No. 24-1021

# In the Supreme Court of the United States

CEDRIC GALETTE,

*Petitioner*,

v.

NEW JERSEY TRANSIT CORPORATION,

*Respondent.*

**On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania**

## PETITIONER'S SUPPLEMENTAL BRIEF


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## SUPPLEMENTAL BRIEF

**1.** Both petitioner and respondent NJ Transit agree that this Court's review is necessary to resolve the conflict between the Pennsylvania and New York courts over NJ Transit's entitlement to interstate sovereign immunity. Now, 22 politically diverse States have filed an amicus brief likewise urging the Court to grant certiorari. See Amicus Br. of Texas, et al. (filed Apr. 24, 2025).

As the 22 States explain (at 1), "[c]ourts around the country * * * are splintered regarding how to determine whether instrumentalities that States use for important public functions are immune from suit" under the interstate sovereign immunity doctrine. They stress (at 10-12) "the importance of sovereign immunity to meaningful federalism" and assert the need for a "clear rule" to guide courts and litigants alike on the question presented. At bottom, the 22 States ask (at 22) the Court to "grant the petition."

The bulk of the States' amicus brief is devoted to the merits. They take the position (at 3) that when "a State itself characterizes the entities it creates as instrumentalities of the State," that alone should be "dispositive" of the immunity question. Accord *id.* at 15-20. And even when "a State has *not* characterized an entity as an arm or instrumentality of that State," still "there should be a strong presumption favoring sovereign immunity" that is overcome only when "additional factors" clearly warrant it. *Id.* at 4 (emphasis added).

There is much wrong with these arguments, but we limit our response here to two brief points. First, the States' proposed test would grant untenable control over the scope of interstate sovereign immunity to the States themselves. If all it took for a State to extend its sovereign immunity to a state-created entity were to "characterize" the entity as an "instrumentality" (Amicus Br. 15), never again would a State create an entity that it didn't label as

such. But it should go without saying that entitlement to immunity must turn on substance, not labels or other formalisms. The danger inherent in the States' contrary position is clear: It would place almost unilateral power to dictate the reach of a constitutional immunity doctrine in the self-serving hands of the very litigant seeking to invoke it.

Second, the States' proposed test is entirely ahistorical and would extend sovereign immunity to entities that the Founders never would have thought entitled to it. See Pet. 18. This case proves the point: NJ Transit is a massive, revenue-generating corporation (not a traditional state agency) providing a service that historically was furnished by private, for-profit enterprises.

At the Founding, mass transportation was a nascent concept. The original iteration of horse-drawn buses was introduced in Paris in 1662 as *carrosses a cinq sous*, but that enterprise soon failed. See Henry Charles Moore, *Omnibuses and Cabs: Their Origin and History* 2-7 (1902). The idea was reintroduced as the "omnibus" in London, again by a private venture, more than a century and a half later, in 1829. *Id.* at 10-14. Early steamboats arguably were also analogues to modern-day mass transit at the Founding, and they too were run by private interests. See, *e.g.*, 1 Seymour Dunbar, *A History of Travel in America* 253-254 (1915).

Thus, NJ Transit would have been understood at the Founding as a state-sponsored venture competing for business with private parties. In that context, a state-created entity loses its "sovereign character, and takes that of a private citizen." *Bank of the United States* v. *Planters' Bank of Georgia*, 22 U.S. (9 Wheat.) 904, 908 (1824). More generally, when the defendant to a suit is "a corporation created by * * * the state" with the power to "sue and be sued in all courts in like manner as individuals," it cannot be said that "the state is [the] real"

party-defendant. *Lincoln County* v. *Luning*, 133 U.S. 529, 530 (1890) (for Eleventh Amendment immunity purposes, addressing the status of a "city, town, or other municipal corporation").

The States' proposed test, which would grant interstate sovereign immunity to State-created corporations if they are simply "characterized" as "instrumentalities" by the State itself, cannot be squared with the relevant historical background or this Court's precedents.

**2.** As we explained in the petition (at 16), this case is a perfect vehicle for resolving the question presented. NJ Transit agrees. *See* Resp. Br. 4, 16-19.

In the time since we filed the reply, NJ Transit has filed a petition in *New Jersey Transit* v. *Colt*, No. 24-1113 (docketed Apr. 28, 2025). NJ Transit argues in the *Colt* petition (at 3) that "[i]f this Court grants review in *Galette*, as it should, then it should hold [*Colt*] pending resolution of that case." It asks the Court to grant plenary review in *Colt* only "[i]f this Court does not grant the *Galette* petition." *Ibid.*

The respondents in *Colt* understandably argue that the Court should deny review in both cases. But they also offer a fallback, asserting (at 24) that if the Court is inclined to grant review, it should favor review in *Colt* rather than in this case. The *Colt* respondents offer three arguments for support.

First, they assert (at 24) that the New York Court of Appeals' opinion in *Colt* is "exceptionally thorough" in comparison with the "the Pennsylvania Supreme Court's opinion in *Galette*." That is a strange contention. The lower court in this case devoted its entire opinion—many thousands of words spanning 24 pages of the petition's appendix (at 1a-24a)—to a comprehensive analysis of the question presented, including a discussion and rejection of the *Colt* decision. To be sure, we agree that the New

York court's opinion is better reasoned and reached the correct outcome, whereas the Pennsylvania court did not. But that observation has no bearing on the suitability of either case as a vehicle for review. In resolving the merits, the Court can of course consider any judicial opinion it finds persuasive, regardless of whether it is the opinion below, any of the opinions in *Colt*, or some prior precedent like *Hess* v. *Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994).

Second, the *Colt* respondents suggest (at 24-25) that they have made a "historically-based argument," whereas we have not. That is incorrect. The petition focuses (at 17) on the independent authority and structure of NJ Transit and argues (at 18) that such entities are not entitled to immunity as a matter of Founding Era history. All relevant merits issues are before the Court in this case, and each will be fully developed in plenary merits briefing if the Court grants the petition.

Finally, the *Colt* respondents suggest review is more appropriate in *Colt* because they have sued the bus driver in their case, and NJ Transit has agreed to indemnify him. That is a bug, not a feature. The Court has said in the Eleventh Amendment context that an indemnification provision does not extend sovereign immunity under the Federal Constitution to actors not otherwise entitled to it. See *Lewis v. Clarke*, 581 U.S. 155, 164-65 (2017). The bus driver's participation as a defendant in *Colt*, together with the indemnity provision, thus mean that the Court's resolution of the question presented almost surely will have no effect on the ultimate outcome in *Colt*—NJ Transit will have to pay any judgment entered against the bus driver, essentially as if the judgment had been entered against NJ Transit itself.

On top of that, it is an open issue in *Colt* whether NJ Transit waived sovereign immunity, even supposing it were otherwise entitled to it. The *Colt* respondents argued

waiver, and the intermediate New York appellate court noted that there were "unresolved issues" on that topic, because "the record is bereft of any evidence, such as a contract, of NJT's operations at the Port Authority Bus Terminal, which may be dispositive as to whether there is consent or waiver." *Colt* Pet. App. 94a n.2. See also *id.* at 105a n.5. It is thus possible that the question presented to this Court will be irrelevant twice over to the outcome in *Colt*. And either way, substantial additional proceedings will be needed on remand in that case, no matter how the Court resolves the question.

There are no similar procedural complications present in *Galette*, which offers a perfectly clean vehicle for reaching and resolving the question presented. The Court accordingly should grant review in *Galette* and either hold the petition in *Colt*, as NJ Transit has requested, or otherwise grant review in both cases.

Respectfully submitted.

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June 2025