24-1610

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRYAN S. MICK,
Plaintiff–Appellee,

v.

DEPUTY BARRETT GIBBONS, ET AL.,
Defendants–Appellees,

NEBRASKA STATE PATROL
Third-Party Appellant.

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

Brief of Amici Curiae American Association for Justice, Public Justice, Nebraska Association of Trial Attorneys, and Nebraska Defense Counsel Association in Support of Plaintiff–Appellee Bryan S. Mick and Affirmance

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Corporate Disclosure Statement

Pursuant to Fed. R. App. P. 26.1 and 29(a)(4)(A), American Association for Justice, Public Justice, Nebraska Association of Trial Attorneys, and Nebraska Defense Counsel Association state that they have no parent corporations, and there are no publicly held corporations that own 10% or more of their stock.

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INTEREST OF AMICI CURIAE

Amici are American Association for Justice ("AAJ"), Public Justice, the Nebraska Association of Trial Attorneys ("NATA"), and the Nebraska Defense Counsel Association ("NDCA").

AAJ is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions. Throughout its 78-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

Public Justice is a national public interest legal advocacy organization that specializes in precedent-setting, socially significant civil litigation, with a focus on fighting corporate and governmental misconduct. Public Justice has long maintained an Access to Justice Project, which seeks to ensure that civil courts are an effective tool that people with less power can use to win just outcomes and hold to account those with more power. Towards that end, Public Justice has an interest in addressing overbroad assertions of immunity.

NATA is an organization of lawyers and law students established in 1958 in the State of Nebraska who are dedicated to the preservation of the justice system and the representation of injured persons in civil cases.

NDCA is an organization comprised of approximately 200 attorneys in the State of Nebraska who devote a majority of their law practice to the defense of civil lawsuits in state and federal court. Among the interests crucial to NDCA's members is the ability to fully and fairly litigate matters.

This case is of acute interest to AAJ, Public Justice, NATA, and NDCA because state agencies regularly collect information relevant to various civil cases, and allowing state agencies to categorically refuse to provide material information in discovery would impede the ability to either prosecute or defend suits, undermine public confidence in the civil justice system, and minimize the role that jury verdicts play in American democracy.[1]

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[1] All parties have consented to the filing of this brief. Fed. R. App. P. 29(a)(2). No one other than amici and their counsel authored any part of this brief or monetarily funded its preparation or submission. Fed. R. App. P. 29(a)(4)(E).

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Introduction

Sovereign immunity does not protect state agencies like the Nebraska State Patrol ("Patrol") from federal subpoenas. As Plaintiff–Appellee Bryan Mick ("Mick") persuasively demonstrates, this Court already rejected that claim in *In re Missouri Department of Natural Resources*, 105 F.3d 434 (8th Cir. 1997). That decision should be the end of this appeal.

Amici write separately to address the assertion by the Patrol and its amici that granting States sovereign immunity from federal subpoenas would be good public policy. That argument is rooted in the Fifth Circuit's recent decision in *Russell v. Jones*, 49 F.4th 507 (5th Cir. 2022), which departed from the settled view—shared by this Court and other courts across the country—that the Eleventh Amendment does not protect states from federal subpoenas.

But *Russell*, the Patrol, and its amici make two critical mistakes in their attempt to use public policy as a justification for State immunity from federal subpoenas.

First, they never consider the public interest in discovery from state agencies. This is a significant oversight: The right to every person's evidence belongs to the *public*, and State immunity from federal subpoenas would [1] frustrate the public interest in the administration of justice by depriving litigants of material evidence in civil-rights

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cases, tort cases, and even criminal cases; [2] undermine public confidence in the justice system by producing unjust outcomes; [3] block public transparency into government; and [4] impair the public's ability to set standards and behavioral norms in their community through jury verdicts.

Second, proponents of State immunity from federal subpoenas also ignore the significant ways ordinary discovery rules protect States from improper or unduly burdensome discovery. In particular, the federal rules protect States from [1] improper discovery into privileged material and high-ranking officials, and [2] unduly burdensome discovery where the burden to produce material would outweigh its probative value.

Thus, if the purpose of sovereign immunity is to promote the public good as everyone agrees, then extending States immunity from federal subpoenas would be a cure worse than the disease. Accordingly, this Court should reject the Patrol's invitation to plow new ground by extending sovereign immunity to give States immunity from federal subpoenas.[2]

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[2] Citations to the Patrol's opening brief appear as "(AOB *x*)," where *x* is the page. Citations to the amicus brief in support of the Patrol appear as "(AG-ACB *x*)," where *x* is the page.

Argument

1. State immunity from federal subpoenas would wreak havoc on public interests.

The Patrol and its amici defend State immunity from federal subpoenas on public-policy grounds. (AOB 6–7, 10, 35 [emphasizing burden on public officials' time]; AG-ACB 10 [same].) But they entirely ignore the cost State immunity from federal subpoenas would impose on *the public*.

This is no small oversight: The "'right to every man's evidence'" belongs to "'*the public*." *Trump v. Vance*, 140 S. Ct. 2412, 2420 (2020) (quoting 12 Parliamentary History of England 693 (1812) (emphasis added). "[*S*]*ociety* has the right to the testimony because the demand comes from 'the community as a whole—from justice as an institution and from law and order as indispensable elements of civilized life.'" *Davis Enters. v. U.S. E.P.A.*, 877 F.2d 1181, 1190 (3d Cir. 1989) (Weis, J., dissenting) (emphasis added).

And as discussed below, State immunity from federal subpoenas would wreak havoc on public interests: It would [1] frustrate the public interest in the administration of justice by depriving litigants of material evidence; [2] undermine public confidence in the justice system by producing unjust outcomes; [3] block public transparency into government; and [4] impair the public's ability to set standards and behavioral norms in their community.

1.1. State immunity from federal subpoenas would frustrate the public interest in the administration of justice.

"The contention that a government agency . . . has blanket immunity from discovery procedure" is an "acute" threat "[t]o all litigants in need of facts in the Government's possession." Raoul Berger & Abe Krash, *Government Immunity from Discovery*, 59 Yale L.J. 1451, 1453 (1950).

And, indeed, state immunity from federal subpoenas would frustrate justice in many civil cases.

Civil-rights cases would be most vulnerable.

If States had immunity from federal subpoenas then "a plaintiff who sues a state official in his individual capacity, a lawsuit specifically authorized by the United States Supreme Court, will never be able to prove his or her case," if as is the case here, "any required proof is in the hands of the State's custodian of records." *Allen v. Woodford*, 544 F. Supp. 2d 1074, 1079 (E.D. Cal. 2008). This would obviously doom many potentially righteous civil-rights cases. *E.g., Est. of Gonzalez v. Hickman*, 466 F. Supp. 2d 1226, 1227 (E.D. Cal. 2006).

But the adverse effects on civil rights would extend well beyond cases alleging unconstitutional acts by police officers or prison wardens. Take *National Rifle Association of America v. Vullo*, 602 U.S. 175 (2024), as an example. There,

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the NRA sued the New York Department of Financial Services (DFS), its superintendent Maria Vullo, and New York's governor Andrew Cuomo, alleging that they pressured regulated entities to cut ties with the NRA in order to curb its pro-gun message. *Id.* at 180, 185. The district court dismissed the claims against DFS and Cuomo on sovereign-immunity grounds, but let the First Amendment claims against Vullo go forward. *Id.* at 185; *Nat'l Rifle Ass'n of Am. v. Cuomo*, 525 F. Supp. 3d 382, 407, 411 (N.D.N.Y. 2021). Ultimately, the Supreme Court affirmed that decision, holding the NRA plausibly alleged Vullo violated the First Amendment. *Vullo,* 602 U.S. at 186, 198. On remand, the NRA must now substantiate the allegations in its complaint. Presumably, DFS and its officials have many documents in their possession that might do so. But if the Patrol can quash this subpoena on sovereign immunity grounds, then DFS could quash any in *Vullo*, too.

Tort actions removed to federal court would also be affected.

Motor-vehicle collisions on public highways are an obvious example: State troopers are often key witnesses in such cases. *E.g.*, *Williams v. Frank Martz Coach Co.*, No. 13-CV-1860 MKB, 2014 WL 2002853, at *7 (E.D.N.Y. May 14, 2014) (holding that investigating state troopers were within

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the court's subpoena power to provide evidence on car accident); *Woodby v. Nat'l Cas. Co.*, No. 1:12-CV-00007-TMB, 2012 WL 12905801, at *1–2 (D. Alaska May 23, 2012) (holding that an insurer, sued by injured driver under an underinsured motorist policy, could subpoena police reports and witness contact information from state troopers); *Garris v. Goforth*, No. CV 06-19-DCR, 2006 WL 8447844, at *3 (E.D. Ky. June 14, 2006) (holding that an injured plaintiff could subpoena a state trooper who investigated an auto-truck collision). But if States had immunity from federal subpoenas, state troopers would be unavailable to testify in any lawsuits arising out of traffic collisions involving out-of-state defendants that are removed to federal court. And in the many cases where that evidence would prove outcome determinative for either side, State immunity from federal subpoenas would only serve to pervert justice.

And this effect would extend far beyond collisions on public highways. In our dual-sovereign system, "the state," under "its police power," has primacy "to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity." *Barbier v. Connolly*, 113 U.S. 27, 31 (1884); *see also Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). As a result, there are state

agencies with jurisdiction over virtually every aspect of daily life, each full of "government officers who," like state troopers writing traffic-collision reports, "have made in the course of their duties thousands of similar written . . . statements concerning events coming within their jurisdictions." *Wong Wing Foo v. McGrath*, 196 F.2d 120, 123 (9th Cir. 1952). Thus, in the many tort cases in which a state agency had outcome-determinative evidence in its possession but withheld it under sovereign immunity, only injustice would reign.

Notably, these effects would not be limited to civil cases; even criminal matters would be in jeopardy.

Take *Matter of Special April 1977 Grand Jury*, 581 F.2d 589 (7th Cir. 1978). There, the Illinois attorney general was the subject of a federal investigation. *Id.* at 591. The federal prosecutor subpoenaed five members of the attorney general's staff, demanding documents, including employee rosters, travel records, and long-distance phone calls. *Id.* The attorney general moved to quash on sovereign immunity grounds. *Id.* The Seventh Circuit disagreed, holding that "the existence of some degree of sovereignty does not excuse a state from its responsibility to provide evidence to the grand jury." *Id.* at 592. But if States have sovereign immunity from federal subpoenas, as the Patrol and its

amici urge, then state officials could use that immunity to hide corruption from federal investigators.

The Patrol's brief completely ignored these concerns. And while the Patrol's amici briefly addressed them, their proposed solution—public-records requests (AG-ACB 15–16)—falls short.

Davis Enterprises, 877 F.2d 1181, shows why. There, the plaintiff alleged the defendant corporation polluted their property. *Id.* at 1182. The EPA investigated and found the corporation was not responsible. *Id.* at 1183. The corporation then obtained a copy of the report with a public-records request and subpoenaed the EPA employee responsible for the report to lay foundation. *Id.* The EPA refused. *Id.*

Although the Third Circuit quashed the subpoena on grounds unrelated to sovereign immunity, *Davis Enterprises* nonetheless illustrates that even when a party obtains a probative document through a public-records request, it may still need to depose a state employee in order to admit that evidence. *Id.* at 1190 ("The curious feature of this case is that the data have already been disclosed to the parties, but ... cannot be submitted to the jury in the state court except through the process of direct and cross-examination of the EPA employee ...."). Thus, even putting aside inefficiencies of public-record requests, *Davis Enterprises* shows they are no substitute for discovery to obtain *admissible* evidence.

1.2. State immunity from federal subpoenas would undermine public confidence in the justice system.

State immunity from federal subpoenas would harm public confidence in the justice system in two ways.

First, as discussed above, the loss of States' evidence would produce unjust outcomes, and those unjust outcomes would undermine public confidence in the justice system. *United States v. Nixon*, 418 U.S. 683, 709 (1974) ("The need to develop all relevant facts in the adversary system is [so] fundamental" that "public confidence in the system depend on full disclosure of all the facts.").

Second, the fact those unjust outcomes would stem from States' refusal to comply with subpoenas that ordinary citizens must obey, would exacerbate the damage. "We naturally look to the action of a sovereign state, to be characterized by a more scrupulous regard to justice, and a higher morality, than belong to the ordinary transactions of individuals." *Woodruff v. Trapnall*, 51 U.S. 190, 207 (1850). Thus, "[t]he administration of justice is poorly served when the government itself fails to set a proper example for its citizens." *Davis Enters.*, 877 F.2d at 1190 (Weis, J., dissenting). Put simply, "sovereigns cannot expect an individual citizen . . . to testify regardless of personal inconvenience or financial loss" if "a governmental agency" demands a "lesser standard of civic responsibility." *Id.*

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1.3. State immunity from federal subpoenas would block public transparency into government.

When government officials refuse to testify, it impedes "[t]ransparency in government," which "remains a vital national interest in a democracy." *Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 14 (D.C. Cir. 2009). "'[G]overnment transparency is critical' to ensure 'the people have the information needed to check public corruption, hold government leaders accountable, and elect leaders who will carry out their preferred policies.'" *Ctr. for Investigative Reporting v. U.S. Dep't of Just.*, 14 F.4th 916, 922 (9th Cir. 2021).

Vullo, 602 U.S. 175—in which New York authorities allegedly coerced entities to terminate their associations with the NRA—illustrates how State immunity from federal subpoenas would make it harder for citizens to bring public misconduct to light.

The selective immunity the Patrol seeks here would only compound the problem. Because the Patrol provided documents in response to Mick's subpoena and only asserted sovereign immunity from depositions (AOB 10), the Patrol evidently seeks a selective immunity in which, in the course of a single case, "a Government agency [can] decide for itself what ... it will divulge to the court." Berger & Krash, *Government Immunity from Discovery*, 59 Yale L.J. at 1453.

The results of such selective immunity would be the antithesis of transparency: It would allow state agencies to disclose only the information that puts them in a favorable light, while withholding information that does not. Conceivably, States could even play favorites in litigation by waiving sovereign immunity for subpoenas from parties they favor, then playing their sovereign-immunity card when they receive a subpoena from a perceived adversary. It is hard to imagine a worse outcome for public confidence in our democracy than that.

1.4. State immunity from federal subpoenas would impair the public's ability to set standards in the community.

Extending State sovereign immunity to federal subpoenas would also undermine the ability of jurors to reach considered verdicts based on the best available evidence, thereby impeding a "central foundation of our justice system and our democracy." *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 210 (2017).

As the district judge here observed, jury verdicts "have long been understood" as a means by which citizens dictate "standards and behavioral norms of the community." *A.W. v. Lancaster County School Dist. 0001*, 784 N.W.2d 907, 914 (Neb. 2010) (Gerrard, J.). Largely for that reason, "[t]ogether with the right to vote, those who wrote our Constitution

considered the right to trial by jury, 'the heart and lungs, the mainspring and the center wheel' of our liberties, without which 'the body must die; the watch must run down; the government must become arbitrary.'" *United States v. Haymond*, 588 U.S. 634, 640–41 (2019) (quoting Letter from Clarendon to W. Pym (Jan. 27, 1766), in 1 *Papers of John Adams* 169 (R. Taylor ed. 1977)).

If "[t]he jury is a tangible implementation of the principle that the law comes from the people," *Pena-Rodriguez*, 580 U.S. at 210, it follows that the jury must have access to the best evidence in order to reach a considered decision. *Davis Enters.*, 877 F.2d at 1188 ("[T]here is a generalized public interest in having public employees cooperate in the truth seeking process by providing testimony useful in litigation.").

Of course, state agencies are "unusually trustworthy sources of evidence." *Chesapeake & Delaware Canal Co. v. United States*, 250 U.S. 123, 128–29 (1919); *Wong Wing Foo*, 196 F.2d at 123 (recognizing official records carry "the presumption of a proper performance of official duty"); Fed. R. Evid. 803(8)–(10) (listing special hearsay exceptions for public records). Public officials who gather evidence "under the sanction of public duty," understand the need "for regular contemporaneous" records, and presumably have "a

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minimum of motive . . . to either make false entries or to omit proper ones." *Chesapeake*, 250 U.S. at 128–29.

Thus, State immunity from federal subpoenas would frustrate a critical form of direct democracy by withholding evidence material to the public's ability to set behavioral norms and community standards.

*   *   *

In sum, the rationale for State immunity is that "public service would be hindered, and the public safety endangered" in "favor of individual interests" in its absence. *Russell*, 49 F.4th at 513–14 (first quoting *The Siren*, 74 U.S. 152, 154, then quoting *Ex parte Ayers*, 123 U.S. 443, 505 (1887)).

But rather than promote the public interest, State immunity from federal subpoenas would [1] frustrate the public interest in the administration of justice; [2] undermine public confidence in the justice system; [3] impair the public's ability to set standards in their community; and [4] limit public transparency into government.

Accordingly, the public good does not support extending sovereign immunity to give States immunity from federal subpoenas.

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2. Federal rules already protect States from improper or unduly burdensome subpoenas without the side effects of sovereign immunity.

The Patrol and its amici not only ignore the many ways State immunity from federal subpoenas would harm the public interest, but they also ignore that giving States immunity from federal subpoenas is not necessary to protect States from undue discovery burdens.

Indeed, as discussed below, ordinary discovery rules protect States from [1] improper discovery into privileged material or high-ranking officials, and [2] unduly burdensome discovery where the burden of production outweighs the benefits.

As shown below, these tools not only show that sovereign immunity's strong medicine (and corresponding side effects on the public interest) are unnecessary to protect States' interests, they also raise significant constitutional-avoidance concerns by deciding cases on sovereign-immunity grounds that could instead be decided on (for example) the basis of a common-law privilege. *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.").

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2.1. Federal rules protect States from improper discovery into privileged material or high-ranking officials.

The federal discovery rules protect States from improper discovery in two significant ways that obviate the need for sovereign immunity.

First, States are free to assert well-established privileges such as the mental-processes privilege or attorney-work-product privilege.

Federal Rule of Civil Procedure 45 expressly protects against the discovery of privileged or protected matter. Fed. R. Civ. P. 45(d)(3)(A)(iii). Similarly, Federal Rule of Evidence 501 confirms that common-law privileges are available in federal court, and specifically provides that "*state law* governs privilege" where "state law supplies the rule of decision." Fed. R. Evid. 501. Thus, States already have the ability to protect their most sensitive materials (e.g., a judge's private writings or a state attorney's notes) from a subpoena without invoking sovereign immunity. *Matter of Special Apr. 1977 Grand Jury*, 581 F.2d at 592 ("Rather than carving out an unprecedented exemption from an arm of the federal government's enforcement powers, the requisite deference to a state's needs can be applied by considering with some care whether those needs are sufficient to create a privilege for certain state records.").

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The best case for the Patrol and its amici—the Fifth Circuit's opinion in *Russell*, 49 F.4th 507—underscores this point. There, plaintiffs challenging an allegedly unconstitutional cash-bail system subpoenaed state judges. *Id.* at 510. The Fifth Circuit quashed the subpoenas on sovereign-immunity grounds—a holding the Patrol and its amici ask for here too. But in so holding, the Fifth Circuit acknowledged that the "mental processes rule," a common-law privilege, "might also" bar them. *Id.* at 510–11.

Thus, *Russell* not only confirms that sovereign immunity's strong medicine is unnecessary to protect States from improper discovery, but it also illustrates that deciding cases like this on sovereign-immunity grounds will violate the doctrine of constitutional avoidance. *Spector Motor*, 323 U.S. at 105.

Second, under the so-called "apex doctrine," higher-ranking state officials would avoid all but the most essential, minimally burdensome depositions.

The general rule in federal court is that high-ranking government officials are not subject to depositions. *See In re United States*, 197 F.3d 310, 314 (8th Cir. 1999) (citing *United States v. Morgan*, 313 U.S. 409, 421–22 (1941)); *see also In re McCarthy*, 636 F. App'x 142, 142 (4th Cir. 2015); *In re United States*, 542 F. App'x 944, 947 (Fed. Cir. 2013); *In re F.D.I.C.*, 58 F.3d 1055, 1060 (5th Cir. 1995); *In re*

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United States, 985 F.2d 510, 512–13 (11th Cir. 1993); *Simplex Time Recorder Co. v. Secretary of Labor*, 766 F.2d 575, 586–87 (D.C. Cir.1985); *Kyle Engineering Co. v. Kleppe*, 600 F.2d 226, 231 (9th Cir. 1979).

This rule applies to "heads of agencies and other top government executives." *Church of Scientology of Boston v. I.R.S.*, 138 F.R.D. 9, 12 (D. Mass. 1990). To overcome the presumption against depositions of such officials, the proponent must generally show the official has "personal factual information pertaining to material issues in an action" that cannot be obtained from another source. *Id.*

And even in the exceptionally rare case where a high-ranking official might be required to testify, federal courts could ensure their testimony is taken at a time, place, and manner that minimizes the burden on their time. *Clinton v. Jones*, 520 U.S. 681, 691–92 (1997) ("We assume that the testimony of the President, both for discovery and for use at trial, may be taken at the White House at a time that will accommodate his busy schedule.").

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2.2. Federal rules protect States from unduly burdensome discovery demands.

Even with an otherwise proper discovery request, district courts retain extensive discretion to protect States from unduly burdensome discovery.

Federal Rule of Civil Procedure 26 directs district courts to limit discovery where "the burden or expense of the proposed discovery outweighs its likely benefit," or where producing the material would impose an "undue burden or cost," or where the discovery "can be obtained from some other source that is more convenient, less burdensome, or less expensive." Fed. R. Civ. P. 26(b)(1), (b)(2)(B), (b)(2)(C)(i). And Rule 45 directs district courts to quash any subpoena that would "impos[e] an undue burden or expense." Fed. R. Civ. P. 45 (d)(1), (3)(A)(iv).

In addition to limiting the scope of a subpoena, a district court may "shift all or part of the costs of production to the requesting party." *Kirschenman v. Auto-Owners Ins.*, 280 F.R.D. 474, 487 (D.S.D. 2012); *see also G & E Real Est., Inc. v. Avison Young-Washington, D.C., LLC*, 317 F.R.D. 313, 315 (D.D.C. 2016).

Notably, a district court's discretion to limit discovery (or shift the costs of production) is at its apex with subpoenas to nonparty government agencies—the exact situation here. *See Peoples v. U.S. Dept. of Agric.*, 427 F.2d

561, 567 (D.C. Cir. 1970) ("The District Court has adequate discretion to assure that discovery … will not unduly burden the government officials concerned."); *Exxon Shipping Co. v. U.S. Dep't of Interior*, 34 F.3d 774 (9th Cir. 1994) ("The Federal Rules also afford nonparties special protection against the time and expense of complying with subpoenas."); *Precourt v. Fairbank Reconstruction Corp.*, 280 F.R.D. 462, 467 (D.S.D. 2011) (noting district court's power to "modify the subpoena's scope" to "protect a nonparty from undue burden or expense").

These federal rules "assure that discovery will be reasonably related to the object of furnishing the court with an adequate basis for ruling intelligently on the questions before it, and will not unduly burden the government officials concerned." *Peoples,* 427 F.2d at 567.

Exxon Shipping Co., 34 F.3d 774, is instructive. There, federal agencies asserted sovereign immunity in response to deposition subpoenas. *Id.* at 778. Like the Patrol here, the government emphasized the need to "conserv[e] its employee resources and 'minimiz[e] governmental involvement in . . . matters unrelated to official business'" *Id.* at 779. Rejecting those arguments, the Ninth Circuit held that the federal rules—including Rules 26 and 45—adequately address those concerns without resorting to sovereign immunity. *Id.* at 779–80.

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Other courts agree that federal courts' ability to limit discovery that poses an undue burden on a government agency or official is sufficient to protect States' interest in avoiding undue discovery burdens. *See, e.g., Linder v. Calero-Portocarrero*, 251 F.3d 178, 182–83 (D.C. Cir. 2001) (affirming decision to quash subpoena to government official because cost of complying was an undue expense under Rule 45); *Moore v. Armour Pharm. Co.*, 927 F.2d 1194, 1197–98 (11th Cir. 1991) (affirming decision to quash subpoena to take CDC employee's deposition because burden of discovery to CDC outweighed its benefit to the plaintiff); *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 399 n.2 (D.C. Cir. 1984) (holding that subpoenas are not barred by sovereign immunity, but instead may be barred by common law privileges).

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In sum, ordinary discovery rules adequately protect State governments from improper or unduly burdensome discovery without the collateral damage to the public interest sovereign immunity would entail.

Thus, as the overwhelming majority of courts to consider the issue have concluded, sovereign immunity does not allow States to ignore federal subpoenas. *E.g.*, *United States Dep't of Just. v. Ricco Jonas*, 24 F.4th 718, 727 (1st Cir. 2022), *cert. denied sub nom. Program Adm'r of the New*

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Hampshire Controlled Drug Prescription Health & Safety Program v. Dep't of Just., 143 S.Ct. 207 (2022) (holding that administrative subpoena served upon a state official did not violate Eleventh Amendment); *Barnes v. Black*, 544 F.3d 807, 812 (7th Cir. 2008) ("[A]n order commanding a state official who is not a party to a case ... to produce documents in the state's possession during the discovery phase of the case ... do[es] not violate the Eleventh Amendment."); *Charleston Waterkeeper v. Frontier Logistics, L.P.*, 488 F. Supp. 3d 240, 248 (D.S.C. 2020) ("[T]he doctrine of state sovereign immunity does not preclude a court from enforcing the subpoena against [a state agency] or any of its employees."); *United States v. Univ. of Massachusetts, Worcester*, 167 F. Supp. 3d 221, 223–24 (D. Mass. 2016) ("[N]onparty discovery does not constitute a 'suit' for purposes of the Eleventh Amendment."); *Ali v. Carnegie Inst. of Washington*, 306 F.R.D. 20, 30 n.8 (D.D.C. 2014) ("The Eleventh Amendment, therefore, does not completely shield [state agency] from certain non-party discovery requests."); *Wilson v. Venture Fin. Grp., Inc.*, No. C09-5768BHS, 2010 WL 4512803, at *2 (W.D. Wash. Nov. 2, 2010) (holding that sovereign immunity does not bar subpoena to State); *Arista Recs. LLC v. Does 1-14*, No. 7:08CV00205, 2008 WL 5350246, at *5 (W.D. Va. Dec. 22, 2008) (holding that the Eleventh Amendment does not bar federal subpoena to state agency);

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Jackson v. AFSCME Loc. 196, No. CIV. 3:07CV0471JCH, 2008 WL 1848900, at *3 (D. Conn. Apr. 25, 2008) ("the Eleventh Amendment does not apply to the subpoenas at issue"); *Allen*, 544 F. Supp. 2d at 1079 (The "Eleventh Amendment does not apply to preclude discovery from a State agency" because "a discovery request" does not constitute "a suit or suing the state within the meaning of the Eleventh Amendment."); *United States v. Juv. Male 1*, 431 F. Supp. 2d 1012, 1016 (D. Ariz. 2006) ("Federal subpoenas routinely issue to state and federal employees to produce official records or appear and testify in court and are fully enforceable despite any claim of immunity."); *Laxalt v. McClatchy*, 109 F.R.D. 632, 635 (D. Nev. 1986) (holding that Eleventh Amendment did not bar subpoena duces tecum).

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's order and remand for further proceedings.

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Dated: September 5, 2024

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 **4,859** 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 (13-point Century Schoolbook) using Microsoft Word (the same program used to calculate the word count).

/s/ Benjamin I. Siminou
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Certificate of Service

On September 5, 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 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 personally delivered 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).

/s/Benjamin Siminou
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