

APPENDICES

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APPENDIX A**J-55-2024****In the Supreme Court of Pennsylvania
Eastern District**

Cedric Galette	No. 4 EAP 2024
v.	Appeal from the Order of the Superior Court entered on March 21, 2023, at No. 2210 EDA 2021, affirming the Order of the Court of Common Pleas of Philadelphia County, Civil Division, entered on September 27, 2021, at No.2008000610.
NJ Transit and Julie E. McCrey	ARGUED: September 11, 2024

OPINION

JUSTICE BROBSON

FILED: MARCH 12, 2025

Appellee Cedric Galette (Galette) initiated a negligence action against Julie McCrey (McCrey) and Appellant New Jersey Transit (NJ Transit) in the Court of Common Pleas of Philadelphia County (trial court). NJ Transit is an “instrumentality” of the State of New Jersey under New Jersey law. N.J. Stat. Ann. § 27:25-4(a). Based upon this status, NJ Transit filed a motion to dismiss Galette’s suit, invoking the doctrine of interstate sovereign immunity. The trial court denied the motion, and, on appeal, the Superior Court affirmed, holding that NJ Transit is not an instrumentality or arm of the State of New Jersey and, therefore, is not entitled to the protections provided by

sovereign immunity.¹ This Court granted allowance of appeal to determine whether the United States Supreme Court’s decision in *Franchise Tax Board of California v. Hyatt*, 587 U.S. 230, 139 S. Ct. 1485 (2019) (*Hyatt III*), compels a conclusion that interstate sovereign immunity bars Galette’s suit against NJ Transit. Because we answer this question in the affirmative, we reverse the Superior Court’s judgment, which results in the dismissal of Galette’s suit against NJ Transit.

I. Background

Galette filed a civil complaint in the trial court, naming NJ Transit and McCrey as defendants. In the complaint, Galette averred that, on August 9, 2018, he was a passenger in a vehicle operated by McCrey “when NJ Transit struck the vehicle,” while the vehicle was stopped on Market Street in Philadelphia, Pennsylvania. (Complaint, 5/26/2021, at ¶5.) Galette alleged that NJ Transit and McCrey were negligent in several respects and that their negligence caused him to suffer physical injuries.

NJ Transit filed an answer with new matter to the complaint, as well as a cross-claim against McCrey. Relevant to this appeal, NJ Transit alleged in its new matter that it is an arm of the State of New Jersey entitled to the protections of sovereign immunity. NJ Transit subsequently filed a motion to dismiss Galette’s action.

In its motion to dismiss, NJ Transit relied on the United States Supreme Court’s decision in *Hyatt III* for

¹ The case law in this area often uses the words “instrumentality” and “arm” interchangeably. Other courts also invoke the term “alter ego” to mean the same thing as “instrumentality” and “arm.” In this opinion, we utilize “instrumentality” and “arm” interchangeably to mean a State-created entity “such that a suit brought against” the entity “would be, for all practical purposes, a suit against the [S]tate itself.” *Goldman v. Se. Pennsylvania Transp. Auth.*, 618 Pa. 501, 57 A.3d 1154, 1171 (2012).

the proposition that “States retain their sovereign immunity from private suits brought in the courts of other States.”² (Motion to Dismiss, 7/16/2021, at ¶19 (quoting *Hyatt III*, 587 U.S. at 236, 139 S. Ct. 1485) (emphasis omitted).) NJ Transit further highlighted that the United States Court of Appeals for the Third Circuit has concluded that NJ Transit is an arm of the State of New Jersey and is “entitled to claim the [immunity] protections of the Eleventh Amendment [of the United States Constitution], which in turn functions as an absolute bar to any claims . . . against NJ Transit.”³ (*Id.* at ¶25 (quoting *Karns v. Shanahan*, 879 F.3d 504, 519 (3d Cir. 2018)).) The trial court denied the motion to dismiss, and NJ Transit appealed to the Superior Court.

In a published opinion, a three-judge panel of the Superior Court affirmed the trial court’s order. *Galette v. NJ Transit*, 293 A.3d 649 (Pa. Super. 2023). After providing a background regarding State sovereign immunity, the Superior Court recognized that, in *Hyatt III*, the United States Supreme Court expressed that “[i]nterstate sovereign immunity is . . . integral to the structure of the Constitution” and that “States retain their sovereign immunity from private suits brought in courts of other States.” *Id.* at 654-55 (quoting *Hyatt III*, 587 U.S. at 246, 236,

² Prior to *Hyatt III*, the United States Supreme Court issued two opinions addressing the same litigation that led to the High Court’s decision in *Hyatt III*: *Franchise Tax Board of California v. Hyatt*, 538 U.S. 488, 123 S. Ct. 1683 (2003) (*Hyatt I*), and *Franchise Tax Board of California v. Hyatt*, 578 U.S. 171 (2016) (*Hyatt II*). Those decisions do not impact this appeal.

³ The Eleventh Amendment of the United States Constitution provides: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. Const. amend. XI.

139 S. Ct. 1485). The Superior Court further acknowledged that sovereign immunity extends to instrumentalities of the States. The Superior Court, however, rejected the notion that NJ Transit is an instrumentality of the State of New Jersey.

In concluding that NJ Transit is not an arm of the State of New Jersey, the Superior Court pointed out that, for purposes of Eleventh Amendment jurisprudence, this Court in *Goldman* held that a six-factor test can assist in determining whether a State-created entity operates as the State itself.⁴ Those factors are as follows:

(1) the legal classification and description of the entity within the governmental structure of the State, both statutorily and under its caselaw; (2) the degree of control the State exercises over the entity; (3) the extent to which the entity may independently raise revenue; (4) the extent to which the State provides funding to the entity; (5) whether the monetary obligations of the entity are binding upon the State; and (6) whether the core function of the entity is normally performed by the State.

Id. at 655 (citing *Goldman*, 57 A.3d at 1179).

The Superior Court concluded that the first, second, and sixth factors support NJ Transit's position that it is an arm of the State of New Jersey but that the third, fourth, and fifth factors weigh in favor of finding the opposite. The Superior Court then reported that, because

⁴ The Superior Court refused to rely upon the Third Circuit's conclusion in *Karns* that NJ Transit is an arm of the State of New Jersey. In support of this decision, the Superior Court highlighted, *inter alia*, that holdings of the Third Circuit are not binding on the courts of this Commonwealth. *Galette*, 293 A.3d at 655-56 (citing *Werner v. Plater-Zyberk*, 799 A.2d 776, 782 (Pa. Super. 2002)).

this six-factor test did not resolve whether NJ Transit qualifies as an instrumentality of New Jersey, the court was required to consider whether allowing NJ Transit to be sued under these circumstances would thwart the primary purposes of the Eleventh Amendment: protecting the States' sovereign dignity and treasuries. The Superior Court ultimately held that NJ Transit is not an arm of the State of New Jersey because, like the entity at issue in *Goldman*, a private lawsuit against NJ Transit does not threaten the sovereign dignity nor the treasury of the State that created it.

II. Issues

This Court granted NJ Transit's petition for allowance of appeal, limited to the following issues:

- (1) Whether guidance by this Court is necessary when the Superior Court issued an opinion that [NJ] Transit is not an arm of the State of New Jersey, conflicting with its own prior decision in *Flamer v. New Jersey Transit Bus Operations* [414 Pa. Super. 350], 607 A.2d 260 (Pa. Super. 1992) and thereby creating inconsistent precedent?
- (2) Whether guidance by this Court is necessary when the Superior Court disregarded the persuasive authority of *Karns v. Shanahan*, 879 F.3d 504 (3rd. Cir. 2018) and instead misinterpreted and misapplied *Goldman v. SEPTA* [618 Pa. 501], 57 A.3d 1154 (Pa. 2012) to issue an opinion that [NJ] Transit is not an arm of the [S]tate of New Jersey and therefore not entitled to Eleventh Amendment Sovereign Immunity?
- (3) Whether guidance by this Court is necessary because the issue of whether [NJ] Transit is an arm of the [S]tate of New Jersey entitled to Eleventh Amendment Sovereign Immunity under the United

States Constitution in accordance with [*Hyatt III*] is an issue of first impression in this Court?

Galette v. NJ Transit, 313 A.3d 450 (Pa. 2024) (*per curiam*).⁵ These three issues focus on whether NJ Transit enjoys the protections of interstate sovereign immunity as an arm of the State of New Jersey in an action brought in a Pennsylvania court under Pennsylvania tort law. As this question is purely legal in nature, our standard of review is *de novo*. *Goldman*, 57 A.3d at 1170.

III. Discussion

The doctrine of sovereign immunity has its roots in English common law. *Dorsey v. Redman*, 626 Pa. 195, 96 A.3d 332, 340 (2014). “The common-law rule was that no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him.” *Hyatt III*, 587 U.S. at 238-39, 139 S. Ct. 1485 (citation and internal quotation marks omitted). Although the rule originally was designed to shield the English king from legal actions, sovereign immunity survived in the United States after it gained its independence from England. Indeed, “the doctrine that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified.” *Alden v. Maine*, 527 U.S. 706, 715-16, 119 S. Ct. 2240 (1999). “An integral component of the States’ sovereignty was their immunity from private suits.” *Hyatt III*, 587 U.S. at 238, 139 S. Ct. 1485 (citation and internal quotation marks omitted).

⁵ This Court further directed the parties to address the Commonwealth Court’s decision in *Marshall v. Southeastern Pennsylvania Transportation Authority*, 300 A.3d 537 (Pa. Cmwlth. 2023) (holding that, as arm of State of New Jersey, NJ Transit is entitled to protections of sovereign immunity under *Hyatt III* in private suit pursued in Pennsylvania court under Pennsylvania tort law).

With that said, however, it was not until the 1979 decision in *Nevada v. Hall*, 440 U.S. 410, 99 S. Ct. 1182 (1979) (*Hall*), *overruled by Hyatt III*, that the United States Supreme Court directly addressed whether the federal Constitution dictates that a State’s sovereign immunity protects it against private suits filed in the courts of its sister States. In *Hall*, the High Court “held that the Constitution does not bar private suits against a State in the courts of another State.” *Hyatt III*, 587 U.S. at 236, 139 S. Ct. 1485. “Instead, the Court concluded that the Founders assumed that ‘prevailing notions of comity would provide adequate protection against the unlikely prospect of an attempt by the courts of one State to assert jurisdiction over another.’ ” *Id.* (quoting *Hall*, 440 U.S. at 419, 99 S. Ct. 1182). Forty years later, the High Court expressly overruled *Hall* in *Hyatt III*, characterizing *Hall* as “irreconcilable with our constitutional structure.” *Id.* at 249, 139 S. Ct. 1485. In so doing, the High Court relied upon the overall design of the federal Constitution and “the understanding of sovereign immunity shared by the States that ratified the Constitution.” *Id.* at 236, 139 S. Ct. 1485.

The United States Supreme Court began its substantive analysis in *Hyatt III* by detailing the historical record regarding the role of State sovereign immunity in the United States after it secured its independence from England but before the ratification of the Constitution. The High Court reported that, during that period, “the States considered themselves fully sovereign nations.” *Id.* at 237, 139 S. Ct. 1485. The High Court explained:

The Founders believed that both “common law sovereign immunity” and “law-of-nations sovereign immunity” prevented States from being amenable to process in any court without their consent. The common-law rule was that no suit or action can be brought against the king, even in

civil matters, because no court can have jurisdiction over him. The law-of-nations rule followed from the perfect equality and absolute independence of sovereigns under that body of international law.

Id. at 238-39, 139 S. Ct. 1485 (some internal quotation marks and citations omitted). “The founding generation thus took as given that States could not be haled involuntarily before each other’s courts.” *Id.* at 239, 139 S. Ct. 1485.

Next, the United States Supreme Court in *Hyatt III* explained how the ratification of the Constitution did and did not alter State sovereign immunity. By way of example, the High Court highlighted that, under Article III of the federal charter, “the States . . . surrendered a portion of their immunity by consenting to suits brought against them by the United States in federal courts.”⁶ *Id.* at 241, 139 S. Ct. 1485. The United States Supreme Court reported that, in *Chisholm v. Georgia*, 2 U.S. 419, 2 Dall. 419 (1793), one of the High Court’s earliest decisions, the High Court erroneously concluded that Article III

⁶ Article III of the Constitution addresses the Judicial Branch of the federal government. In relevant part, Article III provides:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. art. III, § 2.

permitted a citizen of one State to sue another State in federal court.

According to the United States Supreme Court, its decision in *Chisholm* “precipitated an immediate ‘furor’ and ‘uproar’ across the country,” resulting in “Congress and the States . . . act[ing] swiftly to remedy the Court’s blunder by drafting and ratifying the Eleventh Amendment.” *Id.* at 242-43, 139 S. Ct. 1485. The High Court opined that “[t]he Eleventh Amendment confirmed that the Constitution was not meant to ‘rais[e] up’ any suits against the States that were ‘anomalous and unheard of when the Constitution was adopted.’ ” *Id.* at 243, 139 S. Ct. 1485 (quoting *Hans v. Louisiana*, 134 U.S. 1, 18, 10 S. Ct. 504 (1890)). In other words, the Eleventh Amendment made clear that, by ratifying the Constitution, the States did not consent to being sued in federal court by private citizens of sister States. The High Court, however, emphasized that the sovereign immunity of the States “neither derives from, nor is limited by, the terms of the Eleventh Amendment.” *Id.* (quoting *Alden*, 527 U.S. at 713, 119 S. Ct. 2240).

The United States Supreme Court then expressed that “the Constitution affirmatively altered the relationships between the States, so that they no longer relate to each other solely as foreign sovereigns.” *Id.* at 245, 139 S. Ct. 1485. According to the High Court, “[e]ach State’s equal dignity and sovereignty under the Constitution implies certain constitutional limitation[s] on the sovereignty of all of its sister States.” *Id.* (citation and internal quotation marks omitted). The High Court observed that “[o]ne such limitation is the inability of one State to hale another into its courts without the latter’s consent.” *Id.* The High Court explained that the “Constitution does not merely allow States to afford each other immunity as a matter of comity; it embeds interstate sovereign immunity within the constitutional design.” *Id.*

Further outlining how interstate sovereign immunity operates under the Constitution, the United States Supreme Court noted that the “Constitution . . . reflects implicit alterations to the States’ relationships with each other, confirming that they are no longer fully independent nations.” *Id.* at 246, 139 S. Ct. 1485. For instance, the High Court explained that, prior to the ratification of the federal Constitution, States had the power to apply their own law to resolve interstate controversies, such as disputes over borders and water rights. *Id.* at 246, 139 S. Ct. 1485. The High Court observed that “the Constitution implicitly forbids that exercise of power because the interstate . . . nature of the controversy makes it inappropriate for [S]tate law to control.” *Id.* (citation and internal quotation marks omitted).

The United States Supreme Court then declared that “[i]nterstate sovereign immunity is . . . integral to the structure of the Constitution.” *Id.* The High Court expressed that, “[l]ike a dispute over borders or water rights, a State’s assertion of compulsory judicial process over another State involves a direct conflict between sovereigns.” *Id.* at 246-47, 139 S. Ct. 1485. The High Court stated that the “Constitution implicitly strips States of any power they once had to refuse each other sovereign immunity, just as it denies them the power to resolve border disputes by political means.” *Id.* at 247, 139 S. Ct. 1485. The High Court’s analysis reflects that, while the States retained their sovereign immunity after ratifying the Constitution, the Constitution necessarily altered the nature of that immunity to ensure the vitality of the United States’ federalist system of government.

The United States Supreme Court, therefore, held that, as a matter of constitutional mandate, “States retain their sovereign immunity from private suits brought in the courts of other States.” *Id.* at 236, 139 S. Ct. 1485. Stated differently, as the Commonwealth Court accu-

ately explained in *Marshall*, “[i]nstead of each [S]tate exercising its *discretion* on whether to recognize a sister [S]tate’s sovereign immunity, each [S]tate was now *obligated* to recognize the other’s sovereign immunity.” *Marshall*, 300 A.3d at 547 (emphasis in original). Finding that *stare decisis* did not protect its contrary conclusion in *Hall*, the High Court overruled that decision.⁷

Of further importance, and as explained in more detail below, the protections that fall under the Eleventh Amendment have expanded over time and generally shield States from being sued privately pursuant to federal statutes. *Goldman*, 57 A.3d at 1170-73. As part of this evolution, the United States Supreme Court has “extended sovereign immunity to entities which are agents or instrumentalities of the [S]tate such that a suit brought against them would be, for all practical purposes, a suit against the state itself.” *Id.* at 1171 (collecting cases). Although the circumstances underlying the ratification of the Eleventh Amendment were part of the historical evidence that the High Court utilized to support its holding in *Hyatt III*, that holding is not purely a product of Eleventh Amendment jurisprudence. Rather, the High Court’s holding stems from a broader understanding of the manner in which the federal Constitution operates. *See, e.g., Hyatt III*, 587 U.S. at 233, 139 S. Ct. 1485 (“This case . . . requires us to decide whether the Constitution permits a State to be sued by a private party without its consent in the courts of a different State.”); *id.* at 236, 139 S. Ct. 1485 (“*Hall* is contrary to our constitutional design and the understanding of sovereign immunity shared by the States that ratified the Constitution.”); *id.* at 237, 139

⁷ As NJ Transit points out in its brief to this Court, “[n]umerous [S]tate courts have ... dismissed suits based on *Hyatt III*, including claims against NJ Transit.” (NJ Transit’s Brief at 14-15 (citing, among other cases, Commonwealth Court’s decision in *Marshall*).)

S. Ct. 1485 (“*Hall*’s determination that the Constitution does not contemplate sovereign immunity for each State in a sister State’s courts misreads the historical record and misapprehends the implicit ordering of relationships within the federal system necessary to make the Constitution a workable governing charter and to give each provision within that document the full effect intended by the Framers.”) (citation and internal quotation marks omitted); *id.* at 246, 139 S. Ct. 1485 (“Interstate sovereign immunity is . . . integral to the structure of the Constitution.”). With that said, however, we discern no principled reason why the High Court would not extend its holding in *Hyatt III* to instrumentalities of the States.⁸

Applying this law to the present circumstances, the State of New Jersey indisputably enjoys interstate sovereign immunity from private suits filed in the courts of this Commonwealth. The question, therefore, becomes whether NJ Transit is an arm or instrumentality of the State of New Jersey entitled to the protections afforded by the doctrine of sovereign immunity under the circumstances contemplated in *Hyatt III*. The United States Supreme Court has yet to articulate how a State-created entity qualifies as an arm or instrumentality of a State such

⁸ Interestingly, the plaintiff in *Hyatt III*, a Nevada citizen, brought suit under Nevada law in a Nevada State court against the Franchise Tax Board of California (Board), not against the State of California. See *Hyatt III*, 587 U.S. at 234 (characterizing Board as “the state agency responsible for assessing personal income tax”); see also William Baude and Stephen Sachs, *The Misunderstood Eleventh Amendment*, 169 U. Pa. L. Rev. 609, 621 (2021) (*The Misunderstood Eleventh Amendment*) (“The Nevada plaintiff had filed suit in Nevada court, under Nevada law, against what the parties took to be an arm of the state of California.”) (footnote omitted). The United States Supreme Court did not discuss this aspect of the case before it in *Hyatt III*.

that interstate sovereign immunity attaches to that entity.⁹

As observed above, the Superior Court turned to this Court’s decision in *Goldman* in concluding that NJ Transit is not an arm of the State of New Jersey. In *Goldman*, several plaintiffs brought a civil suit against the Southeastern Pennsylvania Transportation Authority (SEPTA), a Pennsylvania-created entity, in a Pennsylvania court, contending that SEPTA violated a federal statute, namely, the Federal Employers’ Liability Act (FELA), 45 U.S.C. §§ 51-60. SEPTA invoked sovereign immunity under the Eleventh Amendment, insisting that it was an arm of the Commonwealth. In response, this Court explained that the United States Supreme Court has repeatedly expanded the immunity captured in the Eleventh Amendment by finding that the States are shielded “from certain . . . types of private suits brought under federal law beyond those explicitly referenced in its text.” *Goldman*, 57 A.3d at 1170.

This Court in *Goldman* further observed that the High Court has “embraced an interpretation of the Eleventh Amendment which extended sovereign immunity to entities which are agents or instrumentalities of the [S]tate such that a suit brought against them would be, for all practical purposes, a suit against the [S]tate itself.” *Id.* at

⁹ In *Flamer*, the Superior Court stated that NJ Transit “is a public entity of the [S]tate of New Jersey and an alter ego of that [S]tate.” *Flamer*, 607 A.2d at 262. The court, however, did not enunciate a test for determining whether a State-created entity qualifies as an “alter ego” of the State. Rather, the court merely cited two federal district court decisions, both of which utilized Eleventh Amendment jurisprudence, to conclude that NJ Transit is the “alter ego” of the State of New Jersey. *Smith v. New Jersey Transit Corp.*, 691 F. Supp. 888 (E.D. Pa. 1988); *Dunn v. New Jersey Transit Corp.*, 681 F. Supp. 246 (D. N.J. 1987). In short, the Superior Court’s decision in *Flamer* does not aid our analysis in this case.

1171. To determine whether SEPTA qualified as an arm of the Commonwealth, this Court utilized a six-factor test, which involves consideration of the following:

(1) the legal classification and description of [the entity] within the governmental structure of [the State], both statutorily and under [its] caselaw;

(2) the degree of control [the State] exercises over [the entity], both through the power of appointment, and the power to subsequently veto its actions; (3) the power of the [entity's board] to independently raise revenue on its own; (4) the degree of funding provided by [the State to the entity relative to other funding sources]; (5) whether any monetary obligation incurred by [the entity] is binding upon [the State]; and (6) whether the core function of [the entity] . . . can be categorized as a function which is normally performed by local government or [S]tate government.

Goldman, 57 A.3d at 1179. For purposes of the Eleventh Amendment, these factors carry equal weight. *Id.*

Concluding that this test failed to resolve whether sovereign immunity protected SEPTA from being sued under FELA in a Pennsylvania court, the *Goldman* Court expressed that it was required “to consider whether allowing SEPTA to be sued under FELA in Pennsylvania courts would thwart the two principal purposes of the Eleventh Amendment . . . [, *i.e.*,] the protection of [a State's] dignity as a sovereign . . . and the protection of [a State's] treasury against involuntary depletion from suits brought by private persons.” *Id.* at 1181. This Court ultimately concluded that SEPTA is not an arm of the Commonwealth of Pennsylvania for purposes of the Eleventh Amendment because allowing SEPTA to be sued

pursuant to FELA does not threaten Pennsylvania’s sovereign dignity nor its treasury. For these reasons, the Court held that SEPTA is “not entitled to claim immunity under the Eleventh Amendment.” *Id.* at 1185.

State sovereign immunity is a complex doctrine that is not easily cabined into a singular concept. Many courts have suggested that the States enjoy two forms of sovereign immunity: the immunity expressed in Eleventh Amendment jurisprudence and a broader immunity that originated in the common law but transformed as applied to the States after the ratification of the Constitution, as explained by the High Court in *Hyatt III*. See, e.g., *Tercero v. Texas Southmost Coll. Dist.*, 989 F.3d 291, 296 (5th Cir. 2021) (“The U.S. Constitution affords two types of immunities to [S]tates. The one the district court invoked—‘Eleventh Amendment immunity’—applies to suits between a state and a citizen of another state. See U.S. CONST. amend. XI. The other is state sovereign immunity, which generally prohibits private suits against [S]tates (including the plaintiff’s home [S]tate).”) (citing *Hyatt III*); *Beaulieu v. Vermont*, 807 F.3d 478, 483 (2d Cir. 2015) (“Accordingly, there are two types of ‘sovereign immunity’ at issue here: (1) a particular species of sovereign immunity—Eleventh Amendment immunity from suit in federal court—and (2) the [S]tates’ broader general sovereign immunity against all suits.”); and *Lombardo v. Pennsylvania, Dep’t of Pub. Welfare*, 540 F.3d 190, 194 (3d Cir. 2008) (“We can discern two distinct types of state sovereign immunity: immunity from suit in federal court and immunity from liability.”). While these “forms” of sovereign immunity overlap, they serve differing primary objectives.

The law that has developed around the Eleventh Amendment generally holds that, under certain circumstances, States are shielded from being sued privately pursuant to federal statutes. *Goldman*, 57 A.3d at 1170-

73. The primary purposes of this principle are: (1) to uphold the dignity of the States, *i.e.*, to guard against the States having to defend themselves against private lawsuits; and (2) to protect the treasuries of the States. *Id.* at 1175, 1181. While the dignity and treasuries of the States also are shielded by the so-called “broader” or common-law sovereign immunity, the more general objective of common-law sovereign immunity harkens back to its origin—divesting courts of jurisdiction over the king—by preventing the States from being exposed to process in any court without their consent. *See Hyatt III*, 587 U.S. at 238, 139 S. Ct. 1485 (“The Founders believed that . . . ‘common law sovereign immunity’ . . . prevented States from being amenable to process in any court without their consent.”). Applied in the context of interstate relations, this sovereign immunity eliminates the possibility of a State provoking a direct conflict with a sister State by preventing the latter State from compelling the sister State into its courts. *See id.* at 246-47, 139 S. Ct. 1485 (“Interstate sovereign immunity is similarly integral to the structure of the Constitution. Like a dispute over borders or water rights, a State’s assertion of compulsory judicial process over another State involves a direct conflict between sovereigns.”). In other words, interstate sovereign immunity ensures that each State honors the coequal sovereign status of her sister States.

Goldman’s six-factor test lends insight into whether a state-created entity is designed to act as either: (1) an arm of the State that enjoys the immunity associated with the Eleventh Amendment; or (2) something separate from the State, such as a corporation, that is not shielded by such immunity. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280, 97 S. Ct. 568 (1977) (“The issue here thus turns on whether the Mt. Healthy Board of Education is to be treated as an arm of the State partaking of the State’s Eleventh Amendment immunity,

or is instead to be treated as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend.”). The same general inquiry is present in this case, albeit within the framework of interstate sovereign immunity: Is a state-created entity an arm of the State or distinct from the State? Consequently, the *Goldman* test can operate as a general guidepost in determining whether a state-created entity is entitled to the benefits of interstate sovereign immunity.

The six-factors of this test, however, must be weighed differently in the context of interstate sovereign immunity given the varying primary objectives underlying interstate sovereign immunity, which is the focus of this case, as compared to the immunity associated with the Eleventh Amendment. More specifically, as noted, *Hyatt III* requires a State to avoid a direct conflict with a sister State by refusing to compel the sister State to defend against a private action in the former State’s courts. Accordingly, when a Pennsylvania court is asked to determine whether a sister State created an entity that is shielded by interstate sovereign immunity, the court must give primacy to the manner in which the sister State classifies and describes the entity within the structure of that State. In other words, the first *Goldman* factor plays a key role in determining whether an entity created by a sister State operates as that State’s instrumentality, as that factor provides the clearest expression of the sister State’s intention in designing the entity in question.

Applying the *Goldman* factors to the present circumstances, the first, second, and sixth factors weigh heavily in favor of concluding that NJ Transit is an arm of the State of New Jersey. The New Jersey Public Transportation Act of 1979 (Transportation Act or Act), N.J. Stat. Ann. § § 27:25-1 to -24.2, established NJ Transit. In the Act, the New Jersey Legislature made several findings and declarations, including that the “provision of

efficient, coordinated, safe and responsive public transportation is an essential public purpose.” N.J. Stat. Ann. § 27:25-2(a). The New Jersey Legislature further declared that, “[a]s a matter of public policy, it is the responsibility of the State to establish and provide for the operation and improvement of a coherent public transportation system in the most efficient and effective manner.” *Id.* § 27:25-2(b). The Transportation Act provides NJ Transit with “the necessary powers to accomplish the[se] purposes and goals.” *Id.* § 27:25-2(e). As noted above, the New Jersey Legislature specifically characterized NJ Transit “as an instrumentality of the State exercising public and essential governmental functions” and announced that “the exercise by the corporation of the powers conferred by this act shall be deemed and held to be an essential governmental function of the State.” *Id.* § 27:25-4(a).

The Transportation Act also makes clear that the political branches of the State of New Jersey exercise a significant degree of control over NJ Transit. NJ Transit is “established in the Executive Branch of the State Government” and is “allocated within the Department of Transportation[,]” though NJ Transit operates independently from the Department of Transportation. *Id.* § 27:25-4(a). NJ Transit is governed by a thirteen-member board, which consists of the Commissioner of Transportation, the State Treasurer, another member of New Jersey’s Executive Branch chosen by the Governor, six public members appointed by the Governor upon the advice and consent of the New Jersey Senate, one public member appointed by the Governor upon the recommendation of the President of the Senate, one public member appointed by the Governor upon the recommendation of the Speaker of the General Assembly, and two non-voting members, one of which is appointed by the Governor “upon the recommendation of the labor organization representing the

plurality of the employees of the corporation involved in rail operations” and one that is appointed by the Governor “upon the recommendation of the labor organization representing the plurality of the employees of the corporation involved in motorbus operations.” *Id.* § 27:25-4(b). The Commissioner of Transportation serves as the chairperson of NJ Transit’s board, *id.* § 27:25-4(d), and annually reviews NJ Transit’s finances, *id.* § 27:25-20(a).

Of further note, the Transportation Act requires the NJ Transit board to deliver the minutes of every meeting to the Governor and provides that “[n]o action taken at such meeting by the board shall have force or effect until approved by the Governor or until [ten] days after such copy of the minutes shall have been delivered.” *Id.* § 27:25-4(f). Moreover, the New Jersey Legislature has the authority to override NJ Transit’s decisions to acquire certain privately-owned properties by means of eminent domain. *Id.* § 27:25-13(g). NJ transit also is required to provide a detailed annual report regarding its activities for the preceding fiscal year to, among others, the Governor, the President of the Senate, and the Speaker of the General Assembly. *Id.* § 27:25-20(b).

As detailed above, the Transportation Act evinces New Jersey’s intent to have NJ Transit perform the core, governmental function of providing public transportation to New Jersey’s citizens. The Act also provides NJ Transit with powers unique to States. For example, the Act permits NJ Transit to acquire land and property by means of eminent domain. *Id.* § 27:25-13; see *Mississippi & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878) (“The right of eminent domain, that is, the right to take private property for public uses, appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty.”). “NJ Transit is also considered [S]tate property for tax purposes and is exempt from [S]tate taxation.” *Karns*, 879

F.3d at 517 (citing N.J. Stat. Ann. § 27:25-16). In *Karns*, the Third Circuit explained that these attributes are associated with sovereignty. *Id.* (citing *Christy v. Pa. Tpk. Comm’n*, 54 F.3d 1140, 1148 (3d Cir. 1995); and *Skehan v. State Sys. of Higher Educ.*, 815 F.2d 244, 249 (3d Cir. 1987)). The Act further establishes a NJ Transit Police Department. N.J. Stat. Ann. § 27:25-15.1. The Police Department’s “officers are vested with ‘general authority, without limitation, to exercise police powers and duties . . . in all criminal and traffic matters at all times throughout the State.’ ” *Karns*, 879 F.3d at 517 (quoting N.J. Stat. Ann. § 27:25-15.1(a)).

As to the third, fourth, and fifth *Goldman* factors, the Transportation Act empowers NJ Transit to independently raise revenue in a number of ways. For example, NJ Transit is permitted to: (1) apply for and accept gifts and grants from, among others, private sources, N.J. Stat. Ann. § 27:25-5(g); (2) lease or sell real and personal property, *id.* § 27:25-5(k); and (3) collect fares, *id.* § 27:25-5(n). NJ Transit’s operating budget is funded through a number of streams, including passenger fares “and a combination of commercial revenue and state and federal resources.”¹⁰ The Transportation Act further suggests that the State of New Jersey would not be liable for a judgment entered against NJ Transit. *See id.* § 27:25-17 (stating that “[n]o debt or liability of the corporation shall be deemed or construed to create or constitute a debt, liability, or a loan or pledge of the credit of the State”).

While these three factors to some extent indicate that NJ Transit is a separate entity from the State of New Jersey, the first, second, and sixth factors strongly support a conclusion that New Jersey created NJ Transit to act as

¹⁰ *See* <https://www.njtransit.com/press-releases/nj-transit-adopts-fiscal-year-2024-operating-and-local-programs-budget-secures> (last visited Jan. 23, 2024).

its arm to provide and operate a public transportation system, which the New Jersey legislature has deemed to be an essential governmental function. Indeed, the Transportation Act provides a good reason to believe that the State of New Jersey designed NJ Transit to enjoy the protections of interstate sovereign immunity. *See Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 47, 115 S. Ct. 394 (1994) (stating that, when faced with question regarding applicability of immunity associated with Eleventh Amendment, High Court must consider “whether there is here ‘good reason to believe’ the States and Congress designed [a port authority] to enjoy Eleventh Amendment immunity”) (quoting *Lake Country Ests., Inc. v. Tahoe Reg’l Plan. Agency*, 440 U.S. 391, 401, 99 S. Ct. 1171 (1979)). As a coequal sovereign to New Jersey, Pennsylvania must honor this decision and refuse to allow NJ Transit to be haled into Pennsylvania courts to defend against private suits.

We recognize that the highest court of the State of New York, the Court of Appeals of New York, recently reached a contrary result in *Colt v. New Jersey Transit Corporation*, --- N.Y.3d ----, --- N.Y.S.3d ----, --- N.E.3d ----, 2024 WL 4874365 (N.Y. 2024) In so doing, the New York High Court determined that, “[i]n considering whether a foreign [S]tate-created entity is entitled to sovereign immunity in New York, courts should consider: (1) how the State defines the entity and its functions, (2) the State’s power to direct the entity’s conduct, and (3) the effect on the State of a judgment against the entity.” *Id.* at ----, --- N.Y.S.3d ----, --- N.E.3d ----, 2024 WL 4874365 at *5. The Court concluded that: (1) the first factor “leans toward according [NJ Transit] sovereign immunity,” *id.* at ----, --- N.Y.S.3d ----, --- N.E.3d ----, 2024 WL 4874365 at *6; and (2) the second factor “does not weigh heavily in either direction.” *Id.*

As to the last factor, the New York High Court reported that, under N.J. Stat. Ann. § 27:25-17, New Jersey “clearly disclaimed any legal liability for judgments against [NJ Transit], counseling against treating [NJ Transit] as an arm of New Jersey.” *Id.* at ----, --- N.Y.S.3d ----, --- N.E.3d ----, 2024 WL 4874365 at *7. The Court then opined as follows:

Balancing each consideration, we conclude that New Jersey’s lack of legal liability or ultimate financial responsibility for a judgment in this case outweighs the relatively weak support provided by the other factors. Put simply, allowing this suit to proceed would not be an affront to New Jersey’s dignity because a judgment would not be imposed against the State, and the entity that would bear legal liability has a significant degree of autonomy from the State. We therefore conclude that [NJ Transit] is not an arm of New Jersey and may not invoke sovereign immunity.

Id. (footnotes omitted).

Our disagreements with the New York High Court are obvious. In our view, the Transportation Act, which defines NJ Transit and its functions, strongly evidences that New Jersey views NJ Transit as its arm for purposes of providing public transportation. The Act also demonstrates that the political branches of the State of New Jersey have significant power over NJ Transit, as the New Jersey Executive and Legislative branches appoint NJ Transit’s board and the board can take no action without seeking the Governor’s approval following a meeting. While it seems that the New York High Court is correct that the State of New Jersey would not be responsible for a judgment entered against NJ Transit, we do not place significant weight on this factor under the circumstances presently before us. Rather, as we explained above, we

view the first factor as the driving force in concluding that NJ Transit is an arm of the State of New Jersey.

NJ Transit’s arguments to this Court align with our analysis. Galette, however, attempts to avoid the result of our interpretation and application of the controlling law by contending, in a confusing fashion, that the issues that we granted allowance of appeal to consider are moot “because the negligent actions of [NJ Transit’s] employee, bus driver, under New Jersey law are ministerial actions that are not afforded immunity under the New Jersey Tort Claims Act,” N.J. Stat. Ann. § § 59:1-1 to :12-3. (Galette’s Brief at 4.) This argument misses the mark.

As best we can discern, Galette is arguing that the State of New Jersey waived sovereign immunity for purposes of the circumstances of this case in the New Jersey Tort Claims Act. In the context of discussing the immunity associated with the Eleventh Amendment, the United States Supreme Court has stated that “[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here.” *Edelman v. Jordan*, 415 U.S. 651, 673 (1974). In *Edelman*, the High Court explained that, “[i]n deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated ‘by the most express language or by such overwhelming implications from the text as (will) leave no room for any other reasonable construction.’ ” *Id.* (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909)). Further expounding upon this concept, the High Court has expressed that “a State does not consent to suit in federal court merely by consenting to suit in the courts of its own creation. Nor does it consent to suit in federal court merely by stating its intention to ‘sue and be sued.’ ” *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676 (1999) (internal citations omitted).

Like the immunity associated with the Eleventh Amendment, interstate sovereign immunity is grounded in the federal Constitution. A State's waiver of that immunity, therefore, must be express. Galette has failed to identify any provision of New Jersey law generally or the New Jersey Tort Claims Act specifically that evinces New Jersey's express consent to be sued in Pennsylvania courts pursuant to Pennsylvania law. Moreover, although the Transportation Act permits NJ Transit to sue and to be sued, N.J. Stat. Ann. § 27:25-5(a), the United States Supreme Court has concluded that such a statement is insufficient to act as a waiver of constitutionally grounded immunity. For these reasons, Galette's argument is meritless.

IV. Conclusion

In *Hyatt III*, the United States Supreme Court unequivocally held that "States retain their sovereign immunity from private suits brought in the courts of other States." *Hyatt III*, 587 U.S. at 236. Here, Galette filed a private suit under Pennsylvania law in a Pennsylvania court against NJ Transit, an entity that New Jersey created as an instrumentality of that State. Consistent with *Hyatt III*, we conclude that interstate sovereign immunity precludes Galette's suit as it pertains to NJ Transit. Because the Superior Court erred in holding otherwise, we reverse the Superior Court's judgment, which results in the reversal of the trial court's order denying NJ Transit's motion to dismiss. Consequently, NJ Transit is dismissed from this litigation. We, however, remand the matter to the trial court for further proceedings relative to Galette's allegations of negligence against McCrey.

Chief Justice Todd and Justices Donohue, Dougherty, Wecht, Mundy, and McCaffery join the opinion.

APPENDIX B

J-S37005-22
2023 PA SUPER 46

Cedric Galette		In the Superior Court
v.		of Pennsylvania
NJ Transit and		No. 2210 EDA 2021
Julie E. McCrey		

Appeal from the Order Entered September 27, 2021
 In the Court of Common Pleas of Philadelphia County
 Civil Division at No(s): 2008000610

BEFORE: BOWES, J., LAZARUS, J., AND OLSON, J.

OPINION BY BOWES, J.: FILED MARCH 21, 2023

New Jersey Transit Corporation (“NJ Transit”) appeals the September 27, 2021 denial of its motion to dismiss the negligence claims of Cedric Galette pursuant to the doctrine of sovereign immunity. We affirm.

This controversy stems from an August 9, 2018 incident wherein a collision occurred between a bus owned and operated by NJ Transit and the personal vehicle of Julie McCrey in Philadelphia, Pennsylvania. Mr. Galette was a passenger in Ms. McCrey’s vehicle and suffered various physical injuries as a result of the collision. He timely commenced this civil action by filing a *praecipe* for a writ of summons on August 7, 2020, and, ultimately, served both Ms. McCrey and NJ Transit. Thereafter, Mr. Galette filed a complaint containing claims sounding in

negligence against both Ms. McCrey and NJ Transit.¹ NJ Transit filed an answer with a new matter alleging, *inter alia*, that it was an “arm” of the State of New Jersey and that Mr. Galette’s claims against it were barred by the doctrine of sovereign immunity. *See* Answer and New Matter, 6/15/21, at ¶ 28 (“NJ Transit and its subsidiary, NJ Transit Bus Operations, Inc., are arms of the State of New Jersey and are protected by the [s]tate[-]afforded governmental and sovereign immunities and, as such, [Mr. Galette’s c]omplaint is barred and must be dismissed.”). Thereafter, NJ Transit filed a motion to dismiss reiterating this particular claim.² Mr. Galette filed a response opposing NJ Transit’s arguments.

On September 27, 2021, the trial court denied NJ Transit’s motion to dismiss. On October 25, 2021, NJ Transit filed a timely notice of appeal to this Court. The trial court did not direct NJ Transit to file a concise statement of errors pursuant to Pa.R.A.P. 1925(b) and none was filed. Nonetheless, the trial court submitted a Rule 1925(a) opinion expressing its belief that NJ Transit’s appeal was improper and interlocutory pursuant to Pa.R.A.P. 311(b) (requiring a party to take certain actions to take an immediate appeal from an order sustaining venue, or personal or *in rem* jurisdiction). NJ Transit submits that the order was collateral and immediately appealable.

NJ Transit has raised the following claims for our consideration:

¹ Although Ms. McCrey is listed as an appellee in this proceeding, she has not participated in this matter. Accordingly, we will not discuss her further.

² It is well-established that “a defense of governmental immunity is an absolute defense and is non-waivable,” thus, “it may be raised at any time[.]” *Snead v. Society for Prevention of Cruelty to Animals of Pennsylvania*, 929 A.2d 1169, 1178 n.10 (Pa. Super. 2007).

1. Is the order denying NJ Transit’s motion to dismiss on its defense of state sovereign immunity an appealable collateral order?
2. Did the trial court err, as a matter of law, in denying NJ Transit’s motion to dismiss for lack of jurisdiction where NJ Transit, a foreign state entity, did not provide consent to be sued in another state and rightfully asserted its state sovereign immunity protections under the United States Constitution?

NJ Transit’s brief at 4 (cleaned up; issues reordered for ease of disposition).

We begin our analysis by assessing whether the trial court’s September 27, 2021 order is an appealable, collateral order pursuant to Pennsylvania Rule of Appellate Procedure 313. The appealability of an order pursuant to the collateral order doctrine is a question of law, over which our standard of review is *de novo* and our scope of review is plenary. *See Brooks v. Ewing Cole, Inc.*, --- Pa. ---, 259 A.3d 359, 365 (2021).

Rule 313 provides that “[a]n appeal may be taken as of right from a collateral order of a trial court or other government unit.” Pa.R.A.P. 313(a). Thus, the collateral order doctrine is a “specialized, practical application of the general rule that only final orders are appealable as of right.” *Price v. Simakas Co., Inc.*, 133 A.3d 751, 755 (Pa. Super. 2016). An order is considered “final and appealable” under the collateral order doctrine if: (1) it is separable from and collateral to the main cause of action; (2) the right involved is too important to be denied review; and (3) the question presented is such that if review is postponed until final judgment in the case, the claimed right will be irreparably lost. *See Brooks, supra* at 370; Pa.R.A.P. 313(b) (same). If an order satisfies this test, then “an appellate court may exercise jurisdiction even though the order is not final. If the test is not met,

however, and in the absence of another exception to the final order rule, there is no jurisdiction to consider an appeal of such an order.” *Brooks, supra* at 370.

In *Brooks*, our Supreme Court addressed whether a decision denying a governmental party’s assertion of the sovereign immunity defense meets the collateral order doctrine. Therein, the High Court concluded that a claim of sovereign immunity is: (1) “separable” from civil claims of negligence since it presents a “purely legal question” that can be resolved without “an examination of the merits of [the plaintiff’s] negligence claims;” (2) “is too important to evade review before final judgment;” and (3) “irreparably lost if appellate review of an adverse decision on sovereign immunity is postponed until after final judgment.” *Id.* at 371-73. Accordingly, it found that an order denying a party’s petition for relief pursuant to the sovereign immunity doctrine was a collateral order that was immediately appealable as of right. *Id.* at 373 (“Subjecting a governmental entity, which claims it is immune, to the legal process undermines the purposes of sovereign immunity.”).

Pursuant to *Brooks*, we find that the September 27, 2021 order denying NJ Transit’s motion to dismiss is a collateral order that was immediately appealable as of right. Accordingly, our jurisdiction over this appeal is proper pursuant to Rule 313. Thus, we proceed to the merits.

In its substantive claim for relief, NJ Transit asserts the trial court erred in declining to dismiss based upon sovereign immunity. See Appellant’s brief at 9 (“[NJ Transit] is an arm of the State of New Jersey who was hauled into a foreign [s]tate court without its consent.”). Our standard of review is *de novo*, and our scope of review is plenary. See *Goldman v. Southeastern Pennsylvania*

Transp. Authority, 618 Pa. 501, 57 A.3d 1154, 1170 (2012).

Sovereign immunity is a venerable legal doctrine that has its origins in the old adage of the English common law that “the Crown could not be sued without consent in its own courts.” *Alden v. Maine*, 527 U.S. 706, 715, 119 S. Ct. 2240 (1999). After examining the relevant history and case law, the United States Supreme Court has concluded that this general legal principle was “universal” in terms of its recognition at the time that the United States Constitution was “drafted and ratified.” *Id.* at 716, 119 S. Ct. 2240. Specifically, the Court has recognized that the historical circumstances of the passage of the Eleventh Amendment clearly evince an intent “to preserve the States’ traditional immunity from private suits.” *See id.* at 724, 119 S. Ct. 2240; *see also* U.S. Const., Amend XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”). Specifically, “[t]he Eleventh Amendment confirmed that the [United States] Constitution was not meant to raise up any suits against the States that were anomalous and unheard of when the Constitution was adopted.” *Franchise Tax Board of California v. Hyatt*, --- U.S. ---, 139 S. Ct. 1485, 1496 (2019) (cleaned up). However, the Court has also emphasized that “the bare text of the Amendment is not an exhaustive description of the States’ constitutional immunity from suit.” *Alden*, *supra* at 736.

Sovereign immunity often arises in the context of interstate lawsuits. In the landmark ruling of *Nevada v. Hall*, 440 U.S. 410, 99 S. Ct. 1182 (1979), the High Court held that the question of “any one State’s immunity from suit in the courts of another State” was “a matter of comity.” Thus, it was not automatically incumbent upon one

State to recognize the sovereign immunity of another State. *See also Flamer v. New Jersey Transit Bus Operations, Inc.*, 414 Pa. Super. 350, 607 A.2d 260, 262 (1992) (citing *Hall, supra* at 425, 99 S. Ct. 1182) (“[W]hether one [S]tate is required to accord sovereign immunity in its courts to another [S]tate is purely a question of comity and is not a constitutional mandate.”).

In *Hyatt*, the Court revisited and explicitly overruled *Hall*:

Interstate sovereign immunity is ... integral to the structure of the Constitution. Like a dispute over borders or water rights, a State’s assertion of compulsory judicial process over another State involves a direct conflict between sovereigns. The Constitution implicitly strips States of any power they once had to refuse each other sovereign immunity, just as it denies them the power to resolve border disputes by political means. Interstate immunity, in other words, is implied as an essential component of federalism.

....

[*Hall*] is irreconcilable with our constitutional structure and with the historical evidence showing a widespread preratification understanding that States retained immunity from private suits, both in their courts and in other courts. We therefore overrule that decision.

Hyatt, supra at 1497-99. Thus, *Hall* no longer animates the contours of sovereign immunity and “States retain their sovereign immunity from private suits brought in the courts of other States.”³ *Id.* at 1492.

³ The holding in *Franchise Tax Board of California v. Hyatt*, --- U.S. ---, 139 S. Ct. 1485 (2019) did not include any discussion of the

Although the State of New Jersey is not directly named as a defendant in this matter, it is well-established that sovereign immunity extends to “entities which are agents or instrumentalities of the [S]tate such that a suit brought against them would be, for all practical purposes, a suit against the [S]tate itself.” *Goldman, supra* at 1171. NJ Transit maintains it is an instrumentality of the State of New Jersey. *See* Appellant’s brief at 10-14.

At a basic level, the determination of whether a particular entity qualifies as an alter ego of a State for the purposes of sovereign immunity is a question of federal law that concomitantly relies upon a searching examination of state law provisions. *See Goldman, supra* at 1173. Interpreting the relevant precedents of the United States Supreme Court, the Pennsylvania Supreme Court has distilled this inquiry into six factors of “equal importance,” namely: (1) the legal classification and description of the entity within the governmental structure of the State, both statutorily and under its caselaw; (2) the degree of control the State exercises over the entity; (3) the extent to which the entity may independently raise revenue; (4) the extent to which the State provides funding to the entity; (5) whether the monetary obligations of the entity are binding upon the State; and (6) whether the core function of the entity is normally performed by the State. *See id.* at 1179.

Rather than discuss Pennsylvania law, however, NJ Transit has relied entirely upon the jurisprudence of the U.S. Court of Appeals for the Third Circuit, which has previously concluded that NJ Transit qualifies as an instrumentality of the State of New Jersey for the purposes of

determinative issue in the instant appeal, *i.e.*, whether a particular entity qualifies as an instrumentality of a State for the purposes of sovereign immunity.

sovereign immunity under its own three-part test.⁴ See *Karns v. Shanahan*, 879 F.3d 504, 513 (3d Cir. 2018). It is well-established that the holdings of the Third Circuit are not binding upon this Court, even in the context of a question of federal law.⁵ See *Werner v. Plater-Zyberk*, 799 A.2d 776, 782 (Pa. Super. 2002) (“[A]bsent a United States Supreme Court pronouncement, the decisions of federal courts are not binding on Pennsylvania state courts, even when a federal question is involved.”). Rather, such decisions have only persuasive value. See *Chiropractic Nutritional Associates, Inc. v. Empire Blue Cross and Blue Shield*, 447 Pa. Super. 436, 669 A.2d 975, 980 (1995). NJ Transit is mistaken to the extent it suggests *Karns* or other holdings from the Third Circuit controls the result here. Nonetheless, *Karns* does offer significant clarification as to the issues at play and we considered it for its proper persuasive value.

The first element in Pennsylvania’s six-part test entails an examination of NJ Transit’s status under New Jersey law, which clearly evinces support for the conclusion that it should be considered an instrumentality of the State of New Jersey. See N.J.S.A. § 27:25-4 (“[NJ Transit] is hereby constituted as an instrumentality of the State exercising public and essential governmental functions, and the exercise by [NJ Transit] of the powers conferred by this act shall be deemed and held to be an

⁴ Specifically, the Third Circuit examines the following factors in determining whether an entity qualifies as an alter ego of state government: “(1) whether the payment of the judgment would come from the state; (2) what status the entity has under state law; and (3) what degree of autonomy the entity has.” *Karns v. Shanahan*, 879 F.3d 504, 513 (3d Cir. 2018).

⁵ Our Supreme Court has rejected identical attempts to render Third Circuit jurisprudence controlling in this context. See *Goldman v. Southeastern Pennsylvania Transp. Authority*, 618 Pa. 501, 57 A.3d 1154, 1169 n.12 (2012).

essential governmental function of the State.”). Similarly, the second factor regarding relative autonomy is also supportive of a finding that NJ Transit is an alter ego of the State’s government. *See Karns, supra* at 518 (reviewing New Jersey statutes to document the “operational constraints” placed upon NJ Transit by the state government, which controls the appointment of its governing board, reviews and audits its expenditures, and possesses veto power over actions taken by its board and certain acquisitions). Finally, the sixth factor also supports the same conclusion, as NJ Transit’s activities are explicitly identified as an “essential governmental function” of New Jersey. *See* N.J.S.A. § 27:25-4.

By contrast, however, the remaining three factors augur in favor of the opposite conclusion. Specifically, NJ Transit is independently empowered to raise revenue through several different avenues. *See* N.J.S.A. § 27:25-5(k), (n)-(o) (providing NJ Transit may generate revenue through the disposition of “real and personal property,” by setting and collecting fares, rentals, fees, and other charges, and/or by depositing corporate revenues in interest-bearing accounts). Moreover, NJ Transit is funded from a “combination of federal, state, and local funds,” such that “it is not entirely reliant on state funds[.]” *Karns, supra* at 516. Finally, New Jersey law provides that “[n]o debt or liability of the corporation shall be deemed or construed to create or constitute a debt, liability, or a loan or pledge of the credit of the State.” N.J.S.A. § 27:25-17. Accordingly, “the [S]tate is under no legal or other obligation to pay NJ Transit’s debts or to reimburse NJ Transit for any judgments that it pays.” *Karns, supra* at 516. Thus, the third, fourth, and fifth factors do not support NJ Transit’s alleged status as an instrumentality of New Jersey.

Where, as here, the six-factor test is not dispositive, we must reach a conclusion by inquiring as to whether

allowing NJ Transit to be sued in this particular manner would “thwart the two principal purposes of the Eleventh Amendment,” namely, “the protection of [New Jersey’s] dignity as a sovereign [S]tate and the protection of [New Jersey’s treasury] against involuntary depletion from suits brought by private persons.” *Goldman, supra* at 1181. In this context, we are “mindful” that “state dignity is the paramount purpose of the Eleventh Amendment.” *Id.* at 1182 (citing *Federal Maritime Comm’n v. South Carolina State Ports Authority*, 535 U.S. 743, 769, 122 S. Ct. 1864 (2002)).

Goldman is highly instructive on the merits of these related points of inquiry. Therein, the Pennsylvania Supreme Court considered whether it would offend the dignity or the finances of the Commonwealth to permit the Southeastern Pennsylvania Transportation Authority (“SEPTA”) to be sued in a Pennsylvania state court pursuant to the Federal Employees Liability Act (“FELA”).⁶ Ultimately, the Court found a lawsuit naming SEPTA as a defendant would not offend Pennsylvania’s sovereign dignity, reasoning as follows:

In such a suit, the Commonwealth is not a named defendant, as SEPTA has been designated by the legislature of the Commonwealth as a distinct legal entity with the power to sue and be sued in its own capacity. Thus, it is not any purported negligent act of the Commonwealth at issue in a suit, but, rather, the alleged negligent act of SEPTA itself. Neither can the Commonwealth be joined as a defendant in any action against SEPTA since the Commonwealth has specifically repudiated

⁶ While *Goldman* was an intrastate legal dispute, it directly adjudicates the salient issue of whether an entity should be considered an “arm” of state government for the purposes of sovereign immunity under federal law.

any legal responsibility for obligations incurred by SEPTA; hence, having explicitly disclaimed all responsibility for any financial liability incurred by SEPTA, it may not be joined in a suit against SEPTA under our rules of civil procedure. *See* Pa.R.C.P. 1076.1, 2252(a)(1), (4) (allowing joinder by plaintiff or defendant in a civil action of only those parties which are solely liable to the plaintiff, liable to the joining party, or jointly or severally liable with the joining party on the plaintiff's cause of action). Further, the Commonwealth does not enter its appearance to defend a suit on SEPTA's behalf, and it does not otherwise participate in the litigation, as the legislature has explicitly placed the responsibility on SEPTA to manage all of its own legal affairs, which responsibility includes the defense of any suits against it. In sum, then, SEPTA bears the sole and exclusive burden of any litigation against it in our state courts.

Because a suit against SEPTA in the courts of common pleas of this Commonwealth proceeds against SEPTA, alone, as a wholly independent entity without the involvement of the Commonwealth, the Commonwealth cannot, therefore, be subject to any decree or order of court as the result of such a suit. Thus, no right or interest of the Commonwealth will be affected by the outcome of a suit against SEPTA in our Commonwealth's courts, and so a suit poses no danger that the Commonwealth will be involuntarily subject to and controlled by the mandates of judicial tribunals, without its consent, at the instance of private parties.

Goldman, supra at 1183-84 (cleaned up).

We find the particulars of NJ Transit’s status with respect to the State of New Jersey to be in complete parity with this analysis. NJ Transit is a distinct legal entity that is empowered to sue, and be sued, in a capacity that is independent from the State. *See* N.J.S.A. §§ 27:25-4(a), 27:25-5(a). To that end, NJ Transit is authorized “[t]o employ and retain legal counsel” at its own discretion and, thereby, manage its own legal affairs. *See* N.J.S.A. § 27:25-5(z). New Jersey has also disclaimed any and all financial responsibility as to the liabilities of NJ Transit. *See* N.J.S.A. § 27:25-17.

We discern no risk to the sovereign dignity of New Jersey in permitting a suit against NJ Transit to proceed. For the purposes of such legal disputes, it seems beyond cavil that NJ Transit operates as a “wholly independent entity” that cannot bind the State of New Jersey or otherwise place it in a position where it will be “subject to and controlled by the mandates of judicial tribunals,” without its consent, “at the instance of private parties.” *Goldman, supra* at 1183. Thus, the paramount consideration of the Eleventh Amendment does not support a finding that NJ Transit is a state instrumentality for the purposes of sovereign immunity. *See id.* at 1183-84.

Likewise, we also find that any potential judgment against NJ Transit would have no discernible impact upon the New Jersey treasury. While such an inquiry cannot be reduced to a formalistic assessment of “ultimate financial responsibility,” the “controlling question is whether [the State] would be legally liable to pay” if a bevy of legal claims overwhelmed NJ Transit’s ability to pay. *Goldman, supra* at 1184 (emphasis in original) (citing *Regents of the Univ. of California v. Doe*, 519 U.S. 425, 431-32, 117 S. Ct. 900 (1997)). Comparatively, “the mere prospect that a [S]tate might render financial assistance to cover an unforeseen budgetary shortfall of an entity it created does not create a legal obligation of the [S]tate to

pay.” *Id.* at 1184 (emphasis in original) (citing *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 43-44, 115 S. Ct. 394 (1994)). Overall, New Jersey bears no culpability with respect to the financial liabilities of NJ Transit. *See* N.J.S.A. § 27:25-17. Accordingly, this secondary factor also supports a conclusion that NJ Transit is not an instrumentality of the State of New Jersey.

Based on the foregoing analysis, we discern that Mr. Galette’s lawsuit poses no threat to either the sovereign dignity or the state treasury of New Jersey. Accordingly, we conclude that NJ Transit is not an arm of the State of New Jersey and, thus, it is not entitled to the protections of sovereign immunity which it has asserted. *See Goldman, supra* at 1185.

Order affirmed.

APPENDIX C

**Court of Common Pleas of Pennsylvania,
First Judicial District,
Trial Division - Civil
Philadelphia County**

Cedric GALETTE, Plaintiff,

v.

NJ TRANSIT and Julie E. McCrey, Defendants.

No. 200800610.

September 23, 2021.

CIVIL ACTION

Control No. 21072480 21073012

Order

Crumlish, III, Judge.

AND NOW this 23rd day of September, 2021, upon consideration of the Motion to Dismiss of Defendant NJ Transit for lack of jurisdiction (Control No. 21073012) and Defendant, it appearing that Plaintiff misapprehends that the matter of this Court's assertion of jurisdiction over NJ Transit is a matter of choice of law and which state has the most significant interest in the outcome of this dispute, this Court agreeing with Defendant that its motion implicates the matter of sovereign immunity, but disagreeing that a court of this jurisdiction are incapable of affording NJ Transit any immunities to which it is entitled and disagreeing that principles of federalism require any more than the Court recognize any applicable immunity, it is, accordingly, hereby ORDERED and DECREED that Defendant's Motion to Dismiss is DENIED; and, further,

Upon consideration of the Motion of Defendant NJ Transit for Judgment on the Pleadings (Control No. 21072480) on the ground that Plaintiff's Complaint fails to State a Claim, it appearing that Defendant seeks to impose a highly literal and **needlessly** hypertechnical interpretation to the allegations of the Complaint in derogation of the requirement that Plaintiff be entitled to all reasonable inferences that arise from the factual allegations, and the Court finding that the assertion that Defendant's vehicle ran into a stopped vehicle in which Plaintiff was a passenger and the Plaintiff thereafter having suffered from headaches and injuries to his head, back and shoulders, coupled with the listing of the alleged acts of negligence committed by the Defendant, it is hereby ORDERED and DECREED that Defendant's Motion for Judgment on the Pleadings is DENIED.

BY THE COURT:

<<signature>>

Crumlish, III, J.

APPENDIX D

Relevant portions of the New Jersey Statutes are reproduced below.

27:25-4 - New Jersey Transit Corporation established; board; powers

a. There is hereby established in the Executive Branch of the State Government the New Jersey Transit Corporation, a body corporate and politic with corporate succession. For the purpose of complying with the provisions of Article V, Section IV, paragraph 1 of the New Jersey Constitution, the corporation is hereby allocated within the Department of Transportation, but, notwithstanding that allocation, the corporation shall be independent of any supervision or control by the department or by any body or officer thereof. The corporation is hereby constituted as an instrumentality of the State exercising public and essential governmental functions, and the exercise by the corporation of the powers conferred by this act shall be deemed and held to be an essential governmental function of the State.

b. The corporation shall be governed by a board which shall consist of 13 members. 11 of the members shall be voting members and shall consist of: the Commissioner of Transportation and the State Treasurer, who shall be members ex officio, another member of the Executive Branch to be selected by the Governor who shall also serve ex officio, and eight public members who shall be appointed by the Governor as follows: . . .

27:25-5 - Powers and duties of corporation

In addition to the powers and duties conferred upon it elsewhere in this act, the corporation may do all acts necessary and reasonably incident to carrying out the objec-

tives of this act, including but not in limitation thereof the following:

a. Sue and be sued; . . .

c. Make and alter bylaws for its organization and internal management and for the conduct of its affairs and business; . . .

g. Apply for, accept and expend money from any federal, State, county or municipal agency or instrumentality and from any private source as gifts, grants, or loans; comply with federal statutes, rules and regulations, and qualify for and receive all forms of financial assistance available under federal law to assure the continuance of, or for the support or improvement of public transportation and as may be necessary for that purpose to enter into agreements, including federally required labor protective agreements;

h. Plan, design, construct, equip, operate, improve, maintain, and, through the New Jersey Transportation Trust Fund Authority, finance either directly or by contract with any public or private entity, public transportation services, capital equipment and facilities or any parts or functions thereof, and other transportation projects, or any parts or functions thereof, which may be funded under section 3 of the federal Urban Mass Transportation Act of 1964 . . . ; . . .

j. Purchase, lease as lessee, or otherwise acquire, own, hold, improve, use and otherwise deal in and with real or personal property, or any interest therein, from any public or private entity, wherever situated; . . .

k. Lease as lessor, sell or otherwise dispose of on terms which the corporation may prescribe, real and personal property, including tangible or intangible property and consumable goods, or any interest therein, to any

public or private entity, in the exercise of its powers and the performance of its duties under this act . . . ; . . .

m. Establish one or more operating divisions as deemed necessary;

n. Set and collect fares and determine levels of service for service provided by the corporation either directly or by contract including, but not limited to, such reduced fare programs as deemed appropriate by the corporation; revenues derived from such service may be collected by the corporation and shall be available to the corporation for use in furtherance of any of the purposes of this act;

o. Set and collect rentals, fees, charges or other payments from the lease, use, occupancy or disposition of properties owned or leased by the corporation; such revenues shall be available to the corporation for use in furtherance of any of the purposes of this act;

p. Deposit corporate revenues in interest bearing accounts or in the State of New Jersey Cash Management Fund established pursuant to section 1 of P.L. 1977, c.281 (C.52:18A-90.4);

q. Delegate to subordinate officers of the corporation such powers and duties as the corporation shall deem necessary and proper to carry out the purposes of this act;

r. (1) Procure and enter into contracts for any type of insurance and indemnify against loss or damage to property from any cause, including loss of use and occupancy, against death or injury of any person, against employees' liability, against any act of any member, officer, employee or servant of the corporation, whether part-time, full-time, compensated or noncompensated, in the performance of the duties of his office or employment or any other insurable risk. . . . ; . . .

s. Promote the use of public transportation services, coordinate ticket sales and passenger information and

sell, lease or otherwise contract for advertising in or on the equipment or facilities of the corporation;

t. Adopt and maintain employee benefit programs for employees of the corporation including, but not limited to, pension, deferred compensation, medical disability, and death benefits, and which programs may utilize insurance contracts, trust funds, and any other appropriate means of providing the stipulated benefits, and may involve new plans or the continuation of plans previously established by entities acquired by the corporation;

u. Own, control, vote, and exercise any and all other rights incidental to the ownership of any equity, membership interest, or any shares of the capital stock of any incorporated entity acquired, formed, incorporated, or established by law by the corporation pursuant to the powers granted by this act. Any such corporate entity may be utilized in order to enable the corporation to participate with other private or public entities in any transaction, memorandum of understanding, undertaking, or arrangement that the corporation would have the power to conduct by itself, whether or not such participation involves sharing or delegation of control with or to other public or private entities regarding the ownership, operation, control, and management of services, equipment, or facilities. For purposes of this subsection, “corporate entity” means any business entity, including but not limited to, any corporation, limited liability company, joint venture, limited partnership, general partnership, association of any kind, or collaborative arrangement that may be jointly owned by the corporation and any other public or private entities that provide public transportation services;

v. Enter into any and all agreements or contracts, execute any and all instruments, and do and perform any and all acts or things necessary, convenient or desirable for

the purposes of the corporation, or to carry out any power expressly or implicitly given in this act;

w. . . . issue operating grant anticipation notes which shall be secured and retired from operating assistance grants authorized under section 9 of the federal Urban Mass Transportation Act of 1964 . . . ; . . .

x. Enter into agreements with a public or private entity or consortia thereof to provide for the development of demonstration projects through the use of public-private partnerships . . . ;

y. Enter into agreements with a public or private entity or consortia thereof to provide for the development of projects through the use of public-private partnerships. . . . ; . . .

z. To employ and retain legal counsel at the corporation's discretion, including choosing representation by the Attorney General.

27:25-17 - Liability for expenses of corporation

All expenses incurred by the corporation in carrying out the provisions of this act shall be payable from funds available to the corporation therefor and no liability or obligation shall be incurred by the corporation beyond the extent to which moneys are available. No debt or liability of the corporation shall be deemed or construed to create or constitute a debt, liability, or a loan or pledge of the credit of the State.

59:1-3 - Definitions

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“Public entity” includes the State, and any county, municipality, district, public authority, public agency, and any other political subdivision or public body in the State.

“State” shall mean the State and any office, department, division, bureau, board, commission or agency of the State, but shall not include any such entity which is statutorily authorized to sue and be sued. “State” also means the Palisades Interstate Park Commission, but only with respect to employees, property and activities within the State of New Jersey.

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59:2-2 - Liability of public entity

a. A public entity is liable for injury proximately caused by an act or omission of a public employee within the scope of his employment in the same manner and to the same extent as a private individual under like circumstances.

b. A public entity is not liable for an injury resulting from an act or omission of a public employee where the public employee is not liable.