No. 06-16507-FF

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

LYDIA ROSARIO and AUDRA PHILLIPS,
on behalf of themselves and all others similarly situated,
Plaintiffs-Appellants,

v.

AMERICAN CORRECTIVE COUNSELING SERVICES, INC.
DON R. MEALING, KELLY KEAHEY, JOSEPH AYALA, and
DENISE NIELSON,
Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Florida

BRIEF FOR APPELLANTS

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February 28, 2007

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26-1, appellants provide the following list of persons who have an interest in the outcome of this appeal:

American Corrective Counseling Services, Inc.

ACCS Administration, Inc.

Joseph Ayala

O. Randolph Bragg

Clausen Miller, P.C.

Ronald Dean Cook

Michael Joseph Corso

The Honorable Douglas N. Frazier, U.S. Magistrate Judge

Fulfillment Unlimited, Inc.

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Adina H. Rosenbaum

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The Honorable John E. Steele, U.S. District Judge

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STATEMENT REGARDING ORAL ARGUMENT

Appellants request oral argument because the issues presented are important. In an extraordinary decision that goes beyond the bounds of all prior Eleventh Amendment jurisprudence, the district court conferred state sovereign immunity on a private, for-profit California debt collector that does business in partnership with local Florida prosecutors, but is otherwise completely independent of the State of Florida, maintains no offices in the State of Florida, derives no funding from the State of Florida, and would bear sole responsibility for any judgments against it. An affirmance would bring this Court squarely into conflict with other circuits, run afoul of Supreme Court precedent, and create a sweeping new immunity defense for private contractors of every stripe.

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 15 U.S.C. § 1692k(d) and 28 U.S.C. §§ 1331, 1367. The district court issued its order granting defendants' motion for summary judgment on November 15, 2006 (DN 220) and a judgment consistent with that order on November 22, 2006 (DN 221). Plaintiffs timely filed a notice of appeal on December 12, 2006 (DN 222). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED

1. Whether American Corrective Counseling Services, Inc. (ACCS)—a private, for-profit California debt collector that operates bad check collection programs in partnership with Florida prosecutors—is an arm of the State of Florida, where

    (a) state law defines ACCS as an independent contractor and provides that independent contractors are not entitled to share in the state's sovereign immunity;

    (b) the State of Florida does not control ACCS's day-to-day collection operations, all of which are conducted in California;

    (c) ACCS derives no funding from the State of Florida; and

    (d) ACCS would be solely responsible for paying any judgment.

2. Whether, even assuming ACCS is an arm of the state, the district court erred in dismissing plaintiffs' claims against ACCS officers and employees for declaratory relief concerning alleged violations of federal law.

STATEMENT OF THE CASE

A. Nature of the Case and Proceedings Below

This appeal arises from a class action brought by Florida consumers targeted by ACCS, a private California debt collector that operates "bad check restitution programs" in partnership with local prosecutors throughout the nation. The lawsuit challenges ACCS's collection practices under the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C § 1692 *et seq*., and the Florida Consumer Collection Practices Act (FCCPA), Fla. Stat. § 559.55 *et seq.*, seeking both damages and declaratory relief. (RE 39).

The district court granted defendants' motion for summary judgment and dismissed the entire action on Eleventh Amendment grounds, relying on *Shands Teaching Hospital and Clinics, Inc. v. Beech Street Corp.*, 208 F.3d 1308 (11th Cir. 2000). (RE 220). The court acknowledged "the facts that ACCS is a private corporation not controlled by the State of Florida, acts pursuant to a contract with the [State Attorney Office], is not controlled by the [State Attorney Office], does not derive income from the State of Florida, and will itself be responsible for any judgment entered," but nevertheless concluded that ACCS was an arm of the State of Florida by virtue of the company's contractual relationship with Florida prosecutors. (RE 220 at 8). This appeal followed. (DN 222).

B. Statement of Facts

1. Overview of ACCS's Operations. ACCS is a for-profit California corporation that describes itself as the "largest private contractor in the United States" to operate bad check collection programs in partnership with prosecutors' offices. (DN 160-5 at 3). Through these programs, ACCS collects debt owed to merchants who have received dishonored checks. (DN 190 at 26-30). The checks are sent to ACCS for collection either by the merchants directly or via prosecutors' offices. (DN 190 at 7-8). ACCS then sends collection notices to the consumers who wrote the checks, using threats of criminal prosecution to coerce payment. (DN 190 at 26-30). The program's revenues are derived from collection fees that are often many times the face amounts of the checks themselves. For example, after plaintiff Audra Phillips wrote a $9.62 check to a grocery store, ACCS demanded she pay $134.62. (DN 190 at 26-27). ACCS keeps the lion's share of these fees for itself and gives a portion to the prosecutors. (RE 160 at 4-5).

According to its website, ACCS works with "partnering prosecutors" in seventeen states.[1] All of ACCS's collection operations, however, are conducted out of a single office in San Clemente, California; the company maintains no

[1] *See* http://accs-inc.com/partnering.html (last visited Feb. 28, 2007).

offices in Florida or in any of the other states with which it does business. (DN 190 at 3). All checks are mailed to California for collection by ACCS, all mail directed to ACCS's programs is automatically forwarded to California, all collection notices are mailed from California, and all telephone contact with consumers is made through ACCS employees in California. (DN 190 at 7-9, 22).

Although ACCS works through contracts with prosecutors, all of its collection programs are self-funded. In marketing its programs, ACCS offers prosecutors what it describes as a "win-win solution":

- "ACCS Programs require No-Startup or monthly operating costs."
- "All of our programs generate surplus revenue back to your jurisdiction."

(DN 160-5 at 2). The marketing materials stress that the "ultimate goal" of each ACCS program is to form a "partnership" with a local prosecutor that will increase the prosecutor's budget and "manage a greater volume" of bad check debt "*without* impacting the local criminal justice system" and "***at no additional taxpayer expense***." (DN 160-5 at 6) (bold and emphasis in original). ACCS advertises that "[a]ll of our programs are designed to *reduce* current levels of both administrative and financial costs." (DN 160-5 at 3) (emphasis in original).

2. ACCS's Florida Contracts. ACCS has contracts to operate bad check programs with two Florida prosecutors: the State Attorneys for the 20th Judicial

Circuit (Charlotte, Collier, Glades, Hendry and Lee Counties) and the 11th Judicial Circuit (Miami-Dade County). (DN 190 at 4).[2] The prosectuors enter into these contracts under a state statute that permits them to "establish" bad check programs "either within the state attorney's office or through an independent contractor." Fla. Stat. § 832.08(1).

ACCS Is An Independent Contractor. According to ACCS, its status under each of these contracts is that of an "independent contractor." (DN 190 at 5). The contracts confirm that status and provide that (1) ACCS agrees not to act as an agent of the state attorneys, (2) ACCS assumes exclusive responsibility for its acts, and (3) ACCS is not entitled to any of "the rights, status and privileges" of the state attorneys:

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

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[2] At the time of briefing in the district court, ACCS had a contract with the State Attorney for the 15th Judicial Circuit (DN 190 at 5), but it apparently no longer does business with that office. *See* http://accs-inc.com/partnering.html (last visited Feb. 28, 2007). ACCS's website now lists a contract with the State Attorney for the 17th Judicial Circuit, *id.*, but that contract is not in the record.

> employees, or agents as they relate to the services provided during the course and scope of their employment. ACCS, its agents and employees, shall not be entitled to any rights, status, and privileges of Judicial Circuit employees while engaged in providing services.

(RE 160 at 9).

ACCS Is Responsible for All Day-to-Day Management. The contracts "establish" bad check programs that are to be "operated by ACCS." (RE 160 at 2). ACCS is responsible for the "daily management" of "all" clerical, accounting, collection, and financial functions of the programs, including generating and mailing the demand letters; the collection of all money; the disbursement of payments to merchants; financial reporting; and the maintenance of all physical files, financial records, documentation reports, and computer files. (RE 160 at 3-4).

As for the role of the state attorneys' offices, the contracts say very little. The state attorneys agree to "assist and direct ACCS with the planning and development" of policies and procedures, but day-to-day operations are left entirely to ACCS. (RE 160 at 4). The only specific responsibilities of the state attorneys are to (1) "designate a staff member to serve as Liason with ACCS" in organizing the program, (2) receive bad check complaints that are forwarded to ACCS in California, and (3) review cases for prosecution only *after* ACCS has completed its collection attempts. (RE 160 at 4).

The actual operation of the programs reflects the same hands-off policy on the part of Florida prosecutors. The programs are operated out of the ACCS office in San Clemente, California. (DN 190 at 3). The address for the 20th Judicial Circuit's Bad Check Restitution Program is actually a commercial mailbox at a Mail Boxes, Etc. store in Florida, paid for by ACCS; all mail directed to the program is forwarded by Mail Boxes, Etc. to the ACCS office in San Clemente, California, on a prearranged schedule. (DN 190 at 7-8). All collection notices are mailed from the ACCS office in California, and all telephone contact with consumers is made through the California office as well. (DN 190 at 3, 7-9, 22).

Janeen P. Diebler, the designated "Liason" to ACCS for the 20th Circuit State Attorney's Office, was unable to specify what, if any, ACCS activities are supervised by her office. (DN 81 at 27). Ms. Diebler testified that cases are never reviewed by attorneys in the State Attorney's Office before they are sent to ACCS for collection. (DN 81 at 42 (Question: "Does an attorney review or approve the shipment to ACCS?" Answer: "No."); DN 190 at 9). Dennis Pearlman, the Executive Director of the State Attorney's Office, when asked whether he "exercise[d] any supervisory authority" over ACCS's designated representative, answered that his role was limited to "suggestions and recommendations" in "general terms, but not as an employer because I wasn't." (DN 91 at 42-43).

The state attorneys have the authority to terminate their contracts with ACCS only "for cause," and only after giving ACCS notice and opportunity to correct any alleged breach. (RE 160 at 7). Although the contracts give the state attorneys, as well as other state or federal officials, the right to audit work performed by ACCS (RE 160 at 7), they have not done so. (DN 91 at 58).

The ACCS Programs Are Self-Funded. The contracts provide for the division of collection-fee revenue between ACCS and the state attorneys and ACCS agrees to operate the programs solely in consideration for its share of that revenue. (RE 160 at 4-5). The state attorneys receive 35% of "administrative fee revenue," and ACCS keeps the remainder plus the revenue from various other fees—including a $75 "class fee"—for itself. Although a state statute limits the fees that the programs may charge, both the contract and ACCS's actual practice exceeds those statutory limits. *Compare* Fla. Stat. § 832.08(5) (authorizing maximum fee of $25 on checks less than $50 and maximum fee of $40 on all checks) *with* Contract (RE 160 at 4-5) (authorizing ACCS to collect $75 "class fee," $25 assessment installment-plan fee, $25 failure-to-appear fee, and $10 late fee, all of which ACCS keeps for itself). All fees collected by the programs are deposited in commercial bank accounts maintained by ACCS. Each month, the state attorneys receive a check drawn on that account signed by ACCS's President. (DN 190 at 39).

Neither the State of Florida nor the state attorneys' offices pay for any aspect of the programs' operations. ACCS agrees to "furnish all personnel, supplies, equipment, furniture, insurance, utilities, and facilities necessary for its business operation," and absent prior authorization may "not use Judicial Circuit supplies or equipment for any purpose" unless specifically authorized. (RE 160 at 9). Program employees are paid entirely by ACCS and receive "performance bonuses" based on the percentage of the "ACCS fees" they collect. (DN 65 at 33).

ACCS Bears Exclusive Responsibility for Adverse Judgments. As an independent contractor, ACCS bears "exclusive responsibility" for its actions. (RE 160 at 9). ACCS further agrees to "indemnify, defend with counsel," and "save harmless" the Judicial Circuit, its officers, agents, and employees, for any claims arising "in connection with the performance of [the] contract." (RE 160 at 10).

3. ACCS's Collection Practices. The nature and legality of ACCS's collection practices are hotly contested by the parties. Plaintiffs allege that ACCS's practices systematically violate several provisions of the FDCPA, including prohibitions against harassing, oppressive, or abusive conduct, 15 U.S.C. § 1692d, the use of false or deceptive misrepresentations and threats, *id.* § 1692e, the collection of fees not authorized by law, *id.* § 1692f(1), and the failure to provide proper notice, *id.* § 1692g. (RE 39 at 21-23). Plaintiffs allege similar violations under the FCCPA, Fla. Stat. § 559.55 *et seq.* (RE 39 at 24-25).

This dispute is part of a larger controversy over ACCS's tactics, which have attracted the criticism of courts, regulators, the press, and consumer advocates nationwide.[3] In DeKalb County, Georgia, for example, ACCS's contract was canceled after an investigation revealed that the company was "charging a $125 fee to check bouncers to attend an 'educational class'" that was never held, "records show[ed] all but a handful of the hundreds of letters it sent to demand payment were for amounts" it was not authorized to collect, and it made demands for payment "without first allowing check writers to make the check good," as Georgia law required. Soto, *DeKalb DA's Bad Check Plan Bounces*, Atlanta Journal-Constitution, May 14, 2001 (2001 WLNR 3945839). In Illinois, a state court appointed a special prosecutor to investigate ACCS. Schenk, *Illinois Court Determines San Clemente, Calif., Company Is Collection Agency*, News Gazette, Nov. 26, 2002 (2002 WLNR 9053480). ACCS has also been prosecuted by state regulatory agencies and investigated by state attorneys general. *See* Goodrich, *Bad Check Collection Firm Needs License, State Officials Say: Agency Files Complaint*

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

Against Company, St. Louis Post-Dispatch, Feb. 14, 2001 (2001 WLNR 11350836); Dalmer, *Bad check cases bring warnings, little action: The small number of prosecutions may affect lawsuits against a collection agency*, Des Moines Register, May 20, 2001.

In previous litigation against ACCS, it has gone "undisputed that ACCS is not an officer or employee of . . . any State," but "a private contractor assisting local prosecutors." *Liles v. Am. Corrective Counseling Servs. Inc.*, 131 F. Supp. 2d 1114, 1119 (S.D. Iowa 2001). ACCS has not taken the position that it falls within the FDCPA's exemption for "any officer or employee of . . . any State," 15 U.S.C. § 1692a(6)(C), and every court to consider the issue has held that ACCS and similar companies are "debt collectors" subject to the FDPCA—a determination that was recently confirmed by Congress. *See, e.g.*, *Liles v. Am. Corrective Counseling Servs.*, 131 F. Supp. 2d at 1118-20; *Del Campo v. Am. Corrective Counseling Servs., Inc.*, No. CV-01-21151 (N.D. Cal. May 8, 2002); *Gradisher v. Check Enforcement Unit*, 133 F. Supp. 2d 988, 992 (W.D. Mich. 2001).[4]

[4] The 2006 amendments to the FDCPA confirm that private operators of bad check collection programs are covered by the statute unless they meet certain specific requirements, including complying with state penal laws, refraining from threatening prosecution unless a prosecutor has first made a probable-cause determination, providing notice to consumers of their right to dispute the validity of the charges, and complying with limitations on the collection fees they may charge. 15 U.S.C. § 1692p.

As one court put it: "As a private actor, attempting to take action against Plaintiff, a private individual, in order to compensate a private third-party creditor, partially or completely, for a private debt owed by Plaintiff to that third-party, ACCS is bound by the requirements of the FDCPA . . . . Although the FDCPA exempts from its requirements officers and employees of state governments, ACCS is a private organization with a government contract; it is not a government agency or employee. The existence of a contract with a local government, regardless of its underlying purpose or motive, cannot exempt a private actor from the provisions and requirements of the FDCPA." *Del Campo v. American Corrective Counseling Servs., Inc.*, No. CV-01-21151, 2007 WL 470262, at *3 (N.D. Cal. Feb. 8, 2007). The same court recently rejected ACCS's claim that it is an arm of the State of California. *See* Order, *Del Campo v. American Corrective Counseling Servs., Inc.*, No. CV-01-21151 (N.D. Cal. Dec. 5, 2006).

STANDARD OF REVIEW

In Eleventh Amendment cases, as in other cases, this Court "review[s] the district court's grant of summary judgment *de novo*, with all facts and reasonable inferences therefrom reviewed in the light most favorable to the nonmoving party." *Harbert Int'l, Inc. v. James*, 157 F.3d 1271, 1277 (11th Cir. 1998). The circuits that have addressed the issue have "unanimously concluded that 'the entity asserting Eleventh Amendment immunity has the burden to show that it is entitled to immunity.'" *Woods v. Rondout Valley Central School Dist. Bd of Educ.*, 466 F.3d 232 (2d Cir. 2006) (quoting *Gragg v. Ky. Cabinet for Workforce Dev.*, 289 F.3d 958, 963 (6th Cir. 2002)).

SUMMARY OF ARGUMENT

The district court's holding—that a private, for-profit California debt collector is an arm of the State of Florida when it does business in partnership with Florida prosecutors—is a distant outlier in the universe of Eleventh Amendment jurisprudence. No federal court has gone as far in extending state sovereign immunity beyond its traditional moorings. This Court should reverse the district court and send a clear signal that the Eleventh Amendment does not entail blanket immunity from suit for private government contractors such as ACCS.

I. Eleventh Amendment cases turn on a multi-factor analysis with few bright-line rules. This case, however, is easy. All four of the relevant factors point in a single direction. *First*, under Florida law, independent contractors like ACCS do not share in the state's immunity. *Second*, the State of Florida exercises no control over ACCS's day-to-day operations; ACCS has no offices in Florida and conducts all of its collection operations in California; and Florida prosecutors may terminate their contracts with ACCS only "for cause," and only after providing ACCS with notice and an opportunity to cure any alleged breach. *Third,* ACCS receives no funding from the State of Florida. And *finally*, and most importantly, ACCS is solely responsible for any judgments against it.

This case is a far cry from *Shands Teaching Hosp. and Clinics, Inc. v. Beech Street Corp.*, 208 F.3d 1308 (11th Cir. 2000), which held that two administrators of a state employee health insurance program, sued by a hospital seeking reimbursement for services rendered under the program, were arms of the state. In that case, (1) state law specifically defined the defendants as "agents" of the state and reserved responsibility for all "day-to-day management" to the state itself, *id.* at 1309; (2) the state retained "virtually complete control" of the program and could terminate the contract at any time "for convenience," *id.* at 1311 & n.2; (3) the program was "funded through annual legislative appropriations," *id.* at 1311; and (4) any judgment against the defendants would have been "an obligation of the State." *Id.* at 1313. *Shands* held that "the dispositive question" was who would be "financially responsible"—the state or the defendants? The answer was that a judgment on the hospital's claims necessarily "would implicate state funds."

II. Despite the enormous differences between this case and *Shands*, ACCS relied principally on *Shands* in the court below. ACCS urged the district court to read *Shands* as an open invitation to shield government contractors whenever imposing liability on them for the functions in which they are engaged would interfere with state programs, and without regard to the traditional four-part test.

ACCS's proposed rule would not only be at odds with *Shands* itself, but would bring this Court into conflict with the Supreme Court and every circuit that has considered the Eleventh-Amendment status of private or quasi-private corporations. The federal courts have recognized that conferring immunity on entities like ACCS would turn privatization into a farce, under which an entity would simultaneously enjoy both the immunities to which only the state is entitled and the financial and operational autonomy to which only private corporations are entitled. Because private corporations answer to their shareholders rather than the voters of a state, contractors like ACCS would operate in a special no-man's land beyond the reach of both federal legal process and ordinary democratic channels of political accountability.

The federal courts have taken guidance from the Supreme Court's decision in *Richardson v. McKnight*, 521 U.S. 399 (1997), which rejected the notion that a private contractor may enjoy immunity merely for performing a government function. Where, as here, the activity is more akin to private profiteering than a core government function such as operating a prison, a finding of immunity based on a purely functional approach would make even less sense than it would have in *Richardson*.

A decision extending immunity to ACCS would also place insufficient weight on the twin aims of the Eleventh Amendment—the protection of the states' treasuries and the preservation of their dignity. A decision that ACCS is immune could not be reconciled with precedent stressing that the impact on the state treasury is the most important factor and, in particular, that it is more important than any indicator of state control. And extending immunity under these circumstances—where the state itself has made a considered judgment that the entity should *not* share in its immunity—would disregard the very dignity interests that the Eleventh Amendment is designed to protect.

III. Finally, even if ACCS were an arm of the state, the district court's decision would still be wrong because the complaint seeks declaratory relief based on an ongoing violation of federal law, relief from which even the states themselves are not immune.

ARGUMENT

An "important limit to the principle of sovereign immunity is that it bars suits against States but not lesser entities." *Alden v. Maine*, 527 U.S. 706, 756 (1999). More precisely, "only States and arms of the State possess immunity from suits authorized by federal law." *Northern Ins. Co. of New York v. Chatham County, Ga.*, 126 S. Ct. 1689, 1693 (2006). Even counties, municipal corporations, and other political subdivisions of a state—that is, state-created government entities that may exercise a significant "slice of state power"—do not enjoy sovereign immunity because they are not the state itself. *Id.*

That "important limit" applies with special force in the case of a private entity, like ACCS, that seeks to cloak itself in the state's immunity while simultaneously retaining operational and financial independence from the state. *See Takle v. Univ. of Wis. Hosp.*, 402 F.3d 768, 771 (7th Cir. 2005). "[T]he question is whether the [entity] has the same kind of independent status as a county or is instead an arm of the State, and therefore 'one of the United States' within the meaning of the Eleventh Amendment." *Regents of the Univ. of Calif. v. Doe*, 519 U.S. 425, 429 n.5 (1997). As a private independent contractor that retains substantial autonomy from the state, receives no state funding, and bears sole liability for any judgments against it, ACCS's "independent status" demonstrates that it is decidedly not "one of the United States." To the contrary, ACCS is "self-sufficient: it generates its own revenues and pays its own debts" and so a suit against it "does not touch the concerns—the States' solvency and dignity—that underpin the Eleventh Amendment." *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 52 (1994).

I. ACCS IS NOT AN ARM OF THE STATE OF FLORIDA UNDER THIS COURT'S ELEVENTH AMENDMENT JURISPRUDENCE.

"[T]his Court uses four factors to determine whether an entity is an 'arm of the State' in carrying out a particular function: (1) how state law defines the entity; (2) what degree of control the State maintains over the entity; (3) where the entity derives its funds; and (4) who is responsible for judgments against the entity."

Manders v. Lee, 338 F.3d 1304, 1309 (11th Cir. 2003) (en banc). Those same factors must be analyzed even when a seemingly private entity asks to be declared an arm of the state. *See Shands*, 208 F.3d at 1311; *United States ex rel Barron v. Deloitte & Touche*, *L.L.P*., 381 F.3d 438, 444 (5th Cir. 2004). Here, all four factors weigh decisively against a finding of immunity: (1) Florida law defines ACCS as an "independent contractor" and provides that independent contractors may not share in the state's immunity; (2) consistent with ACCS's independent-contractor status, the state exercises no control over its day-to-day operations and may terminate its contract only "for cause," and only after providing ACCS with notice and an opportunity to cure any alleged breach; (3) ACCS derives no funding from the state; and (4) ACCS is solely responsible for any judgments against it.

A. Under Florida Law, ACCS Is An Independent Contractor That Is Not Entitled to Share in the State's Immunity.

"The first factor—how state law defines the entity—weighs heavily against assigning arm of the state status" to ACCS. *Abusaid v. Hillsborough County Bd. of County Comm'rs*, 405 F.3d 1298, 1305 (11th Cir. 2005). "[N]o indicia of state law—constitution, laws, judicial opinions, attorney general's opinions [or] other official statements—identify [ACCS] as something other than a purely private corporation. In particular, there is no state case law identifying [ACCS] as an arm of the state." *Barron*, 381 F.3d at 441. And unlike the defendants in *Shands*, ACCS is an "independent contractor" and not an "agent" of the state. 208 F.3d at

1311 (private fiscal intermediaries may be "protected by governmental immunity when they are clearly acting as agents of the state").

1. ***Florida Case Law.*** Under Florida law, ACCS cannot be both an independent contractor and an arm of the state. "To the contrary, an entity or business acting as an independent contractor of the government, and not as a true agent, logically cannot share in the full panorama of the government's immunity." *Dorse v. Armstrong World Indus., Inc.*, 513 So. 2d 1265, 1268 (Fla. 1987) (Barkett, J.). "It is well settled in Florida that an independent contractor . . . does not escape liability merely because his principal, for whatever reason, cannot be sued." *Id.* ACCS admits that its relationship with the State Attorneys offices with which it contracts is that of an independent contractor. DN 190 at 5.

2. ***Florida Statutes.*** Florida's statutes say the same thing. A Florida state attorney is authorized to "establish" a "bad check diversion program" in one of only two ways: either on its own or "through an independent contractor." Fla. Stat. § 832.08(1); *see* ER 160 at 2 ¶ 2 (purpose of contract is to "establish" a bad check diversion program to be "operated by ACCS"). Thus, ACCS, in its role in operating bad check diversion programs, is defined by Florida statute as an "independent contractor." *See Shands*, 208 F.3d at 1311 (for Eleventh Amendment purposes, "[t]he pertinent inquiry" is the defendant's "function or role in a particular context").

In *Shands*, by contrast, a state employee insurance program was created by a comprehensive statutory and regulatory scheme that specifically defined the defendant corporations as "agents" of the state and vested all "day-to-day management" with the State itself. *See* Fla. Admin. Code Ann. r. 60P-1.003(18) (defining plan administrator as an "agent"); Fla. Stat. § 110.123(3)(c) ("It is the intent of the Legislature that the Department of Management Services *shall be responsible for the contract management and day-to-day management* of the state employee health insurance program, including, but not limited to, employee enrollment, premium collection, payment to health care providers, and other administrative functions related to the program.") (emphasis added); *Shands*, 208 F.3d at 1309 (emphasizing that the state was "responsible for contract management and day-to-day management").

Consistent with Florida case law, when a Florida statute refers to a government contractor as an "independent contractor," it reflects a legislative judgment that the contractor should bear sole legal liability and is not an instrumentality of the state. *See, e.g.*, Fla. Stat. § 30.24(2)(b) ("Any company transporting a prisoner pursuant to this section shall be considered an independent contractor and shall be solely liable for the prisoner while the prisoner is in the custody of the company."). Conversely, when Florida's legislature refers to some contractors as "agents," it may reflect an intent to allow the contractor to share the state's immunity. *See, e.g.*, Fla. Stat. § 766.1115 (detailed provisions reflecting "the intent of the Legislature to ensure that health care professionals who contract to provide [free medical] services as agents of the state are provided sovereign immunity"). ACCS falls into the former category.

3. *The ACCS-State Attorney Contracts*. The independent contractor/agent distinction is also confirmed by the ACCS contracts themselves. That fact is significant because "independent contractor" and "agent" are not always mutually exclusive categories and the existence of an agency relationship, which turns on the principal's level of control, ultimately "depends upon the terms of the contract." *Stoll v. Knoll*, 694 So. 2d 701, 703 (Fla. 1997) (considering contract terms, policies incorporated by contract, and whether the principal has "acknowledge[d] that [it has] create[d] an agency relationship" and "acknowledged full financial responsibility for the [agent's] actions") (citing *National Sur. Corp. v. Windham*, 74 So. 2d 549, 550 (Fla. 1954)).

The ACCS contracts foreclose, in forceful terms, any possibility that ACCS is an agent of the state. The contracts provide that "*ACCS shall be an independent contractor* and as such, shall have no authority, expressed or implied, to bind the State Attorney, Judicial Circuit, or subdivision thereof, to any agreement, settlement, liability, or understanding whatsoever, and *agrees not to perform any acts as agent for same*." RE 160 at 9 (emphasis added); *see also* RE 220 at 11 (district court finding that "ACCS was an independent contractor"). Indeed, the contracts go even further, making clear that

> *Nothing within this agreement shall be construed as creating a relationship of . . . principal and agent*, between the Judicial Circuit and ACCS, or any of ACCS's agents or employees. ACCS assumes exclusive responsibility for the acts of its employees, or agents, as they relate to the services provided during the course and scope of their employment. ACCS, its agents and employees, s*hall not be entitled to any rights, status, and privileges* of Judicial Circuit employees while engaged in providing services.

RE 160 at 9 (emphasis added). In other words, for ACCS to act as an agent of, or enjoy the status or privileges of, the states attorneys would violate the contract.

As far as Florida law is concerned, ACCS's position that it is entitled to share in the state's immunity cannot be squared with the contracts' directives that ACCS may not "perform any acts as agent" for the state, that the contracts shall not be "construed as creating" a principal-agent relationship with the state, and—perhaps most significantly—that ACCS "shall not be entitled to any rights, status, and privileges" of the state attorney. *See Dorse*, 513 So. 2d at 1268 n.4 ("A person or entity may share in governmental immunity only when performing activities within the scope of a true agency relationship with a sovereign."); *Sierra v. Assoc'd Marine Insts., Inc.*, 850 So. 2d 582, 590 (Fla. App. 2 Dist. 2003) (For "private corporations that have contracted to furnish services to the state," "[t]heir entitlement, if any, to sovereign immunity protection turns on whether they can be deemed agents of the state under either common law or statute.").

Under these circumstances, "where an entity claims to share a state's sovereignty and the state has not clearly demarcated the entity as sharing its sovereignty"—here, Florida law says just the opposite—"there is great reason for caution. It would be every bit as much an affront to the state's dignity and fiscal interests were a federal court to find erroneously that an entity was an arm of the state, when the state did not structure the entity to share its sovereignty." *Fresenius Med. Care Cardiovascular Res., Inc. v. Puerto Rico and Carribean Cardiovascular Ctr. Corp.*, 322 F.3d 56, 63 (1st Cir. 2003).[5]

B. The State of Florida Does Not Control ACCS.

ACCS's status as an independent contractor is equally relevant to the second factor to be considered—"the degree of state control" over ACCS. *Abusaid*, 405 F.3d at 1306. As an independent contractor, ACCS enjoys a level of "financial and operational independence" that is inconsistent with arm-of-the-state status. *Vierling v. Celebrity Cruises, Inc.*, 339 F.3d 1309, 1315 (11th Cir. 2003) (citing *Hess*, 513 U.S. at 49). The key difference between an ordinary independent government contractor and a true agent of the state is "the degree of control

[5] This discussion is not meant to suggest that an entity designated by state law as an "agent" of the state is automatically, or even ordinarily, an arm of the state. Florida law does not endorse that proposition, and *Shands* itself steered clear of such a *per se* rule. 208 F.3d at 1311 ("This is not to say that an agent of the government, be it federal or state, is totally immune to liability . . ."). In any event, because ACCS is an independent contractor and not an agent, this case does not require the Court to explore the issue.

exercised by the principal." *Dorse*, 513 So. 2d at 1268 n.4. As the district court acknowledged, "ACCS is a private corporation not controlled by the State of Florida," and, specifically, "is not controlled by the [State Attorney's Office]." RE 220 at 8.

1. *Day-to-Day Management of the Program Rests With ACCS*. The level-of-control factor focuses on whether the state manages the entity's day-to-day operations. *Compare Abusaid*, 405 F.3d at 1307 ("Florida law . . . gives sheriffs great independence in their day-to-day operations"), *with Shands*, 208 F.3d at 1309, 1311 (defendants were agents of the state because, under state law, the state was "responsible . . . for day-to-day management of the state program" and "retain[ed] virtually complete control over the actions of its administrators."); *see also* Brief of Appellee Unisys Corp. in *Shands*, No. 99-10114, 1999 WL 33618124 (11th Cir., filed July 6, 1999) (describing complex statutory, regulatory, and contractual regime requiring substantial day-to-day state control).

ACCS, not the State, is responsible for the day-to-day management and control of the bad check collection programs. The programs are "operated by ACCS." RE 160 at 2. More to the point, the contracts specifically state that "ACCS shall provide daily management of all clerical and accounting," as well as collection, disbursement, and reporting functions, including the generation of all of the collection notices—in short, the entire operation of the programs. *Id.* at 5. The day-to-day role of the state attorneys, on the other hand, is either minimal or nonexistent. The contracts specify only that the state attorneys are to assist with "the planning and development" of the programs, not the carrying out or implementation of the programs' operations on a daily basis. *Id.* In short, as one court that examined ACCS's operations concluded:

> The [ACCS Bad Check] Restitution Program . . . is not an instrumentality of the [State] Attorney. The Restitution Program is a collection agency associated with the [State] Attorney's Office as an independent contractor. It was not created by the [State] Attorney's Office. [Once a check is referred to ACCS for collection, the State] Attorney has no further control over the Restitution Program's actions unless the Restitution Program's attempts at debt collection fail.
>
> The Restitution Program exists to facilitate the payment of bad checks. It operates under typical debt collection rules. While the State certainly has an interest in ensuring that checks are paid, the Restitution Program's function is more similar to private debt collection than a typical government function.

In re Reisen, 2004 WL 764628, at *5 (Bankr. N.D. Iowa 2004) (citations omitted).

2. *The State Cannot Terminate the Contract for Convenience.* The state's power to remove an entity's board or its officers is also generally a component of the degree-of-control analysis. *See Abusaid*, 405 F.3d at 1307 (fact that state could remove sheriffs only in limited circumstances, as opposed to a general right of removal, weighed against sovereign immunity); *Manders*, 338 F.3d at 1321. In *Shands*, the court noted that the "contractual provisions between the State and Unisys reserve[d] to the State the right to terminate the third party administrator contract *for convenience*." 208 F.3d at 1311 n.2 (emphasis added). Such termination-for-convenience clauses are common in government contracts. *See Harris Corp. v. Giesting & Assocs., Inc.*, 297 F.3d 1270, 1273-74 & n.1 (11th Cir. 2002) (citing *Stock Equip. Co. v. Tenn. Valley Auth.*, 906 F.2d 583, 586 n.3 (11th Cir. 1990)). They give the government the "absolute right" to terminate "*without cause*" and without suffering the usual financial consequences of breach of contract. *Id.* (emphasis added). In *Shands*, in fact, the state retained the ability to terminate the contract with as little as 24-hours notice. *See* Order, *Shands*, No. 98-cv-0087 (N.D. Fla. Jan. 5, 1999), at *7 (quoting contract language).

The ACCS contract, by contrast, gives either party the right to terminate the contract, but only "*with cause*" and subject to strict limitations. RE 160 at 7 (emphasis added). The state attorneys are precluded from terminating ACCS unless and until ACCS has been given (1) "written notice of the alleged breach," (2) an opportunity to "cure the alleged breach" within thirty days, and (3) thirty days from the date of a written notice of termination. *Id.* These provisions are just the opposite of the open-ended termination-for-convenience clause in *Shands*.

3. *ACCS Is An Autonomous Private Corporation*. Finally, and most obviously, the requisite degree of control is lacking here because "[ACCS] is an autonomous entity; the State neither appoints nor approves of [ACCS]'s board of directors or its corporate officers" and, "as a private corporation, [ACCS] has the independent authority to make internal decisions about compensation" and corporate governance. *Barron*, 381 F.3d at 441 (internal citations omitted). And unlike government agencies, which are accountable to the citizens of the state through their elected representatives and at the ballot box, ACCS is for-profit corporation accountable chiefly to its stockholders. *See Dodge v. Ford Motor Co.*, 170 N.W. 668, 664 (Mich. 1919) ("There should be no confusion [about] the duties which Mr. Ford conceives that . . . he owe[s] to the general public and the duties which in law he [owes to the stockholders]. A business corporation is organized and carried on primarily for the profit of the stockholders.").

C. ACCS Receives No State Funding.

The third factor, ACCS's source of funding, also weighs against immunity. "[ACCS] is a totally self-sufficient enterprise that receives no financial support from the state. All the money that [ACCS] needs to run its operations comes from revenues it generates. No tax money goes to [ACCS], and any judgment or claim against it is paid by [ACCS] alone." *Vierling*, 339 F.3d at 1315 (finding no immunity based primarily on the fact that defendant was "financially self-sufficient") (footnotes omitted); *compare Abusaid*, 405 F.3d at 1310 (funding factor "weighs decisively" against immunity where court could "find nothing in Florida law to suggest that the state contributes any money at all to its sheriffs, let alone the particular function" at issue), *with Shands*, 208 F.3d at 1311 (stressing that the state employee insurance program was "funded through annual legislative appropriations").

It would be particularly absurd to confer immunity on ACCS because its bad check restitution programs are not only self-sufficient, but actually *generate* funds for Florida's state attorneys. As the Supreme Court put it in *Hess*, it would "heighten 'a mystery of legal evolution'" for the courts "to spread an Eleventh Amendment cover over an [entity] that consumes no state revenues but contributes to the State's wealth." 513 U.S. at 51 n.21 (quoting Borchard, *Government Liability in Tort*, 34 Yale L.J. 1, 4 (1924)).

D. The State's Treasury Would Not Be Burdened by an Adverse Verdict.

1. ***ACCS Bears Exclusive Responsibility for Judgments Against It.*** For similar reasons, the final and most salient factor—"whether the state's treasury would be burdened by an adverse verdict against [ACCS]—also weighs decidedly against arm of the state status." *Abusaid*, 405 F.3d at 1312. Under its contract, ACCS bears "exclusive responsibility" for the legal consequences of its bad check collection activities. RE 160 at 9; *see also In re Reisen*, 2004 WL 764628, at *2 ("Any sanctions imposed for the . . . Bad Check Restitution Program's actions are the legal responsibility of American Corrective Counseling Services.").

Once again, the facts here are the opposite of those in *Shands*, which affirmed a ruling "that any judgment for [the plaintiff] would necessarily come from state funds, and thus that the State's Eleventh Amendment immunity" barred the lawsuit. 208 F.3d at 1310. *Shands* repeatedly emphasized the financial liability of the state. This Court held that "the dispositive question for Eleventh Amendment purposes" was one of financial liability: Did the suit assert claims for which the defendants alone "would be financially responsible"? 208 F.3d at 1308; *accord Vierling*, 339 F.3d at 1314. Because a judgment on the hospital's reimbursement claims necessarily "would implicate state funds" and, specifically, because payment for the services rendered was legally "an obligation of the State," *Shands* held that the defendants were immune, *id.* at 1313—a finding that is also fully consistent with the Supreme Court's decision in *Hess.* Here, however, like the defendant in *Hess*, ACCS is "financially self-sustaining: it generates its own revenues, and pays its own debts." 513 U.S. at 53. It is ACCS, not the state, that bears "potential legal liability." *Regents v. Doe*, 591 U.S. at 431.

2. *Indirect Burdens or Benefits Are Irrelevant.* It is no answer to say that the state, as a result of an adverse judgment, might lose its share of the profits derived from the ACCS programs or otherwise decide to fund the program itself. "The proper focus is not on the use of profits or surplus, but rather is on losses and debts. If the expenditures of the enterprise exceed receipts, is the State in fact obligated to bear and pay the resulting indebtedness of the enterprise? When the answer is ‘No’–both legally and practically–then the Eleventh Amendment’s core concern is not implicated.” *Hess*, 513 U.S. at 51.

This Court recently rejected an indirect-impact argument in *Abusaid*, where the defendant Sheriff argued that state funds would be “implicated indirectly” because “an adverse verdict would diminish the resources available . . . for law enforcement” and would require the state to “fill the gap.’” 405 F.3d at 1312. “[A] finding of Eleventh Amendment immunity in cases involving ‘indirect’ burdens on state treasuries,” however, “would require extending it to counties themselves,” because a judgment against a county is likely to have a “substantial, albeit indirect impact on the state treasury.” *Id.* The Eleventh Amendment is concerned with “judgments that *must* be paid out of a State’s treasury,” “not with any judgment that *may* indirectly affect a state’s finances.” *Id.* (internal citations omitted and emphasis added) (quoting *Hess*, 513 U.S. at 48); *accord Beentjes v. Placer County Air Pollution Control Dist.*, 397 F.3d 775, 780-81 (9th Cir. 2005). The same goes for arguments about the loss of benefits or profits that the state would otherwise receive. *See Takle*, 402 F.3d at 769-70 (“[T]he Supreme Court has rejected the state-benefit theory of sovereign immunity”). Such incidental financial consequences of liability would be permissible even if the defendants were unquestionably state officials. *See Edelman v. Jordan*, 415 U.S. 651, 668 (1974) (fact that state officials “would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct" does not bar suit under Eleventh Amendment; rather, "[s]uch an ancillary effect on the state treasury is a permissible and often an inevitable consequence" of liability).

Where, as here, all of the relevant factors point in a single direction, the analysis ends there. ACCS is not an arm of the State of Florida and is therefore not "one of the United States" within the meaning of the Eleventh Amendment.

II. THE COURT SHOULD NOT EXTEND *SHANDS* TO COVER ACCS.

A. Conferring Immunity on ACCS Would Create A Conflict With Every Other Circuit That Has Addressed Sovereign Immunity in the Privatization Context.

1. Despite the overwhelming differences between this case and *Shands*, the district court relied almost exclusively on *Shands* in reaching its conclusion that ACCS is an arm of the state. ACCS's brief in the district court argued that *Shands* stood for a broad new rule for analyzing the immunity of private contractors: "A private entity retained to administer a state program is entitled to Eleventh Amendment immunity if imposing liability on it for a 'function or role in a particular context' would 'interfere with the administration of the state . . . program.'" DN 154 at 10 (quoting *Shands*, 208 F.3d at 1311). This Court should reject the invitation to read *Shands* in this manner.

For starters, that is not what *Shands* says. "Interference with the administration" of a state program in the abstract is not a new test or a fifth factor to be added to the arm-of-the-state analysis, but a description of the potential result when the state, as opposed to the private entity, is required to bear financial liability. *Shands*, 208 F.3d at 1311-12 (contrasting a judgment that would "interefere with the administration" of the state health insurance program with a judgment for which only the defendants "would be financially responsible"). If ACCS's proposed rule were the law, there would have been no need for *Shands* to perform the standard multi-factor analysis and consider the "effect of the relief sought" to determine whether a judgment would be "an obligation of the State." 208 F.3d at 1311, 1313; *see also id. at* 1311 (stressing that contractors are not granted "blanket immunity" and that even "agents" of the state are not "totally immune"). Under ACCS's proposed rule, the fact that the contractors administered the state insurance program would itself have been sufficient to establish their status as arms of the state. Sovereign immunity, in other words, could extend to virtually all government contractors; there would be no clear stopping point.

2. Reading *Shands* as ACCS suggests—as an open invitation to shield private government contractors from liability regardless of how they are defined by state law, whether they are state-funded, or whether a judgment would implicate the state's treasury—would not only be at odds with *Shands* itself, but would bring

this circuit into conflict with decisions of the Supreme Court and every other circuit to have considered the arm-of-the-state status of private or quasi-private corporations. More specifically, a decision that ACCS is an arm of the state could not be reconciled with decisions of the First, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits—all of which have rejected similar claims, often in cases where the indicia of immunity were substantially stronger than they are here. *See United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 716-21 (10th Cir. 2006); *Takle*, 402 F.3d 768; *Barron*, 381 F.3d at 439-42; *United States ex rel. Ali v. Daniel, Mann, Johnson & Mendenhall* ("*DMJM*"), 355 F.3d 1140, 1147-48 (9th Cir. 2004); *Fresenius*, 322 F.3d at 68-75; *Brotherton v. Cleveland*, 173 F.3d 552, 560-61 (6th Cir. 1999).

These courts have recognized that conferring immunity on a private entity like ACCS—one that retains financial and operational autonomy but that performs a function in partnership with the government—would, as Judge Posner explained, turn privatization into a "farce":

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

Takle, 402 F.3d at 771 (privatized state university hospital whose board members were appointed by the governor, whose employees were still considered state employees and entitled to state pensions, and whose buildings were owned by the state, was not an arm of the state); *accord Sikkenga,* 472 F.3d at 721-22 (state university's privatized laboratory that was owned by the state but that maintained a self-sustaining national business was not an arm of the state); *Fresenius*, 322 F.3d at 64 (state-created public hospital corporation whose board consisted of public officials and gubernatorial appointee and which received significant, but diminishing, state funding was not an arm of the state).

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

3. In rejecting an approach that extends immunity whenever a private entity is administering a state program or performing a public function, several circuits have taken their cue from *Richardson v. McKnight*, which remains the Supreme Court's only discussion to date of the interaction between privatization and immunity. 521 U.S. 399 (1997) (declining to extend qualified immunity to guards employed by a private, for-profit corporation managing a state prison). *Richardson* "answered the immunity question . . . in the context," as here, "in which a private firm, systematically organized to assume a major lengthy administrative task (managing an institution) with limited direct supervision by the government, undertakes that task for profit and potentially in competition with other firms." *Id.* at 413. The Court explained that it "never has held that the mere performance of a governmental function could make the difference" between liability and immunity, "especially for a private person who performs a job without government supervision or direction." *Id.* at 408-09. Instead, the Court stressed "certain important differences that, from an immunity perspective, are critical," including, the "ordinary marketplace pressures" that are present when a "firm is systematically organized to perform a major administrative task for profit." *Id.* at 409. *Richardson* thus held that private prison guards "resemble those of other

private firms and differ from government employees," and therefore should not be entitled to immunity. *Id.* at 410.

Carrying this reasoning into arm-of-the-state analysis, the Fifth Circuit in *Barron* held that "performance of state functions alone is insufficient to create immunity," based in part on *Richardson*'s "willingness to allow disparate treatment for state and private employees performing the same functions." 381 F.3d at 443 n.7. And in *DMJM*, the Ninth Circuit similarly relied on *Richardson* when it "decline[d] the invitation to expand state sovereign immunity dramatically by extending it to corporate actors." 355 F.3d at 1147 (rejecting private contractor's request to extend the federal contractor defense into state sovereign immunity doctrine because, even for federal contractors, that defense "does not confer sovereign immunity on contractors") (citing *Boyle v. United Techs. Corp.*, 487 U.S. 500, 505 n.1 (1988)); *see also Fresenius*, 322 F.3d at 64 (citing *Richardson* as support for recognition of the *state*'s interest in the differential treatment of private and public entities performing the same function).

Because the activity here is more akin to private profiteering than a core government function such as operating a prison, a finding of immunity based on a functional approach would make even less sense than it would have in *Richardson*. *See In re Reisen*, 2004 WL 764628, at *5 (ACCS's "function is more similar to private debt collection than a typical government function"); *In re Simonini*, 272

B.R. 604, 614-18 (Bankr. W.D.N.C. 2002) (bad check restitution program "is debt collection in sheep's clothing"). ACCS's immunity defense, in other words, would fail even under a purely functional approach.

The analytical approach advocated by ACCS, then, is necessarily more sweeping than the one rejected by the Supreme Court in *Richardson*. If this Court were to confer immunity on ACCS, state sovereign immunity would be radically expanded to encompass a wide range of private corporations that contract with the state—everything from private prison operators or privatized public hospitals, to, as here, profitable private business partnerships that consume no tax dollars.

B. Conferring Immunity on ACCS Would Disregard the Importance of the Impact on the State's Treasury.

A ruling that ACCS is an arm of the State of Florida would also create a direct conflict with other circuits and the Supreme Court concerning the importance of the impact on the state treasury in Eleventh Amendment analysis. Perhaps most obviously, such a ruling would squarely conflict with the Fifth Circuit's decision in *Barron*. The facts there were very similar to *Shands*—the suit alleged that NHIC, an insurance company that processed claims and distributed Medicaid funds for the State of Texas, had acquiesced in fraudulent billing practices. The court found the state-treasury factor to be "controlling." 381 F.3d 440; *accord Shands*, 208 F.3d at 1311-12 (financial responsibility was the "dispositive question"). But in *Barron* that factor pointed in the opposite direction because the state was "neither directly responsible for a judgment, nor would it indemnify the defendant. The contract between NHIC and the State of Texas resolve[d] the matter because it dictates that NHIC is to pay its own judgments and indemnify the State from any liability." 381 F.3d at 440. The Fifth Circuit distinguished *Shands*: "[I]n *Shands*, Florida would have been legally liable for any judgment rendered. By contrast, NHIC has not shown that Texas would bear any legal liability for any damages assessed against NHIC in this case." 381 F.3d at 444. That same distinction applies here.

Similarly, in *DMJM*, the Ninth Circuit considered whether a construction management firm under contract with California State University was immune from liability as "an agent of the state." 355 F.3d at 1144. In reversing the district court, *DMJM* held, in accord with *Shands* and *Barron*, that "whether a money judgment would be satisfied out of state funds is the most important factor," and that the private firm was not immune because there was "no evidence that [the state university] would have a legal obligation to pay any judgment against [the firm]." *Id.* (citing *Regents v. Doe*, 519 U.S. at 432); *accord Sikkenga*, 472 F.3d at 718 ("First and foremost, it is clear that the State of Utah's treasury is not legally liable for any judgment against ARUP."); *Fresenius*, 322 F.3d 56 ("[T]he Commonwealth has left itself free to provide or not provide funds to PRCCCC as it sees fit, and it has not come close to obligating itself to assume the burden of paying PRCCCC's debt."); *Takle*, 402 F.3d at 769 (state's sovereignty would be impaired if hospital were state-financed, "so that any judgment against it would be paid out of state funds," but hospital was not so financed); *Ormsby v. C.O.F. Training Services, Inc.*, 194 F. Supp. 2d 1177 (D. Kan. 2002) (rejecting sovereign immunity claim of a government contractor that operated a home for the developmentally disabled where the contractor, "instead of the state, [was] legally responsible for payment"); *Mullin v. P & R Educational Services, Inc.*, 942 F. Supp. 110, 114 (E.D.N.Y. 1996) (rejecting sovereign immunity claim of an "independent contractor who, pursuant to [state law], has contracted with the [state] to offer a Drinking and Driving Program" where evidence did not show that program was "funded by the State" or that "any judgment against P & R would be paid out of the State's treasury"). None of these decisions can be squared with a finding of immunity here.

To be sure, this Court said in *Manders* that a drain on the state treasury is not "a per se condition of Eleventh Amendment immunity." 338 F.3d at 1327. But *Manders*, of course, did not overrule the Supreme Court's decisions in *Hess*. And under *Hess*, to the extent that "indicators of immunity point in different directions, the Eleventh Amendment's twin reasons for being"—namely, protection of the state's treasury and dignity—are "our prime guide." *Hess*, 513 U.S. at 404. *Hess* held that, because "the impetus for the Eleventh Amendment" was "the prevention of federal-court judgments that must be paid out of a State's treasury," the "vulnerability of the State's purse" is properly regarded as "the most salient factor in Eleventh Amendment determinations." 513 US. at 48. This Court, too, has recognized that the impact on the state's treasury is the most important factor. *See Shands*, 208 F.3d at 1308; *Vierling*, 339 F.3d at 1315 ("Finally, and *most importantly*, the [defendant] is a totally self-sufficient enterprise that receives no financial support from the state.") (emphasis added). Other circuits have also been emphatic on this score.[6] To hold that a private corporation is entitled to arm-of-state status despite a complete lack of state funding or financial responsibility would thus run counter to the weight of authority both within and outside this circuit.

Furthermore, *Hess* specifically rejected the argument that state control, as opposed to the impact on the state treasury, can ever be the dispositive factor. As

[6] *See, e.g., Sikkenga*, 472 F.3d at 721 (analysis of the Eleventh Amendment's twin justifications under *Hess* does not permit a finding that a self-sustaining business is an arm of the state); *Vogt v. Board of Comm'rs*, 294 F.3d 684, 689 (5th Cir. 2002) ("most significant factor in assessing an entity's status is whether a judgment will be paid with state funds"); *Streit v. County of Los Angeles*, 236 F.3d 552, 567 (9th Cir. 2001) (whether the state is liable for a judgment "is the most important factor in identifying an arm of the state"); *Sonnenfeld v. Denver*, 100 F.3d 744, 749 (10th Cir. 1996) ("The most important factor in determining whether a governmental entity is entitled to Eleventh Amendment immunity is whether a judgment against it would be paid from the state treasury."); *Gray v. Laws*, 51 F.3d 426, 433 (4th Cir. 1995) (under *Hess*, the effect of a suit on the state treasury "is largely, if not wholly, dispositive of entitlement to Eleventh Amendment immunity").

the Supreme Court put it, "rendering control dispositive does not home in on the impetus for the Eleventh Amendment: the prevention of federal-court judgments that must be paid out of a State's treasury." 513 U.S. 48; *see also Regents v. Doe*, 519 U.S. at 430 (state's responsibility for adverse judgment "is of considerable importance to *any* evaluation of the relationship between the state and the entity or individual being sued") (emphasis added). To rely on control to support a finding of immunity here would be a stretch because, as discussed in detail above, the state lacks substantial control over ACCS. But to the extent that ACCS argues that the state's minimal ability to control its contractual relationship with ACCS trumps the lack of a financial impact on the state, such an argument would run headlong into *Hess*.

C. Conferring Immunity on ACCS Would Interfere With the State's Dignity Interest in Its Privatization Policy.

Finally, recognizing ACCS as an arm of the state would be in tension with the second of the Eleventh Amendment's "twin reasons for being"—protection of the dignity or integrity of the state. *Hess*, 513 U.S. at 47. "The federal courts' consideration of status and autonomy under state law preserves the state's dignity by making its chosen structures controlling." *Carter v. Philadelphia*, 181 F.3d 339, 355 n.53 (3d Cir. 1999). Extending sovereign immunity to independent private contractors like ACCS, when the state intends them to remain independent, thus creates a danger that federal courts will disregard the very dignity interests of the states that the Eleventh Amendment is designed to protect.

When a state authorizes the privatization of a particular function but does not simultaneously extend its immunity, it makes a considered judgment that the function might be better or more efficiently performed by an entity that is subject to market pressures and ordinary legal rules—an entity, in other words, that does *not* share its governmental status and privileges. *See Richardson*, 521 U.S. at 409-412 (discussing rationales and economics of privatization). As the First Circuit has put it, "[n]ot all entities created by states are meant to share state sovereignty. Some entities may be part of an effort at privatization, representing an assessment by the state that the private sector may perform a function better than the state." *Fresenius*, 322 F.3d at 64; *see Sikkenga*, 472 F.3d at 721-22; *Takle*, 402 F.3d at 771.

Conferring immunity on such an entity can have significant consequences that may be undesirable to the state and contrary to its privatization policy. Among these consequences is "[a] conclusion that the entity is beyond the control of privately enforced Article I legislation enacted by the Congress," such as the FDCPA or federal employment law. *Fresenius*, 322 F.3d at 64. Sovereign immunity necessarily entails the conclusion that the employees of the entity may not enforce the Fair Labor Standards Act, Title I of the Americans with Disabilities

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

III. EVEN ASSUMING ACCS IS AN ARM OF THE STATE, THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' CLAIMS FOR DECLARATORY RELIEF.

Even if ACCS were an arm of the State of Florida, the district court's decision would still have been wrong because it failed to consider whether any part of the suit should go forward under *Ex Parte Young*, 209 U.S. 123, 162 (1908). "In determining whether the doctrine of *Ex Parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (internal quotation marks and alterations omitted); *see MCI Telecomm. Corp. v. BellSouth Telecomm. Inc.*, 298 F.3d 1269, 1272 (11th Cir. 2002). That "straightforward inquiry" is satisfied here: Plaintiffs have sued not only ACCS, but also individual employees of ACCS, and seek not only damages, but a declaration that ACCS's current and ongoing collection practices violate federal law. RE 39 at 25. Even if the district court were correct that ACCS is entitled to state sovereign immunity, it should still have permitted the suit to go forward as to plaintiffs' request for declaratory relief.

CONCLUSION

Because neither ACCS nor its officers or employees are arms of the State of Florida, the district court's decision should be reversed and remanded.

Respectfully submitted,

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February 28, 2007

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

I hereby certify that my word processing program, Microsoft Word, counted 10,615 words in the foregoing brief, exclusive of the portions excluded by Rule 32(a)(7)(B)(iii).

February 28, 2007

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CERTIFICATE OF SERVICE

I hereby certify that on this date I am causing two copies of the foregoing brief to be served by first-class mail, postage pre-paid, on the following counsel:

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