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

REPLY BRIEF FOR APPELLANTS

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REPLY BRIEF FOR APPELLANTS

In this appeal, a private debt collection company asks the Court to take the extraordinary step of immunizing it from suit in federal court on the theory that it is an arm of the State of Florida when it does business under contract with Florida prosecutors. But that company, American Corrective Counseling Services (ACCS), does not deny that it conducts its collection operations entirely in California and that it has no offices in Florida, and it does not attempt to show that it has any greater connection with Florida than with the seventeen other states with which it does business. And because ACCS's ties to the State of Florida are no more extensive than those of a wide range of contractors that perform various tasks for the government, a ruling in favor of ACCS would have the unprecedented effect of sweeping numerous private corporations under the cloak of state sovereign immunity.

Although one would not know it from ACCS's brief, the very contracts on which ACCS premises its entitlement to sovereign immunity compel just the opposite conclusion: ACCS not only "assumes exclusive responsibility" for its acts, but "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 (emphasis added)). That contract provision, standing

alone, is reason enough to reject ACCS's claim that it is "entitled to [the] status" of arm of the state.

Shifting gears from its position below, ACCS now attempts to satisfy this Court's four-factor test for determining whether an entity is an arm of the state. ACCS Br. 30-31. Despite ACCS's best efforts, however, the four factors all point decisively away from immunity. First, the company argues that it is defined as an "agent" of the state under Florida law, but that argument fails in the face of unequivocal contract language to the contrary. Second, it argues that it is controlled by the state, but it is forced to concede that it retains control over all day-to-day operations, and the other indicia of control that it cites are both commonplace and minimal. Third, although ACCS asserts for the first time that it is state-funded, in fact, it is a self-sufficient enterprise that receives no financial support from the state. And finally, ACCS's attempt to use the contracts' indemnification clause to show that a judgment would burden the state treasury fails both on its own terms and because the Supreme Court and this Court have held that the possibility of indemnification is irrelevant to Eleventh Amendment analysis.

I. THIS SUIT CHALLENGES ACCS'S COLLECTION PRACTICES, NOT STATE LAW OR POLICY.

Before explaining why ACCS's plea for Eleventh Amendment immunity fails under this Court's traditional four-factor test, it is necessary to confront the

theme that runs throughout ACCS's brief—an attempt to recast this lawsuit as "in substance" an attack on state law and state policy, rather than a challenge to ACCS's collection practices. ACCS Br. 15-17, 19-21, 25-27, 49-53. ACCS asserts that although the complaint "posits that ACCS has violated" federal and state fair debt collection law, its "allegations of wrongdoing make it clear that [the] lawsuit is actually an indictment of the State Attorney's policies and practices." ACCS Br. 19. That argument is both wrong and irrelevant.

In fact, this suit squarely attacks ACCS's corporate practices in collecting debts from consumers, not the Florida statutory scheme authorizing legitimate bad check restitution programs or the policies of Florida prosecutors. The collection practices challenged in this lawsuit were designed and developed by ACCS and its founder, defendant Don Mealing (DN 160 at 4), and are part of a package that ACCS markets to prosecutors throughout the nation (DN 160-5 at 2-3). Florida consumers targeted by the program are contacted not by the prosecutors' offices, but by ACCS collection employees in California, who regularly identify themselves to consumers using pseudonyms. (DN 190 at 2-3). The challenged practices are carried out entirely at ACCS's central office in California and do not differ in substance from state to state or prosecutor to prosecutor. Indeed, the record reveals that ACCS's contracts with different prosecutors are often virtually indistinguishable. (RE 160).

Nothing prevents ACCS from complying with both the Fair Debt Collection Practices Act *and* its obligations under its contracts and state law. Federal law requires ACCS to refrain from harrassing, oppresive, or abusive conduct, 15 U.S.C. § 1692d, but nothing in state law or policy requires ACCS to violate that obligation. Federal law requires ACCS to refrain from using false or deceptive misrepresentations or threats, *id.* § 1692e, to refrain from collecting fees not authorized by law, *id.* § 1692f(1), and to provide consumers with notice of their rights, *id.* § 1692g, but neither state law nor state policy dictates otherwise.

ACCS's attempt to recharacterize this lawsuit as a challenge to state policy is especially astonishing because, in several respects, ACCS's practices actually *violate* the limitations set forth by both state law and its own contracts. For example, as pointed out in our opening brief (at 8), the collection fees demanded by ACCS greatly exceed the maximum limits set by state statute. And, remarkably, a representative of the prosecutors' office testified that he was not aware of any authority for the $25 fee that ACCS charges consumers for payments made in installments. (DN 165 at 42). Despite its obligations, ACCS regularly sets its own fees as a matter of corporate policy, based on its own prerogatives. The recent amendment to the Fair Debt Collection Practices Act confirms that companies like ACCS must comply with the full panoply of the statute's requirements when, among other things, they fail to comply with state law, or with

the terms of their contracts, or when they fail to provide consumers with adequate notice of their right to dispute the validity of the debt. 15 U.S.C. § 1692p.[1]

In any event, ACCS's characterization of the suit as an attack on state policy is not only wrong, but is also irrelevant. The Eleventh Amendment does not confer blanket immunity on private entities that are involved in implementing state policy, just as it does not shield many governmental entities that wield "a slice of state power." *Northern Ins. Co. of New York v. Chatham County, Ga.*, 126 S.Ct. 1689, 1693 (2006). Rather, the question is whether, based on a set of "indicators of immunity or the absence thereof," *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994), the entity "has the same kind of independent status as a county

[1]Although ACCS refers to the operation of its programs as a core state function, courts have consistently seen through such attempts to equate bad check collection operations, including those operated by ACCS, with traditional state criminal enforcement. *See, e.g., In re Reisen*, 2004 WL 764628, at * 5 (Bankr. N.D. Iowa 2004) (ACCS-run bad check program "is not an instrumentality of the Dubuque County Attorney," but "a collection agency" that "exists to facilitate the payment of bad checks" and "operates under typical debt collection rules."); *In re Simonini*, 272 B.R. 604, 614-18 (Bankr. W.D.N.C. 2002) ("The [Bad Check Diversion Unit's] prosecution is debt collection in sheep's clothing."); *In re Baumblit*, 15 Fed. Appx. 30 (2d Cir. 2001) (program "attempts to collect payment of bad checks through the threat of prosecution . . . The mere fact that the BCU is a collection program associated with a local district attorneys' office does not make its actions a criminal proceeding."); *Liles v. Am. Corrective Counseling Servs.*, 131 F. Supp. 2d 1114 (S.D. Iowa 2001) (ACCS is "not an officer or employee" of "any State," but "a private contractor assisting local prosecutors"); *Gradisher v. Check Enforcement Unit, Inc.*, 133 F. Supp. 2d 988 (W.D. Mich. 2001); *Del Campo v. Am. Corrective Counseling Servs.*, 2007 WL 470262, at *3 (N.D. Cal. 2007) ("ACCS is a private organization with a government contract; it is not a government agency or employee.").

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 demonstrated below and in our opening brief, ACCS is not an arm of the state.

II. ACCS HAS FAILED TO DEMONSTRATE THAT IT IS AN ARM OF THE STATE OF FLORIDA UNDER THIS COURT'S FOUR-FACTOR TEST.

A. ACCS Is Not An Agent of the State of Florida.

Because Eleventh Amendment analysis is often "dependent on the law of the state," this case calls for a "close review of Florida's statutes and case law." *Abusaid v. Hillsborough County Bd. of County Com'rs*, 405 F.3d 1298, 1303-05 (11th Cir. 2005). Yet ACCS offers only a cursory discussion of state law (at 31-33) that is notable more for what it omits than for what it says. Specifically, ACCS does not deny that:

- Florida statutes refer to contractors as "independent contractors" to indicate that they function independently of the state and shall bear their own liability, whereas Florida statutes refer to entities as "agents" when the legislature intends them to enjoy sovereign immunity. *Compare, e.g.*, Fla. Stat. § 30.24(2)(b) *with* Fla. Stat. § 766.1115.

- ACCS is defined as an "independent contractor," not only by its contracts, but by the relevant Florida statute. Fla. Stat. § 832.08(1).
- Under Florida law, "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).
- ACCS is expressly precluded by contract from "perform[ing] any acts as agent" for the State Attorney, Judicial Circuit, or any subdivision thereof. (RE 160 at 9).

Despite contract language to the contrary, ACCS argues that it is an agent of the State of Florida under traditional state-law agency principles. ACCS seeks to override the contract language by relying on Florida cases holding that where the "actual practice" of the parties and level of control establishes an agency relationship, the fact that the contract uses an "independent contractor" label is always not dispositive. ACCS Br. 32-33; s*ee, e.g., Keith v. News & Sun Sentinel Co.*, 667 So. 2d 167, 171 (Fla. 1995) (holding that Florida courts "should initially look to the agreement between the parties, if there is one, and honor that agreement, unless other provisions of the agreement, or the parties' actual practice, demonstrate that it is not a valid indicator of status."). As explained below, the State of Florida does not exercise control over ACCS in a manner consistent with a

true agency relationship. But even assuming ACCS's account of the facts, its argument is unavailing.

First, ACCS concedes (at 32) that to qualify as an agent it must satisfy the "essential elements of an agency relationship" under Florida law—which include an "acknowledgment by the principal that the agent will act for him or her" and "the agent's acceptance of the undertaking." But ACCS never attempts to explain how these "essential elements" could be satisfied here. Because the State of Florida has not acknowledged that ACCS may act as its agent and because ACCS has not accepted such an undertaking, ACCS is not an agent of the State of Florida. *Banco Ficohsa v. Aseguradora Hondurena, S.A.*, 937 So. 2d 161, 165 (Fla. Dist. Ct. App. 2006).

Second, the contracts do not merely label ACCS as an independent contractor. Rather, they expressly *forbid* ACCS from "perform[ing] any acts as an agent." And, even more importantly, they foreclose—in language that ACCS simply ignores—any claim that ACCS is an agent of the state, or that the state bears any responsibility for ACCS's acts, or that ACCS is entitled to the "status" of the state:

- "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 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's argument fails to account for these provisions. ACCS produces no cases in which courts have overrriden such unequivocal contract language to find an agency relationship—let alone in a case in which a private corporation makes the extraordinary claim that it is an agent of the state entitled to sovereign immunity. In fact, where contracts contain similar language, Florida courts reject attempts to demonstrate that a party has a status that is "contrary to the plain language of the contract." *Metric Engineering, Inc. v. Gonzalez*, 707 So. 2d 354, 355 (Fla. Dist. Ct. App. 1998) (where contract provided that "Nothing in this agreement shall be construed to make any party hereunder the agent, employee, partner, or joint venturer of the other," rejecting suggestion to the contrary because "the contract is clear and unequivocal"); *Anthony Distributors, Inc. v. Miller Brewing Co.*, 882 F. Supp. 1024, 1031 (M.D. Fla. 1995) (applying Florida law and according dispositive weight to contract provision stating that parties were "not joint venturers or partners, and neither may act as the agent, employee, or fiduciary of the other").

The federal courts, moreover, have long held that when a private government contractor seeks to "cloak itself in the mantle of [the government] and thereby gain governmental immunity with respect to third parties, the relevant contract terms assume an enhanced significance." *United States v. Penn. Envtl. Hearing Bd.*, 584 F.2d 1273, 1278 (3d Cir. 1978). That is particularly so where, as here, "the language of the contracting parties is unmistakably clear" and "was specifically intended to establish the status of one in relation to the other." *Id.* The Supreme Court's decision in *Powell v. United States Cartridge Co.*, 339 U.S. 497 (1950), is instructive. There, a private company under contract with the federal government claimed that it was a government agent, even though its contract—much like the ACCS contracts —stated that it was "an independent contractor and in no wise an agent of the Government." *Id.* at 505. Relying on the contract language, the Court rejected the suggestion that any other aspect of the contractual relationship was compelling enough to "deprive these statements of their ordinary meaning." *Id.*

Under this Court's precedent in the sovereign immunity context, such contract language controls. In *Whitaker v. Harvell-Kilgore Corp*., the old Fifth Circuit held that a federal government contractor was not entitled to sovereign immunity where, as in *Powell*, the contract contained a provision that the company was an independent contractor and not an agent of the government. 418 F.2d 1010,

1014 (5th Cir. 1969). The Court also rejected a second company's claim to immunity because it was likewise an "independent contractor, separate from the sovereign." *Id.* at 1015; *see also Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736, 740 (11th Cir. 1985) (citing *Whitaker* as precedent and explaining that "a firm must be more than simply an independent contractor to be regarded as the government's agent"), *abrogated on other grounds by Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988); *Amtreco, Inc. v. O.H. Materials, Inc.*, 802 F. Supp. 443, 446 (M.D. Ga. 1992) (rejecting private contractor's sovereign immunity defense under *Shaw* because "the contract . . . indicates that the relationship is not one of principal/agent").

Because the contract language here forecloses the conclusion that ACCS is an agent of the state, this case is fundamentally different from *Shands Teaching Hospital and Clinics, Inc. v. Beech Street Corp.*, 208 F.3d 1308, 1311 (11th Cir. 2000) (private corporations may enjoy immunity "when they are clearly acting as agents of the state"). Accordingly, this case does not require the Court to explore thorny questions, left unresolved by *Shands*, about the extent to which contractors that qualify as agents are entitled to Eleventh Amendment immunity. *Id.* at 1311 (cautioning against "blanket immunity" for agents). As a matter of both state and federal law, ACCS is not an agent of the state.

B. The State of Florida Does Not Control ACCS.

Our opening brief explained that ACCS's bad check collection programs are "operated by" ACCS; that all of the program's collection operations are conducted out of a single ACCS office in San Clemente, California; that ACCS maintains no offices in Florida; that all checks are mailed to California for collection by ACCS; and that all contact between the program and consumers is made by ACCS employees in California. Pl's Br. 3-4, 6-7, 24-25. ACCS does not dispute these facts. To the contrary, ACCS is forced to concede that it is ACCS–and not the State of Florida–that is responsible for both the operation and all day-to-day management of its bad check collection programs. ACCS Br. 34.

That concession is critical, because it demonstrates once again why this case falls on the opposite side of any sensible dividing line between the state health insurance plan servicing agents in *Shands* and the majority of private government contractors, who handle a wide array of tasks under varying levels of supervision and accountability. The critical difference is that in *Shands* it was the State of Florida itself, and not its private servicing agents, that was directly "responsible . . . for day-to-day management of the state program" and that "retain[ed] virtually complete control over the actions of its administrators." 208 F.3d at 1309, 1311.

This Court also recognized the importance of that distinction in *Abusaid*, which held that the state-control factor pointed away from sovereign immunity for

Florida sheriffs because Florida law gives them "great independence in their day-to-day operations." 405 F.3d at 1307. The areas of day-to-day independence specifically discussed in *Abusaid*–"the purchase of supplies and equipment, selection of personnel, and the hiring, firing and setting of salaries of such personnel," 405 F.3d at 1307—are all areas in which ACCS maintains independence from the state under its contract. (RE 160 at 9). All employees of the collection program are hired, fired, and controlled exclusively by ACCS (DN 69 at 21 (Hasney Depo.)), with the prosecutors' role limited to making only "suggestions or recommendations" to ACCS in "general terms." (DN 91 at 42-43 (Pearlman Depo.)). As in *Abusaid*, the company has "absolute control over the selection and retention of" its personnel and, accordingly, "as to these day-to-day operations, the state has retained no control over" ACCS. 405 F.3d at 1307.

Rather than address the issue of day-to-day control, ACCS seizes on other indicia of control mentioned in *Shands*—that the contract there gave the state the right to terminate the contract for convenience, inspect records and work, approve subcontracts, and access files. ACCS Br. 35. These are commonplace aspects of government contracts. To be sure, governments always retain *some* level of control under contracts with private corporations—they are invariably able to monitor the contractor's performance or remove the contractor—just as all states retain some level of control over counties, municipal corporations, quasi-

governmental corporations, dual-state entities, and other entities that do not enjoy Eleventh Amendment immunity. But ACCS does not go so far as to claim that *all* government contractors are arms of the state and, in any event, such an argument would find no support in existing law. Rather, the question is whether ACCS retains 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). And notably, the first factor cited by ACCS–the ability of the state to terminate the contract–actually points *away* from immunity in this case. As explained in our opening brief (at 25-26), the provisions authorizing the prosecutors to terminate their contracts with ACCS only "with cause" are just the opposite of the open-ended "for convenience" provision in *Shands*. ACCS does not challenge the importance of that distinction, which has been recognized by this Court in the context of government contract disputes, but instead asserts that the nature of the state's authority to terminate or remove is itself not a "significant" factor. ACCS Br. 35 n.8.

Although attempts by private corporations to invoke state sovereign immunity have been few and far between—and as demonstrated in our opening brief (at 32-41), have been nearly universally rejected—this Court can take guidance from qualified-immunity cases, in which courts have analyzed the level of governmental control over private contractors. *See Richardson v. McKnight*,

521 U.S. 399 (1997). In *Hinson v. Edmond*, for example, this Court rejected the immunity defense of a private company that had been hired by a sheriff to provide medical services in a jail and thus was, like ACCS, "systematically organized to perform a major administrative task for profit." 192 F.3d 1342, 1346 (11th Cir. 1999). *Hinson* concluded that the company "performed its task with limited direct supervision and control by the government" based on factors similar to those present here. *Id.* Although a government employee was designated to "act as a liaison" with the company, the liaison's responsibility was only to "help ensure" that the company was performing its contract: The liaison "did not supervise" the company, "hire or fire [its] employees," or exercise any authority to change its corporate policies, and the "Sheriff did not undertake to supervise or train anyone working for [the company]." *Id.*

Similarly, the contracts here specify that the state attorneys will name a "liaison" to ACCS, but that they have no authority over ACCS employees. (RE 160 at 4). More importantly, just as in *Hinson*, neither the liaison nor anyone else in the state attorney's office "supervise[s]" the company or its employees. Indeed, Janeen Diebler, the person designated as the Liaison between the 20th Circuit State Attorney's Office and ACCS, was unable to name *any* respect in which the State Attorney's Office supervises ACCS. (DN 81 at 27 (Diebler Depo.)). This

showing falls far short of the "virtually complete control" retained by the state in *Shands*. 208 F.3d at 1311.[1]

C. The State of Florida Does Not Fund ACCS.

Although it said nothing of the sort in the court below (DN 154 at 10-12), ACCS now argues that its operations are "[f]ully [f]unded" by the State of Florida. ACCS Br. 40-41. ACCS concedes that, unlike the servicing agents in *Shands*, none of its operations are "funded through legislative appropriations," 208 F.3d at 1311, or, for that matter, by any other stream of financing that runs from the state's coffers to ACCS. Rather, ACCS's position is that it is "funded" by the state because the money runs in the *opposite* direction–that is, because ACCS collects fees from consumers under its contract and, like any collection agency, derives its

[1] In its statement of the case (at 8), ACCS purports to "[s]et" the record "[s]traight" with respect to the prosecutors' level of control over ACCS. But instead of addressing the extent to which state employees do or do not exercise management or supervision of ACCS, ACCS focuses on the procedures in the prosecutors' offices *before* checks are sent to ACCS for collection and *after* collection attempts have been exhausted by ACCS. And even in this respect, ACCS misstates the record. Without quoting it, ACCS cites the deposition testimony of an official in the prosecutor's office, Gary O'Nolan, for the proposition that attorneys screen all checks before they are sent to ACCS for collection. But that is not what O'Nolan's testimony says. To the contrary, O'Nolan testified that attorneys in the prosecutor's office generally do not review the cases—for example, to determine whether the check writer had an intent to defraud—until *after* materials are returned from ACCS because collection attempts have been exhausted. (DN 162 at 23). The exception is a small category of checks that are "not sent to ACCS" at all; a check may fall into this category if "it is a large check" for an amount over $1,000. (*Id.* at 23; *see id.* at 26 ("There's two times that it goes to the attorney for intake, if it doesn't go to ACCS or when it comes back.")).

income from a portion of what it collects. But ACCS does not deny that it bears all expenses of the program's operations, including "furnish[ing] all personnel, supplies, equipment, furniture, insurance, utilities, and facilities necessary for its business operation." (RE 160 at 9). Nor does ACCS deny that the money collected is deposited into a commercial bank account maintained by ACCS, from which ACCS itself deducts its monthly share. (DN 190 at 39). Indeed, ACCS concedes that the program, by design, is operated "at *no expense to the taxpayer*." ACCS Br. 40 (emphasis added). As such, ACCS's position cannot be reconciled with the Supreme Court's observation in *Hess* that it would be absurd "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.

The only authority that ACCS cites to support its novel state-funding argument is *Miccosukee Tribe of Indians of Florida v. Florida State Athletic Commission*, 226 F.3d 1226, 1233 (11th Cir. 2000), but that case actually undermines ACCS's argument. There, the plaintiff argued that the Florida State Athletic Commission is "fiscally independent because it does not rely upon state funds to support its operations" but instead "raises its own funds to pay its expenses." *Id.* But the Court held that the Commission is an arm of the state *despite* that fact, not *because* of it: "Even though the Commission may collect money to pay for its own expenses, the Commission is still an arm of the state

because the state controls its fiscal life." *Id.* *Miccosukee* reached this conclusion on the basis of four factors: (1) the "Florida legislature appropriates the funds to carry out the Commission's functions," (2) the government submitted detailed reports on the Commission to the legislature, (3) the Commission was required "to send all moneys collected to the State Treasurer," and the "Treasurer, and not the Commission, pays the Commission's expenses," and (4) "if the Commission's trust fund exceeds $250,000, the excess money goes to the state's general revenue fund." *Id.*

Every one of those factors cuts against immunity here: The legislature appropriates no funds to ACCS; no reports are submitted to the legislature for approval; money goes directly into ACCS's bank account and ACCS pays its own expenses directly; and ACCS gets to keep its profits. (RE 160 at 4-5; DN 190 at 39). Indeed, the last point encapsulates ACCS's very reason for being: It is an autonomous for-profit corporation answerable to its shareholders. In no way does the state control ACCS's "fiscal life."

D. Florida's Treasury Would Not Be Burdened By An Adverse Judgment.

1. Before addressing the state-treasury factor, ACCS hedges its bets. It points out that a drain on the treasury is not a *per se* condition of Eleventh Amendment immunity in all cases. ACCS Br. 42-43. But, as we explained in our opening brief (at 37-41), the Supreme Court and the lower federal courts have

consistently emphasized that this factor is the most important. And it is particularly critical in cases involving private entities: Both this Court and the Fifth Circuit have correctly stressed the state's financial responsibility as the "dispositive question" in such cases. *Shands*, 208 F.3d at 1311-12; *see United States ex rel Barron v. Deloitte & Touche, LLP*, 381 F.3d 438, 440 (9th Cir. 2004) (describing state-treasury factor as "controlling"). To disregard the importance of this factor and confer immunity on ACCS would create a direct conflict among the circuits by eviscerating the distinction drawn by the Fifth Circuit in *Barron*—that immunity was unwarranted under circumstances that were otherwise factually similar to *Shands* because the private corporation, and not the state, was directly responsible for a judgment against the company. *Barron*, 381 F.3d at 440 (distinguishing *Shands*); *see also United States ex rel. Ali v. Daniel, Mann, Johnson Mendenhall*, 355 F.3d 1140, 1144 (9th Cir. 2004); *Fresenius Med. Care Cardiovascular Res., Inc. v. Puerto Rico and Carribean Cardiovascular Ctr. Corp.*, 322 F.3d 56, 63 (1st Cir. 2003); *Takle v. Univ. of Wisc. Hosp. and Clinics Auth.*, 402 F.3d 769, 769 (7th Cir. 2005).

2. ACCS next makes a convoluted attempt to show that the state-treasury factor is satisfied in this case. ACCS Br. 43-45. Like the private corporation in *Barron*, ACCS "assumes exclusive responsibility for the acts of its employees, or agents as they relate to the services to be provided during the course and scope of

its employment." (RE 160 at 11). ACCS, however, attempts to downplay that fact by pointing to the contract's indemnification provision, which provides that ACCS broadly "agrees to indemnify, defend with counsel acceptable to the Judicial Circuit, and save harmless the Judicial Circuit, its officers, agents, and employees, from and against any and all claims and losses whatsoever accruing or resulting to any all persons . . . arising out of or connected with [ACCS's] performance of this agreement unless arising out of the sole negligence or willful misconduct of Judicial Circuit." (RE 160 at 11). Seizing on the limiting language at the end of the indemnification clause, ACCS presents the following chain of assertions: (1) Nothing in the contract insulates the prosecutors for damages arising solely out of their own fault. (2) This lawsuit is actually a "thinly veiled" attack on state policy. (3) Florida law permits the state to be sued in tort for money damages for loss caused by negligence or wrongful acts or omissions. (4) Therefore, this suit "gives rise to the potential for an indemnity action by ACCS against the State Attorney if ACCS is found liable for an act attributable to negligence on the part of the State Attorney." ACCS Br. 45.

This argument is meritless. ACCS does not deny that it bears "exclusive responsibility" for its performance under its contract. Nor does it deny that it must broadly indemnify the state against a broad range of claims "arising out of or connected with" its performance. The conduct at issue in this case falls within

both obligations. The limiting language on which ACCS relies concerns only conduct that arises out of the "sole" negligence or misconduct of the prosecutors—conduct, in other words, that does not involve ACCS. Although ACCS claims that this suit implicates state policy, it cannot deny that the conduct at issue is ACCS's conduct; this suit does not challenge the conduct of the prosecutors, let alone conduct involving their "sole" negligence. "[T]he aspect of the contract that is significant for the [Eleventh Amendment] analysis is [the contractors's] obligation to pay any damages resulting from *its performance*. This clause conclusively establishes that [Florida] will suffer no legal liability for any damages assessed against [ACCS]." *Barron*, 381 F.3d at 440 n.7.

In summary, ACCS fails to demonstrate that any one of the four factors weighs in favor of sovereign immunity—it is not an agent of the state, it is not controlled by the state, it is not funded by the state, and a judgment against it would not be the obligation of the state.

III. ACCS FAILS TO GRAPPLE WITH CONTRARY CASE LAW OR OFFER THIS COURT A SENSIBLE LIMITING PRINCIPLE.

Our opening brief (at 31-37) urges this Court not to expand *Shands* to cover ACCS because doing so would not only be inconsistent with *Shands* itself, but would create an open invitation to immunity claims by private government contractors of all stripes. We also explained why a ruling in favor of ACCS in this case 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 entities. Specifically, we noted (at 33-34) the concern expressed by other circuits that privatization should not be treated as a "farce" in which a privatized entity enjoys both the benefits of not being the state and the immunity reserved to the state.

ACCS makes no effort to grapple with these concerns, and does not even attempt to offer the Court a sensible limiting principle that would avoid extending blanket immunity across a broad spectrum of private contractors. Instead, ACCS attempts unconvincingly to distinguish each of the other circuits' decisions on its facts, based on either the nature of the government function involved, or the nature of the allegations, or the level of government supervision. ACCS Br. 46-49. Two of these factors—the nature of the function involved and the nature of the allegations—are not critical to any of the other circuits' decisions, and are not even factors considered under this Court's Eleventh Amendment analysis. And ACCS's attempt to distinguish the cases based on the nature of the allegations rests, once again, on a mischaracterization of this lawsuit as an attack on the conduct of the prosecutors rather than the practices of ACCS. As to the level of government supervision, suffice it to say that ACCS's argument requires one to believe that ACCS is subject to greater state control than state-created entities whose boards consist of state officials appointed by the governor, whose employees are deemed

state employees and entitled to state pensions, and whose buildings are owned by the state. *See* Pl's Br. 33-34.

In dismissing *Richardson v. McKnight*, 521 U.S. 399 (1997), as "likewise distinguishable" on its facts because it involved a different government function (operating a prison), ACCS entirely misses the point of our discussion (Pl's Br. 35-37) of how *Richardson*'s analytical framework can be brought to bear on the interplay between sovereign immunity and privatization. The key point is that the Supreme Court *rejected* the suggestion that "mere performance of a government function could make the difference" between liability and immunity. *Id.* at 408-09. *Richardson* emphasized instead that there are "important differences" between private firms and public officials, including the "ordinary market pressures" that affect the behavior of for-profit firms. *Id.* at 409. And ACCS also does not respond to the point that its defense would fail even under a purely functional approach, because debt collection is surely less of a core governmental function than, for example, operating a prison.

Finally, ACCS offers no rebuttal at all to our argument (at 41-43) that extending state sovereign immunity to a private contractor like ACCS would interfere with the state's dignity interest in its privatization policy. *See Fresenius*, 322 F.3d at 64 ("Not 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.").

IV. EVEN ASSUMING ACCS IS AN ARM OF THE STATE OF FLORIDA, THE DISTRICT COURT ERRED IN DISMISSING THE ENTIRE SUIT.

ACCS does not deny that the complaint in this lawsuit seeks, among other things, a declaration that ACCS's current and ongoing collection practices violate federal law. (RE 39 at 25). Nor can ACCS deny that the complaint names as defendants not only ACCS, but also four individual ACCS employees, including its founder and longtime president, Don Mealing. (RE 39 at 1-3). Thus, even if the Court were to deem ACCS an arm of the State of Florida, there is no reason this case would not satisfy the "straightforward inquiry" that courts conduct to determine whether the Eleventh Amendment bars all aspects of the relief sought. *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) ("In determining whether the doctrine of *Ex Parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." (internal quotation marks and alterations omitted)). ACCS lists three collateral reasons why it believes that the plaintiffs should not be permitted to seek prospective relief concerning ACCS's alleged ongoing violations of federal law: (1) the plaintiffs waived the argument by failing

to raise it below, (2) ACCS is not an "official" of the state, and *Ex Parte Young*, 209 U.S. 123 (1908), only applies to officials; and (3) the 2006 amendment to the FDCPA renders any request for prospective relief "moot." ACCS Br. 53-56.

As to the first point, we acknowledge that the plaintiffs did not frame their complaint as an "official capacity" suit against a "state" officer, as one might in a lawsuit involving governmental defendants, or cite *Ex Parte Young* in their papers below. Plaintiffs did, however, vigorously protest the suggestion that the Eleventh Amendment barred their suit and—particularly given the novelty of ACCS's defense—they should not be precluded from presenting an argument in support of that same position. Moreover, "Eleventh Amendment jurisdictional questions can be raised for the first time on appeal." *Doe v. Moore*, 410 F.3d 1337, 1349 (11th Cir. 2005); *see Smith v. Avino*, 91 F.3d 105, 107-08 (11th Cir. 1996) ("Under the law of this Circuit, Eleventh Amendment immunity is considered to be in the nature of subject matter jurisdiction, which can be considered at any time in the litigation and cannot be waived by the parties."), *abrogated on other grounds by Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998); *Whiting v. Jackson State Univ.*, 616 F.2d 116, 127 n. 8 (5th Cir. 1980) ("Although neither [defendant] has raised the bar of the eleventh amendment, we consider it *sua sponte* because a defense based upon the eleventh amendment is in the nature of a jurisdictional bar."); *see also Gramegna v. Johnson*, 846 F.2d 675, 678 (11th Cir. 1988)

(discussing liberal waiver and pleading policy in Eleventh Amendment context). It would make little sense to deny one party the opportunity to fully respond to a defense that the other party can raise for the first time on appeal, particularly where the question involves a "straightforward inquiry," *Verizon Md., Inc*, 535 U.S. at 645, that does not turn on evidence that might have been presented below. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976). Indeed, ACCS itself has taken several entirely new positions in this appeal—including its claim that it satisfies the Court's four-factor test for immunity, its argument that it is funded by the state, and its argument that the state treasury would be burdened by a judgment.

ACCS next argues that it cannot be sued under *Ex Parte Young* because it is not a state "official." But *Ex Parte Young* relies on a "distinction between the sovereign and its agents," *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 146 n.29 (1984) (Stevens, J., dissenting), and so if ACCS is correct that it is an agent of the state for purposes of enjoying immunity, then it should also properly be considered an agent of the state for purposes of *Ex Parte Young*. Moreover, as explained in our opening brief, plaintiffs have sued "not only ACCS, but individual employees of ACCS." Pl.'s Br. 44. So even if one were to view the private corporation as standing in the place of a state *agency* rather than a state *agent*, ACCS still offers no explanation why the individual defendants would not be appropriate defendants under *Ex Parte Young*. Either way, the plaintiffs should be

permitted to go forward with their request for prospective relief. *See Gramegna*, 846 F.2d at 678 & n.2. To hold otherwise would greatly undermine the availability of relief in federal court to prevent ongoing violations of federal law and would create the absurd result that private contractors would enjoy greater immunity than the state itself.

Finally, ACCS argues that plaintiffs cannot seek prospective relief because, in its view, the FDCPA no longer applies to ACCS as a result of a 2006 amendment to the statute. In *Verizon*, the Supreme Court rejected a very similar argument concerning the applicability of the relevant federal law, explaining that "[t]he inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim." 535 U.S. at 646. Rather, all that is required is an *allegation* of an ongoing violation of federal law. *Id.* ACCS does not deny that the complaint alleged a continuing violation of the FDCPA. That fact is not changed by the 2006 amendment, which in any event does not alter the substantive requirements of the FDPCA, but only the criteria for its applicability. ACCS presents no authority for the proposition that plaintiffs must amend their complaint simply because a statute under which they seek relief has been amended. Indeed, as explained above (*see* Part I, *infra*), the 2006 amendment actually confirms a point that ACCS had previously disputed—that, provided that certain criteria are met, the FDCPA applies to the collection practices of companies like ACCS.

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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June 11, 2007

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

I hereby certify that my word processing program, Microsoft Word, counted 6,840 words in the foregoing brief, exclusive of the portions excluded by Rule 32(a)(7)(B)(iii).

June 11, 2007 Deepak Gupta

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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