No. 19-1770

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JASON McGEHEE, et al.,
Plaintiffs-Appellees,

v.

NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA
(Hon. Laurie Smith Camp; No. 4:18cv3092)

APPELLANT'S PETITION FOR REHEARING EN BANC

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INTRODUCTION AND RULE 35(b)(1) STATEMENT

Rehearing en banc is warranted because this appeal involves a question of exceptional importance: whether sovereign immunity bars Article III jurisdiction over a third-party subpoena served on an unconsenting state.

In *In re Mo. Dept. of Natural Res.*, 105 F.3d 434 (8th Cir. 1997) (*Missouri DNR*"), this Court found "no authority" to bar such a subpoena. But later, this Court held that a third-party subpoena to an Indian tribe is a "suit" barred by tribal immunity. *Alltel Commc'ns, LLC v. DeJordy*, 675 F.3d 1100 (8th Cir. 2012). And the Supreme Court has reaffirmed "[a]n integral component of the States' sovereignty [is] their immunity from private suits." *Franchise Tax Bd. of California v. Hyatt*, 139 S. Ct. 1485, 1493 (2019) (cleaned up). That includes "prevent[ing] States from being amenable to process in any court without their consent." *Id.*

Since sovereign immunity forbids federal courts from exercising jurisdiction over "any suit" against a state and a third-party subpoena served on an unconsenting state is a "suit," rehearing en banc is warranted, and the portion of *Missouri DNR* finding no authority to bar such a subpoena should be overruled.

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STATEMENT OF ISSUES MERITING REHEARING EN BANC

I. Whether sovereign immunity bars Article III jurisdiction over a third-party subpoena served on an unconsenting state.

II. Subsumed within that issue is whether *In re Missouri Dept. of Natural Res.*, 105 F.3d 434 (8th Cir. 1997), should be overruled.

STATEMENT OF THE CASE

Appellees are Arkansas prisoners who are or were on that state's death row for capital murder convictions and have sued Arkansas alleging that state's method of execution violates the Eighth Amendment. *See McGehee v. Hutchinson*, No. 4:17-CV-179 (E.D. Ark.).

To frustrate the state's ability to carry out executions, and as part of a national trend, *see* Amici Brief of Missouri et al., Appellees served subpoenas on many state corrections departments across the country, including Nebraska and at least three other states. J.A. 0012 (Neb.); *McGehee v. Texas Dep't of Criminal Justice*, No. 4:18-MC-1546 (S.D. Tex.); *McGehee v. Missouri Dep't of Corr.*, No. 2:18-MC-4138 (W.D. Mo.); *McGehee v. Florida Dep't of Corr.*, 4:18-MC-00004 (N.D. Fla.).

The subpoena here requested significant information and records from the Nebraska Department of Correctional Services relating to the

State's knowledge of, and communications with, suppliers of an execution drug. J.A. 0012, J.A. 0019-0021 (subpoena). The State timely served nonparty objections and asserted sovereign immunity. J.A. 0022-0034.

Appellees thereafter filed suit in district court to compel compliance with the subpoena, and the State moved to dismiss for lack of subject matter jurisdiction. J.A. 0006-0008, J.A. 00179. As the State's initial objection and subsequent briefing made clear, the State from the outset argued that sovereign immunity erects a categorical bar to third-party subpoenas on nonconsenting states.

The court allowed a modified version of the subpoena to proceed for information regarding the State's attempts to obtain an execution drug and communications with the State's supplier (with the supplier's name redacted). J.A. 0668-0670. The district court denied the State's assertion of sovereign immunity. J.A. 0670-0675. This appeal followed.

The panel affirmed because it was bound by the prior panel decision in *Missouri DNR. McGehee v. Nebraska Dep't of Corr. Servs.,* 2020 WL 4517553 (8th Cir. 2020). Judge Stras concurred but expressed doubts that "a state may be haled into federal court solely for the purpose of answering a third-party subpoena." *Id.*

ARGUMENT

I. En banc review of *Missouri DNR* is warranted.

Missouri DNR is contrary to both the text of the Eleventh Amendment and this Court's decision in *Alltel Commc'ns, LLC v. DeJordy*, 675 F.3d 1100, 1105 (8th Cir. 2012). *Missouri DNR*'s broad pronouncement that "[t]here is simply no authority for the position that the Eleventh Amendment shields government entities from discovery in federal court," 105 F.3d at 436, misapplied *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958), by extending it from party litigation to an unconsenting state facing a third-party subpoena.

More importantly, the professed lack of authority mentioned in *Missouri DNR* no longer exists. This Court has since held a third-party subpoena is an immunity-triggering "suit." *Alltel*, 675 F.3d at 1105. And the Supreme Court has reaffirmed "[a]n integral component of the States' sovereignty [is] their immunity from private suits." *Franchise Tax Bd. of California v. Hyatt*, 139 S. Ct. 1485, 1493 (2019) (cleaned up). That includes "prevent[ing] States from being amenable to process in any court without their consent." *Id.* Indeed, "[t]he very object and purpose of the Eleventh Amendment was to prevent the indignity of subjecting a state

to the coercive process of judicial tribunals at the instance of private parties." *Ex parte Ayers*, 123 U.S. 443, 505 (1887).

Maintaining *Missouri DNR*'s broad pronouncement on sovereign immunity leaves unconsenting states with less protection from third-party subpoenas than federal agencies and Indian tribes. *Alltel*, 675 F.3d at 1105; *COMSAT Corp. v. Nat'l Sci. Found.*, 190 F.3d 269 (4th Cir. 1999); *United States EPA v. Gen. Elec. Co.*, 197 F.3d 592 (2d Cir. 1999).

Yet panels of this Court have observed but repeatedly declined to address the inconsistency. *See Webb v. City of Maplewood*, 889 F.3d 483, 488 (8th Cir. 2018), *cert. denied sub nom. City of Maplewood, Mo. v. Webb*, 139 S. Ct. 389 (2018) (raised first at oral argument and not considered, but observing "that any State official or entity the plaintiffs subpoena for discovery may raise a claim of sovereign immunity at that time."); *In re Mo. Dep't of Corr.*, 839 F.3d 732 (8th Cir. 2016) (quashing subpoena on relevancy and undue burden grounds; declining to reach sovereign immunity issue), *cert. denied sub nom. Jordan v. Mo. Dep't of Corr.*, 137 S. Ct. 2180 (2017); *Alltel*, 675 F.3d at 1104.[1]

[1] In *Bonnet v. Harvest (U.S.) Holdings, Inc.*, 741 F.3d 1155, 1156 (10th Cir. 2014) ("*Bonnet*"), the Tenth Circuit not only reached the same "immunity-triggering-suit" holding as *Alltel*, but specifically anticipated

This question of exceptional importance should be resolved. Currently, out-of-state private civil litigants can compel unconsenting states to act in ways they otherwise would not. J.A. 0673. Such infringement on the States' sovereignty will continue until the en banc court confirms sovereign immunity bars Article III jurisdiction over a third-party subpoena served on an unconsenting state.

II. A third-party subpoena served on an unconsenting state is a "suit" that is subject to immunity.

This Court has already held a subpoena is a suit. A "federal court's third-party subpoena in private civil litigation is a 'suit' that is subject to Indian tribal immunity." *Alltel*, 675 F.3d at 1105. The definition of "suit" for immunity purposes cannot be different for states than it is for tribes. *See Bonnet*, 741 F.3d at 1159 ("[T]he term 'suit' embodies the broad principle that the government is not subject to 'legal proceedings, at law

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a future holding that "the Eleventh Amendment may well shield a state agency from discovery in federal court." 741 F.3d at 1161. And in *Virginia Dep't of Corr. v. Jordan*, 921 F.3d 180, 188 (4th Cir. 2019), the Court ordered post-argument supplemental briefing on whether a subpoena issued against a non-party state agency "runs afoul of that state's sovereign immunity." It was only because Virginia "backpedaled" its prior insistence on a sovereign immunity defense that the Court declined to address the issue. *Id.* at 187-88.

or in equity' or 'judicial process ' without its consent.") (quoting *Belknap v. Schild,* 161 U.S. 10, 16 (1896)).

In *Alltel*, this Court observed that tribal immunity from third-party subpoenas presents a "very different issue" from cases where the tribe is a party litigant since "[t]he Government as a litigant is, of course, subject to the rules of discovery." 675 F.3d at 1102-03 (quoting *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 681 (1958)). Instead, a subpoena "command[s]" a nonparty governmental unit "to appear in federal court and obey whatever judicial discovery commands may be forthcoming." *Id.* at 1103. Just as in *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002), when a third-party subpoena is served on an unconsenting state, the state only has two options, appear in the proceeding or stand defenseless and subject to contempt. Either option coerces the state into federal court, and thus a third-party subpoena is a "suit."

III. Sovereign immunity bars "any suit" in federal court against an unconsenting state.

The Supreme Court has consistently held that "an unconsenting State is immune from suits brought in federal courts . . . by citizens of another State." *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). "It is inherent in the nature of sovereignty not to be amenable to the suit of an

individual without its consent." *Hyatt*, 139 S. Ct. at 1493 (quoting The Federalist No. 81 (Alexander Hamilton)). The very adoption of the Eleventh Amendment—which swiftly followed the Court's early "blunder" in *Chisolm v. Georgia*, *id.* at 1496—"confirmed 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.'" *Id.* (quoting *Hans v. Louisiana*, 134 U.S. 1, 18 (1890)).

Private suits against a state by citizens of another state were antithetical to the constitutional design. *Id.* at 1495. During the ratification debates, James Madison emphasized that "[i]t is not in the power of individuals to call any state into court." *Id.* (quoting 3 Debates on the Constitution 533 (J. Elliot ed. 1876) (Pendleton) ("Elliot's Debates")). John Marshall was more pointed: "With respect to disputes between *a state and the citizens of another state*, its jurisdiction has been decried with unusual vehemence. I hope no gentleman will think that a state will be called at the bar of the federal court." *Id.* (quoting Elliot's Debates 555 (emphasis original)).

As the Supreme Court recently summarized, it was the Founders' understanding that the foundational principles of sovereign immunity

"prevented States from being amenable *to process* in any court without their consent." *Id.* at 1493 (emphasis added). And the Supreme Court has "often made it clear that the r*elief sought by a plaintiff suing a State is irrelevant* to the question whether the suit is barred by the Eleventh Amendment." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 58 (1996) (emphasis added). "Sovereign immunity does not merely constitute a defense to monetary liability or even to all types of liability. Rather, it provides an immunity from suit." *S.C. State Ports Auth.*, 535 U.S. at 766.

IV. Since tribal immunity applies to a third-party subpoena, state sovereign immunity must apply here.

Supreme Court precedents have established that "[t]he scope of tribal immunity . . . is more limited" than state sovereign immunity. *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1154 (10th Cir. 2011) (citing *Plains Commerce Bank v. Long Family & Cattle Co.*, 554 U.S. 316, 327 (2008), and *Montana v. United States*, 450 U.S. 544, 563 (1981)). "Because tribal immunity is a matter of federal common law, not a constitutional guarantee, its scope is subject to congressional control and modification." *Id.* "As domestic dependent nations, Indian tribes exercise sovereignty subject to the will of the Federal Government." *Michigan v.*

Bay Mills Indian Cmty., 572 U.S. 782, 803 (2014) (internal quotation omitted).

States, in contrast, exercise sovereignty that has been enshrined in the Constitution not only through the words of the Eleventh Amendment but also built into the very structure of our founding charter. *Hyatt*, 139 S. Ct. at 1496. Simply put, there is no support for the notion that the sovereign immunity of the States is *less* protective than common law tribal immunity.

V. This appeal is not moot.

The eleventh-hour mootness challenge that Appellees raised in a last-ditch Rule 28(j) letter is no impediment to granting en banc review.[2] Most notably, case law establishes that this appeal is not moot. *See Church of Scientology of California v. United States*, 506 U.S. 9, 13 (1992) (an order to return the records is meaningful relief); *In re Green Grand Jury Proceedings*, 492 F.3d 976, 982 n.5 (8th Cir. 2007) (same); *In re Grand Jury Subpoenas Duces Tecum*, 78 F.3d 1307, 1310 (8th Cir. 1996)

[2] The panel opinion contains a typographical error indicating the Rule 28(j) letter was submitted by the Appellant ("NDCS" in the opinion). The docket correctly shows the letter was actually submitted by the Appellees.

(same). The underlying Arkansas litigation is not over, the subpoena was not withdrawn, and the State's records have not been returned or destroyed. Moreover, the State's sovereignty was infringed the moment the State was haled into federal court without its consent. This Court can—and should—"correct[ ] the error of the lower court in entertaining the suit." *In re AFY*, 734 F.3d 810, 816 (8th Cir. 2013).

CONCLUSION

The Court should grant the petition for rehearing en banc.

Respectfully submitted August 20, 2020.

NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, Appellant.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this petition complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Century Schoolbook, a proportionally spaced font.

I further certify that this petition complies with the type-volume limitation of Fed. R. App. P. 35(b)(2) because it contains 2,278 words, excluding the parts of the brief exempted under Rule 32(f), according to Microsoft Word.

By: *s/ Ryan S. Post*

CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2020, I filed the foregoing document with the Clerk of the United States Court of Appeals for the Eighth Circuit using the CM/ECF system, causing notice of such filing to be served on all parties.

By: *s/ Ryan S. Post*