

No. _____

In The
Supreme Court of the United States

SABINE RIVER AUTHORITY,
STATE OF LOUISIANA,

Petitioner,

v.

PERRY BONIN, et al.,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Subject matter jurisdiction, a threshold issue, cannot exist in federal court where Louisiana has conditionally waived its sovereign immunity to allow suits against it to proceed only in Louisiana courts. La. R.S. 13:5106; La. Const., Art. XII, §10. Did the Fifth Circuit Court of Appeal err in denying Applicant’s Motion to Dismiss for Lack of Subject Matter Jurisdiction where the present suit is proceeding in Texas federal court against Sabine River Authority, State of Louisiana – an entity both Louisiana state courts and the Fifth Circuit itself have recognized is a state agency designated as an “instrumentality of the state of Louisiana,” La. R.S. 38:2324(A) – that qualifies as an “arm of the state” under the applicable test outlined in *Clark v. Tarrant County*, 798 F.2d 736 (5th Cir. 1986)?
2. Under Louisiana’s civil law tradition, legislation is the “solemn expression of legislative will,” La. C.C. art. 2, which may not be abrogated by the only other source of law, custom. La. C.C. art. 1. Legislation is the “superior form of law,” La. C.C. art. 3, cmt. d. The Fifth Circuit’s ruling relied upon inapplicable jurisprudence that did not assess Louisiana legislation that specifically and unambiguously defines Sabine River Authority, State of Louisiana as an “agency and instrumentality of the state of Louisiana” thus, entitling it to Eleventh Amendment immunity. Did the Fifth Circuit err when it applied principles of stare decisis that disregard Louisiana’s unique civil law principles?

QUESTIONS PRESENTED FOR REVIEW
– Continued

3. The Fifth Circuit’s ruling allows a state agency, designated as an instrumentality of the state of Louisiana, to be haled into a federal court in Texas despite Louisiana legislation that preserves Louisiana’s immunity from suit in this venue consistent with the sovereign immunity granted to Louisiana under the Eleventh Amendment to the United States Constitution. Where legislation is written and implemented in Louisiana with the understanding that it will be interpreted consistently with the civilian methodology, was the Fifth Circuit’s ruling legal error when it did not consider Louisiana’s civil law tradition, thereby placing Louisiana at an inherent disadvantage to all other states in the Union with respect to sovereign immunity under the Eleventh Amendment?

PARTIES TO THE PROCEEDING BELOW

Petitioner is Sabine River Authority, State of Louisiana. Respondents are Plaintiffs Perry Bonin, Ace Chandler, Michael Manuel, et al., and fully identified in Exhibits A and B to Plaintiff's Complaint and Amended Complaint.

Sabine River Authority of Texas is also a party to proceedings before the District Court but is not involved with this Petition.

LIST OF ALL PROCEEDINGS

United States District Court for the Eastern District of Texas

Civil Action No. 1:19-cv-00527

Perry Bonin, Ace Chandler, Michael Manuel, et al.

v.

Sabine River Authority of Texas; Sabine River Authority, State of Louisiana

The order on Sabine River Authority, State of Louisiana's Motion to Dismiss pursuant to Fed. R. Civ. P. Rule 12(b)(1) filed on November 19, 2019 was issued on February 10, 2020.

LIST OF ALL PROCEEDINGS – Continued

United States District Court for the Eastern District of Texas

Civil Action No. 1:19-cv-00527

Perry Bonin, Ace Chandler, Michael Manuel, et al.

v.

Sabine River Authority of Texas; Sabine River Authority, State of Louisiana

The order on Sabine River Authority, State of Louisiana's Motion to Dismiss pursuant to Fed. R. Civ. P. Rule 12(b)(1) filed on December 8, 2021 was issued on June 30, 2022.

United States Court of Appeals for the Fifth Circuit

No. 20-40138 consolidated with No. 22-40433

Perry Bonin, Ace Chandler, Michael Manuel, et al.

v.

Sabine River Authority, State of Louisiana

The Order on Sabine River Authority, State of Louisiana's Consolidated Appeal from the Eastern District of Texas' ruling affirming the denial of Appellants' Motions to Dismiss pursuant to Fed. R. Civ. P. Rule 12(b)(1) issued on April 14, 2023.

LIST OF ALL PROCEEDINGS – Continued

United States Court of Appeals for the Fifth Circuit

No. 20-40138 consolidated with No. 22-40433

Perry Bonin, Ace Chandler, Michael Manuel, et al.

v.

Sabine River Authority, State of Louisiana

The Order denying Sabine River Authority, State of Louisiana’s Petition for Rehearing issued on May 15, 2023.

United States Court of Appeals for the Fifth Circuit

No. 20-40138 consolidated with No. 22-40433

Perry Bonin, Ace Chandler, Michael Manuel, et al.

v.

Sabine River Authority, State of Louisiana

The judgment Sabine River Authority, State of Louisiana’s Consolidated Appeal from the Eastern District of Texas’ ruling affirming the denial of Appellants’ Motions to Dismiss pursuant to Fed. R. Civ. P. Rule 12(b)(1) issued on May 23, 2023.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, issued on April 14, 2023, is published at *Bonin v. Sabine River Authority*, 65 F.4th 249 (5th Cir. 2023). It is reproduced with this Petition at App. 1-18. The February 10, 2020 opinion of the United States District Court for the Eastern District of Texas is published at *Bonin v. Sabine River Authority of Texas*, 438 F.Supp.3d 747 (E.D. Tex. 2020). It is reproduced with this Petition at App. 21-39. The June 30, 2022 opinion of the United States District Court for the Eastern District of Texas is unpublished, but electronically available at *Bonin v. Sabine River Authority of Texas*, No. 1:19-CV-00527, 2022 WL 3137425 (E.D. Tex. 2022). It is reproduced with this Petition at App. 40-41.

JURISDICTIONAL STATEMENT

The Fifth Circuit issued an order holding that Sabine River Authority, State of Louisiana (“SRA-La.”) was not entitled to Eleventh Amendment sovereign immunity from a suit brought in federal court in Texas on April 14, 2023. SRA-La. timely filed a Petition for Rehearing, which the court denied on May 15, 2023. This Court’s jurisdiction arises under Art. III, §2, cl. 2 of the Constitution of the United States and under 28 U.S.C.A. §1254(1).

**CONSTITUTIONAL AND/OR
STATUTORY PROVISIONS INVOLVED**

U.S. Const., amend. XI

This provision is included in the Appendix at App. 43.

U.S. Const., Art. III, §2, cl. 2

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

La. Const., Art. XII, §10

This provision is included in the Appendix at App. 43.

La. Const., Art. III, §16

This provision is included in the Appendix at App. 44.

La. C.C. art. 1

This provision is included in the Appendix at App. 45.

La. C.C. art. 2

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La. C.C. art. 3

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La. C.C. art. 9

This provision is included in the Appendix at App. 49.

La. C.C. art. 10

This provision is included in the Appendix at App. 49-50.

La. C.C. art. 11

This provision is included in the Appendix at App. 50-51.

La. C.C. art. 12

This provision is included in the Appendix at App. 51.

La. C.C. art. 13

This provision is included in the Appendix at App. 51-52.

La. C.C. art. 450

This provision is included in the Appendix at App. 52-58.

La. R.S. 1:1

This Act shall be known as the Louisiana Revised Statutes of 1950 and shall be cited as R.S. followed by

the number of the Title and the number of the Section in the Title, separated by a colon. Example: Section 1 of Title 20 shall be cited as R.S. 20:1.

La. R.S. 1:4

This provision is included in the Appendix at App. 58.

La. R.S. 13:5102

This provision is included in the Appendix at App. 59-60.

La. R.S. 13:5106

This provision is included in the Appendix at App. 61-66.

La. R.S. 13:5109

This provision is included in the Appendix at App. 66-67.

La. R.S. 36:1

This Title shall be known and may be cited as the Executive Reorganization Act.

La. R.S. 36:2

A. The legislature hereby recognizes and accepts the responsibility vested in it by the constitution of 1974, wherein in Article IV, Section 1 and Article XIV, Section 6, the legislature is mandated to effect reorganization of the executive branch of state government by allocation and/or reallocation of the functions,

powers, duties, and responsibilities of all departments, offices, agencies, and instrumentalities of the executive branch of state government, except the offices of governor and lieutenant governor, into not more than twenty departments, and wherein it is further required that allocation of the functions, powers, and duties of all departments, offices, agencies, and other instrumentalities of the executive branch, except those functions, powers, duties, and responsibilities allocated by the constitution, shall be as provided by law, and wherein it is further provided that such allocation is insusceptible to veto by the governor. Recognizing that the constitution requires such allocation to become operative not later than December 31, 1977, and in order to provide for the orderly allocation and reallocation thus required to achieve the purposes of the constitution, the legislature enacts this Title for the purpose of designating the departments within the executive branch of the state government, creating and providing with respect to such departments and allocating to these departments the powers, duties, functions, and responsibilities of those boards, commissions, departments, offices, agencies, and other instrumentalities within the executive branch of the state government. The legislature hereby specifically reserves to itself the power and authority vested in it by the constitution to complete and make operative the reorganization of the executive branch of state government no later than December 31, 1977, through such additional legislative action insusceptible of gubernatorial veto as it finds necessary fully to carry out this constitutional mandate.

B. To accomplish the purposes above set forth, specifically enumerated agencies are herein transferred into the departments created and provided for in this Title and other specifically enumerated agencies are abolished. The powers, duties, functions, and responsibilities of such agencies are herein transferred and/or merged and consolidated into such departments, all in the manner and to the extent provided in this Title.

C. It is the public policy of this state and the purpose of this Title to create a structure for the executive branch of state government which is responsive to the needs of the people of this state and which is sufficiently flexible to meet changing human and natural conditions; to promote economy and efficiency in the operation and management of state government and to strengthen the executive capacity for effective, efficient, and economic administration at all levels; to improve the quality of the functions performed and the programs and services rendered by state government for the citizens of the state; to conserve and enhance the human and natural resources of the state; to provide that the responsibility of the respective departments for the implementation of programs and policies is clearly fixed and ascertainable; and to eliminate to the fullest practicable extent duplication of effort within the executive branch of state government in order to use wisely the funds of the state and more conveniently to meet the needs of the citizens of Louisiana which are supported by revenues derived from the people and from the natural resources belonging to them.

D. It is the further intent of the legislature that the reorganization of the executive branch of state government shall be accomplished with the least possible disruption of governmental services and the least possible expenditure of public moneys and that all officials and employees participating in the effectuation of such reorganization shall at all times be charged with the responsibility for carrying out the intent herein stated.

E. It is further the intent of the legislature that the statutory functions, powers, and duties of any agency existing before the effective date of this Title, which is not abolished by this Title, shall not be increased, decreased, or changed, unless such intent is specifically and clearly expressed in this Title or in legislation hereafter enacted. None of the constitutional or statutory powers, duties, functions, or responsibilities of the various constitutionally provided for higher education boards shall be increased, decreased, or changed hereby nor shall this Title be construed to provide that any such powers, duties, functions, or responsibilities of any such board are to be exercised by any other official or agency.

F. This Title shall in no instance grant any new authority or expand the existing authority of any official or agency to regulate the activities of any person or business enterprise or regulate or interfere with the right to property, unless such authority existed on the effective date of this Title in an official or agency and the powers and duties of said official or agency were transferred to or merged into an official or agency established herein.

La. R.S. 36:509

This provision is included in the Appendix at App. 68-70.

La. R.S. 38:2321

This provision is included in the Appendix at App. 70-71.

La. R.S. 38:2322

This provision is included in the Appendix at App. 71-72.

La. R.S. 38:2324

This provision is included in the Appendix at App. 72-74.

La. R.S. 38:2325

This provision is included in the Appendix at App. 74-83.

La. R.S. 38:2329

This provision is included in the Appendix at App. 83.

STATEMENT OF THE CASE

The Fifth Circuit issued an order that allowed the Sabine River Authority, State of Louisiana (“SRA-La.”) to be haled into a federal court in Texas despite Louisiana legislation that declares SRA-La. an “arm of the

state” of Louisiana entitled to sovereign immunity, La. R.S. 38:2321, *et seq.*, and legislation that independently requires any suits against Louisiana or its agencies to proceed in state court. La. R.S. 13:5106. SRA-La. petitions this Court to review the Fifth Circuit’s denial of a Motion to Dismiss for Lack of Subject Matter Jurisdiction pursuant to Fed. R. Civ. P. Rule 12(b)(1) where the court’s ruling did not utilize Louisiana’s civilian methodology, which elevates legislation over all other legal authority. The lower courts’ ruling should be reversed because suits SRA-La. are barred by operation of sovereign immunity under the Eleventh Amendment to the United States Constitution and, as a result, subject matter jurisdiction does not exist.

I. SRA-La. was established in 1950 as a conservation and reclamation district to create and construct the Toledo Bend Project, which provides recreational, economic, and utility benefits to State.

SRA-La. was originally formed in 1950, via Acts 1950, No. 261, as part of a joint effort between the states of Louisiana and Texas to construct the Toledo Bend Project (“the Project”). No. 20-41038, Doc. 77, pp. 37-44. SRA-La. exercises specific authority delegated by the Louisiana legislature to oversee the state of

Louisiana's interests in the waters of the Sabine River and creation and governance of the Project.¹

In the original legislation, the Louisiana legislature designated SRA-La. as a "corporation and political subdivision of the State of Louisiana." No. 20-41038, Doc. 77, p. 39. Six years later, the Louisiana legislature modified SRA-La.'s status to the following:

[T]o be an agency and instrumentality of the State of Louisiana required by the public convenience and necessity for the carrying out of the functions of the state, and to be a corporation and body politic and corporate, the power of the of perpetual and body politics and corporate, with power of perpetual succession, invested with all powers, privileges, rights and immunities conferred by law upon other corporations of like character within the state, but without power to levy taxes. . . . Said Authority in carrying out the purpose of this act will be performing an essential public function under the constitution[.] Acts 1956, No. 432. Emphasis added. No. 20-41038, Doc. 77, p. 46.

The legislature has reorganized portions of the enabling statutes since 1956, but the substance of this

¹ SRA-La. is in contrast with the Sabine River Compact Administration, which was formed as an interstate administrative agency via the Sabine River Compact between the states of Louisiana and Texas. La. R.S. 38:2329, Editors' Notes at Art. VII(a). The Sabine River Compact was signed by representatives of Texas and Louisiana and approved by Congress on or about January 26, 1953. App. 97.

change remains codified at La. R.S. 38:2324. This legislative history was provided to the Fifth Circuit, but the court did not assess this information in its final analysis.

The Project was federally licensed in 1963² by the Federal Power Commission,³ and completed in 1969.⁴ It consists of the Toledo Bend Dam, a reservoir that is one of the largest in the nation, a spillway and a hydroelectric plant. *Simmons v. Sabine River Authority Louisiana*, 732 F.3d 469, 471-72 (5th Cir. 2013). The Project provides vital services, including power generation, soil and water conservation and economic benefits through recreation, tourism and other business opportunities in the state. *See*, La. R.S. 38:2325. SRA-La.'s enabling legislation imbues SRA-La. with broad authority, consistent with its role as a steward of an important state resource, but subjects SRA-La. to limitations consistent with its role as an extension of the state of Louisiana. For instance:

² *See*, Sabine River Authority of Louisiana, "About Us." <https://srala-toledo.com/sra/>.

³ In 1977, the Federal Power Commission was reorganized and renamed the Federal Energy Regulatory Commission ("FERC"). *Simmons v. Sabine River Authority of Louisiana*, 732 F.3d 469, 472, n. 1 (5th Cir. 2013).

⁴ *See*, Sabine River Authority of Louisiana, "History." <https://srala-toledo.com/engineering/>. *See also*, Texas Water Development Board, "Toledo Bend Reservoir (Sabine River Basin)." https://www.twdb.texas.gov/surfacewater/rivers/reservoirs/toledo_bend/index.asp#:~:text=Construction%20of%20the%20Toledo%20Bend,dam%20was%20completed%20in%201969.

- SRA-La.’s authority to “exercise such authority and power of control and regulation over the waters of the Sabine River and its tributaries as may be exercised by the State of Louisiana, subject to the provisions of the constitution of Louisiana.” La. R.S. 38:2325(B).
- SRA-La. is expressly prohibited from levying taxes. La. R.S. 38:2324(B)(2).
- SRA-La. is authorized “[t]o acquire . . . real and personal property of every kind within its territorial jurisdiction,” La. R.S. 38:2325(A)(2). However, “title to all property acquired by [SRA-La.] shall be taken in its corporate name and shall be held by it as an instrumentality of the State of Louisiana[.]” La. R.S. 38:2325(B).
- SRA-La. is granted authority to “fix, maintain, collect, and revise rates, charges, and rentals for the facilities of the authority and the services rendered thereby,” La. R.S. 38:2325(A)(6). However, rates for the services from hydroelectric power are subject to regulation by Louisiana’s Public Service Commission. La. R.S. 38:2325(A)(11)(a).
- SRA-La. is authorized to enter into contracts, La. R.S. 38:2325(A)(3, 4, 8), including for the “sale, conservation, storage, utilization, preservation, distribution, or consumption, whether within or without the state of Louisiana, of the waters over which the authority has jurisdiction or over which the authority has legal control.” La. R.S. 38:2325(A)(16)(a). However, to the extent SRA-La. proposes to

contract for “the sale, utilization, distribution or consumption, outside of the boundaries of the state of Louisiana, of the waters over which the authority has jurisdiction or control,” SRA-La. must obtain the written concurrence of the governor, the Louisiana Senate Committee on Natural Resources, the Louisiana House Committee on Natural Resources and Environment, and the Water Resources Commission. La. R.S. 38:2325(A)(16)(b, c, e), as well as the concurrence by resolution of at least two-thirds of the governing authorities of the parishes within the territorial jurisdiction of the authority. La. R.S. 38:2325(A)(16)(d).

II. Various prior claimants brought suit against SRA-La. for its operations without success.

In multiple instances, various Plaintiffs have attempted to recover from SRA-La. based on claims similar to the ones raised in the present suit. These efforts have been uniformly unsuccessful. *See, e.g., Baca v. Sabine River Authority*, 2021-0009 (La.App. 1 Cir. 6/4/2021), 327 So.3d 529, writ denied, 2021-00939 (La. 10/19/21), 326 So.3d 261 (Finding that claims for inverse condemnation, whether based on the construction of the Toledo Bend dam or the operation thereof, were time-barred.); *Simmons v. Sabine River Authority Louisiana*, 732 F.3d 469 (5th Cir. 2013), writ denied, 134 S.Ct. 1876, 188 L.Ed.2d 912 (2014) (Holding that the Federal Power Act preempted claims for negligence based on SRA-La.’s operation of the Project.); *Crump v.*

Sabine River Authority, 1998-2326 (La. 6/29/99), 737 So.2d 720 (Holding that claims for damages arising from third-parties' conduct on expropriated land were time-barred.).

In fact, in the recent *Baca* case, cited above, the Louisiana First Circuit Court of Appeal found that the takings claims based on the same flood event at issue herein were prescribed (time barred), laying state court takings claims against SRA-La. to rest. This ruling is now final. *Baca v. Sabine River Authority*, 2021-00939 (La. 10/19/21), 326 So.3d 261. A dismissal should follow in the federal system upon a finding that SRA-La. is entitled to sovereign immunity as an "arm of the state" of Louisiana.

III. SRA-La. has consistently maintained its entitlement to Eleventh Amendment immunity from suit for Plaintiffs' federal takings claim.

Plaintiffs originally filed suit on October 24, 2019 in the Eastern District of Texas.⁵ In their Petition, Plaintiffs alleged that Sabine River Authority of Texas ("SRA-Tx.") and SRA-La. are liable under the Fifth Amendment of the United States Constitution for a taking based on (i) SRA-Tx. and SRA-La.'s acceptance of a 2014 license from the Federal Energy Regulatory Commission ("FERC") to jointly operate the Toledo Bend Project ("the Project") and (ii) the subject

⁵ Plaintiffs' Complaint.

operation of the Project pursuant to and in compliance with the FERC license.⁶

In response to the Petition, SRA-La. filed a Motion to Dismiss pursuant to Fed. R. Civ. P. Rule 12(b)(1) on the grounds that subject matter jurisdiction did not exist because SRA-La. was an “arm of the state” of Louisiana entitled to sovereign immunity. The District Court denied the Motion. SRA-La. timely appealed and briefed the issues.

In the interim, SRA-La. secured a state court judgment finding that claims brought on behalf of various Louisiana citizens – some of whom are also Plaintiffs in the present matter⁷ – were time-barred. *Baca v. Sabine River Authority*, 2021-0009 (La.App. 1 Cir. 6/4/2021), 327 So.3d 529, writ denied, 2021-00939 (La. 10/19/21), 326 So.3d 261. In that case, the Louisiana First Circuit specifically recognized that SRA-La. is statutorily established as an “agency and instrumentality of the State of Louisiana,” 2021-0009, p. 6; 327 So.3d at 533, which the Louisiana Supreme Court elected not to review.

Thereafter, but while SRA-La.’s appeal in the present matter was pending, Plaintiffs filed an Amended Complaint on November 17, 2021 alleging a federal takings claim.⁸ SRA-La. filed an additional Motion to

⁶ Plaintiffs’ Amended Complaint, ¶9.

⁷ Arlis Barrow, Donnia Barrow, Charles Tilley and Geraldine Tilley are plaintiffs in the present action and were plaintiffs in the *Baca* litigation.

⁸ Plaintiffs’ Amended Complaint.

Dismiss. The District Court again denied the Motion and SRA-La. timely appealed. The Fifth Circuit consolidated the matters *sua sponte* and instructed that no further briefing should be filed absent leave of court. SRA-La. filed a Motion for Leave to file supplemental briefing.

On April 14, 2023, the Fifth Circuit issued its ruling that SRA-La. was not an “arm of the state.” App. 1. *See also, Bonin v. Sabine River Authority*, 65 F.4th 249 (5th Cir. 2023). Chief Judge Richman dissented without reasons. The court simultaneously denied SRA-La.’s request for leave to file supplemental briefing. *Id.* at 259.

SRA-La. timely filed a Petition for Rehearing on April 28, 2023, in which it outlined errors in the court’s ruling, including the relevant legislative history outlined above. On May 15, 2023, the court summarily denied SRA-La.’s request for rehearing. App. 42. No written reasons were provided. This Petition timely follows.



REASONS TO GRANT THE WRIT

I. SUMMARY OF THE ARGUMENT

It is well-established that sovereign immunity granted under the Eleventh Amendment is fundamental to principles of federalism implicit within the framework of the Constitution. This immunity limits the ability of citizens and non-citizens of a state to

bring suit against that state in federal court absent the state's waiver of the immunity. *Franchise Tax Board of California v. Hyatt*, 139 S.Ct. 1485, 203 L.Ed.2d 768 (2019). This immunity extends not only to the state, but also entities designated as "arms of the state." *Regents of the University of Ca. v. Doe*, 519 U.S. 425, 429-30, 117 S.Ct. 900, 903-04, 137 L.Ed.2d 55 (1997). Louisiana has not waived sovereign immunity to allow private suits against it in federal court in this matter. La. R.S. 13:5106(A).

Under the six factors outlined in *Clark v. Tarrant County*, 798 F.2d 736 (5th Cir. 1986), SRA-La. is an "arm of the state" of Louisiana entitled to sovereign immunity. Specifically, the Louisiana legislature statutorily designated SRA-La. as both an "agency" and "instrumentality of the state of Louisiana," La. R.S. 38:2324(A), a status that has been recognized in cases throughout the state of Louisiana and within the Fifth Circuit. *See, e.g., Baca*, supra; *Simmons*, supra; *Wright v. Sabine River Authority*, 308 So.2d 402 (La.App. 3d Cir. 1/23/75), writ denied, 313 So.2d 245 (La. 6/6/75); *State of La., Through Sabine River Authority v. Lindsey*, 524 F.2d 934 (5th Cir. 1975), writ denied, 96 S.Ct. 3166 (1976). The Louisiana legislature's designation of SRA-La. as a state agency further signaled that the State should answer for judgments against SRA-La. La. Const., Art. XII, §10(C); La. R.S. 13:5109(B)(2).

By operation of Louisiana's civil law tradition, these designations are the "solemn expression of legislative will," La. C.C. art. 1. Accordingly, legislation is written with the expectation that it will be interpreted

consistently with the civilian understanding that it is “the superior source of law in Louisiana,” La. C.C. art. 3, cmt. d, and that jurisprudential pronouncements will yield to it. *Clark v. Bridges*, 2023-237 (La. 2/22/23), 356 So.3d 990, 993. The claims against SRA-La. should have been dismissed where SRA-La.’s enabling legislation qualified it as an “arm of the state” of Louisiana entitled to sovereign immunity.

Instead, the Fifth Circuit applied common law principles of stare decisis and thus subjugated the express direction of the Louisiana legislature to inapplicable cases and footnoted dicta that referenced outdated legislation. From this analysis, the court determined that SRA-La. was neither a state agency nor an “arm of the state.”

This Court’s review is appropriate under Supreme Court Rule 10(a) and (c). The Fifth Circuit’s ruling negates the express declarations of the Louisiana legislature on an issue that is a cornerstone of federalism. Under Louisiana’s civil law tradition – a decision that disregards express legislative will – is tantamount to overruling the state court of last resort in any other state. Moreover, this ruling conflicts with principles established by this Court and by the Fifth Circuit’s own rulings.

More importantly, the Fifth Circuit’s analysis unduly prejudices the state of Louisiana on important questions of law. The Louisiana legislature functions within the civilian methodology. Thus, it anticipates that the laws it implements will be interpreted and

applied within the prescribed legal framework. The Fifth Circuit has previously recognized that it must adjust the lens through which it interprets Louisiana statutes. But in this case, it failed to do so. This ruling disrupts Louisiana's ability to ensure that its laws are enforced as intended. The effect of the ruling is to place Louisiana at an inherent disadvantage to all other states in suits proceeding in the federal court system.

Accordingly, SRA-La. respectfully prays that this Court grant SRA-La.'s petition for a writ of certiorari and reverse the rulings of the lower courts to find that SRA-La. is an arm of the state of Louisiana entitled to sovereign immunity and thereby dismiss the claims against it for lack of subject matter jurisdiction.

II. LAW & ANALYSIS

A. Sovereign immunity granted by the Eleventh Amendment is foundational to principles of federalism underlying the United States Constitution.

This Court has repeatedly explained the importance of Eleventh Amendment immunity to the fundamental principle of federalism. As this Court noted in *Alden v. Maine*, 527 U.S. 706, 713, 119 S.Ct. 2240, 2246-47, 144 L.Ed.2d 636 (1999):

The phrase ["Eleventh Amendment immunity"] is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment.

Rather, as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments.

In several opinions, this Court outlined history of the Eleventh Amendment to explain its role and importance to the foundation of the United States' system of government. *Franchise Tax Board of California v. Hyatt*, 139 S.Ct. 1485, 1493-97, 203 L.Ed.2d 768 (2019); *Alden*, 527 U.S. at 713-30, 119 S.Ct. at 2247-54; *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 69-71, 116 S.Ct. 1114, 1130-32, 134 L.Ed.2d 252 (1996); *Hans v. Louisiana*, 134 U.S. 1, 9-15, 10 S.Ct. 504, 505-07, 33 L.Ed. 842 (1890). Specifically, the vast majority of the Constitution's ratifiers believed and understood that the states retained sovereign immunity from private suits under the government the Constitution established. *Alden*, 527 U.S. at 726.

Five years after the passage of the Constitution, the Supreme Court issued the decision in *Chisholm v. Georgia*, 2 U.S. 419, 2 Dall. 419, 1 L.Ed. 440 (1793), which allowed a private citizen to pursue a private suit against the state of Georgia. The *Chisholm* decision "created such a shock of surprise throughout the country that, at the first meeting of congress thereafter, the

eleventh amendment to the constitution was almost unanimously proposed, and was in due course adopted by the legislatures of the states.” *Hans v. Louisiana*, 134 U.S. 1, 11, 10 S.Ct. 504, 505, 33 L.Ed. 842 (1890). It is accepted that the amendment “confirmed . . . sovereign immunity as a constitutional principle” such that “the scope of the States’ immunity from suit is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design.” *Alden*, 527 U.S. at 728-29; *Hyatt*, 139 S.Ct. at 1496.

In application, it is well-established that the Eleventh Amendment of the United States Constitution bars suits against a State “brought in federal courts by her own citizens as well as citizens of another State.” See, e.g., *Lapides v. Board of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 616, 122 S.Ct. 1640, 1642, 152 L.Ed.2d 806 (2002); *Edelman v. Jordan*, 415 U.S. 651, 662-63, 94 S.Ct. 1347, 1355-56, 39 L.Ed.2d 662 (1974). “Absent a waiver or consent by the state or an express negation of immunity by act of Congress, the Eleventh Amendment prohibits a federal court from awarding either legal or equitable relief against the state.” *Neuwirth v. Louisiana State Bd. of Dentistry*, 845 F.2d 553, 555 (5th Cir. 1988). A state’s sovereign immunity under the Eleventh Amendment extends to any state agency or other political entity that is an “arm of the State.” *Regents of the Univ. of California v. Doe*, 519 U.S. 425, 429, 117 S.Ct. 900, 903-04, 137 L.Ed.2d 55 (1997).

There is no “bright-line” test for determining whether a political entity is an “arm” of the State for purposes of Eleventh Amendment immunity, rather, “the matter is determined by reasoned judgment about whether the lawsuit is one which, despite the presence of a state agency as the nominal defendant, is effectively against the sovereign state.” *See, e.g., Vogt v. Board of Comm’rs of Orleans Levee Dist.*, 294 F.3d 684, 689 (5th Cir. 2002), quoting *Earles v. State Bd. of Certified Public Accountants of La.*, 139 F.3d 1033, 1037 (5th Cir. 1998), cert. denied, 525 U.S. 982, 119 S.Ct. 444, 142 L.Ed.2d 399 (1998).

In *Clark v. Tarrant County*, 798 F.2d 736, 744-45 (5th Cir. 1986), the Fifth Circuit identified six factors, now commonly known as the *Clark* factors, which provide a framework for the analysis:

- 1) whether the state, through statutes or case law, views the entity as an arm of the State;
- (2) the source of the entity’s funding;
- (3) whether the entity is concerned with local or statewide problems;
- (4) the entity’s degree of authority independent from the state;
- (5) whether the entity can sue and be sued in its own name; and
- (6) whether the entity has the right to hold and use property.

Hudson v. City of New Orleans, 174 F.3d 677, 681 (5th Cir. 1999).

The factors are not given equal weight. Consistently with the framework applied in every other circuit and this Court, the second factor – which considers

whether a judgment against the political entity will be paid with state funds – is recognized as the most important because a primary goal of the Eleventh Amendment is the protection of state treasuries. *See, e.g., Daniels v. University of Texas Southwestern Medical Center*, 960 F.3d 253, 257-58 (5th Cir. 2020); *Vogt*, *supra*, 294 F.3d at 689; *Delahoussaye v. City of New Iberia*, 937 F.2d 144, 147-48 (5th Cir. 1991). The last two factors are “accorded significantly less weight than the others.” *Cozzo v. Tangipahoa Parish Council-President Govt.*, 279 F.3d 273, 281 (5th Cir. 2002). All of these factors need not be present for a defendant to be entitled to Eleventh Amendment immunity. *See, e.g., Perez v. Region 20 Educ. Service Center*, 307 F.3d 318, 327 (5th Cir. 2002), citing *Hudson*, 174 F.3d at 682.

B. Louisiana’s civil law tradition elevates legislation over jurisprudence, a legal paradigm that the Fifth Circuit Court of Appeal did not consider in denying SRA-La. Eleventh Amendment immunity.

As recently as February 2023, the Louisiana Supreme Court explained the unique methodology applied in Louisiana with respect to legislation, custom and jurisprudence:

[C]ivilian methodology and the civil code instruct that the sources of law are legislation and custom, and that legislation is the superior source of law. [La. C.C.] arts. 1, 3. Legislation, which is defined as the solemn expression of legislative will, [La. C.C.] art. 2,

is to be interpreted according to the rules set forth in the Civil Code, [arts 9-11] . . . In Louisiana, legislation is superior to any source of law[.] [La. C.C.] art. 2. . . . Although jurisprudence is persuasive in analyzing statutory law in our civil law system, the courts are not the lawmakers. The sources of law, as stated in the Civil Code, are legislation and custom. Judicial pronouncements are not sources of law. In our civilian jurisdiction, legislation, the solemn expression of the legislative will, is the superior source of law. Jurisprudence constant carries ‘considerable persuasive authority,’ but is not the law and must yield to legislative pronouncements.

As is required in Louisiana’s civil law system, this court begins, as it must, with the statutory pronouncements of the legislature. *See* La. R.S. 1:4; La. C.C. art. 9.

Clark, 356 So.3d at 993 (citing Prof. Alain Levasseur, Louisiana Law of Obligations in General – A Comparative Civil Law Perspective, Author’s notes, p. xix (2020) and *Willis-Knighton Med. Ctr. v. Caddo Shreveport Sales & Use Tax Comm’n*, 2004-473 (La. 4/1/05), 903 So.2d 1071, 1085, *adhered to on reh’g* (June 22, 2005)). *See also*, *Newtek Small Business Finance, LLC v. Baker*, 2022-01088, p. 4 (La. 6/27/23), ___ So.3d ___, 2023 WL 4195581 at *2, citing *Bergeron v. Richardson*, 2020-1409, p. 9 (La. 6/30/21), 320 So.3d 1109, 1116. (“[R]esort ‘to jurisprudence is unnecessary when an issue may be decided by the positive law.’”).

The Fifth Circuit previously recognized that the analysis of Louisiana law “requires that we employ the appropriate Louisiana civilian methodology to decide th[e] issue[s presented] the way that we believe the Supreme Court of Louisiana would decide [them].” *American Intern. Specialty Lines Ins. Co. v. Canal Indem. Co.*, 352 F.3d 254, 260 (5th Cir. 2003). The court expressly noted that faithful adherence to the civil law tradition required that the court divorce itself from the concept of stare decisis and treat “[j]urisprudence, even when so cohesive and entrenched as ‘to rise to the level of *jurisprudence constante*,’ [as] merely ‘a secondary law source.’” 352 F.3d at 260-61. Internal citations omitted.

Accordingly, Louisiana’s codified rules dictate the court’s interpretation of how a given statute applies. These general principles require that statutes be read in their entirety, giving effect to all parts of a statute and attempting to harmonize and reconcile the language internally and with other provisions. *See*, La. C.C. arts. 9-13; La. R.S. 1:1, *et seq.* *See also*, *Seguin v. Remington Arms Company, L.L.C.*, 31 F.4th 311, 316 (5th Cir. 2022), citing *ABL Mgmt. Bd. v. Bd. of Supervisors of S. Univ.*, 2000-0798, p. 6, (La. 11/28/00), 773 So.2d 131, 135. Louisiana law requires that the statute be interpreted “as having the meaning that best conforms to the purpose of the law,” La. C.C. art. 10, although “the letter of [the written legislation] shall not be disregarded under the pretext of pursuing its spirit.” La. R.S. 1:4.

Per La. R.S. 13:5106, Louisiana consents only to suits brought against “the state or a state agency or political subdivision” only if the suit is brought in a Louisiana state court. Where SRA-La. qualifies as both an agency and an “arm of the state” of Louisiana, it is entitled to sovereign immunity from suit in federal court. The lower courts erred when they failed to consider applicable Louisiana legislation, including SRA-La.’s enabling legislation, within the state’s civil law tradition. Accordingly, the lower courts’ ruling should be reversed and the suit against SRA-La. brought in a federal court in Texas should be dismissed.

i. The Fifth Circuit’s analysis of whether Louisiana views SRA-La. as an “arm of the state” in satisfaction of the first *Clark* factor failed to account for Louisiana’s civil law methodology that elevates legislation over jurisprudence.

The Louisiana legislature expressly stated that SRA-La. is an “agency and instrumentality of the state of Louisiana.” La. R.S. 38:2324(A). This designation has been expressly accepted and affirmed by both Louisiana courts and the Fifth Circuit. *Baca*, 2021-0009, p. 6; 327 So.3d at 533, writ denied, 2021-00939 (La. 10/19/21), 326 So.3d 261 (“The plaintiffs seek damages for the taking of their property by SRA-L, an agency and instrumentality of the State of Louisiana. See La. R.S. 38:2324[(A)].”); *Simmons*, 732 F.3d at 471 (“Two state agencies jointly regulate the Sabine

River’s waterways: the Sabine River Authority of Louisiana and the Sabine River Authority of Texas[.]”). *See also, Simmons*, 732 F.3d at 476 (“Plaintiffs assert claims only under *Louisiana* law and only against *Louisiana* state agencies[.]” Emphasis in original.).

Louisiana’s Civil Code dictates that clear and unambiguous expressions of legislative intent must be evaluated in the context of their generally prevailing meaning, with “words of art being given their technical meaning.” La. C.C. art. 11. Pursuant to Louisiana’s civil tradition, the Louisiana legislature recognizes that the legislation it enacts will be implemented and treated as the “superior source of law.” La. C.C. art. 1, 3. *See also, Willis-Knighton Medical Center*, 2004-0473, p. 21, 903 So.2d at 1085.

In this connection, the designation of a governmental entity as an agency and “instrumentality of the state” carries a particular meaning that the Louisiana legislature plainly intended to implement. In *Swolinski v. England Econ. and Indus. Develop. Dist.*, 2002-0189 (La. 2002) 828 So.2d 520, the Louisiana Supreme Court stated that an entity qualified as an instrumentality of the state based on whether it is “‘an arm of the state’ or state agency.” *Id.* at 523. The court recognized that “[b]ecause of the weighty consequences that arise when the legislature includes the term of art, ‘instrumentality of the state,’ . . . it is unreasonable to assume our legislature overlooked it, when they made their intent proof positive in the statutes[.]” *Id.* at 2002-0189, p. 4; 828 So.2d at 523. Notably, in connection with this analysis, the *Swolinski*

court conducted a study of entities designated as “instrumentalities of the state.” The court also recognized that only SRA-La. was also expressly designated as an “agency.” *See also, Smith Board of Commissioners of Louisiana Stadium and Exposition District*, 372 F.Supp.3d 431, 441-42 (E.D. La. 2019) discussing the *Slowinski* case and further discussing the “weighty consequences” associated with the designation of an entity as an “instrumentality of the state.”

In conducting its analysis, the *Slowinski* court referenced several factors that, if satisfied, militated in favor of finding that the entity was an “arm of the state.” These factors included an entity’s designation as an “instrumentality of the state,” an organization within the Executive Branch of the state government, the appointment of board members outside of the local governing bodies, and an inability to tax. SRA-La. satisfies all of these factors. *See*, La. R.S. 38:2324(A) where SRA-La. is expressly designated as an “agency and instrumentality of the state.” *See*, La. R.S. 36:509(F)(1) where SRA-La. was transferred to the Executive Branch. *See*, La. R.S. 38:2322 regarding appointment of all board members at the pleasure of the Governor and confirmation of the Senate. *See*, La. R.S. 38:2324(B) which prohibits SRA-La. from levying taxes.

Reliance on these factors is consistent with the Fifth Circuit’s prior decisions on the “arm of the state” analysis. In *Delahoussaye v. City of New Iberia*, 937 F.2d 144 (5th Cir. 1991), the Fifth Circuit recognized the importance that the constituency of an agency’s

governing body plays in the analysis. That case inherently recognized that when supervision and management of an agency occur under the direction of a constitutionally created agency and Board, the first *Clark* factor weighs in favor of finding that the agency is an “arm of the state.” 937 F.2d at 147. *See also, Swolinski*, 828 So.2d at 524-25 (Where the Louisiana Supreme Court expressly contrasts an entity whose board is created and operates wholly autonomously from state control with entities whose boards are appointed by the governor and confirmed by the state Senate to find that the former is not an agency or instrumentality of the state under an “arm of the state” analysis.). Similarly, SRA-La. is governed by a board of thirteen members who are appointed by and serve at the pleasure of the Governor of Louisiana. La. R.S. 38:2322(A)(1). “Each appointment by the governor shall be submitted to the Senate for confirmation.” La. R.S. 28:2322(A)(2).

Also, in *Vogt v. Board of Com’rs of Orleans Levee District*, 294 F.3d 684, 692 (5th Cir. 2002), the Fifth Circuit noted:

In every recent case in which a Louisiana political entity has been held to be an “arm of the state,” the state agency being sued was part of a department within the executive branch. **Our prior decisions have gone so far as to suggest ‘that all Louisiana executive departments have Eleventh Amendment immunity.’** *Id.* at 692, citing *Champagne v. Jefferson Parish Sheriff’s Office*, 188 F.3d 312 (5th Cir. 1999). Footnoted

citations omitted. *See also, Darlak v. Bobear*, 814 F.2d 1055, 1060 & n. 5 (5th Cir. 1987), citing *Fireman's Fund Ins. Co. v. Department of Transp. & Dev.*, 792 F.2d 1373, 1375 (5th Cir. 1986).

Via La. R.S. 36:509(F)(1), the Louisiana legislature transferred SRA-La. to Louisiana's Executive Branch.

Notwithstanding the abundant support for this first *Clark* factor, the Fifth Circuit pronounced that this factor weighed “only modestly” in favor of finding that SRA-La. was an “arm of the state,” *Bonin*, 65 F.4th at 259. The Fifth Circuit's reasoning was based on the fact that La. R.S. 38:2324(A) further defines SRA-La. as “a corporation and body politic and corporate.” In its proper context, the designation as a “corporation and body politic and corporate” does not affect SRA-La.'s status as an “agency” because this designation merely defines the “powers, privileges, rights, and immunities” of the agency necessary to effect the broad authority granted to SRA-La. to act as an “instrumentality of the state” and “arm of the state.” Any other reading renders the term “agency” superfluous. Such a result is impermissible under Louisiana law. *Fairbanks Development, LLC v. Johnson*, 2020-01031, p. 5-6 (La. 9/30/2021), 330 So.3d 183, 187 citing La. C.C. art. 9, La. R.S. 1:3, La. R.S. 1:4. (“Courts are bound to give effect, if possible, to all parts of a law and to construe no sentence, clause, or word as meaningless and surplusage if a construction giving force to and preserving every word can legitimately be found.”).

Here, the Fifth Circuit relied upon *Jacintoport Corp. v. Greater Baton Rouge Port Comm'n*, 762 F.2d 435, 439-40 (5th Cir. 1985) to conclude that the description of an entity as an “agency” bears little weight in determining how the state treats the entity for purposes of Eleventh Amendment immunity. However, the *Jacintoport* court considered an entity that was only assessed as an “agency” based on prior judicial characterizations by the Louisiana Supreme Court and other courts without regard to express legislative statements. In contrast, SRA-La. is designated as an “agency and instrumentality of the state of Louisiana” by express legislative will, which cannot be supplanted by jurisprudence.

The Fifth Circuit further disregarded Louisiana’s civil law tradition when it subjugated the plain language of the statute to inapplicable jurisprudence. Specifically, the Fifth Circuit noted that SRA-La. was described as a “political subdivision” in a footnote in a single case where the entity’s status was not at issue and the basis for the footnoted statement was not provided. *See Crump v. Sabine River Authority*, 737 So.2d 720, 722, n. 1 (La. 6/29/1999). This footnote is ostensibly based on the originating legislation from 1950, which expressly provided: “Sabine River Authority is hereby declared to be a corporation and political subdivision of the state of Louisiana.” Acts 1950, No. 261 §4. However, as outlined, subsequent legislation in 1956 amended and reenacted La. R.S. 38:2324 to expressly provide that SRA-La. was an “agency and

instrumentality of the state of Louisiana,” Acts 1956, No. 432 §1, an expression that remains today.

The Fifth Circuit’s analysis reflects a rejection of Louisiana’s civil law tradition. If left undisturbed, this decision renders Louisiana legislation vulnerable to interpretation by federal courts that is inconsistent with Louisiana’s intent. Such a result is inherently at odds with principles of federalism and particularly disadvantages Louisiana in federal courts assessing Eleventh Amendment immunity.

ii. Judgments against SRA-La. are a liability of the state of Louisiana by operation of La. Const., Art. XII, §10(C) and La. R.S. 13:5109(B)(2) such that the second *Clark* factor is satisfied.

Louisiana has constitutionally and statutorily mandated that judgments against “agencies” should be paid by the State pursuant to La. Const., Art. XII, §10(C) and La. R.S. 13:5109(B)(2). Both the constitution and statute require that governmental entities be classified in one of three ways: as the State, as an agency or as a political subdivision. Only political subdivisions are obligated to pay their own judgments. The analysis demonstrates that SRA-La. is not a political subdivision. Therefore, SRA-La. must be found to have “agency” status, which should end the analysis.

The Fifth Circuit – acknowledging that the obligation of the state to pay the judgment would impact its

analysis and unmoved by the express statement of the Louisiana legislature that SRA-La. was an “agency” – conducted additional analysis to assess whether the state could be responsible for SRA-La.’s general debts. Not only did this analysis compound the court’s initial error with respect to the interpretation of La. R.S. 38:2324, in effect, it also overruled the state’s legislature by artificially bifurcating the “arm of the state” analysis between agencies that are granted some level of financial autonomy and agencies that are not granted any financial autonomy. The Louisiana legislature made no such distinction.

In creating and applying such a distinction, the Fifth Circuit ran afoul of an inviolate principle of federalism: “A State is entitled to order the processes of its own governance, assigning to the political branches, rather than the courts, the responsibility for directing the payment of debts.” *Alden*, 527 U.S. at 752, citing *Gregory v. Ashcroft*, 501 U.S. 452, 460, 111 S.Ct. 2395, L.Ed.2d 410 (1991). The Fifth Circuit improperly subsumed the role of the Louisiana legislature to order the state’s payment of debts when it did not apply civilian methodology and recognize the law of Louisiana as stated by the legislature.

Analysis of the relevant statutes demonstrates that the second *Clark* factor is satisfied. SRA-La. operates from self-generated revenues,⁹ La. R.S.

⁹ Although this portion of the statute provides that SRA-La. is not a budget unit of the State, contrary interpretations exist on this point. *See, e.g.*, La. Atty. Gen. Op. No. 98-252. June 25, 1998.

38:2324(B)(1), that derive from the delegated authority to utilize the waters of the Sabine River for generation of electric power and for sale. La. R.S. 38:2325(A)(11)(a). The waters of the Sabine River belong to the State, La. C.C. art 450. SRA-La.'s "self-generated revenues," in actuality, are revenues from a state resource that the State has assigned to the steward of that resource for the steward's operations, subject to conditions and limitations for operation outlined in the enabling statutes.¹⁰ This assignment is consistent with the expressed understanding that SRA-La. is an "agency and instrumentality of the state of Louisiana," La. R.S. 38:2324(A)(1) charged with "performing an essential public function under the constitution" La. R.S. 38:2324(D). The assignment of revenues to SRA-La. is similar to the manner in which the legislature would otherwise appropriate funds for particular needs, an act specifically reserved to the Louisiana legislature. La. Const., Art. III, §16.

The Louisiana legislature exercised its right to order and direct the payment of debts arising from SRA-La.'s operation. General debts are paid from SRA-La.'s revenues that are assigned to it by statute. Judgments against this state agency remain the obligation of the state. Under the *Clark* analysis, the second factor is satisfied.

¹⁰ As outlined in the following section, SRA-La. was not granted unfettered use or sale of the waters of the Sabine River; rather, the enabling legislation outlines a specific procedure for use and sale in particular circumstances.

iii. SRA-La.’s autonomy is limited to the confines of the State, consistently with its role as an “agency and instrumentality of the state of Louisiana” such that the third *Clark* factor is satisfied.

The third *Clark* factor considers whether SRA-La. has authority to operate independently of the state, including “consideration of the entity’s ‘independent management authority’ and, to a lesser degree, ‘the independence of the individual commissioners.’” *Bonin v. Sabine River Authority*, 65 F.4th 249, 257 (5th Cir. 2023) citing *Vogt*, 294 F.3d at 694-95.

In *Delahoussaye v. City of New Iberia*, 937 F.2d 144 (5th Cir. 1991), the Fifth Circuit recognized that appointment of board members by the governor, subject to Senate confirmation, supported a finding of “arm of the state” status, especially where certain other functions were supervised or managed by other state boards, commissions or branches of government. *Id.* at 148. The absence of local nominations and terms of office has been recognized by the Fifth Circuit as “militat[ing] against local autonomy.” *Jacintoport Corp. v. Greater Baton Rouge Port Comm.*, 762 F.2d 435, 442 (5th Cir. 1985) (“vulnerability . . . to the governor’s pleasure militates against a finding of local autonomy”).

This factor weighs in favor of finding that SRA-La. satisfies the third *Clark* factor. La. R.S. 38:2324(A)(1) and (2) provide that each member of SRA-La’s board is

“appointed by the governor,” subject to Senate confirmation, and “shall serve at the pleasure of the governor making the appointment.” The Board exercises authority consistent with its role as steward of a state resource, but subject to limitations on authority articulated in the enabling legislation. For instance, any contracts or agreements made “which provide for the sale, utilization, distribution, or consumption, outside of the boundaries of the state of Louisiana, of the waters over which the authority has jurisdiction or control” requires a collection of written concurrences, including from the Governor, the Senate Committee of Natural Resources and the House Committee of Natural Resources and the Environment, at least 2/3 of the governing authorities of the parishes within the territorial jurisdiction of the authority, and the Water Resources Commission. La. R.S. 38:2325(A)(16). Similarly, under La. R.S. 38:2324(B)(2), SRA-La. lacks any authority to levy taxes.

The Fifth Circuit’s analysis on this factor was equivocal, finding that the composition of the Board weighed in favor of finding an “arm of the state,” while the management autonomy counterweighted this finding. *Bonin*, 65 F.4th at 257-58. The analysis did not consider the oversight and concurrence required for certain functions, such as out-of-state contracting. Here, SRA-La.’s management autonomy is coextensive with its status as an “agency and instrumentality of the state.” SRA-La. functions autonomously only within the confines of the State and satisfies this portion of the “arm of the state” analysis.

iv. SRA-La.'s focus and concern is statewide in satisfaction of the fourth *Clark* factor.

This factor “centers on whether the entity acts for the benefit and welfare of the state as a whole or for the special advantage of local inhabitants.” *Vogt*, supra, 294 F.3d at 695. The Fifth Circuit found that this factor weighed against SRA-La. solely because of its geographic limitations and “localized” activity. *Bonin*, 65 F.4th at 259. Geographical limitations can suggest that an agency is not an “arm of the state,” except where the regional entity is a local solution to a statewide problem, *Williams v. Dallas Area Rapid Transit*, 242 F.3d 315, 321-22 (5th Cir. 2001), citing *Clark*, 798 F.2d at 745, or an administrative division of a statewide system. *Vogt*, 294 F.3d at 695, citing *Williams*, 242 F.3d at 321-22 & n. 10.

This factor weighs in favor of finding SRA-La. is an “arm of the state.” The Louisiana legislature expressly stated that SRA-La. was “required by the public convenience and necessity for the carrying out of the functions of the state.” La. R.S. 2324(A). The statute further provides that SRA-La., “in carrying out the purposes of this Chapter, **will be performing an essential public function under the constitution.**” La. R.S. 38:2324(D). Emphasis added. The Toledo Bend Reservoir is one of the largest reservoirs in the nation. The Project that SRA-La. and SRA-Tx. jointly operate serves the important functions of water conservation, hydropower generation, and recreational opportunities

for all persons, not just local inhabitants. *Id.* Indeed, per SRA-La.'s Mission Statement:

The mission of the Sabine River Authority of Louisiana, consistent with Louisiana Revised Statutes 38:2321, et seq., and with Article 48 of the Federal Power Commission License, Project 2305, is to provide for economic utilization and preservation of the waters of the Sabine River and its tributaries by promoting economic development, irrigation, navigation, improved water supply, drainage, public recreation, and hydroelectric power **for the citizens of Louisiana.**¹¹

Other legislation further establishes that SRA-La. exists as both a “local solution to a statewide problem” and “administrative division of a statewide system.” SRA-La. was transferred to the Louisiana Department of Transportation within the executive branch of state government by the Executive Reorganization Act, La. R.S. 36:1, *et seq.*, in 1977 following the amendment of the state constitution in 1974. This transfer was, *inter alia*, part of a consolidation effort for the following stated purpose:

[T]o create a structure for the executive branch of state government which is responsive to the needs of the people of this state and which is sufficiently flexible to meet changing human and natural conditions; to promote economy and

¹¹ See, Sabine River Authority of Louisiana, “Mission Statement.” <https://srala-toledo.com/sra/>. Emphasis added.

efficiency in the operation and management of state government and to strengthen the executive capacity for effective, efficient, and economic administration at all levels; to improve the quality of the functions performed and the programs and services rendered by state government for the citizens of the state; **to conserve and enhance the human and natural resources of the state;** to provide that the responsibility of the respective departments for the implementation of programs and policies is clearly fixed and ascertainable; **and to eliminate to the fullest practicable extent duplication of effort within the executive branch of state government in order to use wisely the funds of the state and more conveniently to meet the needs of the citizens of Louisiana which are supported by revenues derived from the people and from the natural resources belonging to them.** La. R.S. 36:2(C). Emphasis added.

The conclusion that this factor weighs in favor of finding SRA-La. is an “arm of the state” is further supported by jurisprudence where entities similarly situated were found to have statewide interests. For example, the Fifth Circuit has found that a university located in a discrete geographical area provided a state-wide benefit because its purpose was to provide education for the people of Louisiana. *Delahoussaye*, supra, 937 F.2d at 148. Similarly, in *Clark v. Tarrant County, Texas*, the Fifth Court determined this factor

weighed in favor of finding the Tarrant County Adult Protection Department was an “arm of the state,” even though it served only the community in one county, because it “address[es] a statewide problem.” 798 F.2d at 745. *See also, Perez v. Region 20 Educ. Service Center*, 307 F.3d at 327, in which an education service center was concerned with state-wide problems because the center’s mission was to “ensure that all Texas children have access to a quality education.”

The broad reach and effects of SRA-La. and its hydroelectric, water conservation, irrigation and recreational activities confirms that SRA-La. does not involve only local concerns. As such, this factor also weighs in favor of finding SRA-La. is an arm of the State of Louisiana.

v. The fifth *Clark* factor is not dispositive of the analysis where it is one of the “least important,” and all other factors weigh in favor of finding SRA-La. is imbued with “arm of the state” status.

The fifth *Clark* factor considers whether the entity has the authority to sue and be sued. Pursuant to La. R.S. 38:2324(B)(2), SRA-La. may “sue and be sued.” This right is recognized by the Fifth Circuit to “not amount to a waiver of Eleventh Amendment immunity.” *Delahoussaye*, supra, 937 F.2d at 148, n. 6, citing *Usry v. Louisiana Dept. of Hwys.*, 459 F.Supp. 56, 63-64 (E.D. La. 1978). The Fifth Circuit has held that this

factor carries “significantly less weight than the others.” *Cozzo*, supra, 279 F.3d at 281. *See also, e.g., Vogt*, supra, 294 F.3d at 696; *Hudson*, 174 F.3d at 682 (The last two factors are generally considered to “balance the equities and determine ‘whether the suit is in reality a suit against the state itself.’”).

vi. SRA-La.’s ability to own property is conditioned on taking such property in its corporate name and as an instrumentality of the state such that the sixth *Clark* factor is satisfied.

The sixth *Clark* factor considers whether SRA-La. is authorized to hold and use property. SRA-La.’s enabling legislation authorizes it to acquire and use property. La. R.S. 38:2325(A)(2). However, “[t]itle to all property acquired by the Authority [SRA-La] shall be taken in its corporate name and shall be held by it as an instrumentality of the State of Louisiana.” La. R.S. 38:2325(B). Louisiana’s law of statutory interpretation requires that terms of art be given their particular meaning and no part of a statute be read as superfluous. The only interpretation of La. R.S. 38:2325(B) consistent with this framework is that SRA-La. may own property on a conditional basis, i.e., strictly within its capacity as an instrumentality and arm of the state of Louisiana.

The Fifth Circuit declined to assess the import of the state legislature’s express pronouncement that

property would be held by SRA-La. in its capacity as an “instrumentality of the state” and gave greater weight to the fact that property would be taken by SRA-La. “in its corporate name.” La. R.S. 38:2325(B). The court likened this pronouncement to the situation in *Vogt*, where the entity merely claimed that all of its property ultimately belonged to the state. *Bonin*, 65 F.4th at 259.

In any event, this factor, like the fifth *Clark* factor, carries the least weight in the “arm of the state” analysis. *See, Richardson v. Southern University*, 118 F.3d 450 (5th Cir. 1997), where the Fifth Circuit stated that “just because Southern’s Board can be sued and can hold and use property does not mean that these final two factors weigh against a finding of sovereign immunity. **In fact, precisely the opposite is true.** First, as noted, Louisiana has not waived its immunity from suit in federal court. Second, and perhaps most importantly, money judgments against the Board are paid by the State of Louisiana.” *Id.* at 456. Emphasis added. Internal citations omitted.

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CONCLUSION

Louisiana statutes expressly declare Sabine River Authority, State of Louisiana a state agency, an “instrumentality of the state,” and, by extension, an “arm of the state” for purposes of Eleventh Amendment immunity. Nevertheless, the lower courts declined to dismiss the suit. In doing so, the lower courts relied on

principles of stare decisis without consideration of Louisiana's civil law tradition. This approach disturbs inviolate principles of federalism and constrains the enforcement of Louisiana law as intended by the state's legislature – a result suffered by no other state in the Union. Sabine River Authority, State of Louisiana respectfully prays that this Court reverse these rulings and dismiss the suit against Sabine River Authority, State of Louisiana for a lack of subject matter jurisdiction.

Respectfully submitted,

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