No. 24-1113

In the Supreme Court of the United States

NEW JERSEY TRANSIT CORPORATION, ET AL.,

Petitioners,

v.

JEFFREY COLT, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Court of Appeals of New York

REPLY FOR PETITIONERS

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REPLY FOR PETITIONERS

This Petition arises from a clear and acknowledged split over whether a state-created entity can invoke sovereign immunity. Lower courts have fractured on the methodology for answering this question and have repeatedly reached conflicting outcomes as a result. In this very case, two States' high courts divided over NJ Transit's own immunity. The second court called its methodological disagreement with the first "obvious," and multiple opinions below called for this Court's guidance. Respondents themselves disagree with all these tests, offering their own categorical view that "state-created corporations" like NJ Transit "do not enjoy sovereign immunity." Opp.23. The conflict is clear, cleanly presented, and important.

Respondents all but recognize that review by this Court is warranted. They erroneously claim that these splits are overstated, and downplay the problems with a single entity like NJ Transit being subject to distinct interstate sovereign immunity rules along its route. But after briefly arguing against certiorari, they ask this Court to grant certiorari here if this Court does so in *Galette v. NJ Transit*, No. 24-1021 (docketed Mar. 25, 2025)—a pending Petition, to which NJ Transit has acquiesced, from the other side of the same split. Petitioners do not object: As NJ Transit noted in both, this Petition and *Galette* involve the same important conflicts, and each is an adequate vehicle. This Court should grant certiorari in either.

I. This Dispute Is Certworthy.

A. This Case Implicates Two Clear Splits.

Whether this Court holds this petition for *Galette* or grants this petition, the conflict is simple: Two state high courts came to diametrically opposing views on a single state-created entity's immunity within months. Pet.App.18; *Galette v. NJ Transit*, 332 A.3d 776, 790 (Pa. 2025). And the New York and Pennsylvania high courts disagreed not only over whether NJ Transit is an arm of the State, but also over how to answer that question. The Pennsylvania Supreme Court even acknowledged its methodology (not just its outcome) diverged from its sister high court's. See Pet.App.11-12 n.4; *Galette*, 332 A.3d, at 790. And the dispute reflects a broader divergence among lower courts over what weight to ascribe to different factors in the arm-of-the-state inquiry. This Court's guidance is needed.

Respondents admit that the split over NJ Transit's status exists, but err in suggesting that it reflects no more than a debate over how to interpret New Jersey law. Opp.7-15. Their reasoning is unconvincing in two respects: Respondents fail to grapple with the broader methodological divide among the lower courts, and they fail to appreciate how the decisions below diverged—as the Pennsylvania court recognized.

1. As to the methodological split, Respondents fail to appreciate the lower courts' explicit divide over the proper arm-of-the-state test. Respondents argue that *Colt*'s three-factor and *Galette*'s six-factor test are "materially identical," and that federal courts' tests include the same basic considerations, Opp.8-10, but they miss the point. Nobody disputes that the core

considerations include (1) the State's characterization of the entity, (2) the control a State exercises, and (3) a judgment's impact on the State's treasury. Accord Opp.9-10. The issue is what *weight* each of those factors receives, which—as *Colt* shows—can be determinative. *Galette* sums that split up perfectly: Having read *Colt*, issued months earlier, the Pennsylvania court refused to "place significant weight on" the treasury factor, treating state characterization as "the driving force" instead. 332 A.3d, at 790.

Federal courts likewise disagree over whether the treasury factor is the "foremost" or "most important" factor in their tests. Respondents do not dispute, for example, that the Third Circuit weighs all the factors equally, *Karns v. Shanahan*, 879 F.3d 504, 515 (CA3 2018); that the Fifth calls "the source of funding" "the most important factor," *Daves v. Dallas County*, 22 F.4th 522, 533 (CA5 2022) (en banc); or that the First treats the treasury factor as "dispositive" when others "point in different directions," *Fresenius Med. Care Cardiovascular Res., Inc. v. P.R. & the Caribbean Cardiovascular Ctr.*, 322 F.3d 56, 68 (CA1 2003). See Pet.14-15 & nn.2-4.

Nor do Respondents dispute that the courts, citing distinct tests, reach different results over the same entities, such as the Puerto Rico Ports Authority. See Resp. to Pet. for Cert. at 13, *Galette*, No. 24-1021 (filed Apr. 15, 2025) (*Galette* Resp.) (citing, *e.g.*, *P.R. Ports Auth. v. Fed. Mar. Comm'n*, 531 F.3d 868, 879-880 (CADC 2008); *Grajales v. P.R. Ports Auth.*, 831 F.3d 11, 21 (CA1 2016)). Respondents point to that acknowledged split to downplay the importance of the

divergence, Opp.11, but they do not gainsay that the different tests lead to different results, as when the First Circuit rejected the D.C. Circuit's reasoning on the same entity. *Grajales*, 831 F.3d, at 19 (recognizing difference in D.C. Circuit's test, which eschewed First Circuit's "second step" at which treasury factor "is dispositive"). The need for certiorari is clear.

2. As to the split over NJ Transit's status, it implicates this methodological divide. *Galette* identified "obvious" differences with *Colt*, 332 A.3d, at 790, and specifically cited "the legal classification and description of" NJ Transit as the "driving force" in its analysis, *id.*, at 785, 790. *Colt*, by contrast, did not accord "how the State defines the entity and its functions" such weight. Pet.App.13-14. And unlike *Colt*, *Galette* did "not place significant weight" on the treasury factor. 332 A.3d, at 790. Respondents say that the New York Court of Appeals did not actually focus on the treasury factor, see Opp.10 (noting that the *Colt* majority called it "the dissent's strawman" in a footnote), but *Galette* clearly perceived a dispute, and Judge Halligan—who joined the majority's opinion—agreed in her concurrence that it would be "understandable" to find that "a concern for state solvency, rather than dignity, drives the majority's analysis." Pet.App.22. The dispute over the proper test, which led to conflicting judgments on the same entity, requires review.

Respondents' contentions are unpersuasive. They principally assert that the disagreement between the Pennsylvania and New York courts was really based on different readings of state law, and had the briefing before the Pennsylvania court been different, it would

have ruled differently. See Opp.12-14 (arguing Pennsylvania court failed to consider NJ Tort Claims Act's definition of "State"; state-law definition of NJ Transit as a sue-and-be-sued entity; and requirement that NJ Transit Board members act with "independent judgment"). Not so. The *Galette* court reviewed and benefitted from *Colt's* analysis, citing it six times. 332 A.3d, at 789-790; see also *id.*, at 788-791 (discussing relevant New Jersey statutes). The Pennsylvania high court was not "apparently unaware" of these sources, Opp.14, nor did it claim its disagreements turned on state law: Instead, it weighed the arm-of-the-state factors differently, thereby reaching a different answer.

Colt's divergence from the Third Circuit in *Karns* is also telling—confirming a split on methodology, not just state law. *Karns* cites all the New Jersey statutes Respondents contend are absent from *Galette*, including NJ Transit's status as an "instrumentality of the State," role conducting "essential governmental functions," and sue-and-be-sued status, as well as the NJTCA. See 879 F.3d, at 517-518 (citing, *inter alia*, N.J. Stat. Ann. §§ 27:25-4, 27:25-5). And like *Colt*, the Third Circuit acknowledged that the treasury factor weighed against immunity. *Id.*, at 515-519. But *Karns* held NJ Transit to be an arm of New Jersey, 879 F.3d, at 519, and *Colt* acknowledged its opinion "conflict[ed] with the [Third Circuit's] determination," Pet.App.12. The natural explanation is methodology: The two courts reached different results despite considering the same core sources and finding the factors largely cut in similar ways because they assigned different weight to certain factors. It is thus telling that

Respondents barely discuss *Karns* or its conflict with *Colt*, let alone address what it reveals about the weight each court ascribed to different factors.

Colt's own analysis reinforces that differences in methodology produced different outcomes. Contrary to Respondents' framing, the majority did not merely conclude that "New Jersey's lack of legal liability or ultimate financial responsibility for a judgment" could "outweigh[]" the other factors. Pet.App.18. Rather, the majority held that Colt's suit "would not be an affront to New Jersey's dignity because a judgment would not be imposed against the State." *Id.* That reasoning reveals the methodological divide, just as Judge Halligan's reading of the opinion she joined underscores, see Pet.App.23: If the fact that a judgment does not run against a State's treasury suffices to preserve the "equal dignity and sovereignty" that motivates interstate sovereign immunity, *Franchise Tax Bd. of Cal. v. Hyatt* (*Hyatt III*), 587 U.S. 230, 245 (2019), then the treasury factor holds special power—the core of the split.

In short, courts are divided on how much weight to assign different factors in assessing whether an entity is an arm of its creator State. Those differences drive outcomes, as the divergent opinions from three courts to assess NJ Transit confirm. And Respondents' quarrels over the precise contours of one court's test do not diminish this division, much less preclude this Court from providing needed clarity—as Respondents concede in urging this case as a vehicle and noting the diversity of the opinions below. Opp.24-25. Instead, one of the few things the judges who voted for the judgment below agreed on was that this Court's

guidance is needed to resolve the "array of multifactor and multistep tests." Pet.App.11 (majority opinion); see also Pet.App.20 (Halligan, J., concurring); Pet.App.70 (Wilson, J., concurring in result). This Court should accept those invitations.

B. The Issue Is Important.

Not only do Respondents err in claiming that this conflict is overstated, but they also err in arguing that the significance of the sovereign immunity question is "overblown." Opp.14. As this Court has found time and again, state sovereign immunity is "integral" to the constitutional order and reflects an "essential component of federalism." *Hyatt III*, 587 U.S., at 246-247. So widespread conflicts over which entities benefit from that essential immunity, see *supra* at 2-7, are particularly worthy of review.

Respondents' effort to dismiss such disagreements as implicating mere "operational difficulties," Opp.15, misses the force of interstate immunity as an "important constitutional question." *Hyatt III*, 587 U.S., at 249. Essential to American federalism is the principle that States act as laboratories of democracy by structuring themselves differently to meet a heterogenous society's needs—including, as in this case, establishing distinct state-created entities to meet different state needs. *See* Brief of Texas et al. as Amici Curiae at 6-7, *Galette*, No. 24-1021 (filed Apr. 24, 2025) (Tex.Br.). That innovation is hindered when States are subjected to sister States' varying and unpredictable tests for sovereign immunity. *Id.*, at 9-12. And as Judge Halligan observed, if a court adopts a test that strips the immunity its sister State believes

it accorded its entity, that can impact interstate relations. Pet.App.32. That is significant.

Respondents are equally misguided in contending that NJ Transit's own sovereign immunity would toggle on and off along its route regardless. Opp.14-15. That is simply wrong. There is no dispute that New Jersey has waived sovereign immunity under its own tort laws, for suits filed in New Jersey. So at all times along those routes, NJ Transit is subject to suit in New Jersey. But NJ Transit's immunity in foreign courts—particularly its interstate immunity—now toggles on or off, depending on whether an alleged injury occurs in Morrisville, Pennsylvania, or New York City. Respondents seem to believe States' interstate immunity should not matter when a State has waived its immunity in its courts, but as 45 States confirmed in *Hyatt III*, sovereigns do not share that view. See Brief of Indiana & 44 States, *Hyatt III*, No. 17-1299 (filed Sept. 18, 2018). Interstate immunity—like any form of sovereignty—should not turn on or off differently whether one train crosses the Hudson River or crosses the Delaware.

II. Like *Galette*, This Case Is A Clean Vehicle.

The parties agree this case is a suitable vehicle to resolve the conflict below. NJ Transit acknowledged that this petition and *Galette* are "equally worthy" to address these sovereign-immunity questions. *Galette* Resp.20. And Respondents do not seriously argue otherwise. While the judgment below does come with a methodological diversity of separate writings, this Court will have the benefit of those writings—as well as fulsome merits and amicus briefing—regardless of the petition it grants. In either case, there is a split on

an important question, involving the same agency and fact pattern, presented in a clean vehicle.

Nor does the presence of petitioner Ana Hernandez impact this Court's review—as Respondents admit. Opp.26. Any dispute about her derivative immunity (an argument NJ Transit preserves) is peripheral, and Petitioners ask this Court to grant certiorari only as to NJ Transit's own sovereign immunity, with any residual questions left for remand.

III. The Decision Below Is Mistaken.

Respondents spend many pages arguing that the New York Court of Appeals was correct. But if that were true, *Galette* and *Karns* would be incorrect, and certiorari to resolve the split would still be warranted. In any event, the decision below is wrong.

Initially, Respondents' argument fails to justify the heavier weight on the treasury factor they prefer. See Opp.19-20. As *Hyatt III* explains, interstate sovereign immunity is based on the principle that States must respect each other's "*equal* sovereignty," 587 U.S., at 246, which extends to how a State chooses to structure its own entities, Tex.Br.6-8. Respondents cannot "respect[] States' dignity" by focusing on formalistic distinctions about how a State protects the public fisc, Opp.20, as that ignores States' executive, legislative, and judicial declarations about what entities are part of them and exercise of their sovereign prerogatives. See *Galette* Resp.21-22 & n.3; Tex.Br.6-8; see also *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 431 (1997) (rejecting treatment of inquiry as "formalistic question of ultimate financial liability"); *Hess v. Port Auth. Trans-Hudson Corp.*, 513

U.S. 30, 51 (1994) (instructing courts to consider treasury factor both "legally and practically").

Respondents' other methodological arguments are unavailing. Respondents' appeals to history, Opp.21-22, conflict with precedent, *e.g.*, *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 691 (1999), and are incorrect, cf., *e.g.*, *In re Ayers*, 123 U.S. 443, 487-492 (1887); Philip J. Stern, *The English East India Company & the Modern Corporation: Legacies, Lessons, & Limitations*, 39 Seattle U. L. Rev. 423, 435 (2016) (noting that the English East India Co. qualified as a sovereign for some purposes).[1] Drawing a legal line at "purely commercial behavior," Opp.23, is not only inapplicable to NJ Transit but also untenable, as this Court has "soundly rejected" "the distinction between commercial operations and traditional … governmental functions," Pet.App.29; see also *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 538-547 (1985). And New York's own interest in "protecting its citizens from tortious commercial behavior within its own borders" cannot be dispositive, Opp.23, because allowing that interest to control would upend *Hyatt III* and return interstate sovereign immunity to the comity regime it rejected, 587 U.S., at 236; see also *id.*, at 234, 249 (disallowing judgment against California agency involving conduct in Nevada). That would be error.

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[1] *Lincoln County v. Luning*, 133 U.S. 529 (1890), implicated a local government, while *Bank of the United States v. Planters' Bank of Ga.*, 22 U.S. (9 Wheat.) 904 (1824), addressed an early public-private partnership. Both are distinguishable.

Last, Respondents' treatment of the other factors is misguided. They place too much weight on NJ Transit's sue-and-be-sued status, claiming it renders the Legislature's characterization of NJ Transit as an instrumentality "irrelevant." Op.16-17. But NJ Transit's sue-and-be-sued status has no such talismanic effect; it simply establishes NJ Transit's discretion over whether to indemnify and defend its employees. See *Galette* Resp.28 (citing, *e.g.*, N.J. Stat. Ann. §§ 59:1-3, 59:10-4). This Court's precedent similarly underscores that the ability to "sue and be sued" does not categorically differentiate an entity from its creator. See *Biden v. Nebraska*, 600 U.S. 477, 493 (2023).

And Respondents fail to recognize the substantial control New Jersey exerts over NJ Transit. The scope of the Governor's removal power says especially little in New Jersey, where even core cabinet members like the Attorney General are removable only for cause. See N.J. Const. art. V, § 4, ¶¶ 1-3, 5. They acknowledge that a similar structure sufficed to render Amtrak part of the U.S. government in *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 397 (1995), without explaining why that would be true for the First Amendment but not sovereign immunity. Respondents similarly fail to explain why, in their view, removal power is crucial to assessing control but veto power is not. See Opp.18-19. Furthermore, their answers on eminent domain and police powers offer no response to the main point, which is that NJ Transit, unlike municipalities, can exercise those sovereign powers statewide. That confirms that NJ

Transit is an arm of New Jersey, not just a slice. See *Galette* Resp.27.[2]

CONCLUSION

This Court should grant the petition in *Galette* or this case and hold the other. If this Court grants the petition in *Missouri Higher Education Loan Authority v. Good*, No. 24-992 (docketed Mar. 18, 2025), this Court should hear *Galette* or this petition alongside it, or alternatively hold both.

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[2] Finally, while Respondents suggest that they cannot sue in New Jersey because of a venue rule, Opp.15 n.6, that is incorrect. In New Jersey, the remedy for mislaid venue is not dismissal but transfer to a more convenient "available" forum. *Anand v. Anand*, No. A-3253-19, 2021 WL 1714193, at *3 (N.J. Super. Ct. App. Div. Apr. 30, 2021) (quoting *Gore v. U.S. Steel Corp.*, 15 N.J. 301, 305 (1954)); see N.J. Ct. R. 4:3-3(a). But a forum where suit is barred by sovereign immunity is plainly not an available forum, and New Jersey courts have indeed adjudicated cases arising from public entities' conduct outside the State. *E.g.*, *Rose v. Port of N.Y. Auth.*, 61 N.J. 129, 132 (1972); *Johnson v. N.J. Transit Corp.*, CAM-L-3139-22 (N.J. Super. Ct. L. Div. Camden Cnty. 2022).

Respectfully submitted,

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