to block or veto MOHELA's actions. Indeed, the board alone selects its chair and vice chair, and it has sole authority to name MOHELA's executive director, secretary, and treasurer. Mo. Rev. Stat. § 173.370. "Thus, the governor determines neither who among the board members leads the board nor the individual in charge of overseeing the day-to-day operations." *Hennessey*, 53 F.4th at 538. "An entity's ability to set its own policies, without oversight and control from the state or a state agency, is instrumental in the entity being autonomous from the state." *Id.* at 541. All indications are that MOHELA enjoys this level of both strategic and day-to-day autonomy.

Other aspects of state oversight relied on by the district court do not meaningfully limit MOHELA's day-to-day business operations or overall business strategy. One provision requires MOHELA's board to comply with requirements applicable to "the conduct of public business by a public agency," Mo. Rev. Stat. § 173.365, and another places MOHELA within the "department of higher education and workforce development" and requires MOHELA to file an annual financial report with the department, *id.* § 173.445. But no Missouri statute grants an official or agency outside of MOHELA the power to set MOHELA's meeting agenda or, aside from the for-cause removal provision, to take action in response to the information presented in its annual report.

The district court also considered certain financial restrictions imposed on MOHELA by statute. One statute requires MOHELA to invest its funds prudentially. *Id.* § 173.385(13). Another limits loan originations for students attending Missouri institutions. *Id.* § 173.387. A third authorizes MOHELA to issue bonds backed by its own revenues, *id.* § 173.390—a feature that supports MOHELA's *autonomy* rather than its status as an arm. *See Hennessey*, 53 F.4th at 534–35. The final provision, Mo. Rev. Stat. § 173.392, dedicates a portion of MOHELA's

revenues to the Lewis and Clark Discovery Fund—a requirement that has no established impact on MOHELA's "ability to establish policies and govern day-to-day affairs without interference from the state." *Hennessey*, 53 F.4th at 542; *cf. Hess*, 513 U.S. at 50 (concluding that interstate-compact entity was not an arm even though it "dedicate[d] at least some of its surplus to public projects which the States themselves might otherwise finance"). To the extent that any of these limitations weigh against MOHELA's autonomy, they do so only at the margins.

"In analyzing [the second *Steadfast*] factor, a court must remain cognizant that some ties and oversight will always remain between the state and an entity created by the state." *Hennessey*, 53 F.4th at 536. Here, the few carefully circumscribed statutory restrictions on MOHELA do not outweigh MOHELA's overarching authority to establish its own business strategies and conduct operations free from state interference. The second *Steadfast* factor weighs strongly *against* a finding that MOHELA is an arm of Missouri.

c. The third *Steadfast* factor concerns "the entity's finances," which "look[s] to the amount of state funding the entity receives and consider[s] whether the entity has the ability to issue bonds or levy taxes on its own

behalf." *Steadfast*, 507 F.3d at 1253. The third factor also examines "the existence, or lack thereof, of regulations on how an entity may handle its finances and whether the entity's funds are classified as public funds." *Hennessey*, 53 F.4th at 533 (internal quotation marks omitted). The district court also considered the absence of state liability for a money judgment against MOHELA under the third *Steadfast* factor. App. 192–93 (Dist. Ct. Op. 6–7); *see also Hess*, 513 U.S. at 45–46 (considering states' liability to pay an entity's judgments in analyzing the entity's finances). Indeed, the district court found the absence of such liability to be an "important" consideration in concluding that the third factor "weighs against a finding of Eleventh Amendment immunity." App. 194 (Dist. Ct. Op. 8).

The court's conclusion on the third *Steadfast* factor was correct. "MOHELA concedes that it does not receive any direct funding from the state." *Id*. at 193 (Dist. Ct. Op. 7). Rather, "[a]ll expenses of [MOHELA] incurred in carrying out the provisions" relating to MOHELA's student-loan servicing business "shall be payable solely from funds" that MOHELA obtains under such provisions. Mo. Rev. Stat. § 173.420. MOHELA is empowered to "issue bonds or other forms of indebtedness

to obtain funds to purchase student loan notes or finance student loans, or both." *Id.* § 173.385(6). Bonds are secured by MOHELA's revenue or another source designated by MOHELA. *Id.*; *id.* §§ 173.390, 173.405. Such "self-funding and power to issue bonds cut against Eleventh Amendment immunity." *Colby*, 849 F.3d at 1277.

Moreover, Missouri law makes clear that MOHELA's debts "shall not constitute a debt or liability" of the state, Mo. Rev. Stat. § 173.385(6), or a "pledge of the full faith and credit of the state or of any … political subdivision," but instead "shall be payable solely from [MOHELA's] funds," *id.* § 173.410. Because state law "explicitly bar[s]" MOHELA "from pledging the credit" of the state, *Hess*, 513 U.S. at 46 (internal quotation marks omitted), state law weighs against MOHELA being an arm of the state. *See also Menorah Med. Ctr.*, 584 S.W.2d at 78.

The district court believed MOHELA's inability to levy taxes to fund its operations was "neutral" or "slightly in favor of immunity." App. 193 (Dist. Ct. Op. 7). But "an entity's inability to levy taxes is emblematic of it being an arm of the state only if the entity also cannot issue bonds without state oversight and cannot generate its own revenue." *Hennessey*, 53 F.4th at 535. MOHELA issues bonds and funds its own operations,

with almost no state oversight beyond the requirement to comply with its authorizing statute.

The district court also gave undue weight to the fact that MOHELA derives its authority to finance its own operations from state statute. App. 193 (Dist. Ct. Op. 7). This Court has focused the relevant inquiry on the breadth of the financing authority granted, rather than its source in state law. *Hennessey*, 53 F.4th at 534 (explaining that "seemingly unconstrained authority to issue bonds" set out in state statute weighed against treating entity as an arm of the state). Indeed, *any* entity with a connection to the state—including political subdivisions—will necessarily derive *some* authority from state law. If the existence of such authority were a significant factor in the arm inquiry, it would drastically expand the types of entities that could invoke the state's sovereign immunity.

The district court suggested, however, that state law "limits the types of bonds that MOHELA may issue." App. 193 (Dist. Ct. Op. 7). But the only meaningful limitation in the provision cited by the court is that MOHELA's bonds must be backed by its own revenues. *See* Mo. Rev. Stat. § 173.390. As this Court has explained, when state law makes a bond "the

sole responsibility of [the entity]," payable of out the entity's revenues, and "not backed by the State," such a requirement weighs against arm status, not in favor of it. *Hennessey*, 53 F.4th at 534–35.

Missouri law also appears to declare that MOHELA's funds should not be "classified as public funds." *Id.* at 533 (internal quotation marks omitted). Specifically, the law provides: "No asset of [MOHELA] shall be considered to be part of the revenue of the state," Mo. Rev. Stat. § 173.425, under a provision of Missouri's constitution applicable to "[a]ll revenue collected and money received by the state," Mo. Const. art. III, § 36. Likewise, state law declares that "[s]tudent loan notes purchased or financed shall not be considered to be public property." Mo. Rev. Stat. § 173.425. MOHELA also "shall not have the power or authority to cause any asset … to be used for the payment of debt incurred by the state, and [it] shall not have the power or authority to distribute any asset … to any fund of the state of Missouri for the purpose of payment of debt incurred by the state." *Id.* § 173.386. MOHELA's funds are separate from those of the state. *Cf. Steadfast*, 507 F.3d at 1255 (holding entity to be a state arm where the statute declares entity's funds to be "public funds" that are

"subject to state laws and regulations governing the receipt and expenditure of public funds" (quoting 82 Okla. Stat. § 861A(A)).

Finally, "MOHELA concedes that a judgment against it would not come directly out of the state's treasury." App. 193 (Dist. Ct. Op. 7). This Court has recognized "the primacy of the impact on the state treasury as a factor in determining immunity." *Duke*, 127 F.3d at 978; *see also Elam Constr.*, 129 F.3d at 1345 ("The state's potential legal liability is of central importance."). Indeed, the Fourth Circuit has relied primarily on this factor to distinguish state-affiliated student-loan servicers that are arms of the state from those that are not. *See United States ex rel. Oberg v. Pa. Higher Educ. Assistance Agency*, 745 F.3d 131, 139, 142–43 (4th Cir. 2014) (*Oberg II*) (reversing a district court's finding that a Pennsylvania-affiliated loan servicer that was "financially independent" was an arm of the state, but finding that an Arkansas-affiliated servicer was an arm of the state where, among other things, Arkansas "would foot the bulk of any judgment"). For this and the other reasons described above, the third *Steadfast* factor weighs strongly against a finding that MOHELA is an arm of the state.

d. The fourth *Steadfast* factor looks at the geographic focus of the entity in question, taking into consideration "the agency's function, composition, and purpose." *Steadfast*, 507 F.3d at 1253. "If a state entity is more like a political subdivision—such as a county or city—than it is like an instrumentality of the state, that entity is not entitled to Eleventh Amendment immunity." *Hennessey*, 53 F.4th at 527–28 (quoting *Steadfast*, 507 F.3d at 1253). If an entity "engages in nationwide activity," that also cuts against the conclusion that it is an arm of the state. *Sikkenga*, 472 F.3d at 719; *see also Oberg II*, 745 F.3d at 137 (holding that student-loan servicer's "non-state concerns" include its "out-of-state operations").

Here, MOHELA has a separate corporate form akin to that of municipal corporations, *see supra* pp. 24–25; MOHELA's work servicing federal student loans is neither local nor state-focused,[3] and its funding of capital projects is more state-focused in nature, as the district court

[3] As a federal student-loan servicer, MOHELA services loans of students throughout the country. *See* MOHELA, Financial Statements 2022, at 4 ("As of June 30, 2022, the Company is servicing 5.2 million federal accounts."), *available at* https://www.mohela.com/DL/common/publicinfo/financialStatements.aspx.

found. App. 194 (Dist. Ct. Op. 8). Accordingly, the fourth *Steadfast* factor seems to weigh both ways in the arm of the state analysis.

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In sum, under a proper analysis, the first, second, and third *Steadfast* factors do not support MOHELA's assertion of immunity, while the fourth factor does not clearly weigh in either direction. The *Steadfast* factors thus provide a strong and sufficient basis for concluding that MOHELA has not satisfied its burden of demonstrating that it is an arm of the state.

2. The two reasons underlying state sovereign immunity do not apply to MOHELA.

If the Court has any doubt that the four-factor test resolves the issue against MOHELA, it should turn to the second inquiry, which examines "the twin reasons underlying the Eleventh Amendment—avoiding an [affront] to the dignity of the state and the impact of a judgment on the state treasury." *Hennessey*, 53 F.4th at 528 (internal quotation marks omitted). The exercise of federal jurisdiction over MOHELA does not implicate either of these interests.

First, immunity is not needed to avoid harm to Missouri's dignitary interests. The state is not "required to answer the complaints of private

parties in federal courts" when MOHELA is named a defendant in a federal lawsuit. *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002); *see also Fresenius*, 322 F.3d at 63 ("The state also has a 'dignity' interest as a sovereign in not being haled into federal court."). By establishing MOHELA as a "body politic and corporate," Mo. Rev. Stat. § 173.360, the Missouri legislature created an entity that enjoys a separate juridical existence from the state itself. *See Boyd*, 610 S.W.2d at 416 (treating "body corporate and politic" as a "corporation"); *cf. First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 626–27 (1983) (stating, in discussing foreign sovereign immunity, that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such.").

Consistent with its separate corporate existence, MOHELA has independent authority to "sue and be sued and to prosecute and defend, at law or in equity, in any court having jurisdiction of the subject matter and of the parties." Mo. Rev. Stat. § 173.385(3). MOHELA identified no circumstance in which Missouri would be subjected to "the indignity of … the coercive process of judicial tribunals at the instance of private

parties" if MOHELA is named as a defendant in a federal lawsuit. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 US. 139, 146 (1993) (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)). Just as the Fourth Circuit concluded with respect to a Pennsylvania-affiliated student-loan servicer, in light of MOHELA's "intended and actual independence from the [state]," it would not "be an affront to [Missouri's] sovereign dignity to permit this action to proceed against" MOHELA. *United States ex rel. Oberg v. Pa. Higher Educ. Assistance Agency*, 804 F.3d 646, 677 (4th Cir. 2015).

Granting MOHELA immunity is also not necessary to protect the state's fisc. The impact on the treasury "focus[es] on [the] legal liability for a judgment, rather than [the] practical, or indirect, impact a judgment would have on a state's treasury." *Duke*, 127 F.3d at 981. Here, no evidence suggests that Missouri's state treasury is at risk from a judgment against MOHELA. To the contrary, MOHELA has acknowledged that "a judgment against MOHELA would not come directly out of Missouri's coffers." App. 167. Missouri law confirms the point: MOHELA is barred from "creat[ing] a debt of the state within the meaning of [Missouri's] constitution or statutes," and Missouri is

statutorily not responsible for MOHELA's "performance" of "any pledge, mortgage, obligation, or agreement" or "breach" thereof. Mo. Rev. Stat. § 173.410. "[C]ommon sense and the rationale of the Eleventh Amendment do not require that sovereign immunity attach when an agency is structured to be self-sustaining and has a long history of paying its own way." *Sikkenga*, 472 F.3d at 721.

Because "the impetus for the Eleventh Amendment" is "the prevention of federal-court judgments that must be paid out of a State's treasury," *Hess*, 513 U.S. at 48, "the potential payment from the state treasury is the most critical factor in determining whether an entity is operating as an arm of the state," *Hennessey*, 53 F.4th at 529 (quoting *Fresenius*, 322 F.3d at 66). Having failed to demonstrate any risk to the state treasury arising from the absence of immunity, MOHELA cannot satisfy its burden of proving that it satisfies the second step of the arm analysis.

II. FCRA waives USDOE's sovereign immunity.

The district court noted that four courts of appeals were equally divided on the question whether FCRA waives federal agencies' sovereign immunity. App. 199–205 (Dist. Ct. Op. 13–19). The court followed the

decisions of the Fourth and Ninth Circuits holding that immunity had not been waived, and it rejected the contrary holdings of the D.C. and Seventh Circuits. *Id.* at 205 (Dist. Ct. Op. 19). Two months after the district court's decision, the Third Circuit decided *Kirtz v. Trans Union LLC*, 46 F.4th 159 (3d Cir. 2022), "agree[ing] with the reasoning of the D.C. and Seventh Circuits." *Id.* at 164. Like those courts, the Third Circuit held that sections "1681n and 1681o unequivocally waive the sovereign immunity of the United States." *Id.* The Third, Seventh, and D.C. Circuits are correct.

A. FCRA's text unambiguously waives federal sovereign immunity.

"Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." *Kansas ex rel. Schmidt v. Zinke*, 861 F.3d 1024, 1028 (10th Cir. 2017) (quoting *Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999)). Congress may waive federal sovereign immunity by including an "unequivocal expression" of its consent to suit "in statutory text." *United States v. Nordic Village, Inc.*, 503 U.S. 30, 37 (1992) (internal quotation marks omitted). "Congress need not state its intent in any particular way" and is "never required" to use "magic words" to waive the government's immunity. *FAA v. Cooper*, 566 U.S. 284, 291

(2012). "Rather, if, after applying the 'traditional tools of statutory construction,' there is 'no ambiguity,' courts must apply a waiver as written." *Kirtz*, 46 F.4th at 164 (quoting *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 590 (2008)).

1.The key language in the FCRA provisions at issue is the term "person." Sections 1681n and 1681o provide that "[a]ny person" that willfully or negligently fails "to comply with any requirement imposed" by FCRA "with respect to any consumer is liable to that consumer" for damages. Accordingly, whether USDOE can be held liable under FCRA turns on whether it is a "person" as that term is used in sections 1681n and 1681o.

If "person" were an undefined term, it would not encompass the USDOE (and FCRA would not waive USDOE's sovereign immunity) because, "[i]n the absence of an express statutory definition, the [Supreme] Court applies a 'longstanding interpretive presumption that "person" does not include the sovereign,' and thus excludes a federal agency." *Return Mail, Inc. v. U.S. Postal Serv.*, 139 S. Ct. 1853, 1861–62 (2019) (quoting *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 780 (2000)). That background principle, however, does not

apply to FCRA because "FCRA contains such an express definition: it defines 'person' to include any 'government or governmental subdivision or agency.'" *Kirtz*, 46 F.4th at 165 (quoting 15 U.S.C. § 1681a(b)). And "[w]hen a statute includes an explicit definition, [the courts] must follow that definition." *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 776–77 (2018) (quoting *Burgess v. United States*, 553 U.S. 124, 130 (2008)).

There is no "ambiguity about whether [FCRA's] express definition—covering 'any ... government or governmental subdivision or agency'—encompasses the United States and its agencies." *Kirtz*, 46 F.4th at 165. The text of the definition not only refers to "any" government, but various provisions of FCRA make sense only if the definition of "person" encompasses the federal government. *Id.* at 165 & n.4 (citing 15 U.S.C. §§ 1681a(y); 1681b(a), (b)(3) and (4); and 1681i)). For instance, section 1681b uses "person" in a way that unambiguously applies to federal agencies. Section 1681b(b)(3)(A) provides that, "in using a consumer report for employment purposes, before taking any adverse action based in whole or in part on the report, the person intending to take such adverse action shall provide to the consumer" a copy of the report and a description of the consumer's rights under FCRA.

This obligation does not apply, however, "[i]n the case of an agency or department of the United States Government which seeks to obtain and use a consumer report for employment purposes," but only if the agency or department makes certain written findings. 15 U.S.C. § 1681b(b)(4)(A). The exception is necessary because the obligations imposed on "person[s]" under section 1681b(b)(3)(A) extend to federal agencies; if agencies were not "persons," the adverse-action requirements would not apply to them in the first place and the exception would be unnecessary and superfluous. *Cf. FCC v. NextWave Personal Commc'ns Inc.*, 537 U.S. 293, 302 (2003) ("These latter exceptions would be entirely superfluous if we were to read [the Bankruptcy Code] as the Commission proposes—which means, of course, that such a reading must be rejected.").

Moreover, FCRA's definition of "person" mirrors similar definitions in the Truth in Lending Act (TILA), 15 U.S.C. § 1601 *et seq.*, and the Equal Credit Opportunity Act, (ECOA), 15 U.S.C. § 1691 *et seq.*, both of which are codified with FCRA under the umbrella of the Consumer Credit Protection Act, 15 U.S.C. §§ 1601–1693r. TILA and ECOA impose civil liability on creditors and define "creditor" in ways that expressly

encompass a "government or governmental subdivision or agency." *See* 15 U.S.C. §§ 1602(d)–(g), 1640(a) (TILA); *id.* §§ 1691a(e)–(f), 1691e(a) (ECOA). And both TILA and ECOA necessarily recognize that federal agencies are included in the definition of "creditor" because both expressly *exempt* the federal government from certain types of liabilities. *See id.* § 1612(b) (TILA); *id.* § 1691e(b) (ECOA). That context "confirms that Congress understood the use of the defined term 'person' to signal an unambiguous waiver of sovereign immunity." *Kirtz*, 46 F.4th at 167; *see also id.* at 167 n.7 ("It is the express authorization of suits against 'any creditor' in § 1691e(a) that waives sovereign immunity, not the government exemption in subsection § 1691e(b), which merely confirms the existence of the waiver.").

FCRA's broad definition of "person" also unambiguously applies to sections 1681n and 1681o. "FCRA could not be clearer that its definitions apply to the entire [statute]." *Id.* at 166. FCRA directs in plain terms that the "[d]efinitions and rules of construction set forth in [§ 1681a] are applicable for the purposes of" the entire "subchapter" in which FCRA's provisions are codified. 15 U.S.C. § 1681a(a). "Indeed, where Congress wanted to use a different or narrower definition of 'person' within the

FCRA, it knew how to do so." *Kirtz*, 46 F.4th at 165 (citing 15 U.S.C. § 1681g(g)(1)(G)). The statutory text thus "leav[es] no doubt as to the definition's reach." *Digital Realty Tr.*, 138 S. Ct. at 777.

"[O]nce it is conceded that 'any ... government' includes the United States—which is necessary to make FCRA's substantive provisions apply to the federal government—there is no basis for denying that the same definition governs FCRA's private damages actions." *Mowrer*, 14 F.4th at 730. An "express definition" in a statute is "virtually conclusive," and courts will not alter a defined meaning, "[s]ave for some exceptional reason." *Sturgeon v. Frost*, 139 S. Ct. 1066, 1086 (2019) (internal quotation marks omitted).

FCRA is not one of those "very rare" cases in which "a defined meaning can be replaced or altered." *Id.* (quoting A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 228 (2012) (cleaned up)). Applying Congress's chosen definition is not "incompatible with Congress' regulatory scheme" and does not "destroy one of [FCRA's] major purposes." *Digital Realty Tr.*, 138 S. Ct. at 778 (cleaned up). "Congress enacted FCRA in 1970 to ensure fair and accurate credit reporting, promote efficiency in the banking system, and protect

consumer privacy." *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 52 (2007); *see also Spokeo, Inc. v. Robins*, 578 U.S. 330, 334 (2016) ("The FCRA seeks to ensure 'fair and accurate credit reporting.'" (quoting 15 U.S.C. § 1681(a)(1))). Credit reports, however, cannot be accurate if furnishers provide inaccurate information about consumers to credit reporting agencies. As "the nation's largest employer and creditor," *Kirtz*, 46 F.4th at 174, the federal government is a significant furnisher of information that appears on credit reports. By applying sections 1681n and 1681o to federal agencies, FCRA ensures that the procedures that Congress has imposed to promote fairness and accuracy in credit reporting apply to government-furnished information, just as they do to information furnished by private entities.

2. The statutory history confirms the statute's plain meaning. As originally enacted, FCRA did not regulate furnishers of consumer-report information. Thus, although the 1970 Act required that the consumer reporting agencies investigate "any item of information" that a consumer disputed, § 611, 84 Stat. at 1132, it imposed no corresponding duty on persons who furnished the information to the consumer reporting agency.

Congress later recognized that the absence of furnisher duties "weaken[ed] the accuracy of the consumer reporting system." S. Rep. No. 103-209, at 6 (1993). Unlike consumer reporting agencies, furnishers "have direct access to the facts of a given credit transaction," so if the furnisher "acts irresponsibly in verifying the information …, inaccurate information may remain on the report and the consumer is left with little or no recourse." *Id*. Accordingly, "to make it more likely that information reported to consumer reporting agencies is accurate," H.R. Rep. No. 102-692, at 69 (1992), Congress amended FCRA to require furnishers to investigate consumer disputes. Under the 1996 amendments, when a consumer reporting agency receives a consumer dispute, it must "provide notification of the dispute to any person who provided any item of information in dispute." *See* 1996 Amendment, § 2409, 110 Stat. 3009-440 (15 U.S.C. § 1681i(a)(2)(A)). That "person" must then investigate the dispute and make any necessary corrections. *Id*. § 2413, 110 Stat. 3009-447 (15 U.S.C. § 1681s-2(b)(1)).

In connection with these new duties, Congress also amended sections 1681n and 1681o, which had previously applied only to consumer reporting agencies and users of consumer reports, to authorize civil

liability against "[a]ny person" who negligently or willfully violates its FCRA obligations. *Id.* § 2412, 110 Stat. at 3009-446. Congress recognized that, with this change, "furnishers will be subject to civil liability for a failure to reinvestigate disputed information or a failure to update information that has been determined to be incorrect or inaccurate." S. Rep. No. 103-209, at 7; *see also* H.R. Rep. No. 103-486, at 49 (1994) (recognizing that the amendment makes civil liability provisions applicable to "persons that furnish information to consumer reporting agencies").

Thus, far from being incompatible with FCRA's regulatory scheme or undermining the statute's purpose, *Digital Realty Tr.*, 138 S. Ct. at 778, faithful application of the statutory definition to FCRA provisions ensures the governmental furnishers of consumer information are treated on par with private furnishers, and advances the goal of the 1996 amendment to improve the accuracy and fairness of consumer reports.

B. Arguments that the statutory text is ambiguous lack merit.

For the reasons explained above, the plain language, statutory structure, applicable canons of interpretation, and statutory history and

purpose all point in one direction: USDOE is a "person" under sections 1681n and 1681o. The district court's contrary holding was incorrect.

1. The district court first stated that "the statutory text is not clear in waiving" immunity because "the [c]ourt would have to piece different provisions together" to find a waiver. App. 205 (Dist. Ct. Op. 19). Specifically, the court was concerned that the waiver could not be found in the texts of sections 1681n and 1681o alone, but would require interpreting the term "person" in those provisions in accordance with the statutory definition in section 1681a(b). *Id*. Consistent with the principle that "Congress need not state its intent [to waive immunity] in any particular way." *Cooper*, 566 U.S. at 291, the Supreme Court has "never required that Congress make its clear statement [waiving immunity] in a single section or in statutory provisions enacted at the same time." *Kirtz*, 46 F.4th at 166 n.6 (quoting *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 76 (2000) (brackets removed)). Waivers of federal sovereign immunity have thus been found even where one provision of a statute, viewed in isolation, would not have fully revealed Congress's intent to subject the federal government to suit. *See Lane v. Pena*, 518 U.S. 187, 193 (1996) (citing "any complaint" language in 29 U.S.C. § 794a(a)(1) as an express

waiver of federal immunity); *cf. Nevada Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 726 (2003) (holding that Congress made its intent to abrogate state sovereign immunity "unmistakably clear" by defining the term "public agency" in a separate statutory provision to encompass state agencies).

2. The district court also stated that sections 1681n and 1681o are ambiguous because there are "*other* statutory provisions in the FCRA where substituting the United States as a 'person' would lead to absurd results." App. 205–06 (Dist. Ct. Op. 19–20) (emphasis added). Notably, the district court did not find anything "absurd" about applying FCRA's definition of "person" to sections 1681n and 1681o—the provisions at issue here.

The district court's reliance on the absurdity canon is misplaced. The only example the court gave was "authorizing the Federal Trade Commission in § 1681s(a)(1) to enforce compliance against the United States." *Id*. at 206 (Dist. Ct. Op. 20). It is not "unprecedented," however, for Congress "to subject the United States and its agencies to enforcement actions brought by administrative agencies." *Kirtz*, 46 F.4th at 173 (giving examples). And there is "no principle of law … that requires

Congress to express its intent to authorize administrative … enforcement in a particular way beyond a clear statement." *Id.*

The district court's concern about absurdity is also "a legal bogeyman." *Id.* at 171. "Courts have never been required to choose between mechanically applying a statutory definition everywhere in a statute or applying it nowhere." *Id.* For instance, FCRA's definition of person has always existed alongside 15 U.S.C. § 1681q, which imposes criminal penalties on any "person" that knowingly and willfully uses false pretenses to obtain consumer information from a consumer reporting agency. The Third Circuit concluded that the "canon against absurdity … leans against applying the FCRA's definition of 'person' to this provision," at least to the extent applying the definition could be read to authorize criminal prosecution against the United States or another governmental entity. *Kirtz*, 46 F.4th at 171–72. But even "assum[ing] that contextual considerations would prevent application of the 'person' definition as written" to section 1681q, "no such contextual considerations apply with respect to sovereign immunity, where the only interpretive constraint is that Congress waive it unambiguously." *Mowrer*, 14 F.4th at 730. "For … provisions of a statute" where application of the definition would not be

absurd, "courts must continue to apply statutory terms as defined." *Kirtz*, 46 F.4th at 171.

3. The district court compared FCRA to other federal statutes that waive sovereign immunity and determined that, unlike those statutes, FCRA was not "clear" and did not "reference the United States." App. 206 (Dist. Ct. Op. 20). But the operative text—"any … government or governmental subdivision or agency"—"surely includes the federal government." *Mowrer*, 14 F.4th at 729. "Congress need not add 'we really mean it!' to make statutes effectual." *Bormes*, 759 F.3d at 796. Indeed, the district court did not purport to construe that phrase in a way that excludes federal agencies.

"It goes without saying … that some waivers of sovereign immunity will be more explicit than others." *Kirtz*, 46 F.4th at 169. But the district court's requirement that a statute must mention the United States by name to waive sovereign immunity flatly contradicts the Supreme Court's admonition that Congress is "never required" to use "magic words" to waive the government's immunity. *Cooper*, 566 U.S. at 291; *see also Kirtz*, 46 F.4th at 169.

4. The district court gave undue weight to 15 U.S.C. § 1681u(j), which creates a cause of action against "[a]ny agency or department of the United States" for obtaining or disclosing consumer reports in violation of section 1681u. The district court believed that "there would be no need to include an explicit waiver" in section 1681u(j) if Congress had "waive[d] the United States' immunity by including 'government' within the definition of 'person.'" App. 207 (Dist. Ct. Op. 21). That reasoning is flawed. When Congress enacted section 1681u in January 1996, Pub. L. No. 104-93, § 601, 109 Stat. 961, 974, sections 1681n and 1681o authorized civil liability only against consumer reporting agencies and users of consumer reports, 15 U.S.C. §§ 1681n, 1681o (1994), and no FCRA provision prohibited a "user" from disclosing consumer information lawfully obtained. Accordingly, section 1681u(j)'s cause of action—and waiver of sovereign immunity—was necessary to provide for civil enforcement of the nondisclosure obligations imposed on government agencies under section 1681u.

Section 1681u(j) remained necessary even after Congress amended sections 1681n and 1681o in September 1996—nine months after it enacted section 1681u—to extend civil liability to "[a]ny person" that

violated its FCRA responsibilities. 1996 Amendment § 2412, 110 Stat. 3009-446. The elements and remedies authorized under section 1681u(j) differ in certain respects from those in FCRA's general civil-liability provisions. In particular, under § 1681u(j), a plaintiff need not prove negligence to recover damages, may recover statutory damages for nonwillful violations, and may not recover statutory damages of more than $100 (as opposed to the $1000 cap under § 1681n for willful FCRA violations). Section 1681u, and section 1681u(j) in particular, thus operates independently from the other provisions of FCRA. *See United States v. Porter*, 745 F.3d 1035, 1049 (10th Cir. 2014) (explaining the canon of statutory interpretation that "a specific statute will not be controlled or nullified by a general one" (quoting *Morton v. Mancari*, 417 U.S. 535, 550–51 (1974))). Accordingly, the district court lacked any basis for concluding that section 1681u(j) creates ambiguity as to the scope of the waiver of sovereign immunity resulting from sections 1681n's and 1681o's application of civil liability to all "person[s]," including "governmental … agencies," 15 U.S.C. § 1681a(b), that violate the statute.

CONCLUSION

This Court should reverse the judgment of the district court and remand the case to the district court for further proceedings.

February 21, 2023

Respectfully submitted,

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REASONS FOR ORAL ARGUMENT

This appeal presents two important questions of law about which federal courts are divided. First, as the district court recognized, the question whether MOHELA is an arm of the state of Missouri is an issue over which district courts are split. *See* App. 195 n.38 (Dist. Ct. Op. 9); *see also Dykes v. Missouri Higher Education Loan Authority*, No. 4:21-cv-83, 2021 WL 3206691, at *4 (E.D. Mo. July 29, 2021) (concluding that MOHELA is not an arm of the state); *Gowens v. Capella Univ., Inc.*, No. 4:19-cv-362, 2020 WL 10180669, at *4 (N.D. Ala. June 1, 2020) (reaching opposite conclusion). Second, as discussed in the foregoing brief, five federal courts of appeals have reached conflicting outcomes on the question of whether FCRA waives federal agencies' sovereign immunity. Both questions have national significance and present issues of first impression in this Court. For these reasons, oral argument would be beneficial to the Court's consideration and resolution of this appeal.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitations of FRAP 32(a)(7)(B). The brief is composed in a 14-point proportional typeface, Century Schoolbook. As calculated by my word processing software (Microsoft Word 365), the brief (excluding those parts permitted to be excluded under the Federal Rules of Appellate Procedure and this Court's rules) contains 12,451 words.

/s/ Nandan M. Joshi
Nandan M. Joshi

CERTIFICATE OF SERVICE

I hereby certify that, on February 21, 2023, the foregoing document was served through the Court's ECF system on counsel for all parties.

/s/ Nandan M. Joshi
Nandan M. Joshi

ADDENDUM

STATUTORY ADDENDUM

15 U.S.C. § 1681a(b) provides:

The term "person" means any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity.

15 U.S.C. § 1681n(a) provides:

Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—(1)(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000; or (B) in the case of liability of a natural person for obtaining a consumer report under false pretenses or knowingly without a permissible purpose, actual damages sustained by the consumer as a result of the failure or $1,000, whichever is greater; (2) such amount of punitive damages as the court may allow; and (3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

15 U.S.C. § 1681o(a) provides:

Any person who is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—(1) any actual damages sustained by the consumer as a result of the failure; and (2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JEFFREY GOOD, **Plaintiff,** **v.** **UNITED STATES DEPARTMENT OF EDUCATION, et al.,** **Defendants.**	**Case No. 21-CV-2539-JAR-ADM**

MEMORANDUM AND ORDER

Plaintiff Jeffrey Good filed suit against Defendants TransUnion, the United States Department of Education ("USDOE"), and the Higher Education Loan Authority of the State of Missouri ("MOHELA") in the District Court for Johnson County, Kansas on November 1, 2021. Plaintiff brings claims for violations of the Fair Credit Reporting Act ("FCRA").[1] Pursuant to 28 U.S.C. § 1442, USDOE removed the case on November 19, 2021.

Defendant MOHELA has now filed a Motion for Judgment on the Pleadings (Doc. 16), and Defendant USDOE has filed a Motion to Dismiss (Doc. 18). MOHELA asserts that it is an arm of the state of Missouri and entitled to Eleventh Amendment immunity. USDOE contends that the FCRA does not expressly waive the United States' immunity from suit and that it has sovereign immunity. In addition, USDOE contends that Plaintiff fails to state a claim. The motions are fully briefed, and the Court is prepared to rule. For the reasons stated in more detail below, the Court grants both motions.

[1] 15 U.S.C. § 1681 *et seq*.

I. Factual and Procedural Background

Plaintiff alleges that he discovered errors on his credit reports provided by Experian, Equifax, and TransUnion. The credit reports inaccurately "reflected two delinquent tradelines simultaneously for the same account, for four different accounts, which dramatically, improperly suppresses Plaintiff's credit score."[2] On or about April 20, 2020, Plaintiff sent a dispute to each of the three credit bureaus and to MOHELA. In this correspondence, Plaintiff disputed the accuracy of the reports and requested re-investigation. Experian and Equifax responded and corrected the issue. TransUnion responded and failed to correct the issue. MOHELA responded as a servicer and representative of USDOE and refused to correct the issue.

Plaintiff filed suit in state court. He asserts three claims under the FCRA—one each against TransUnion, MOHELA, and USDOE. He contends that Defendants failed to conduct a reasonable re-investigation, failed to consider all information, failed to employ procedures to assure accuracy in credit reporting, and failed to correct the inaccurate information on his credit report. Pursuant to 15 U.S.C. §§ 1681n and 1681o, he seeks statutory, actual, and punitive damages. In addition, he seeks costs and attorney's fees.

USDOE removed the case from state court. MOHELA and USDOE, in separate motions, now request judgment in their favor, primarily asserting that they cannot be held liable due to sovereign immunity. USDOE also contends that Plaintiff fails to state a claim.

II. MOHELA's Motion for Judgment on the Pleadings

A. Legal Standard

Pursuant to Fed. R. Civ. P. 12(c), "[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." The standard for a motion for

[2] Doc. 1-1 at 8 ¶ 32.

judgment on the pleadings under Fed. R. Civ. P. 12(c) is the same as that applied to a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6).[3] To obtain judgment on the pleadings, the moving party must demonstrate that the pleadings reveal no material issues of fact to be resolved.[4] All reasonable inferences from the pleadings are construed in the non-moving party's favor.[5]

If a defendant's motion is "based on an affirmative defense raised in an answer, such as immunity," the motion is "accurately described as a motion for judgment on the pleadings under Fed. R. Civ. P. 12(c)."[6] A motion for judgment on the pleadings may be based on an affirmative defense when the court can take judicial notice of facts.[7] Statutes are considered legislative facts of which a court can take judicial notice.[8]

B. Discussion

MOHELA asserts that it is an arm of the sovereign State of Missouri and is immune from suit under the Eleventh Amendment. Plaintiff contends that MOHELA is not an arm of the state and not entitled to immunity. In the alternative, Plaintiff asserts that even if MOHELA is considered an arm of the state, a Missouri statute relating to MOHELA waives sovereign immunity.

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[3] *Myers v. Koopman*, 738 F.3d 1190, 1193 (10th Cir. 2013).

[4] *Cessna Fin. Corp. v. JetSuite, Inc.*, 437 F. Supp. 3d 914, 919 (D. Kan. 2020).

[5] *Id.*

[6] *Ball v. Mayfield*, 566 F. App'x 765, 770 (10th Cir. 2014) (citing *Brown v. Montoya*, 662 F.3d 1152, 1160 n.4 (10th Cir. 2011)).

[7] *See Columbian Fin. Corp. v. Bowman*, 314 F. Supp. 3d 1113, 1132 (D. Kan. 2018).

[8] *United States v. Williams*, 442 F.3d 1259, 1261 (10th Cir. 2006).

1. Arm of the State

Eleventh Amendment immunity extends both to a state and to entities deemed arms of the state, and it bars federal court claims for money damages against covered entities.[9] "The ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court."[10] To determine whether an entity acts as an arm of the state, and thus enjoys immunity, the Court must weigh four factors established by the Supreme Court and Tenth Circuit in *Mount Healthy City School District Board of Education v. Doyle*,[11] and *Steadfast Insurance Co. v. Agricultural Insurance Co.*[12]: (1) the character of the defendant under state law; (2) the autonomy of the defendant under state law; (3) the defendant's finances; and (4) whether the defendant is concerned primarily with state or local affairs.[13] The burden of proof is on Defendant.[14]

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[9] *See Ruiz v. McDonnell*, 299 F.3d 1173, 1180 (10th Cir. 2002).

[10] *Levy v. Kan. Dep't of Soc. & Rehab. Servs.*, 789 F.3d 1164, 1168 (10th Cir. 2015) (quoting *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001)).

[11] 429 U.S. 274, 280 (1977).

[12] 507 F.3d 1250 (10th Cir. 2007).

[13] *Id.* at 1253; *Mt. Healthy*, 429 U.S. at 280. Plaintiff contends that there is ambiguity in the Tenth Circuit regarding whether it is a four- or five-factor test in determining whether an entity is an arm of the state. Plaintiff cites to a 2017 Tenth Circuit opinion that employed a five-factor test. *See Colby v. Herrick*, 849 F.3d 1273, 1276 (10th Cir. 2017) (citing *Sturdevant v. Paulsen*, 218 F.3d 1160, 1166 (10th Cir. 2000)) (setting forth test as: (1) how the entity is characterized under state law; (2) how much guidance and control does the state exercise over the entity; (3) how much funding does the entity receive from the state; (4) does the entity have the ability to issue bonds and levy taxes; and (5) does the state bear legal liability to pay the judgment against the entity). Plaintiff also cites to a 2020 Tenth Circuit opinion employing a four-factor test. *See Couser v. Gay*, 959 F.3d 1018, 1024 (10th Cir. 2020) (citing *Steadfast*, 507 F.3d at 1253) (setting forth test as: (1) the character ascribed to the entity by state law; (2) the autonomy afforded the entity under state law; (3) the entity's finances; and (4) whether the entity is primarily concerned with local or state affairs). Plaintiff primarily relies on the five-factor test, and MOHELA relies on the four-factor test.

The Court will employ the four-factor test as it was set forth in the Tenth Circuit's more recent opinion of *Couser*, and in line with, recent decisions from the District of Kansas. *See Hennessey v. Univ. of Kan. Hosp. Auth.*, No. 21-2231-EFM-TJJ, 2021 WL 6072509, at *2 (D. Kan. Dec. 23, 2021) (citation omitted); *Pino v. Wiedl*, No. 20-2044-JAR-GEB, 2020 WL 3960424, at *3 (D. Kan. July 13, 2020). Finally, the Court notes that the final three factors of the five-factor test set forth in *Colby* are encompassed in the third factor of the four-factor test this Court applies, so those factors are still considerations.

[14] *See Teichgraeber v. Mem'l Union Corp. of Emporia*, 946 F. Supp. 900, 903 (D. Kan. 1996) (treating Eleventh Amendment immunity as an affirmative defense that must be proven by the party asserting it).

a. Character of Defendant

Under this factor, the Court "conduct[s] a formalistic survey of state law to ascertain whether the entity is identified as an agency of the state."[15] MOHELA was established by Missouri statute,[16] and Missouri statutes establish MOHELA's authority as a "public instrumentality and body corporate."[17] By statute, MOHELA is specifically "declared to be performing a public function and to be a separate public instrumentality *of* the state."[18] This statute also declares MOHELA's income and property exempt from Missouri state taxation.[19] In addition, MOHELA's board members are all designated by the state.[20] Thus, this factor weighs in favor of finding that MOHELA is an arm of the state.

b. Autonomy of Defendant

The second factor considers "the degree of control the state exercises over the entity."[21] Here, MOHELA's seven-member board is controlled by the state. The Missouri governor appoints five of the seven MOHELA board members, while the other two board members are designated by statute.[22] In addition, the governor may remove any board member for "misfeasance, malfeasance, willful neglect of duty, or other cause after notice and a public hearing."[23] "State authority over the appointment of Commission members lends obvious

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[15] *Steadfast*, 507 F.3d at 1253 (citing *Sturdevant*, 218 F.3d at 1164, 1166).

[16] MOHELA was established pursuant to the Missouri Higher Education Loan Authority. *See* Mo. Rev. Stat. §§ 173.350–174.445.

[17] *Id.* § 173.360.

[18] *Id.* § 173.415 (emphasis added); *see also* Mo. Rev. Stat. § 173.360 (stating that MOHELA's authority "shall be deemed to be the performance of an essential public function"). !

[19] *Id*. § 173.415.

[20] *Id.* § 173.360.

[21] *Steadfast*, 507 F.3d at 1253 (citing *Sturdevant*, 218 F.3d at 1162, 1164, 1166).

[22] Mo. Rev. Stat. § 173.360.

[23] *Id.*

support to a finding of sovereignty."[24] The state also imposes certain restrictions on how MOHELA can conduct its business, including limitations on investments, limitations on loan origination, limitations on bond issuances, and required distributions to a fund.[25] Finally, Missouri requires MOHELA to have public meetings and provide a yearly report on its income, expenditures, and indebtedness.[26]

MOHELA, however, is also given some autonomy. For example, MOHELA may hire its own employees, adopt bylaws, sue and be sued, enter contracts, and acquire personal property.[27] In addition, MOHELA operates financially independent from the state in certain situations, including by issuing its own bonds, setting its own interest rates, collecting fees to pay its costs, and selling student loan notes.[28] On balance, the control that the state exercises over MOHELA through the appointment of the board, limitations on financial expenditures, and requirements for spending and filing reports weighs slightly in favor of finding that MOHELA is an arm of the state.

c. Defendant's Finances

Under this factor, the Court considers the entity's finances, including how much state funding it receives and whether the entity can issue bonds and levy taxes.[29] In addition, the Court looks at whether a money judgment "is to be satisfied out of the state treasury," focusing

[24] *Christy v. Pa. Turnpike Comm'n*, 54 F.3d 1140, 1149 (3d Cir. 1995) (citation omitted).

[25] Mo. Rev. Stat. §§ 173.385.1(13), 173.387, 173.390, 173.392.

[26] *Id.* §§ 173.365, 173.445.

[27] *Id.* §§ 173.370, 173.385.1(2), 173.385.1(3), 173.385.1(11), 173.385.1(14).

[28] *Id.* §§ 173.385.1(6), 173.390, 173.385.1(12), 173.385.1(8).

[29] *Steadfast*, 507 F.3d at 1253; *see also Couser v. Gay*, 959 F.3d 1018, 1029 (citation omitted).

on the legal liability for judgment instead of the practical impact a judgment would have on a state's treasury.[30]

MOHELA concedes that it does not receive any direct funding from the state. It also notes that it can issue bonds, but it argues that its ability to issue bonds is subject to statutory limitations. Specifically, Missouri limits the types of bonds that MOHELA may issue.[31] In addition, MOHELA cannot levy taxes. "[T]he absence of taxing authority and the ability to issue bonds, with certain state guidance, renders an [entity] more like an arm of the state than a political subdivision."[32] Furthermore, although MOHELA does not receive direct funds from the state, as one court has noted, MOHELA's "ability to self-fund depends on the authority granted to it by its enabling legislation."[33] In sum, MOHELA does not receive state funding, can issue bonds (although circumscribed by the state), and cannot levy taxes. Accordingly, this consideration is neutral to slightly in favor of immunity.

Another consideration under this factor is whether a judgment against MOHELA would be satisfied by the state treasury. The Tenth Circuit has described this consideration as "particularly important."[34] Here, MOHELA concedes that a judgment against it would not come directly out of the state's treasury, but that a judgment against it could cause an indirect "functional" liability upon the State of Missouri. The Court, however, finds this argument to be without merit. The Tenth Circuit has noted that the "focus [is] on [the] legal liability for a

[30] *Sturdevant*, 218 F.3d at 1164 (quoting *Watson v. Univ. of Utah Med. Ctr.*, 75 F.3d 569, 574–75 (10th Cir. 1996)).

[31] Mo. Rev. Stat. § 173.390.

[32] *Steadfast*, 507 F.3d at 1255 (citation omitted).

[33] *Gowens v. Capella Univ., Inc.*, No. 4:19-CV-362-CLM, 2020 WL 10180669, at *3 (N.D. Ala. June 1, 2020).

[34] *Sturdevant*, 218 F.3d at 1164 (citation omitted).

judgment, rather than [the] practical, or indirect, impact a judgment would have on a state's treasury."[35] Thus, because MOHELA concedes that it would first be responsible for a judgment against it—rather than the state—the Court finds that this consideration weighs against a finding of Eleventh Amendment immunity.

Having considered MOHELA's finances, one consideration is neutral to slightly in favor of Eleventh Amendment immunity, and one consideration weighs against Eleventh Amendment immunity. Because the consideration of whether the state is responsible for a judgment is an important one, the Court finds that this factor weighs against a finding of Eleventh Amendment immunity.

d. State or Local Affairs

As to the fourth factor, the Court considers whether the entity is concerned with local or state affairs, examining "the agency's function, composition, and purpose."[36] MOHELA was established by Missouri statute

> to assure that all eligible postsecondary students have access to student loans that are guaranteed or insured, or both, and in order to support the efforts of public colleges and universities to create and fund capital projects, and in order to support the Missouri technology corporation's ability to work with colleges and universities in identifying opportunities for commercializing technologies, transferring technologies, and to develop, recruit, and retain entities engaged in innovative technologies . . . .[37]

And as previously noted, MOHELA's board is comprised of individuals appointed primarily by the governor of Missouri. MOHELA's focus is not on local city or county matters but instead on

[35] *Id.* (quoting *Duke v. Grady Mun. Schs.*, 127 F.3d 972, 981 (10th Cir. 1997)).

[36] *Steadfast*, 507 F.3d at 1253 (citing *Sturdevant*, 218 F.3d at 1166, 1168–69).

[37] Mo. Rev. Stat. § 173.360.

statewide matters. Accordingly, this factor weighs in favor of finding that MOHELA is entitled to Eleventh Amendment immunity.

e. Balance of Factors

In sum, the first factor as to the character of the defendant, and the fourth factor regarding whether the entity is involved in state or local matters favor a finding that MOHELA is an arm of the state and entitled to Eleventh Amendment immunity. The second factor regarding MOHELA's autonomy only slightly favors immunity. The third factor, however, regarding MOHELA's finances weighs against a finding of Eleventh Amendment immunity. Overall, the Court finds that the factors weigh in favor of finding MOHELA an arm of the State of Missouri.[38] Accordingly, MOHELA is entitled to Eleventh Amendment immunity as an arm of the State of Missouri.

[38] The Court notes that several district court cases from outside the Tenth Circuit have come to different conclusions regarding whether MOHELA is an arm of the state. Two of the cases engaged in an in-depth analysis. The Northern District of Alabama, after employing a four-factor test from the Eleventh Circuit, determined that MOHELA was an arm of the state. *Gowens*, 2020 WL 10180669, at *2–4. Ultimately, the court concluded that "while MOHELA exercises some level of fiscal autonomy, MOHELA is a creature of Missouri state law and the State of Missouri exercises significant control and oversight over MOHELA's leadership, decision-making, and finances," and "thus [it] is an 'arm of the state' of Missouri and is entitled to sovereign immunity under the Eleventh Amendment." *Id.* at *4.

In contrast, the Eastern District of Missouri employed a two-factor test from the Eighth Circuit, finding that MOHELA was not an arm of the state. *Dykes v. Mo. Higher Educ. Loan Auth.*, No. 4:21-CV-00083-RWS, 2021 WL 3206691, at *2–4 (E.D. Mo. July 29, 2021). The court found that the first factor weighed slightly in MOHELA's favor due to the state's "significant political and operational control over MOHELA." *Id.* at *3. However, after considering "whether the state would be legally or functionally liable for a judgment against MOHELA," the court determined that "the second factor weighs against finding that MOHELA is an arm of the state." *Id*. at * 3–4. The court then concluded that MOHELA was not an arm of the state and not entitled to Eleventh Amendment immunity. *Id.* at *4.

Although neither decision is binding on this Court, the Eleventh Circuit's four-factor test, and utilized in the *Gowens* decision is more like the Tenth Circuit's four-factor test than the Eighth Circuit's two-factor test utilized in the *Dykes* decision. Thus, the Court finds the *Gowens* decision more instructive when considering whether MOHELA is an arm of the state.

2. Waiver

An exception to Eleventh Amendment immunity occurs when a state consents to suit in federal court.[39] The test for deciding whether a state has waived its sovereign immunity is a strict one.[40] Courts will "find waiver only where stated 'by the most express language or by such overwhelming implications from the text as (will) leave no room for any other reasonable construction.'"[41]

Plaintiff contends that the statute providing that MOHELA has the ability "[t]o sue and be sued and to prosecute and defend, at law or in equity, in any court having jurisdiction of the subject matter jurisdiction and of the parties" waives sovereign immunity.[42] In addition, Plaintiff directs the Court to an unpublished Tenth Circuit decision stating that "[a] sue-and-be-sued provision can constitute a waiver of sovereign immunity."[43] Yet, the United States Supreme Court has made clear that a state

> does not consent to suit in federal court merely by consenting to suit in the courts of its own creation. Nor does it consent to suit in federal court merely by stating its intention to "sue and be sued," or even authorizing suits against it "in any court of competent jurisdiction."[44]

Here, the statute does not clearly and explicitly waive Missouri's sovereign immunity. Although the statute provides that MOHELA can sue and be sued, it also specifically limits suits

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[39] *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999); *Levy v. Kan. Dep't of Soc. & Rehab. Servs.*, 789 F.3d 1164, 1169 (10th Cir. 2015).

[40] *Levy*, 789 F.3d at 1169.

[41] *Id.* (quoting *Edelman v. Jordan*, 415 U.S. 651, 673 (1974)).

[42] Mo. Rev. Stat. § 173.385.1(3).

[43] *Doe v. Doe*, 134 F. App'x 229, 230 (10th Cir. 2005) (citing *FDIC v. Meyer*, 510 U.S. 471, 475 (1994); *Fed. Hous. Admin. v. Burr*, 309 U.S. 242, 245 (1940)). This statement is out of context, and the *Doe* court pointed out that there was no "sue-and-be-sued provision" in the case before it. *Id.*

[44] *Coll. Sav. Bank*, 527 U.S. at 676 (first citing *Smith v. Reeves,* 178 U.S. 436, 441–45 (1900); then citing *Fla. Dep't. of Health & Rehab. Servs. v. Fla. Nursing Home Ass'n,* 450 U.S. 147, 149–50 (1981) (per curium); and then citing *Kennecott Copper Corp. v. State Tax Comm'n,* 327 U.S. 573, 577–79 (1946)).

to "any court having jurisdiction of the subject matter *and of the parties*."[45] Because the federal court generally does not have jurisdiction over the state, and the Court has found that MOHELA operates as an arm of the state, the Court cannot find an express waiver of Eleventh Amendment immunity. Thus, MOHELA is immune from suit in federal court,[46] and MOHELA's motion for judgment on the pleadings is granted.

III. USDOE's Motion to Dismiss

USDOE has filed a motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). It contends that it has sovereign immunity from suit because the FCRA does not expressly waive the United States' immunity from suit. In addition, USDOE contends that Plaintiff fails to state a claim. The Court need not reach USDOE's 12(b)(6) motion because, as explained below, it finds that USDOE, like MOHELA, is immune from suit.

A. Legal Standard

Fed. R. Civ. P. 12(b)(1) provides for dismissal of a claim where the court lacks subject matter jurisdiction. Federal courts are courts of limited jurisdiction and, as such, must have a statutory or constitutional basis to exercise jurisdiction.[47] A court lacking jurisdiction must dismiss the claim, regardless of the stage of the proceeding, when it becomes apparent that jurisdiction is lacking.[48]

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[45] Mo. Rev. Stat. § 173.385.1(3) (emphasis added).

[46] The parties do not address this contention, but the Court notes that this case was removed from state court. Generally, when a state removes federal claims from state court to federal court, it waives its sovereign immunity defense because it voluntarily invoked the jurisdiction of the federal court. *See Estes v. Wy. Dep't of Transp.*, 302 F.3d 1200, 1206 (10th Cir. 2002); *Coll. Sav. Bank*, 527 U.S. at 681 n.3. In this case, USDOE removed the case pursuant to 28 U.S.C. § 1442. In USDOE's removal petition, there is no indication that MOHELA consented to or joined in the removal.

[47] *Montoya v. Chao*, 296 F.3d 952, 955 (10th Cir. 2002).

[48] *Penteco Corp. Ltd. P'ship v. Union Gas Sys., Inc.*, 929 F.2d 1519, 1521 (10th Cir. 1991).

A motion to dismiss under Rule 12(b)(1) generally takes one of two forms: either a facial challenge or a factual challenge.[49] A facial challenge attacks the sufficiency of the allegations in the complaint, while a factual challenge goes beyond the complaint to attack "the facts upon which subject matter jurisdiction is based."[50] In reviewing a facial challenge, the Court accepts the complaint's allegations as true, whereas in a factual challenge the Court has "wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts."[51]

B. Discussion

Under the doctrine of sovereign immunity, the United States "is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit."[52]

> A party suing the United States, its agencies or officers, must allege both a basis for the court's jurisdiction and a specific statute containing a waiver of the government's immunity from suit. Any waiver of sovereign immunity must be 'unequivocally expressed in statutory text,' and courts must strictly construe any such waiver in favor of the United States.[53]

Here, the question is whether the FCRA waives the United States' sovereign immunity. The FCRA states that any "person" who is negligent or who willfully fails to comply with the FCRA "with respect to any consumer is liable to that consumer" for a certain amount of damages

[49] *Stuart v. Colo. Interstate Gas Co.*, 271 F.3d 1221, 1225 (10th Cir. 2001) (citing *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995)).

[50] *Id.* (citation omitted).

[51] *Id.* (quoting *Holt*, 46 F.3d at 1003).

[52] *United States v. Testan*, 424 U.S. 392, 399 (1976) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)).

[53] *Midwest Crane & Rigging, Inc. v. United States*, No. 10-2137-KHV, 2010 WL 4968274, at *2 (D. Kan. Aug. 6, 2010) (first quoting *Lane v. Pena*, 51 U.S. 187, 192 (1996); then citing *Thomas v. Pierce*, 662 F. Supp. 519, 523 (D. Kan. 1987); and then citing *Shaw v. United States*, 213 F.3d 545, 548 (10th Cir. 2000)).

set forth by the statute.[54] Under the FCRA, "[t]he term 'person' means any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity."[55] The sovereign immunity issue "centers on the meaning of the word 'person' in § 1681n and § 1681o, specifically whether the federal government is a 'person' for purposes of FCRA's general civil liability provisions."[56]

There are no decisions from the United States Supreme Court, the Tenth Circuit, or the District of Kansas on this issue. Four circuit courts have decided the issue, and they are evenly split on the issue with the Fourth and Ninth Circuits finding that the FCRA does not expressly waive sovereign immunity,[57] and the District of Columbia and Seventh Circuits holding that the FCRA waives sovereign immunity.[58]

1. Circuit Split

The Seventh Circuit first decided the issue in *Bormes v. United States*.[59] In that case, the United States conceded that it was a "person" under the FCRA's substantive requirements but

[54] 15 U.S.C. §§ 1681o(a), 1681n(a).

[55] 15 U.S.C. § 1681a(b).

[56] *Robinson v. U.S. Dep't of Educ.*, 917 F.3d 799, 802 (4th Cir. 2019), *cert. denied*, 140 S. Ct. 1440 (2020).

[57] *Id.*; *Daniel v. Nat'l Park Serv.*, 891 F.3d 762 (9th Cir. 2018). In 2020, the United States Supreme Court denied certiorari on the *Robinson* case, but two justices dissented noting that because the question had divided the circuit courts of appeals, they would have granted certiorari. *See Robinson*, 140 S. Ct. at 1440–42. Since the Supreme Court's denial of certiorari, the circuit split has widened with the D.C. Circuit aligning itself with the Seventh Circuit in 2021.

[58] *Mowrer v. U.S. Dep't of Transp.*, 14 F.4th 723 (D.C. Cir. 2021); *Bormes v. United States*, 759 F.3d 793 (7th Cir. 2014).

[59] 759 F.3d 793 (7th Cir. 2014). The Supreme Court had specifically remanded this case to the Seventh Circuit to decide whether the FCRA waived the United States' sovereign immunity. *See United States v. Bormes*, 568 U.S. 6, 16 (2012) ("We do not decide here whether FCRA itself waives the Federal Government's immunity to damages actions under § 1681n. That question is for the Seventh Circuit to consider once this case is transferred to it on remand."). In the case before the Supreme Court, the question was "whether the Little Tucker Act waives the sovereign immunity of the United States with respect to damages actions for violations of the [FCRA]." *Id.* at 7. The Supreme Court found that it did not. *Id.* at 8–14.

denied that § 1681n authorized damages against it.[60] The Seventh Circuit determined that the statute defined "person" as including any "*government or governmental subdivision or agency*."[61] It then stated that "[t]he United States is a government. One would suppose that [would be] the end of the inquiry. By authorizing monetary relief against *every* kind of government, the United States has waived its sovereign immunity. And so we conclude."[62] The Seventh Circuit found that the distinction between the substantive and remedial provisions was unimportant.[63] Specifically, the court noted that if the United States was a "person" under § 1681a(b) for purposes of duties,[64] it also was one for the purpose of remedies or damages under § 1681n.[65] Accordingly, the Seventh Circuit found that "[§] 1681a(b) waives the United States' immunity from damages for violations of the FCRA."[66]

Four years after the Seventh Circuit's decision, the Ninth Circuit considered the issue and reached the opposite conclusion. The Ninth Circuit considered the statute as a whole, noting that the word "person" was in multiple sections of the FCRA, and finding that "[s]ubstituting the sovereign for each of the FCRA's iterations of 'person' leads to implausible results."[67] First, it found that "treating the United States as a 'person' across the FCRA's enforcement provisions would subject the United States to criminal penalties."[68] It found it "highly unlikely that

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[60] *Bormes*, 759 F.3d at 795.

[61] *Id.* (quoting 15 U.S.C. § 1681a(b)).

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id*. at 797.

[67] *Daniel v. Nat'l Park Serv*., 891 F.3d 762, 770 (9th Cir. 2018).

[68] *Id.* (citing 15 U.S.C. § 1681q, which provides that "[a]ny person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses shall be fined . . . , imprisoned for not more than 2 years, or both").

Congress intended to" authorize criminal penalties against governments "so obliquely with a broad definition of 'person.'"[69] In addition, the Ninth Circuit found that permitting the United States' own agencies and state governments to "launch enforcement actions against the United States" made "little sense."[70]

The FCRA also allows punitive damages under § 1681n, and the court noted that Congress rarely "license[s] substantial potential punitive damages against the federal government."[71] Finally, the Ninth Circuit noted that § 1681u(j) allows for statutory, actual, and punitive damages against any agency or department of the United States for willfully or intentionally disclosing records in violation of the FCRA.[72] The court found that "[e]quating 'the United States' with a 'person' in multiple sections of the FCRA" conflicts with this "very clear waiver of sovereign immunity [in § 1681u(j)]" and "[b]ecause Congress knew how to explicitly waive sovereign immunity in the FCRA, it could have used that same language when enacting subsequent enforcement provisions."[73]

The Ninth Circuit also found the Seventh Circuit's *Bormes* opinion unpersuasive because the United States conceded it was a "person" in that case, the Seventh Circuit did not consider the imposition of punitive damages against the United States, and the court did not consider the clear waiver of sovereign immunity in § 1681u(j).[74] Finally, the Ninth Circuit stated that a later

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[69] *Id*. (citing *Al-Haramain Islamic Found., Inc. v. Obama*, 705 F.3d 845, 854 (9th Cir. 2012)).

[70] *Id.* at 771 (citing 15 U.S.C. § 1681s, which provides that the Federal Trade Commission is authorized to enforce compliance with the FRCA and can bring suit against any person that violates the FCRA).

[71] *Id.* (citing 15 U.S.C. § 1681n) (noting that there is a "presumption against imposition of punitive damages on governmental entities" (citing *Vt. Agency of Nat'l Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 785 (2000))).

[72] *Id.*

[73] *Id.* at 771–72. The court also acknowledged that the inclusion of punitive damages in § 1681u(j) "cuts both ways" because "[i]t demonstrates that Congress was willing to impose punitive damages on the United States in the FCRA." *Id*. at 771 n.6.

[74] *Id*. at 773–74.

Seventh Circuit opinion in which it found that the FCRA did not explicitly waive sovereign immunity for Indian tribes "questioned its own reasoning in *Bormes*."[75] Accordingly, the Ninth Circuit concluded that it could not "say with 'perfect confidence' that Congress meant to abrogate the federal government's sovereign immunity."[76]

One year later, the Fourth Circuit also determined that the FCRA did not explicitly waive the United States' sovereign immunity.[77] It first noted the "longstanding interpretive presumption that 'person' does not include the sovereign."[78] In addition, "statutes waiving sovereign immunity are normally quite clear," and "the words 'United States' appear in a great many waivers."[79] It concluded that the use of the word "person" was not explicit enough to waive immunity, and the definition section "does not specifically mention the United States or the federal government."[80] Furthermore, like the Ninth Circuit, the Fourth Circuit found that the explicit waiver of sovereign immunity in § 1681u(j), the bizarre consequences of possible criminal charges brought by the United States against the United States, and the investigation of or imposition of punitive damages against the United States counseled against a finding of sovereign immunity.[81] The court noted that "the substantive and enforcement provisions in [the] FCRA are not one and the same," and the issues with finding that the United States is a "person" within the statutory scheme all "relate to the statute's enforcement provisions."[82] Thus, it found

[75] *Id.* at 774 (citing *Meyers v. Oneida Tribe of Indians of Wis.*, 836 F.3d 818 (7th Cir. 2016)).

[76] *Id.*

[77] *Robinson v. U.S. Dep't of Educ.*, 917 F.3d 799 (4th Cir. 2019).

[78] *Id.* at 802 (citing *Vt. Agency of Nat'l Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 780 (2000)).

[79] *Id.* at 803 (collecting statutes).

[80] *Id.*

[81] *Id*. at 804–05.

[82] *Id.* at 806.

that "the ordinary meaning of 'person' has always applied to [the] FCRA's enforcement provisions, [and] the statutory definition of 'person' has always applied to [the] FCRA's substantive provisions."[83] Finally, the Fourth Circuit found that liability imposed against "any government" would expose foreign, tribal, and state governments to liability which Congress surely would not do.[84] Thus, the circuit found that the district court was correct in dismissing the case for lack of subject matter jurisdiction because the FCRA did not waive the United States' sovereign immunity.[85]

Lastly, in 2021—the most recent circuit decision addressing the issue—the District of Columbia Circuit disagreed with the Ninth and Fourth Circuits and concluded that "the Seventh Circuit correctly held that FCRA waives federal sovereign immunity."[86] The D.C. Circuit found that the "FCRA defines 'person' to include 'any . . . government'— a term that, as used in a federal statute, surely includes the federal government."[87] The court did not find a waiver ambiguous and instead noted that for willful violations under § 1681n(a)(1), it "provides one cause of action against '[a]ny person' and [provides] an additional cause of action against any 'natural person.'"[88] The D.C. Circuit appeared to reason that the inclusion of the word "natural person" in one subsection and the inclusion of the term "person" in another subsection indicated a "calibrated approach" to which persons should bear liabilities and that the FCRA spoke "clearly enough to waive federal sovereign immunity."[89]

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[83] *Id.*

[84] *Id.* at 805.

[85] *Id.* at 807.

[86] *Mowrer v. U.S. Dep't of Transp.*, 14 F.4th 723, 729 (D.C. Cir. 2021) (citing *Bormes v. United States*, 759 F.3d 793 (7th Cir. 2014)).

[87] *Id.*

[88] *Id.* at 728–29 (citing 15 U.S.C. § 1681n(1)(A)–(B)).

[89] *Id.* at 729.

The court disagreed with the Ninth and Fourth Circuits' conclusion that the express waiver provision in § 1681u(j) meant that Congress did not intend to waive sovereign immunity elsewhere.[90] The D.C. Circuit noted that

> there is a good reason why [that section] specifically targets federal agencies, as only they may lawfully receive consumer information under it, [and] [t]he fact that [this section] imposes liability only on federal agencies thus says little about whether [the] FCRA's other causes of action cover the United States through broader language encompassing "any . . . government."[91]

The D.C. Circuit also found that several of the consequences of the statute that the Ninth and Fourth Circuit found concerning were "hardly absurd."[92] As to the imposition of punitive damages, the court noted that "Congress may impose punitive damages on government entities, so long as it does so 'expressly.'"[93] It concluded that there was "no arguable basis for limiting [the] FCRA's definition of 'person' to substantive but not enforcement provisions; the definition by its terms is 'applicable for the purposes of this subchapter'—i.e., subchapter III, which contains the entire statute."[94] Thus, the D.C. Circuit found that the FCRA waived sovereign immunity.[95]

After the Fourth Circuit's decision in *Robinson*, but prior to the D.C. Circuit's decision in *Mowrer*, the district court trend appeared to follow the Fourth and Ninth Circuit decisions finding that the FCRA did not waive sovereign immunity.[96] Since the four-court circuit split,

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[90] *Id.*

[91] *Id.*

[92] *Id.* at 730.

[93] *Id.* (citing *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 260 n.21 (1981)).

[94] *Id.* at 730 (citing 15 U.S.C. § 1681a(a)).

[95] *Id.*

[96] *See Washington v. U.S. Dep't of Educ.*, No. 5:20-CV-294(MTT), 2021 WL 2593617, at *5 & n.8 (M.D. Ga. June 24, 2021) (siding with the Fourth and Ninth Circuits and determining that "Congress did not clearly and

there have been two decisions from district courts in which the USDOE was specifically a defendant,[97] and these courts engaged in an in-depth analysis of the circuit split. These two lower courts differed in their rulings, with the Southern District of Ohio finding the Ninth and Fourth Circuits' analysis persuasive and determining that the FCRA did not waive sovereign immunity,[98] and the District of New Jersey following the Seventh and D.C. Circuits' reasoning that the FCRA waived sovereign immunity.[99]

2. Application

In this case, the Court follows the Ninth and Fourth Circuits. Sovereign immunity "can only be waived by statutory text that is unambiguous and unequivocal."[100] And, here, the statutory text is not clear in waiving the United States' immunity. Instead, to find a waiver here, the Court would have to piece different statutory provisions together. Specifically, the Court would have to rely on language in §§ 1681o and 1681n providing that any "person" who is negligent or any "person" who willfully does not comply with the statute is liable. Then the Court would look to the term "person," defined in § 1681a(b) to include "government or governmental subdivision or agency." While construing different statutory provisions together is the method for interpreting statutes,[101] the Court cannot ignore the other statutory provisions in

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unequivocally waive sovereign immunity in the FCRA" and collecting fourteen district court decisions determining that the FCRA did not waive sovereign immunity).

[97] There have been other decisions addressing the waiver of sovereign immunity under the FCRA since the four-court circuit split. The Court only notes the two decisions involving USDOE.

[98] *Morgan v. U.S. Dep't of Educ.*, No. 1:20-CV-709, 2022 WL 974339, at *1–6 (S.D. Ohio Mar. 31, 2022).

[99] *Murphy v. Equifax Info. Servs., LLC*, No. 120-CV-09275-RMBAMD, 2021 WL 5578701, at *2–5 (D.N.J. Nov. 30, 2021).

[100] *Robinson v. U.S. Dep't of Educ.*, 917 F.3d 799, 802 (4th Cir. 2019)

[101] *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 290 (2010) ("Courts have a 'duty to construe statutes, not isolated provisions.'") (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 568 (1995)).

the FCRA where substituting the United States as a "person" would lead to absurd results,[102] such as authorizing the Federal Trade Commission in § 1681s(a)(1) to enforce compliance against the United States.

Furthermore, there are limited instances in which Congress waives the United States' sovereign immunity, and when these statutes do it, they "are normally quite clear" and explicitly authorize suit against the United States or provide that the United States will be liable.[103] For example, "[t]he Little Tucker Act is one statute that unequivocally provides the Federal Government's consent to suit for certain money-damages claims."[104] This statute "specifically describes claims 'against the United States.'"[105] In addition, the Federal Tort Claims Act provides that the "[t]he United States shall be liable."[106] Here, the statutory provision providing for liability does not reference the United States and the Court would instead have to rely on language stating that "any person . . . is liable" to find a waiver of immunity.[107]

Another consideration is that the FCRA clearly waives the United States' immunity in § 1681u(j) by providing that "[a]ny agency or department of the United States obtaining or

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[102] *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("A court must . . . interpret [a] statute 'as a symmetrical and coherent regulatory scheme' and 'fit, if possible, all parts into a[] harmonious whole.'") (quoting *Gustafson*, 513 U.S. at 569; then quoting *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 389 (1959)).

[103] *Robinson*, 917 F.3d at 803 (collecting various statutes providing that the United States is liable).

[104] *United States v. Bormes*, 568 U.S. 6, 16 (2012) (citing *United States v. Mitchell*, 463 U.S. 206, 216 (1983)).

[105] *Robinson*, 917 F.3d at 803 (quoting *Bormes*, 568 U.S. at 7).

[106] 28 U.S.C. § 2674; *see also* the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*, which includes within the definition of "person" an "instrumentality of the United States," *id.* § 6903(15) and provides in another section that "[t]he United States hereby expressly waives any immunity otherwise applicable to the United States." *Id.* § 6961(a).

[107] 15 U.S.C. §§ 1681o, 1681n; *see also Stein v. U.S. Dep't of Educ.*, 450 F. Supp. 3d 273, 277–78 (E.D.N.Y. 2020) ("The purported waiver . . . does not contain the words 'United States,' only the word 'person,' which includes in its definition the words 'government or governmental subdivision or agency'. The lack of specific reference to the United States renders this waiver an impermissible and invalid implied waiver of the government's sovereign immunity." (alteration omitted) (citing 15 U.S.C. § 1681a(b), (n)).

disclosing any consumer reports, records, or information contained therein in violation of this section is liable to the consumer." Had Congress intended to waive the United States' immunity by including "government" within the definition of "person," there would be no need to include an explicit waiver in this section. Looking at the statute as a whole, it is not clear that the inclusion of "government" as a "person" waived the United States' sovereign immunity.

Finally, the facts underlying the Fourth Circuit's decision are similar to the facts in the case before this Court. In *Robinson*, the plaintiff brought suit against several credit reporting agencies, the Pennsylvania Higher Education Assistance Agency, and the USDOE for alleged errors in the plaintiff's credit reports regarding his student loans.[108] The plaintiff claimed that the USDOE violated the FCRA, specifically § 1681s-2(b), when it failed to properly investigate his complaints and failed to review all relevant information.[109] The plaintiff brought claims under §§ 1681n and 1681o, and the USDOE "filed a motion to dismiss for want of subject matter jurisdiction based on sovereign immunity."[110] The Fourth Circuit noted the "confounding problems" with including the United States as a "person" within the statute and stated that "[t]he statute bears no indicia of congressional intent to bring about such a bevy of implausible results, let alone an unambiguous and unequivocal intent to do so."[111] "To read these broad and staggering implications into the statute on the slimmest of textual hints would be to abjure our duty to construe 'the statutory language with that conservatism which is appropriate in the case of a waiver of sovereign immunity.'"[112] This Court agrees.

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[108] *Robinson*, 917 F.3d at 800.

[109] *Id.*

[110] *Id.*

[111] *Id.* at 805.

[112] *Id.* (citing *United States v. Sherwood*, 312 U.S. 584, 590 (1941)).

In sum, the Court concludes that the FCRA does not clearly and explicitly waive the United States' sovereign immunity. Thus, the Court lacks subject matter jurisdiction and will not address USDOE's alternative argument that Plaintiff fails to state a claim.

IT IS THEREFORE ORDERED that Defendant MOHELA's Motion for Judgment on the Pleadings (Doc. 16) is **granted**.

IT IS FURTHER ORDERED that Defendant USDOE's Motion to Dismiss (Doc. 18) is **granted**.

IT IS SO ORDERED.

Dated: June 16, 2022

S/ Julie A. Robinson
JULIE A. ROBINSON
UNITED STATES DISTRICT JUDGE

United States District Court

---------- DISTRICT OF KANSAS----------

JEFFREY GOOD,

Plaintiff,

v.

THE UNITED STATES DEPARTMENT OF EDUCATION, TRANSUNION LLC, THE HIGHER EDUCATION LOAN AUTHORITY OF THE STATE OF MISSOURI,

Defendants.

Case No 21-2539-JAR-ADM

Defendants,

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a jury trial. The issues have been tried and the jury has rendered its verdict.

☒ Decision by the Court. This action came before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That pursuant to the Court's Memorandum and Order filed on June 16, 2022 (Doc. 30), Defendant MOHELA's Motion for Judgment on the Pleadings (Doc. 16) is granted. It was further ordered that Defendant USDOE's Motion to Dismiss (Doc. 18) is granted.

Defendant, TransUnion LLC filed a Notice of Settlement (Doc. 32) on August 23, 2022, and Stipulation of Dismissal (Doc. 34) was filed by TransUnion on October 31, 2022. This case is closed.

11/1/2022
Date

SKYLER B. O'HARA
CLERK OF THE DISTRICT COURT

by: s/ Bonnie Wiest
Deputy Clerk