No. 24-1610

In the United States Court of Appeals for the Eighth Circuit

Bryan S. Mick, Personal representative of the estate of Print Zutavern, deceased,

Plaintiff-Appellee,

v.

Deputy Barrett Gibbons, In his individual and official capacities; Deputy Lawrence Stump, In his individual and official capacities; Sheriff Dan Osmond, In his individual and official capacities; Custer County, A Nebraska political subdivision, Doing business as Custer County Sheriff's Office,

Defendants-Appellees,

Trp. Sam Mortenson, In his individual and official capacities; Sgt. Matt Workman, In his individual and official capacities; Lt. Tim Arnold, In his individual and official capacities; Trp. Trevino, In his individual and official capacities; Trp. Levi Cockle, In his individual and official capacities,

Defendants,

Trp. Brandon Wilke, In his individual capacity,

Defendant-Appellee,

Cpt. Tyler Schmidt, In his individual and official capacities,

Defendant,

John/Jane Doe, Training supervisor of the Nebraska State Patrol, In his/her individual and official capacities,

Defendant-Appellee,

Nebraska State Patrol,

Interested party-Appellant.

On Appeal from the United States District Court
for the District of Nebraska, Lincoln Division

BRIEF FOR THE STATES OF TEXAS, ALABAMA, ALASKA, ARKANSAS, CONNECTICUT, FLORIDA, GEORGIA, INDIANA, IOWA, KANSAS, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, NEW HAMPSHIRE, NORTH DAKOTA, OHIO, OREGON, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VIRGINIA, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF NEBRASKA STATE PATROL

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Identity and Interest of Amici Curiae

Amici are the States of Texas, Alabama, Alaska, Arkansas, Connecticut, Florida, Georgia, Indiana, Iowa, Kansas, Louisiana, Mississippi, Missouri, Montana, New Hampshire, North Dakota, Ohio, Oregon, South Carolina, South Dakota, Tennessee, Utah, Virginia, and West Virginia. State Amici have a fundamental interest in preserving their sovereign prerogative over when and where they will be subjected to judicial process at the behest of private litigants. That interest is directly affected by the issue presented in this appeal: whether state sovereign immunity applies to third-party subpoenas.

Introduction

The founding generation recognized that it would be "neither becoming nor convenient" for a State to be subjected "to the coercive process of judicial tribunals at the instance of private parties." *Ex parte Ayers*, 123 U.S. 443, 505 (1887). So when the colonies broke from Great Britain, they took pains to assert their entitlement, as now-independent sovereigns, to the common-law privilege of immunity from judicial process that monarchs and foreign nations had long enjoyed. Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 Harv. L. Rev. 1559, 1574-80 (2002).

The ratification of the United States Constitution and, later, the Eleventh Amendment, further ingrained that privilege into the fabric of American government. *Alden v. Maine*, 527 U.S. 706, 728-29 (1999). Today courts apply the principle of state sovereign immunity with the "breadth and largeness" necessary to shield

state governments against the indignity, expense, and disruption that would result if any citizen could hale state officials into court. *Ex parte Ayers*, 123 U.S. at 506. Consequently, sovereign immunity frees States from any form of judicial process that "would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act." *Dugan v. Rank*, 372 U.S. 609, 620 (1963) (quotation marks and citation omitted). Applying *Dugan*, several circuits have held—in the contexts of States, the federal government, and tribes—that one such form of judicial process fitting that description and therefore barred by sovereign immunity is third-party subpoenas.

The district court held to the contrary by misreading this Court's precedent to employ a watered-down version of state sovereign immunity that comes into play only when a State is sued as a party. Following that approach, the district court determined that officials in the Nebraska State Patrol could be ordered away from their official duties to respond to third-party discovery requests. J.A. 270–72. That error threatens the "inviolable sovereignty" of the States. *Alden*, 527 U.S. at 715 (quoting *The Federalist No. 39*, at 245 (James Madison) (Clinton Rossiter ed., 1961)). It also departs from the *ratio decidendi* of the very decision the district court purported to follow. *In re Missouri Department of Natural Resources* ("*Missouri DNR*") did not hold that third-party subpoenas fall outside a state's sovereign immunity; only that Missouri had not carried its burden on that question. 105 F.3d 434, 436 (8th Cir. 1997). That is, Missouri failed to explain "how production of . . . documents infringes on the State of Missouri's autonomy or threatens its treasury." *Id.*

This Court has since recognized that when it comes to third-party subpoenas the "potential for severe interference with government functions is apparent." *Alltel Commc'ns, LLC v. DeJordy*, 675 F.3d 1100, 1103 (8th Cir. 2012). And on that basis, *Alltel* rightly held that the common-law sovereign immunity traditionally enjoyed by Indian tribes extends to third-party subpoenas. *Id.* at 1102. States enjoy at least as much protection. If anything, "[t]he scope of tribal immunity . . . is more limited" than state sovereign immunity. *Crowe & Dunley, P.C. v. Stidham*, 640 F.3d 1140, 1154 (10th Cir. 2011). As an invention of federal common law, tribal immunity is of a "qualified nature." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 789 (2014). It persists at Congress's pleasure. *Id.* State sovereign immunity, by contrast, is constitutionally enshrined. U.S. Const. amend. XI. This Court should reverse the district court's decision and join its sister circuits in holding that sovereign immunity applies to bar the enforcement of third-party subpoenas against non-consenting sovereigns.

ARGUMENT

I. State Sovereign Immunity Applies to Third-Party Subpoenas.

The indignity and inconvenience of being haled into court as a third party is in many instances no less than that of being named as a litigant. So when the Framers took up the question of state sovereign immunity, they did not stop at the case caption. They insisted that the new Constitution do nothing to abrogate the full breadth of a State's common-law immunity from being "amenable to *process* in any court without their consent." *Franchise Tax Bd. v. Hyatt*, 587 U.S. 230, 238 (2019) (emphasis added). Not only did they understand the States' traditional immunity to be

undisturbed by the Constitution, but they later ratified the Eleventh Amendment to reassert that view when the Supreme Court took a different tack in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). *See Hyatt*, 587 U.S. at 242-43. Consistent with this history, today federal courts apply sovereign immunity to bar third-party subpoenas served on federal, tribal, and state sovereigns alike.

A. Sovereign immunity is immunity from judicial process, not just immunity from liability.

History and precedent demonstrate that state sovereign immunity protects States not merely from judgments but also from other forms of judicial process.

1. Start with constitutional history. The contours of sovereign immunity were originally shaped by political reality rather than high-minded political theory. Courts existed to serve the king and were consequently impotent to enforce court orders of any kind against an uncooperative sovereign. Unless a sovereign voluntarily submitted to the court's jurisdiction, there was no "way to bring the sovereign within [the] court's power." *Nelson*, *supra*, at 1575; *accord Hyatt*, 587 U.S. at 238-39. "Hence it [was] that no suit or action [could] be brought against the king, even in civil matters, because no court [could] have jurisdiction over him. For all jurisdiction implies superiority of power." 1 W. Blackstone, Commentaries on the Laws of England 243 (1765).

That is how Americans conceived of sovereign immunity in the late eighteenth century. A sovereign's broad immunity not just from suit but also from judicial process was part of the "received wisdom" of the founding generation, which had "been taught by all writers on the Subject, that there is no Earthly Tribunal before whom

Sovereign & independent Nations can be called & compelled to do justice." *Nelson*, *supra* at 1576 (quoting Letter from Edmund Pendleton to Nathaniel Pendleton (May 21, 1792), *reprinted in* 5 The Documentary History of the Supreme Court of the United States, 1789-1800, at 127 (Maeva Marcus ed., 1994)). As one scholar noted, "[w]hen we revisit discussions from the Founding era, we will be struck by how many people thought about sovereign immunity in terms of compulsory process." *Id*. at 1592.

"After independence, the States considered themselves fully sovereign nations." *Hyatt*, 587 U.S. at 237. And supporters of the new Constitution insisted that the plan of the Philadelphia Convention did nothing to upset the States' claim to the broad immunity from judicial process that sovereigns traditionally enjoyed, at least insofar as it came to litigation brought by private parties. *Nelson*, *supra*, at 1578-82. "When [Alexander] Hamilton declared that an unconsenting sovereign was not 'amenable' to suit, he was pointing out that sovereigns could not be commanded to appear or otherwise brought within a court's power." *Id*. at 1575-76 (quoting *The Federalist No. 81*). John Marshall went so far as to deem it "not rational to suppose that the sovereign power should be dragged before a court." The Debates in the Several State Conventions on the Adoption of the Federal Constitution 555 (Jonathan Elliot ed., 1836). And at the Virginia ratifying convention, James Madison assured skeptical antifederalists that it would not be "in the power of individuals to call any state into court." 3 Elliot, *supra* at 533.

The ratification of the Eleventh Amendment reaffirmed rather than displaced the broad version of sovereign immunity from judicial process that the Framers

contemplated. "Not long after the founding," antifederalist fears that the new constitutional order spelled the end of States' traditional sovereign privilege from judicial process appeared to be realized when the Supreme Court "held that Article III allowed the very suits that the 'Madison-Marshall-Hamilton triumvirate' insisted it did not." *Hyatt*, 587 U.S. at 242. The offending *Chisholm v. Georgia* decision "precipitated an immediate 'furor' and 'uproar' across the country." *Id.* at 242-43. Congress introduced a constitutional amendment immediately. *Alden*, 527 U.S. at 718. Its proposal, which became the Eleventh Amendment, reaffirmed the "broader 'presupposition of our constitutional structure,'" *Allen v. Cooper*, 589 U.S. 248, 254 (2020) (quoting *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991)), and "established in effective operation the principle asserted by Madison, Hamilton, and Marshall" about absolute immunity from suit discussed during the ratification debates, *Principality of Monaco v. Mississippi*, 292 U.S. 313, 329 (1934). "The Annals [of Congress] report no debate on the amendment," and "[e]ach House discussed and endorsed it in a single day, almost without dissent." David P. Currie, The Constitution in Congress: The Federalist Period 1789-1801, at 196 (1997). "It is plain that just about everybody in Congress agreed the Supreme Court [in *Chisholm*] had misread the Constitution." *Id.* All that served to vindicate the Federalists' ratification-debate assurances that "the Constitution was not meant to 'rais[e] up' any suits against the States that were 'anomalous and unheard of when the Constitution was adopted.'" *Hyatt*, 587 U.S. at 243 (quoting *Hans v. Louisiana*, 134 U.S. 1, 18 (1890)).

Because the "Eleventh Amendment confirmed, rather than established, sovereign immunity as a constitutional principle," courts have understood the

amendment to reiterate the "fundamental postulates implicit in the constitutional design." *Alden*, 527 U.S. at 728-29. As discussed, those postulates require immunity from judicial process and not just immunity from suit. The "very object and purpose of the eleventh amendment were to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties" and to prevent "the course of their public policy and the administration of their public affairs" from being "subject to and controlled by the mandates of judicial tribunals." *Ex parte Ayers*, 123 U.S. at 505. That is why courts regularly uphold "States' assertions of sovereign immunity in various contexts falling outside the literal text of the Eleventh Amendment." *Alden*, 527 U.S. at 727. "These holdings reflect a settled doctrinal understanding, consistent with the views of the leading advocates of the Constitution's ratification, that sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself," *id.* at 728, which erects a dual-sovereign system under which the States continue to possess "attributes of sovereignty," including immunity "from suits, without their consent." *Principality of Monaco*, 292 U.S. at 322-23.

It is of course true that the federal constitution did not leave state sovereign immunity entirely as it had been under the Articles of Confederation. It significantly altered the States' relationships to each other as co-equal sovereigns and to the federal government as the supreme authority in constitutionally enumerated matters. *See Hyatt*, 587 U.S. at 241. So, "a State may be sued if it has agreed to suit in the 'plan of the Convention,' which is shorthand for 'the structure of the original Constitution itself.'" *PennEast Pipeline Co., LLC v. New Jersey*, 594 U.S. 482, 500 (2021)

(quoting *Alden*, 527 U.S. at 728). And following the ratification of the Civil War Amendments, Congress may "abrogate state sovereign immunity under [its] Fourteenth Amendment" enforcement powers, provided "it does so with the requisite clarity." *Id.*; U.S. Const. amend. XIV § 5. But outside of those two circumstances, non-consenting States retain their immunity from private suits. *See Hyatt*, 587 U.S. at 249; *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55 (1996). Neither the district court nor Appellee have identified any relevant congressional abrogation or plan-of-the-Convention waiver here with respect to third-party discovery. And State Amici are not aware of any either.

2. Precedent describes the scope of sovereign immunity in correspondingly broad terms. The breadth of the privilege would eventually be understood to flow both from the "inherent . . . nature of sovereignty," *Federalist No. 81*, at 487, *see supra* at 4-5, as well as from the practical imperatives of government administration. As the Supreme Court explained in *Larson v. Domestic & Foreign Commerce Corp.*, "[t]he Government as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right." 337 U.S. 682, 704 (1949). Such interference "with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief." *Id.* (quoting *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497, 516 (1840)).

In *The Siren*, Justice Field wrote for the Supreme Court that sovereigns "cannot be subjected to *legal proceedings* at law or in equity without their consent." 74 U.S. 152, 154 (1868) (emphasis added). The Court went on to hold that the United States

was immune from judicial proceedings that placed its property in jeopardy, regardless of whether the United States was named as a party. *Id.* Any other rule would be ill-suited to the "public policy" behind sovereign immunity because "[i]t is obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government." *Id.*; *accord United States v. Clark*, 33 U.S. 436, 444 (1834); *Stanley v. Schwalby*, 147 U.S. 508, 512 (1893); *Belknap v. Schild*, 161 U.S. 10, 16 (1896); *see also Cohens v. Virgnia*, 19 U.S. (6 Wheat.) 264, 407 (1821) (defining a "suit" as "the prosecution, or pursuit, of some claim, demand, or request . . . in a Court of justice").

Modern cases follow the same refrain. As the Supreme Court put it in *Dugan*, "[t]he general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'" 372 U.S. at 620 (citation omitted) (first quoting *Land v. Dollar*, 330 U.S. 731, 738 (1947), then quoting *Larson*, 337 U.S. at 704). That is why sovereign immunity "is to be determined not by the mere names of the titular parties but by the essential nature and effect of the proceeding, as it appears from the entire record." *In re New York*, 256 U.S. 490, 500 (1921).

B. Third-party discovery is a form of judicial process barred by federal, tribal, *and state* sovereign immunity.

If "[t]he policy behind [sovereign immunity] is that the government should not be hampered in its performance of activities essential to the governing of the nation, unless it has given its consent," *United States v. Murdock Mach. & Eng'g Co. of Utah*, 81 F.3d 922, 930 (10th Cir. 1996), it follows that sovereign immunity covers third-party subpoenas. A state official "haled into court on pain of contempt and forced to produce [his] papers," *Russell v. Jones*, 49 F.4th 507, 515-16 (5th Cir. 2022), is one less employee that the State can rely on to conduct the operations of government. The "court's coopting of government personnel to answer the subpoena or assemble requested documents would"—if permitted—"both interfere with the public domain, and compel the government to act." Zoe Niesel, *Terrible* Touhy*: Navigating Judicial Review of an Agency's Response to Third-Party Subpoenas*, 41 Cardozo L. Rev. 1499, 1512 (2020).

Every circuit to have addressed the question—with this Court being the only arguable exception, *but see infra* Part II.B—has thus held that state sovereign immunity bars the enforcement of third-party subpoenas against non-consenting sovereigns. In *EPA v. General Electric Co.*, for example, the Second Circuit concluded that "the enforcement of [a] subpoena duces tecum issued by General Electric to the EPA would compel the EPA to act and therefore is barred by sovereign immunity in the absence of a waiver." 197 F.3d 592, 597 (2d Cir. 1999). Following *Dugan*'s "general rule," the Second Circuit explained that "[a] judicial proceeding is considered brought against the sovereign if the result could serve to 'restrain the Government

from acting, or to compel it to act.'" *Id.* (quoting *Dugan*, 372 U.S. at 620). And third-party subpoenas do just that by compelling government officials to lay aside their official duties to respond to judicial process. *Id.*

The Fourth Circuit reached the same result in *Boron Oil Co. v. Downie*, 873 F.2d 67 (4th Cir. 1989). As in *General Electric*, the Fourth Circuit relied on *Dugan* to conclude that a third-party subpoena proceeding against a federal employee fell "within the protection of sovereign immunity." *Id.* at 71. "Even though the government is not a party to the underlying action," the Fourth Circuit rightly determined that a third-party subpoena proceeding "is inherently that of an action against" the sovereign because it "'interfere[s] with the public administration' and compels the federal agency to act in a manner different from that in which the agency would ordinarily choose to exercise its public function." *Id.* at 70-71 (alteration in original) (quoting *Dugan*, 372 U.S. at 620); *accord COMSAT Corp. v. Nat'l Sci. Found.*, 190 F.3d 269, 277 (4th Cir. 1999) ("[S]overeign immunity . . . gives rise to the Government's power to refuse compliance with a subpoena.").

This Court's own decision in *DeJordy* held that "a federal court's third-party subpoena in private civil litigation is a 'suit' that is subject to Indian tribal immunity." 675 F.3d at 1105. *Alltel* followed *Boron Oil* and *General Electric* in treating as the touchstone of the analysis "[t]he potential for severe interference with government functions." *Id.* at 1103; *see also id.* (quoting *Dugan*, 372 U.S. at 620). And it agreed with the conclusions of its sister circuits that, when it comes to third-party subpoenas, the potential for disruption is "apparent" because third-party subpoenas

"command a government unit to appear in federal court and obey whatever judicial discovery commands may be forthcoming." *Id.*

Tribal sovereign immunity against third-party subpoenas was likewise recognized by the Tenth Circuit in *Bonnet v. Harvest (U.S.) Holdings, Inc.*, 741 F.3d 1155, 1160 (10th Cir. 2014). The result again followed from "the broad principle that the government is not subject to legal proceedings, at law or in equity[,] or *judicial process* without its consent." *Id.* at 1159 (quoting *Murdock Mach. & Eng'g Co.*, 81 F.3d at 931). Any other outcome would contravene "the core notion of sovereign immunity that in the absence of governmental consent, the courts lack jurisdiction to restrain the government from acting, or to compel it to act." *Id.* (quoting *Murdock Mach. & Eng'g Co.*, 81 F.3d at 931).

To be sure, the preceding authorities involve assertions of federal and tribal sovereign immunity rather than state sovereign immunity. But the Fifth Circuit recently applied those precedents to state sovereigns in *Russell*. Having surveyed cases barring third-party subpoenas against other sovereigns, the court observed that, while "state sovereign immunity is" not "in every aspect identical to federal or tribal immunity," States generally hold "the same 'common-law immunity from suit'" as the federal government and tribes. *Russell*, 49 F.4th at 518 (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)). And just as third-party subpoenas are inconsistent with federal and tribal sovereignty because of their tendency to disrupt the operations of government à la *Dugan*, third-party subpoenas of state officials contravene "the 'inviolable sovereignty' retained by the states" because they purport

to subject state officials to "a coercive judicial process." *Id.* at 515 (quoting *Alden*, 527 U.S. at 715).

The Tenth Circuit has similarly signaled the applicability of state sovereign immunity to third-party subpoenas. In *Bonnet*, the Tenth Circuit maintained that it was not elevating tribes above the States by holding that tribal sovereigns were immune from third-party subpoenas. It reassured that "applying tribal immunity to bar the instant subpoena does not require holding the Tribe is entitled to any broader immunity than the States" because "under our binding precedent . . . the Eleventh Amendment may well shield a state agency from discovery in federal court." 741 F.3d at 1161.

As the Fifth Circuit recognized in *Russell*, the circuits "begin to disagree" when it comes to the distinct question whether the *federal* government has sovereign immunity against third-party subpoenas in *federal* court. 49 F.4th at 517; *see also id.* at 517 n.11 (citing *Exxon Shipping Co. v. United States Department of Interior*, 34 F.3d 774 (9th Cir. 2022), as an example). Yet "the disagreement is not about whether sovereign immunity applies to subpoenas *at all*, but rather whether sovereign immunity applies to subpoenas *in federal court*." *Id.* at 517. The latter disagreement raises "serious separation of powers questions" not present here—*i.e.*, the extent to which one federal branch may resist the compulsive process of another federal branch. *Exxon*, 34 F.3d at 778. For purposes of the present dispute—about "whether sovereign immunity applies to subpoenas *at all*"—this Court's sister circuits "agree that where a sovereign is otherwise entitled to immunity, that immunity extends to third-party subpoenas." *Russell*, 49 F.4th at 517.

II. *Missouri DNR* Does Not Require a Different Result.

The district court held to the contrary by misreading this Court's precedent in *Missouri DNR* and in the process rendered state sovereign immunity a paper tiger, relegating it to a privilege that can be invoked only when a State is named as a party. That was error. State sovereignty is not any less infringed because a state official has been "served with a *subpoena duces tecum* instead of a complaint." *Id.* at 515. And *Missouri DNR* does not hold otherwise. The Court is instead bound by *DeJordy* and should follow its sister circuits in applying *Dugan*'s general rule to hold that traditional sovereign immunity principles shield state sovereigns from judicial process when it takes the form of a third-party subpoena.

A. *DeJordy* articulates the applicable rule of decision.

Like its sister circuits, this Court treats interference with public administration as the relevant measure of sovereign immunity. That is illustrated in the Court's *DeJordy* decision. As discussed above, the issue there was whether Indian tribes—which like States "possess the common-law immunity from suit traditionally enjoyed by sovereign powers"—are immune from third-party subpoenas. 675 F.3d at 1102 (quoting *United States v. Red Lake Band of Chippewa Indians*, 827 F.2d 380, 382 (8th Cir. 1987)). The Court determined that under "the plain language of the Supreme Court's definition of a 'suit' in *Dugan*," a "third-party subpoena in private civil litigation is a 'suit' that is subject to Indian tribal immunity." *Id.* at 1105.

DeJordy followed a simple logic. Because the "general rule" is that sovereign immunity applies to any judicial process that "would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the

judgment would be to restrain the Government from acting, or to compel it to act," *id.* at 1102 (quoting *Dugan*, 372 U.S. at 620), it follows that sovereign tribes are immune from discovery orders—including third-party discovery orders. That is because discovery orders "command a government unit to appear in federal court and obey whatever judicial discovery commands may be forthcoming." *Id.* at 1103. The power to call a public official away from his or her public duties is manifestly disruptive of government operations. *See id.* (concluding that the "potential for severe interference with government functions is apparent").

DeJordy found support for its application of *Dugan* in the Second Circuit's *General Electric* decision and the Fourth Circuit's *Boron Oil* decision. The reliance is notable because those two cases dealt with federal rather than tribal immunity, undermining any assertion that *DeJordy*'s analysis is limited to tribes. While *DeJordy* did take account of "federal policies of tribal self determination, economic development, and cultural autonomy," those considerations entered into the Court's analysis only at the back end to alleviate the concern that recognizing tribal immunity may leave tribes with too much protection because tribes, unlike the federal government, have not consented to a broad waiver of immunity from certain suits. *Id.* at 1104. But the heart of *DeJordy*'s analysis was the "strong[] reasons of public policy," *id.* at 1103 (quoting *Larson*, 337 U.S. at 704), underlying the common-law immunity retained by federal, tribal, and state sovereigns alike.

Importantly, applying state sovereign immunity here does not mean that the public will lack access to government records. To the contrary, the National Conference of State Legislatures reports that to "increase transparency and public

awareness of government decision-making, all 50 states have enacted laws that require certain government records to be open to the public." Public Records Law and State Legislatures, *Nat'l Conf. of State Legislatures*, https://tinyurl.com/34za6wsu (last visited June 20, 2024). Take, for example, state open-records laws, such as Texas's Public Information Act. Tex. Gov't Code § 552.001 *et seq.* The Nebraska Public Records Act similarly guarantees public access to the records of government bodies at all levels. Neb. Rev. Stat. § 84-712 *et seq.* Some States have even constitutionalized a right to access government documents. *See, e.g.*, Fla. Const. art. I § 24 (establishing constitutional right to public access to records and meetings of public officials); Mont. Const. art. II § 9 ("No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure."); La. Const. art. XII § 3 (providing that "[n]o person shall be denied the right to observe the deliberations of public bodies and examine public documents, except in cases established by law").

Basic principles of sovereign immunity require litigants to follow these well-worn paths to obtain public records, not seek to enlist the power of federal judicial tribunals to obtain them through third-party subpoenas. *See United States v. Nordic Vill., Inc.*, 503 U.S. 30, 34 (1992) (stating that a waiver of sovereign immunity "must be construed strictly in favor of the sovereign" and "not enlarge[d] . . . beyond what the language requires" (quoting *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685 (1983))).

B. *Missouri DNR* is not to the contrary.

DeJordy notwithstanding, the district court mistakenly thought itself bound by *Missouri DNR* to deny state sovereign immunity from the third-party subpoena requests at issue here. That reading is both unnecessary and inconsistent with recent Supreme Court precedent.

1. Missouri's undoing in *Missouri DNR* was not a stingy view of sovereign immunity. It was a failure of party presentation. On closer reading, *Missouri DNR* used the same standard as was later applied in *DeJordy*, the difference being that Missouri failed where the Indian tribes would later succeed. That is, Missouri neglected to explain "how production of [subpoenaed] documents infringes on the State of Missouri's autonomy or threatens its treasury." 105 F.3d at 436.

No such failure exists here. *DeJordy* established for this Circuit what *General Electric*, *Boron Oil*, *Russell*, and *Bonnet*, established for the Second, Fourth, Fifth, and Tenth Circuits: that "[t]he potential for severe interference with government functions is apparent" when a court orders "a government unit to appear in federal court and obey whatever judicial discovery commands may be forthcoming." *DeJordy*, 675 F.3d at 1103.

Inasmuch as *DeJordy* treated *Missouri DNR* as the final word on state sovereign immunity's application to third-party subpoenas, that reading of *Missouri DNR* is dicta and is not binding on this panel. *Cf. Sanzone v. Mercy Health*, 954 F.3d 1031, 1039 (8th Cir. 2020) (explaining that "[d]icta is a judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential" (quotation marks and alterations omitted)). The

question presented in *DeJordy* was "whether *tribal immunity* bars enforcement of [third-party] subpoenas." *DeJordy*, 675 F.3d at 1102. In holding in the affirmative, the Court discussed *Missouri DNR* only to explain why that decision was "not controlling" on that question. *Id.* at 1104. By contrast, *DeJordy*'s rationale—its positive treatment of *General Electric* and *Bonnet* and its employ of the *Dugan* rule—is binding and applies equally here. *See* Frederick Schauer, *Precedent*, *in The Routledge Companion to Philosophy of Law* 123, 129 (Andrei Marmor ed. 2012) (explaining that "the traditional answer to the question of what is a precedent is that subsequent cases falling within the *ratio decidendi*—or *rationale*—of the precedent case are controlled by that case"); *accord* Pierre N. Leval, *Judging Under the Constitution: Dicta about Dicta*, 81 N.Y.U. L. Rev. 1249, 1257 (2006).

DeJordy was "unwilling to predict how the Supreme Court" might decide a case involving a third-party subpoena of a state official, though it did state that "[b]ased upon the reasoning in cases such as *Boron Oil*, the Court might well conclude that the Eleventh Amendment applies." 675 F.3d at 1104–05. *See also McGehee v. Neb. Dep't of Corr. Servs.*, 968 F.3d 899, 901 (8th Cir. 2020) (Stras, J., concurring) (citing *DeJordy* and expressing "doubts whether, under basic sovereign-immunity principles, a state may be haled into federal court solely for the purpose of answering a third-party subpoena"), *reh'g granted and opinion vacated* (Oct. 5, 2020), *on reh'g*, 987 F.3d 785 (8th Cir. 2021). This panel need not wait for the Supreme Court. No rule of logic or orderliness stands in the way of straightforwardly applying the *DeJordy* rule to state sovereigns.

2. This Court should decline to adopt the district court's reading of *Missouri DNR* for the additional reason that doing so would be in serious tension with, if not contrary to, recent Supreme Court precedent stating that when it comes to sovereign immunity tribes should not receive more favorable treatment than the States. In *Lewis v. Clarke*, the Supreme Court was asked to determine whether tribal immunity applied to a private tort suit against a tribal employee in his personal capacity. 581 U.S. 155, 158 (2017). The Court deemed it necessary to hold that the tribe's sovereign immunity did not extend to a tribal employee sued in his personal capacity lest tribal sovereigns be afforded an immunity more robust than that enjoyed by federal or state sovereigns. The Court rejected the contention that it should extend "sovereign immunity for tribal employees beyond what common-law sovereign immunity principles would recognize for either state or federal employees." *Id.* at 164.

As in *Lewis*, "[t]he protection offered by tribal sovereign immunity here is no broader than the protection offered by state or federal sovereign immunity." *Id.* "Established sovereign immunity principles," *id.*, guard against any judicial process that interferes with the sovereign's administration of government. And this Court has already held that, when it comes to third-party subpoenas, the "potential for severe interference with government functions is apparent." *DeJordy*, 675 F.3d at 1103.

Even setting *Lewis* aside, "[t]here is no reason that the federal common law doctrine of tribal sovereign immunity . . . should extend further than the []constitutiona[l] doctrine of state sovereign immunity." *TTEA v. Ysleta del Sur Pueblo*, 181 F.3d 676, 680 (5th Cir. 1999); *accord Bonnet*, 741 F.3d at 1160-61. Tribal immunity has come under fire as a judge-made doctrine "founded upon an anachronistic

fiction," *Kiowa Tribe of Okla. v. Mfg. Techs.*, 523 U.S. 751, 758 (1998) (citation omitted), while at the same time the Supreme Court has grown increasingly protective of state sovereigns and chastised judicial efforts "to do away with state sovereign immunity without clear authorization from Congress," *Dep't of Agric. v. Kirtz*, 601 U.S. 42, 55 (2024); *see also Bay Mills Indian Cmty.*, 572 U.S. at 814 (Thomas, J., dissenting) (criticizing "the judge-made doctrine of tribal sovereign immunity" as "an affront to state sovereignty").

To be clear, Amici do not question this Court's holding in *DeJordy*. They only ask that States receive the same recognition of immunity from third-party subpoenas as Tribes.

Conclusion

The Court should reverse the district court's order refusing to quash the third-party subpoenas served on the Nebraska State Patrol.

Respectfully submitted.

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Certificate of Service

On June 20, 2024, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Eighth Circuit Rule 25(j); (2) the electronic submission has been generated by printing to PDF from the original word processing file so that the text of the digital version of the brief may be searched and copied in compliance with Eighth Circuit Rule 25A(g); and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses in compliance with Eighth Circuit Rule 28A(h)(2).

I further certify that, within five days of receipt of the notice that the brief has been filed by this Court, the foregoing brief will be sent by Federal Express next-day mail to the Clerk of the Court (ten copies) and to the party counsel of record (one copy each) pursuant to Eighth Circuit Rule 28A(d).

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Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 5,387 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5)(A) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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