No. 22-3000

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TAMATHA HENNESSEY,
Plaintiff-Appellant,

v.

UNIVERSITY OF KANSAS HOSPITAL AUTHORITY,
Defendant-Appellee.

On Appeal from the United States District Court for the District of Kansas (Civil Action No. 2:21-CV-02231, Hon. Eric F. Melgren)

REPLY BRIEF FOR APPELLANT

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ORAL ARGUMENT REQUESTED

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INTRODUCTION

In her opening brief, Ms. Hennessey established that the Hospital Authority failed below to meet its burden to establish that it is an arm of the state of Kansas: its motion to dismiss neither discussed the relevant arm-of-the-state factors, nor provided any evidence pertinent to them. *See* Br. at 16–28.[1] Citing cases finding that similar entities were not arms of their respective states, Ms. Hennessey also established that the Hospital Authority was not an arm of the State of Kansas, and neither of the twin purposes of granting entities arm-of-the-state status would be advanced here. *See id.* at 28–50.

In response, the Hospital Authority concedes that, besides a citation to a single (inapposite) authority, it made no effort to argue or provide evidence to suggest to the district court that it is an arm of the state. *See* App. Br. at 25.[2] And it does not attempt to distinguish—because it cannot—the cases cited in the opening brief where circuits found similar entities were not arms of the state and thus not entitled

[1] Citations to "Br." are to Ms. Hennessey's opening brief, Appellate ECF No. 12.

[2] Citations to "App. Br." are to the Hospital Authority's response brief, Appellate ECF No. 15.

to sovereign immunity. *See* Br. at 28–50 (citing, among others, the nearly identical hospital authority found not to be an arm of the state in *Takle v. University of Wisconsin Hospital & Clinics Authority*, 402 F.3d 768 (7th Cir. 2005)). Nor does the Hospital Authority dispute that it should not be considered an arm of the state if this Court finds that Ms. Hennessey's suit would not implicate either of the twin aims of the doctrine: protecting the state's finances and respecting its dignitary interests. *See* Br. at 29–30.

Instead, the Hospital Authority asserts three arguments, one technical and two substantive. None change the conclusion that the lower court erred and should be reversed.

First, the Hospital Authority contends that the district court should have dismissed Ms. Hennessey's *pro se* complaint for lack of jurisdiction because Ms. Hennessey pleaded that the parties resided or operated in, rather than were citizens of, different states. *See* App. Br. at 8 ("the complaint failed to properly allege the citizenship of the parties"), 12–15. But this argument, rejected *sub silentio* by the district court, fails for a number of reasons. For one, under the liberal pleading standards granted *pro se* plaintiffs, the complaint's allegations that Ms.

Hennessey was a Missouri resident and the Hospital Authority was a Kansas entity operating in Kansas were sufficient for complete diversity. Even if Ms. Hennessey made a technical error in alleging the complete diversity of the parties, such a deficiency can be rectified under 28 U.S.C. § 1653—particularly where, as here, there is no dispute that the parties are domiciled in different states. *See* part I.

Beyond this technical argument, the Hospital Authority asserts two substantive ones: that if the Hospital Authority is an arm of the state, then it is not a "citizen" for purposes of diversity jurisdiction, *see* App. Br. at 10–23, or it is immune from suit under the Eleventh Amendment, *see id.* at 23–26. These arguments turn on a single inquiry: whether the Hospital Authority has shown that it is an arm of the state of Kansas.

But as Ms. Hennessey demonstrated in her opening brief, the Hospital Authority did not meet its burden to show the district court that it is an arm of the state of Kansas. *See* Br. at 16–28. And the Hospital Authority's arguments and authorities provided for the first time on appeal—such as the fact that the Governor of Kansas appoints some of the Hospital Authority's board members, and the Hospital

Authority must provide the state with an annual financial report—do not move the needle. *See* part II.

None of the things the Hospital Authority highlight in its brief, alone or together, make the Hospital Authority an arm of the state. That is particularly so when, as demonstrated in Ms. Hennessey's opening brief, the Hospital Authority is financially independent from the state; the state is not liable for judgments against the Hospital Authority; the Hospital Authority's day-to-day operations are not controlled by the state; and the Hospital Authority does not perform a uniquely government function but is instead competing in the private market. Because the Hospital Authority is not an arm of the state of Kansas, it is a citizen for purposes of diversity jurisdiction and it is not entitled to sovereign immunity under the Eleventh Amendment.

The district court should be reversed.

ARGUMENT

I. MS. HENNESSEY'S *PRO SE* COMPLAINT ADEQUATELY ALLEGED COMPLETE DIVERSITY.

The Hospital Authority first contends that, although it does not dispute that Ms. Hennessey and the Hospital Authority are domiciled in different states, Ms. Hennessey's *pro se* complaint should have been

dismissed because Ms. Hennessey failed to adequately plead the complete diversity requirement of federal diversity jurisdiction when she asserted only where she resided (Missouri) and where the Hospital Authority was created and operated (Kansas). App. Br. at 12–15.

That is wrong, for two reasons. First, Ms. Hennessey's pleadings were adequate under the lenient standard applied to *pro se* plaintiffs. *See* part A. Second, any technical flaws in her pleading could be fixed on appeal by amendment under 28 U.S.C. § 1653. *See* part B.

A. There Is Complete Diversity Between Ms. Hennessey (Missouri) And The Hospital Authority (Kansas).

Under the liberal pleading standards applicable to *pro se* complaints, Ms. Hennessey's complaint adequately alleged the undisputed fact that the parties were domiciled in different states: Ms. Hennessey in Missouri and the Hospital Authority in Kansas.[3]

[3] Although the Hospital Authority argues that it is not a "citizen" for purposes of diversity jurisdiction because it is an arm of the state of Kansas, *see* App. Br. at 16–23, it does not dispute that the Hospital Authority was created by Kansas law, operates in Kansas, and oversees the Kansas hospital at which the events giving rise to this suit took place. In other words, aside from its arm-of-the-state argument, the Hospital Authority puts forward no other argument that it is not a Kansas entity diverse for citizenship purposes from Ms. Hennessey. It thus effectively concedes that Ms. Hennessey has met her burden as to subject matter jurisdiction, which is evaluated before the burden of

1. The complaint adequately alleged that Ms. Hennessey is a Missouri citizen.

Ms. Hennessey's *pro se* complaint alleged that she is a resident of Missouri. The police report attached as an exhibit to her complaint contains evidence of Ms. Hennessey's Missouri driver's license. And the Hospital Authority has never contended that Ms. Hennessey is not a citizen of Missouri. (*See also* Mem. Supp. Mot. Dismiss, ROA at 26 ("While the Petition generally states that Plaintiff is a citizen of Missouri, she does not explicitly assert diversity jurisdiction.")) Taken together, Ms. Hennessey's *pro se* complaint adequately alleged that she is a citizen of Missouri for purposes of complete diversity.

When a *pro se* plaintiff asserts diversity jurisdiction based on his or her residency in a state, a court must interpret the complaint's

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persuasion moves to the Hospital Authority to demonstrate that it is an arm of the state entitled to Eleventh Amendment sovereign immunity. *See, e.g.*, *Rhea v. W. Tenn. Violent Crime & Drug Task Force*, No. 17-cv-02267, 2017 WL 10636418, at *3 (W.D. Tenn. Dec. 29, 2017) ("In order to require both that Rhea bear his burden of proof as to the existence of subject matter jurisdiction and that the Task Force bear its burden of proof as to sovereign immunity, the Court will first consider whether Rhea has shown that the Court could exercise subject matter jurisdiction absent the affirmative defense of sovereign immunity; if he has, the Court will then consider whether the Task Force has shown that it is entitled to sovereign immunity.").

allegations of residency as being assertions that the plaintiff is domiciled in or a citizen of that state when there is support for such an interpretation in the record or it is uncontested by the other side. *Kelleam v. Md. Cas. Co. of Baltimore*, 112 F.2d 940, 943 (10th Cir. 1940) ("[W]here the court is satisfied . . . that the averment of residence in a designated state was intended to mean . . . that the party was a citizen of that state, it is sufficient."), *rev'd on other grounds*, 312 U.S. 377 (1941); *id.* ("Proof that a person is a resident of a state is prima facie evidence that he is a citizen thereof, and shifts the burden of showing that his domicile and citizenship is other than the place of his residence to him who alleges it."). *See, e.g.*, *Mugan v. McGuire L. Firm, P.C.*, No. C-06-3054, 2007 WL 1097564, at *2 (N.D. Iowa Apr. 12, 2007) (adopting magistrate's decision to construe liberally *pro se* complaint's allegations of residency as allegations of citizenship for purposes of diversity jurisdiction).

Appellate courts look to "[t]he whole record" for "facts . . . which, in legal intendment, constitute" an allegation of citizenship, *Sun Printing & Publ'g Ass'n v. Edwards*, 194 U.S. 377, 382 (1904), including, among other things, a driver's license, *see State Farm Mut.*

Auto. Ins. Co. v. Dyer, 19 F.3d 514, 520 (10th Cir. 1994) (affirming district court's reliance on driver's license, among other items, to support diversity of citizenship). *Cf. also, e.g.*, *Olson v. AT&T Corp.*, No. CIV 08-2126, 2010 WL 1292716, at *3 (D. Kan. Mar. 29, 2010) (construing facts alleged in motions, together with complaint, to find diversity jurisdiction).

In *Kelleam*, for example, the complaint claimed diversity jurisdiction based on allegations that the defendants "[we]re residents," rather than citizens, of Arizona and Oklahoma. *Kelleam*, 112 F.2d at 943. While acknowledging that allegations of residency are insufficient, without more, to establish diversity of citizenship, this Court nevertheless found that "[t]he failure to properly allege diversity of citizenship" would not "defeat the jurisdiction of the court if, as a matter of fact, such diversity exists." *Id.* Because there was no dispute as to the factual matter of diversity, this Court affirmed the district court's decision to exercise jurisdiction. *Id.*

So, too, here. Ms. Hennessey's complaint alleged that she "is a resident of the State of Missouri residing at 16313 Spring Valley Road, Belton, MO 64012." (Compl. ¶ 1, ROA at 6). The police report attached

as an exhibit to her complaint shows that Ms. Hennessey has a Missouri driver's license. (Compl. Exh. 1, ROA at 16.) Together these are *prima facie* evidence that Ms. Hennessey is a Missouri citizen. *Kelleam*, 112 F.2d at 943; *Mugan*, 2007 WL 1097564, at *2. *See also, e.g.*, *State Farm*, 19 F.3d at 520 ("[T]he place of residence is *prima facie* the domicile."). The Hospital Authority does not dispute that Ms. Hennessey is a Missouri citizen, and has made no effort to overcome the presumption that her claim of Missouri residence, coupled with a Missouri driver's license, indicates her Missouri citizenship. Thus, the complaint adequately alleged that Ms. Hennessey is a Missouri citizen for purposes of complete diversity. *See Kelleam*, 112 F.2d at 943; *State Farm*, 19 F.3d at 520; *Mugan*, 2007 WL 1097564, at *2.

2. The complaint adequately alleged that the Hospital Authority is a Kansas citizen.

Ms. Hennessey's *pro se* complaint also adequately alleged that the Hospital Authority was domiciled in Kansas, and thus that there was complete diversity between the parties.

For purposes of diversity jurisdiction, a state-created entity like the Hospital Authority is a citizen of the state that created it and in which it operates. *See, e.g.*, *WM Mobile Bay Env't Ctr., Inc. v. Mobile*

Solid Waste Auth., 672 F. App'x 931, 934 (11th Cir. 2016) (authority found to be "not an arm of the State of Alabama . . . . is thus a citizen [of Alabama] for purposes of diversity"); *Roche v. Lincoln Prop. Co.*, 175 F. App'x 597, 601 (4th Cir. 2006) (concluding that the State of Wisconsin Investment Board "is not an arm of the State of Wisconsin and therefore is a citizen [of Wisconsin] within the meaning of 28 U.S.C. § 1332"); *Ala. Space Sci. Exhibit Comm'n v. Merkel Am. Ins. Co.*, 400 F. Supp. 3d 1259, 1271 (N.D. Ala. 2019) (denying motion to remand for lack of diversity jurisdiction, because commission, found not to be an arm of the state, was considered a citizen of Alabama for diversity purposes). *Cf. Chattanooga-Hamilton Cnty. Hosp. Auth. v. Hosp. Auth. of Walker*, 14-cv-00016, 2014 WL 12493735, at *1 (N.D. Ga. Nov. 19, 2014) (diversity jurisdiction over suit involving hospital authority created by Georgia statute).

Here, there is no dispute that Ms. Hennessey's complaint alleges that the Hospital Authority is a Kansas entity, created by the Kansas legislature, that is responsible for the hospital in Kansas where the assault took place. (*See* Compl. ¶ 2, ROA at 6 (Hospital Authority "is and was a corporate entity established by law that operates the hospital

located at 4000 Cambridge Street, Kansas City, Kansas 66106"); *id.* ¶ 5, ROA at 7 (Hospital Authority "is a Kansas corporation and/or entity").) Those allegations should be construed liberally as asserting that the Hospital Authority is a Kansas citizen, thus establishing complete diversity for purposes of federal jurisdiction.

Instead, the Hospital Authority argues only that it is not a "citizen" at all because it is an arm of the state of Kansas. *See* App. Br. at 16–23. As demonstrated in Ms. Hennessey's opening brief, *see* Br. at 28–50, and below, *see* part II, *infra*, the Hospital Authority is not an arm of the state of Kansas and is thus a Kansas citizen for diversity purposes. *See WM Mobile Bay*, 672 F. App'x at 934; *Roche*, 175 F. App'x at 601; *Ala. Space*, 400 F. Supp. 3d at 1271.

B. Any Technical Flaws In Ms. Hennessey's *Pro Se* Complaint Can Be Amended On Appeal Under 28 U.S.C. § 1653.

Even if Ms. Hennessey's complaint contains technical errors in its jurisdictional pleadings, such errors can readily "be amended . . . in the . . . appellate courts." 28 U.S.C. § 1653 (2022). It is "the duty" of an appellate court "to . . . allow[] such an amendment to be made," *Howard v. De Cordova*, 177 U.S. 609, 614 (1900) (pre-§ 1653), and appellate

courts routinely allow amendments to correct flawed jurisdictional allegations, particularly when, as here, they are mere technical defects, *see Snell v. Cleveland, Inc.*, 316 F.3d 822, 828 (9th Cir. 2002) (collecting cases). *Cf. Brennan v. Univ. of Kan.*, 451 F.2d 1287, 1289 (10th Cir. 1971) (purpose of § 1653 was "to avoid dismissal on technical grounds," and permit "the appellate court to correct defective jurisdictional allegations" where the defects are "of form, not substance").

Here, even if Ms. Hennessey's jurisdictional allegations are considered technically deficient, she must be permitted to amend her pleadings to allege the undisputed fact that she is a citizen of Missouri and that the Hospital Authority is domiciled in Kansas, and thus that diversity jurisdiction exists under 28 U.S.C. § 1332. *Snell*, 316 F.3d at 828 ("Here, it is undisputed that complete diversity of citizenship actually existed. Thus, pursuant to § 1653, we order the pleadings amended, *nunc pro tunc*, to correct the defective allegations concerning the proper diversity of parties.").

II. THE HOSPITAL AUTHORITY IS NOT AN ARM OF THE STATE.

The Hospital Authority asserts two substantive arguments: that if it is an arm of the state of Kansas, then it is not a "citizen" for

purposes of diversity jurisdiction, *see* App. Br. at 10–23, or it is immune from suit under the Eleventh Amendment, *see id.* at 23–26. Both arguments are predicated on the belief that the Hospital Authority is an arm of the state of Kansas. But it is not. The Hospital Authority failed to meet its burden to show in its motion to dismiss that it was an arm of the state. *See* part A. And its analysis of the four-factor test, presented for the first time on appeal, does not withstand scrutiny. *See* part B.

A. The Hospital Authority Did Not Meet Its Burden.

Ms. Hennessey demonstrated in her opening brief that the Hospital Authority made no effort—besides a citation to a single inapposite authority—to argue or provide evidence to suggest to the district court that it is an arm of the state of Kansas. *See* Br. at 16–28. Because the Hospital Authority bore the burden of establishing the affirmative defense that it is an arm of the state protected by sovereign immunity, and made no attempt to meet that burden, the motion to dismiss should have been denied. *See id.*

In response, the Hospital Authority concedes that it made no effort to argue any of the four arm-of-the-state factors or provide evidence to support a finding that any of those factors weighed in favor

of finding that it was an arm of the state of Kansas. App. Br. at 25 (admitting that it "did not engage in a full analysis of the 'arm of the state' factors"). Instead, the Hospital Authority argues two points: first, that it does not bear the burden to show that it is an arm of the state, App. Br. at 24, and second, that it "adequately established" that it was an arm of the state when it "cited to a case where the same analysis had already been conducted," *id.* at 25, referring to the citation in its motion to dismiss to *Perkins v. University of Kansas Medical Center*. (*See* Mem. Supp. Mot. Dismiss, ROA at 26.) The Hospital Authority is wrong on both points.

1. As to the burden, Ms. Hennessey demonstrated in her opening brief that every court to address the issue has held that the party asserting sovereign immunity bears the burden of proving entitlement to that defense. *See* Br. at 17–20 (citing cases). The Hospital Authority cites no contrary authority. *See* App. Br. at 24.

Instead, the Hospital Authority asserts that because Ms. Hennessey bore the burden of establishing jurisdiction, it was her burden to establish that the Hospital Authority was not an arm of the state. *See, e.g.*, *id.* at 11 ("While Hennessey complains that UKHA

failed to meet a perceived burden to prove sovereign immunity, the threshold burden is hers to establish subject matter jurisdiction.").

But the Hospital Authority is wrong, for a "district court commit[s] an error of law" when it "h[o]ld[s] that, because plaintiff has the burden of establishing subject-matter jurisdiction, plaintiff . . . bore the burden of proving that defendant was *not* entitled to immunity under the Eleventh Amendment." *J.S. Haren Co. v. Macon Water Auth.*, 145 F. App'x 997, 998 (6th Cir. 2005). *See also, e.g.*, *Hutto v. S.C. Ret. Sys.*, 773 F.3d 536, 543 (4th Cir. 2014) (holding that even though "Eleventh Amendment immunity goes to a court's subject-matter jurisdiction," "it is, as a practical matter, structurally necessary to require the defendant to assert the immunity" because it can be waived); *Woods v. Rondout Valley Cent. Sch. Dist. Bd of Educ.*, 466 F.3d 232, 237 (2d Cir. 2006) (holding that, like every other circuit, the party asserting the defense of sovereign immunity bears the burden of proving it, and rejecting that it is a part of the "plaintiff's burden to demonstrate subject matter jurisdiction"). It has always been the case that the Hospital Authority bore the burden of proving it was an arm of the state of Kansas. *See* Br. at 17–20.

2. As for the Hospital Authority's argument that its single citation to *Perkins* was sufficient to meet its burden, Ms. Hennessey demonstrated in her opening brief that a single citation to a past case is insufficient to demonstrate that an entity is an arm of the state. *See id.* at 24–25. *See also, e.g.*, *Kelly v. Pier*, No. CV 16-3417, 2017 WL 3397030, at *7 (D.N.J. Aug. 8, 2017) (finding that defendants did not meet their burden on sovereign immunity defense where they "assert[ed] they are 'arms' of the state, [but] they provide[d] no evidential or factual support for this assertion"); *Woods v. Abrams*, No. Civ. 06-757, 2007 WL 2852525, at *1 (W.D. Pa. Sept. 27, 2007) ("Defendants failed to cite the applicable law in their Brief. Instead, they referred to some citations in a footnote that did not adequately address their argument or the facts. Such briefing did not meet their burden of moving for dismissal of the state law claims on the basis of sovereign immunity."). The Hospital Authority cites no authority to the contrary. *See* App. Br. at 25.

In any event, as Ms. Hennessey demonstrated in her opening brief, *Perkins* is inapposite. *See* Br. at 25. *Perkins* did not analyze the arm-of-the-state factors with respect to the Hospital Authority, and only

granted the Hospital Authority's motion to dismiss (which raised five separate grounds for dismissal) because the motion was "completely unopposed" by the plaintiff. *Perkins v. Univ. of Kan. Med. Ctr.*, 13-2530, 2014 U.S. Dist. LEXIS 47491, *9–10 (D. Kan. Apr. 7, 2014). It thus does not provide any basis upon which this Court could find that the Hospital Authority had met its burden.

B. The Hospital Authority Is Not An Arm Of The State.

In her opening brief, Ms. Hennessey established that the Hospital Authority was not an arm of the state of Kansas. *See* Br. at 28–50. The most important factor in determining whether an entity is an arm of the state—the entity's financial independence from the state—showed that the Hospital Authority was financially independent of Kansas, because the Hospital Authority was responsible for paying its own debts and losses, generated its own revenues, and could issue bonds that would not be repaid by the state; and, critically, any judgments against the Hospital Authority would not be paid out of the Kansas treasury. *See id.* at 30–39. Ms. Hennessey also demonstrated that the Hospital Authority was autonomous from the state, since its day-to-day operations were not subject to state control, and that the Kansas

Legislature had specifically set up the Hospital Authority to be more independent and nimble than state entities. The state's choice to move the Hospital Authority towards privatization should be respected by treating the Hospital Authority as distinct from the state. *See id.* at 39–47. Finally, Ms. Hennessey established that under state law, the Hospital Authority does not serve a uniquely government function, and thus the way it is characterized under state law also weighs in favor of finding that it is not an arm of the state. *See id.* at 47–49.

In response, the Hospital Authority argues for the first time in that it is an arm of the state under an analysis of each of the *Steadfast* factors. None of its arguments hold water.

1. The Hospital Authority pays any judgments against it and is financially independent from the state.

Start with the finances factor and whether the state of Kansas would be liable for a judgment against the Hospital Authority. The Hospital Authority does not dispute that this is the single most important factor in the analysis. *See Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 49 (1994) (liability is most important factor); *Duke v. Grady Mun. Sch.*, 127 F.3d 972, 980 (10th Cir. 1997) (same). Nor does it dispute that the statute creating the Hospital Authority makes clear

that the state of Kansas will not be liable for any judgments against the Hospital Authority. *See* Kan. Stat. Ann. § 76-3309(b) (2022) (Hospital Authority must "indemnify and hold harmless" the state against debts and losses). Nor does it address the numerous ways that Ms. Hennessey's opening brief demonstrated that the Hospital Authority is financially independent, from the fact that it pays its own debts and generates its own revenues, to its own website's admission that it is an "independent hospital authority" that "receives no state or local funding." *See* Br. at 8–9, 31–38. Nor does it find fault with the cases cited in the opening brief holding that these markers weigh in favor of finding that an entity is not an arm of the state. *See id.* at 30–39.

Instead, the Hospital Authority puts forward only one argument for why this factor weighs in favor of finding that it is an arm of the state: that it has the power to issue bonds but cannot levy taxes, like the entity in *Steadfast*. *See* App. Br. at 21–22. But there are two critical distinctions between *Steadfast* and this case.

One, unlike the Hospital Authority, judgments against the entity in *Steadfast* would be paid out of state funds. This is dispositive: as the *Steadfast* court acknowledged, "[t]he focus of" the financial

independence factor "is on whether state funds are at stake" in litigation against the entity. *Steadfast Ins. Co. v. Agric. Ins. Co.*, 507 F.3d 1250, 1255 n.3 (10th Cir. 2007). *See also Hess*, 513 U.S. at 51 ("whether any judgment would be paid from the state treasury" is the most critical factor); *Duke*, 127 F.3d at 980 ("whether the state treasury would be at risk of paying a judgment" is "the most important" factor). In *Steadfast* a judgment against the entity put "state funds . . . at stake" because all revenues of the entity were considered state funds under Oklahoma law. *Steadfast*, 507 F.3d at 1255.

Here, by contrast, the revenues of the Hospital Authority are not state funds, and the Hospital Authority must pay any judgments out of its own revenues (and indeed, must indemnify the state of Kansas against any judgments). Kan. Stat. Ann. § 76-3309(b). Thus, while suit against the entity in *Steadfast* imperiled Oklahoma's finances, Ms. Hennessey's suit here has no impact on Kansas's finances.

As for the power to issue bonds but not levy taxes, the entity in *Steadfast* could only issue bonds subject to the oversight of the State Bond Oversight Commission. *See Steadfast*, 507 F.3d at 1255. That the state had oversight over the entity's ability to issue bonds "render[ed

the entity] more like an arm of the state." *Id.* (citing *Sturdevant v. Paulsen*, 218 F.3d 1160, 1169–70 (10th Cir. 2000)). But when an entity's ability to issue bonds is not so constrained by state oversight, then this factor weighs in favor of finding that the entity is not an arm of the state—even if that entity does not have the ability to levy taxes. *See, e.g.*, *Takle v. Univ. of Wis. Hosp. & Clinics Auth.*, 402 F.3d 768, 770 (7th Cir. 2005). For example, the hospital authority in *Takle* had the same hallmarks of financial independence as the Hospital Authority here, and could issue bonds without oversight but not levy taxes. *See id.* Nevertheless, the Seventh Circuit found that the financial independence factor weighed in favor of finding that the hospital authority in *Takle* was not an arm of the state of Wisconsin. *Id.*

Here, the Hospital Authority has the ability to issue bonds without state oversight and the bonds are not guaranteed by the state. *See* Kan. Stat. Ann. §§ 76-3308, 76-3312(n) (2022). Thus, like in *Takle*, the Hospital Authority's inability to levy taxes does not change that this factor indicates that the Hospital Authority is not an arm of the state.

2. The Hospital Authority is autonomous from the state.

As to the Hospital Authority's autonomy from the state, Ms.

Hennessey established in her opening brief that the Hospital Authority's day-to-day operations are not controlled by the state, and that the Hospital Authority was specifically created to privatize a formerly-public function, so the legislature's wishes should be respected and the Hospital Authority treated as distinct from the state. *See* Br. at 39–47. For either reason, the autonomy factor weighs in favor of finding that the Hospital Authority is not an arm of the state. *Id.*

In response, the Hospital Authority concedes that "it can conduct day-to-day operations independently," App. Br. at 19, and that, among other things, it can "issue bonds, hire employees, engage in joint ventures, and/or procure its own contracts," *id.* at 21. *See also, e.g.*, Kan. Stat. Ann. § 76-3308 (granting the Hospital Authority "all the powers necessary" including, among other things, the ability to "sue and be sued in its own name," "borrow money" and pledge any and all of its assets as collateral, buy or sell assets, and create or dispose of entities). It also does not dispute Ms. Hennessey's assertion in the opening brief that the Kansas legislature specifically created the Hospital Authority to help limit state control over the University of Kansas Hospital, improve its competitiveness in the market, and make it economically

viable—in other words, to make it more like a private entity—and that this privatization should not "be treated as a farce" by allowing the Hospital Authority to enjoy both the freedom of not being the state and the benefit of the state's sovereign immunity. Br. at 45 (quoting *Takle*, 402 F.3d at 770).

Instead, the Hospital Authority contends that it is not autonomous from the state for a variety of reasons, all of which are overshadowed by the day-to-day independence the Hospital Authority concedes it enjoys and the privatization steps the Kansas legislature took, as outlined in the opening brief. *See* Br. at 4–9, 44–47,

a. The Hospital Authority cites the Governor's power to appoint a majority of the members of its board as evidence that the state retained control over the Hospital Authority. *See* App. Br. at 19. But "the power to appoint" even a majority of the board "is not the power to control." *Takle*, 402 F.3d at 770. *See, e.g.*, *Fresenius Med. Care Cardiovascular Res., Inc. v. P.R. & Caribbean Cardiovascular Ctr. Corp.*, 322 F.3d 56, 71 (1st Cir. 2003) ("The governor's . . . power [to appoint four of the seven board members] . . . is not enough in itself to establish that [the entity] is an arm of the state."). *See also Auer v. Robbins*, 519 U.S. 452,

456 (1997) (appointment of four out of five members is not control).

b. The Hospital Authority also points to various statutory requirements, including that it must maintain some governmental records; its board members are subject to Kansas ethics rules; and it must submit an annual financial report to the state. *See* App. Br. at 19–20. Courts have described requirements like these as "really minor" in comparison to the other indicia of autonomy in the statutory structure of the Hospital Authority. *See, e.g.*, *Takle*, 402 F.3d at 771 ("[i]gnoring such really minor strings as the subjection of the board of directors [of the hospital authority] to the state's open-meeting laws"); *Fresenius*, 322 F.3d at 72–73 (entity not found to be an arm of the state despite requirements that executive director submit annual reports to government ethics office, entity submit a budget to the legislature, and the Commonwealth's comptroller audits the entity).

c. The few remaining statutory features cited by the Hospital Authority are similarly insufficient in light of the significant autonomy it concedes it exercises in every other aspect of its operations. For instance, the Hospital Authority points to the fact that abortions cannot be conducted at the University of Kansas Hospital, and the Hospital

Authority is not permitted to sell the University of Kansas Hospital without legislative approval. *See* App. Br. at 19–20. Such restrictions are less about the day-to-day autonomy of the Hospital Authority than they are about the price extracted by the legislature for spinning off a valuable hospital to an independent entity, and thus are not significant considerations in the arm of the state test. *See, e.g.*, *Takle*, 402 F.3d at 771 (finding that requirement that hospital authority finance state's medical school and provide health services requested by the state are not "significant" in the autonomy analysis because when a state creates an entity and "use[s] its leverage as the creator of the entity to insist that it serve the state's interests as well as its own," that does not mean that the entity is not autonomous from the state).

3. The Hospital Authority does not perform a uniquely government function.

Ms. Hennessey demonstrated in her opening brief that the Hospital Authority's character under state law also suggests that it is not an arm of the state. *See* Br. at 47–49. As the district court correctly noted, the Hospital Authority is not "expressly identif[ied] . . . as a state agency." (Order, ROA at 112.) Thus, Ms. Hennessey argued, when looking at the statutory scheme as a whole and the private function—

providing healthcare—the Hospital Authority performs, it is clear that the statutory scheme treats the Hospital Authority not as an arm of the state, but as an independent, quasi-private entity. Br. at 47–49

a. In response, as evidence that state law considers the Hospital Authority to be an arm of the state, the Hospital Authority points to a statutory provision declaring that the Hospital Authority's exercise of its rights and powers is "deemed and held to be the performance of an essential government function." *See* App. Br. at 18 (citing Kans. Stat. Ann. § 76-3304(a)). But that blanket label is not enough for purposes of the arm-of-the-state test. *See, e.g.*, *Baxter v. Fulton-DeKalb Hosp. Auth.*, 764 F. Supp. 1510, 1522 (N.D. Ga. 1991) (holding that hospital authority was not an arm of the state despite being "deemed [by the legislature] to exercise public and essential government functions"). And the Hospital Authority makes no argument—because it cannot—that the provision of healthcare services is, in fact, an essential government function. *See Fresenius*, 322 F.3d at 71 (health care is not a government function); *Takle*, 402 F.3d at 770 (same); *Thomas v. Hosp. Auth. of Clarke Cty.*, 264 Ga. 40, 43 (1994) (finding hospital authority performing health care services to be engaged in "an area of business

ordinarily carried on by private enterprise," and thus finding that it should be "charged with the same responsibilities and liabilities borne by a private corporation").

b. The Hospital Authority also cites two other provisions of the statute as evidence that state law characterizes it as an arm of the state: a provision purporting to grant the Hospital Authority all the rights and responsibilities "of a body corporate and a political instrumentality of the state," and a provision subjecting the Hospital Authority to the Kansas Tort Claims Act. *See* App. Br. at 18 (citing Kans. Stat. Ann. §§ 76-3308(a)(1) & 76-3315, respectively). Neither changes the analysis.

As to the "body corporate and a political instrumentality" label, a statutory label pointing in one direction is insufficient to overcome a statutory and regulatory structure that points in the other direction. *See Thornquest v. King*, 626 F. Supp. 486, 489 (M.D. Fla. 1985) (rejecting argument that Florida law labeling a community college as a "political subdivision" was sufficient to overcome remainder of regulatory and statutory scheme indicating it was an arm of the state). For example, in *Thornquest*, a community college in Florida was labeled

by the statute as a "political subdivision," which would ordinarily make it not an arm of the state. *See id.* However, the key to this factor of the arm of the state test is not what label is ascribed to an entity, but what the regulatory and statutory scheme as a whole indicates about the relationship between that entity and the state. And under Florida law, the regulatory and statutory scheme around the community college made clear that it was an arm of the state, regardless of what label it was given in the statute. *Id. See also Harris v. Dist. Bd. of Trs. of Polk Cmty. Coll.*, 981 F. Supp. 1459, 1462 (M.D. Fla. 1997) (subsequent change in characterization of community colleges under state law to "local government entities" still insufficient to overcome remainder of regulatory and statutory scheme which made clear they were arms of the state).

So, too, here. The provision of the act creating the Hospital Authority that purports to give the Hospital Authority the rights and responsibilities of a "body corporate and political instrumentality" of Kansas is insufficient to overcome the remainder of the statutory scheme which makes clear that the Hospital Authority is an independent authority outside of the control of the state of Kansas, as

discussed throughout the opening brief. *See* Br. at 5–9, 39–49.

As for the fact that the legislature decided to subject the Hospital Authority to the Kansas Tort Claims Act, that has little bearing on the matter. The Kansas Tort Claims Act applies to numerous entities that are not arms of the state. For example, it applies to all municipalities, including all school districts, *see* Kan. Stat. Ann. § 75-6102(b)-(c) (2022), but school districts are not arms of the state, *see, e.g.*, *Ambus v. Granite Bd. of Educ.*, 995 F.2d 992, 995 (10th Cir. 1993) ("Nearly all other courts considering the issue . . . have refused to grant local school districts Eleventh Amendment immunity" because they are not arms of the state); *Unified Sch. Dist. No. 480 v. Epperson*, 583 F.2d 1118, 1123 (10th Cir. 1978) (holding Kansas school district to not be "the alter ego of the state"). Thus, that the Kansas Tort Claims Act applies to an entity says nothing about whether that entity is an arm of the state.

III. IF MORE INFORMATION IS NEEDED TO MAKE AN ARM-OF-THE-STATE DETERMINATION, THIS COURT SHOULD REMAND TO ALLOW FOR LIMITED DISCOVERY.

Finally, in her opening brief Ms. Hennessey noted that if this Court could not determine whether the Hospital Authority was an arm of the state, it should at a minimum reverse and remand the case for

limited discovery. *See* Br. at 50–52.

In response, the Hospital Authority argues only that Ms. Hennessey did not request discovery into the *Steadfast* factors below—as she acknowledged in her opening brief—and thus has waived the issue. *See* App. Br. at 26–27. But that misunderstands the point: Ms. Hennessey was not claiming that the district court committed reversible error by not allowing for discovery (which she, appearing *pro se*, did not know to request). Rather, Ms. Hennessey was suggesting that if this Court was not prepared to rule that the Hospital Authority is not an arm of the state—and Ms. Hennessey has established that it is not, based on the statutory scheme alone—this Court could remand for further development of a record on which this Court could make such a ruling. *See, e.g.*, *Lang v. Pa. Higher Educ. Assistance Agency*, 610 F. App'x 158, 162–63 (3d Cir. 2015) (vacating and remanding for further factual development before resolving whether the entity was an arm of the state).

CONCLUSION

Ms. Hennessey respectfully requests that this Court reverse the district court's decision.

Respectfully submitted,

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June 29, 2022

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