

No. _____

In the Supreme Court of the United States

CEDRIC GALETTE,

Petitioner,

v.

NEW JERSEY TRANSIT CORPORATION,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the New Jersey Transit Corporation is entitled to interstate sovereign immunity under the Federal Constitution, as held by the highest court of Pennsylvania in square conflict with the highest court of New York.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Cedric Galette was the sole plaintiff in the state-court proceedings below. Respondent New Jersey Transit Corporation is one of two defendants.

Julie E. McCrey was the second defendant. Pursuant to Rule 12.6, Galette states that McCrey is a private individual who has never appeared in the action and has no interest in the sovereign immunity question. She thus has no interest in the outcome of the petition.

RELATED PROCEEDINGS

- *Galette v. NJ Transit*, No. 2210 EDA 2021, Superior Court of Pennsylvania (Mar. 21, 2023)
- *Galette v. NJ Transit*, No. 200800610, Court of Common Pleas (Sept. 23, 2021)

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INTRODUCTION

This case presents the question of whether the New Jersey Transit Corporation (NJ Transit) is entitled to immunity under the interstate sovereign immunity doctrine recognized in *Franchise Tax Board of California v. Hyatt*, 587 U.S. 230 (2019). It is not.

NJ Transit bears none of the traditional hallmarks of a core state agency entitled to New Jersey's sovereign immunity. Although it was created by state statute, it operates "independent of any supervision or control" of the State (N.J. Stat. § 27:25-4), with vast and unilateral powers to plan, operate, and maintain a tristate transit system (*id.* § 27:25-5). Its organic statute specifies expressly that its finances are separate from the State's, and the State cannot be held liable for the corporation's liabilities. *Id.* § 27:25-17. And the New Jersey Tort Claims Act defines NJ Transit, not as a core department or agency of "the State" itself, but as a "public entity" akin to a municipality or public authority that is not traditionally accorded immunity. *Id.* § 59:1-3

These facts all point to the conclusion that NJ Transit is not entitled to interstate sovereign immunity under *Hyatt*. But the Pennsylvania Supreme Court disagreed, remanding for NJ Transit's dismissal as a result. In doing so, it concluded against all the statutory and historical evidence that NJ Transit is an alter ego of the State of New Jersey and serves a traditional state function. App., *infra*, 18a-21a.

That ruling warrants this Court's immediate review. Just three months prior to the decision in this case, the New York Court of Appeals reached the opposite conclusion on the precise same question, holding that NJ Transit is not an arm of the State of New Jersey and thus not entitled to interstate sovereign immunity under *Hyatt*. See *Colt v. New Jersey Transit Corp.*, 2024 WL 4874365 (N.Y. 2024). NJ Transit is thus being treated in opposite

ways by two neighboring States on a matter of federal constitutional law.

At the same time the decision below openly broke from the New York court's decision in *Colt*, it aligned with the Third Circuit's decision in *Karns v. Shanahan*, 879 F.3d 504 (3d Cir. 2018). There, the Third Circuit held that NJ Transit is an "arm of the State" for Eleventh Amendment purposes, and that it is thus has immunity in federal court. Individuals injured by NJ Transit's negligence are therefore entitled as a matter of federal constitutional law to sue NJ Transit in the state courts of New York, but not in the state courts of Pennsylvania or in diversity in the federal courts of the Third Circuit.

This is untenable. NJ Transit is the largest statewide public transit system in the Nation. It served nearly a quarter billion riders in 2024, over a service area greater than 5,200 square miles, including the Philadelphia and New York metropolitan areas. The liability of such a large transit system to public motorists, pedestrians, and riders for the negligence of its employees is tremendously important. Review of the federal constitutional question presented here is therefore imperative.

OPINIONS BELOW

The opinion of the Pennsylvania Supreme Court (App., *infra*, 1a-24a) is not yet published in the Atlantic Reporter but is available in the Westlaw database at 2024 WL 5457879. The opinion of the Superior Court (App., *infra*, 25a-37a) is reported at 293 A.3d 649. The opinion of the Court of Common Pleas (App., *infra*, 38a-39a) is unpublished but available in the Westlaw database at 2021 WL 11551626.

JURISDICTION

The Pennsylvania Supreme Court entered its decision on March 12, 2025. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Pertinent excerpts of the New Jersey Statutes are reproduced in the appendix beginning at page 40a.

STATEMENT**A. The “arm of the State” doctrine**

1. In *Franchise Tax Board v. Hyatt*, 587 U.S. 230 (2019), the Court overturned *Nevada v. Hall*, 440 U.S. 410 (1979), ruling that each State enjoys sovereign immunity not only in federal court under the Eleventh Amendment, but also in the courts of its co-equal States under the doctrine of interstate sovereign immunity. This doctrine, the Court held, “is a historically rooted principle embedded in the text and structure of the Constitution.” *Id.* at 248.

The doctrine of interstate sovereign immunity “neither derives from, nor is limited by, the terms of the Eleventh Amendment.” *Id.* at 243. The lower courts nevertheless have borrowed from the Court’s Eleventh Amendment immunity cases to define the contours of interstate sovereign immunity. Under the Eleventh Amendment, for example, immunity does not extend to municipal corporations or other quasi-independent state entities. See *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 280 (1977). Beyond the State itself, immunity extends only to those core departments and agencies of the State that are properly classed as an “arm” (*ibid.*) or “alter ego” of the State (13 Wright & Miller, Federal Practice and Procedure § 3524.2 (3d ed.)).

The lower courts have uniformly extended the “arm of the state” doctrine to the context of interstate sovereign immunity. See App., *infra*, 17a (“The same general [arm-of-the-State] inquiry” applicable in Eleventh Amendment immunity cases “is present” in cases implicating “interstate sovereign immunity.”). Accord *Colt v. New Jersey Transit Corp.*, 2024 WL 4874365, at *3 (N.Y.

2024) (“Because States’ sovereign immunity in federal and state courts are analytically and historically intertwined, we deem it appropriate to conduct our analysis consistent with the Supreme Court’s and other federal court’s arm-of-the-state jurisprudence.”).

2. This Court has not settled on a test for determining whether a state entity is an arm of the State entitled to sovereign immunity. See *Colt*, 2024 WL 4874365, at *5 (“The Supreme Court has not yet endorsed any particular * * * formulation of the arm-of-the-state test.”); *Kohn v. State Bar of California*, 87 F.4th 1021, 1026 (9th Cir. 2023) (en banc) (“There is no standard test for determining whether an entity is an arm of the state for purposes of sovereign immunity.”).

At different times, the Court has considered “the degree of the State’s control over the entity, how state law characterizes the entity, whether the entity performs traditional state governmental functions, and whether the State would be liable, or financially responsible, for a judgment against the entity.” *Colt*, 2024 WL 4874365, at *4 (collecting cases). The federal circuits “have identified more specific considerations in an array of multifactor and multistep tests.” *Id.* (collecting cases).

The various multifactor tests developed by the lower courts, although often inconsistent, share a core of common considerations, including:

- whether the entity has independent authority such as powers to contract, sue or be sued, raise revenue, expend funds, and acquire and dispose of property;
- whether recovery against the entity will come from state funds or an independent source; and
- whether the State that created the entity structured and treats it as an arm of the State.

See 13 Wright & Miller, Federal Practice and Procedure § 3524.2 (3d ed.) (collecting sources). The more autono-

mous and independent the instrumentality is, and the more insulated its assets and liabilities are from the State treasury, the less likely it is to be an “arm” or “alter ego” of the State. *Ibid.*

B. New Jersey Transit

NJ Transit was established by state statute in 1979 to create, operate, and maintain a public transit system throughout the State of New Jersey and extending into Pennsylvania and New York. See N.J. Stat. §§ 27:25-4, 27:25-5. By statute, it is “an instrumentality of the State” that is “allocated within the [New Jersey] Department of Transportation” under the state constitution. N.J. Stat. § 27:25-4(a).

“[N]otwithstanding that allocation,” however, NJ Transit is “independent of any supervision or control by the department or by any body or officer thereof.” *Ibid.* It is independently “governed by a board” comprising 11 voting members who include three *ex officio* state officials and “eight public members who shall be appointed by the Governor.” *Id.* § 27:25-4(a).

Through its board, NJ Transit is empowered to “do all acts necessary and reasonably incident to carrying out the objectives of [the] act,” including that it may:

- make and amend its own bylaws;
- sue and be sued, including by retaining outside legal counsel of its own choosing;
- raise funds from fares, gifts, grants, or loans;
- plan, construct, operate, and finance public transportation services, directly or indirectly by contract with any public or private entity;
- purchase, lease, and dispose of real and personal property of any kind, wherever situated, including by spending or collecting funds;

- establish its own subsidiary operating divisions and delegate to subordinate officers any powers and duties deemed necessary and appropriate;
- adopt and maintain its own employee benefit plan;
- own and control any corporate entity acquired or formed to carry out its statutory objectives; and
- enter into contracts and do and perform any and all acts or things necessary or convenient to the purposes of the corporation.

See *id.* § 27:25-5. Exercising these powers, it has created four privately held subsidiary corporations: NJ Transit Bus Operations Inc., NJ Transit Mercer Inc., NJ Transit Morris Inc., and NJ Transit Rail Operations Inc.

In addition, “[a]ll expenses incurred by” NJ Transit “in carrying out the provisions of” its organic act “shall be payable from funds available to the corporation” through its own fare collections and fundraising, and “[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.” *Id.* § 27:25-17.

NJ Transit’s immunity from suit in New Jersey state court is established by the New Jersey Tort Claims Act (NJTCA). That statute specifies that a “public entity” is immune from suit in the New Jersey state courts (*id.* § 59:2-1.2), except that it may be sued in state court for torts it has proximately caused (*id.* § 59:2-2(a)). The NJTCA defines a “public entity” to include (1) “the State,” and (2) “any county, municipality, district, public authority, public agency, and any other political subdivision or public body in the State.” *Id.* § 59:1-3. It defines the “the State” to include “any office, department, division, bureau, board, commission or agency of the State,” but not an instrumentality “statutorily authorized to sue and be sued,” which includes NJ Transit. *Ibid.*

In *Muhammad v. New Jersey Transit*, 821 A.2d 1148 (N.J. 2003), the New Jersey Supreme Court held that because NJ Transit is authorized to sue and be sued, it is not a component of “the State” under the NJTCA, but that it nonetheless falls within the statute’s ambit because it is a “public entity” akin to a “county, municipality, district, public authority, [or] public agency.” *Id.* at 1152-1153.

C. Proceedings below

1. Galette sued NJ Transit and Julie McCrey alleging 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. App., *infra*, 2a. Galette alleged that NJ Transit and McCrey were negligent for independent reasons and that their respective acts of negligence caused him injuries. *Ibid.*

NJ Transit filed an answer asserting, among other things, that it is an arm of the State of New Jersey entitled to interstate sovereign immunity. It then moved to dismiss Galette’s suit, noting that the Third Circuit has concluded that NJ Transit is an arm of the State of New Jersey under the Eleventh Amendment. *Id.* at 2a-3a; see *Karns v. Shanahan*, 879 F.3d 504, 519 (3d Cir. 2018).

2. The Court of Common Pleas denied the motion. App., *infra*, 38a-39a.

3. The Superior Court affirmed. App., *infra*, 25a-37a. In concluding that NJ Transit is not an arm of the State of New Jersey, the Superior Court applied a six factor test previously adopted by the Pennsylvania Supreme Court. It concluded, however, that the six factors were roughly in equipoise and thus turned to whether a denial of immunity would thwart the doctrine’s primary purposes: protecting the States’ sovereign dignity and treasuries. The court held that it would not and thus affirmed the trial court’s denial of the motion to dismiss.

4. The Pennsylvania Supreme Court reversed. App., *infra*, 1a-24a. It began by surveying the general state of federal sovereign immunity doctrine (App., *infra*, 6a-12a) and the contours of the “arm of the state” analysis (App., *infra*, 12a-17a).

Turning to the circumstances of this case, the court placed dispositive focus on “the manner in which [New Jersey] classifies and describes [NJ Transit] within the structure of that State.” App., *infra*, 17a. It concluded that NJ Transit’s statutory mission and structure “weigh heavily in favor of concluding that NJ Transit is an arm of the State of New Jersey.” *Ibid.*

In particular, according to the lower court:

- NJ Transit was created to “provide for the operation and improvement of a coherent public transportation system,” which New Jersey believes to be an “essential governmental function[]”;
- the statute “establishes a NJ Transit Police Department”;
- the statute “permits NJ Transit to acquire land and property by means of eminent domain”; and
- “the political branches of the State of New Jersey exercise a significant degree of control over NJ Transit,” which is so because:
 - it is “allocated” to an executive department;
 - the board is appointed by the governor;
 - the governor may veto board decisions within 10 days of their adoption;
 - the state legislature may override the board’s use of eminent domain; and
 - NJ Transit “is required to provide a detailed annual report regarding its activities for the preceding fiscal year to” the governor and members of the legislature.

App., *infra*, 18a-20a. These considerations, the court concluded, demonstrate “New Jersey’s intent to have NJ Transit perform the core, governmental function of providing public transportation to New Jersey’s citizens,” rendering it an arm of the State. App., *infra*, 19a.

Weighing against these considerations, the lower court recognized, are the facts that NJ Transit may raise its own private and public funds, acquire and dispose of real property, and collect fares. These factors, according to the lower court, may “indicate that NJ Transit is a separate entity from the State of New Jersey.” App., *infra*, 20a. But the court held that they were out-weighed by the other considerations. App., *infra*, 20a-21a.

The court concluded by acknowledging its break from *Colt*, explaining (App., *infra*, 22a) that “[o]ur disagreements with the New York High Court are obvious.” The court went on: “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 * * *.” *Ibid.* And although “New Jersey would not be responsible for a judgment entered against NJ Transit,” the Pennsylvania court continued, “we do not place significant weight on this factor.” *Ibid.* “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.” App., *infra*, 22a-23a.

The court rejected Galette’s contention that NJ Transit had waived sovereign immunity in this case and thus remanded with instructions to dismiss NJ Transit. App., *infra*, 24a.

REASONS FOR GRANTING THE PETITION

This petition cleanly presents a question of great practical importance: whether NJ Transit is an arm of the State of New Jersey entitled to interstate sovereign immunity under the Federal Constitution. In open conflict with the highest court of the State of New York, the Pennsylvania Supreme Court held that NJ Transit is an arm of the State and thus entitled to immunity. It accordingly remanded to the trial court for dismissal of the suit against NJ Transit.

That decision warrants review. First, it creates a clear conflict, as a result of which NJ Transit is protected by interstate sovereign immunity in Pennsylvania but not in New York. Second, it departs from this Court's settled precedents, which focus principally on protecting the treasury and dignity of the State. Third, the issue is a matter of great consequence. NJ Transit is an enormous transit system serving *hundreds of millions* of riders annually across three of the Nation's most populous States. Whether a transit system of this size can be held to account for the negligence of its employees is a matter of great importance. The Court accordingly should grant certiorari and reverse.

A. The decision below breaks from a decision of the New York Court of Appeals

1. As the Pennsylvania court openly recognized, its resolution of the question presented conflicts squarely with the New York Court of Appeals' decision in *Colt*. Like the Pennsylvania court, the New York court began its analysis with a recitation of the prevailing case law concerning interstate sovereign immunity. See 2024 WL 4874365, at *2-5. But unlike the Pennsylvania court, which purported to apply a six-factor test, the New York court declined to focus on an inflexible list of "specific subfactors that might not be relevant to all cases." *Id.* at

*5. It instead “analyze[d] each consideration with the fundamental goal of determining whether allowing a suit against the foreign state-created entity to proceed in our courts would offend our sister State’s dignity.” *Ibid.* Having done so, it “conclude[d] that NJT does not enjoy New Jersey’s sovereign immunity.” *Ibid.*

The New York court first analyzed NJ Transit’s structure and role within the government of New Jersey. *Ibid.* It noted that “New Jersey law gives NJT a separate corporate existence” and “the power to sue and be sued.” *Ibid.* And it is granted immunity by state law only under the NJTC, which extends immunity to “many entities that would not be considered arms of the state for [federal] sovereign immunity purposes.” *Ibid.*

Citing *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994), the court expressed doubt that operating a public transit system is “a traditional state governmental function given the myriad other non-state public and private entities that provide similar services.” 2024 WL 4874365, at *6.

The New York court next noted that NJ Transit does not “act[] at the State’s behest” and instead “exercises significant independence from New Jersey’s control.” *Ibid.* That is to say, “New Jersey’s government does not direct the day-to-day operations of NJT,” which has wide-ranging powers to run its own affairs. *Ibid.*

Against those considerations, the New York court weighed the factors that drove the Pennsylvania Supreme Court’s reasoning, concluding that they are in the end closely balanced. *Ibid.* The court thus placed tie-breaking weight on “whether [NJ Transit’s] liability is the State’s liability, such that a judgment against [NJ Transit] would be an affront to the State.” *Id.* at *6. Citing N.J. Stat. § 27:25-17, the court held that it would not: “Put simply, allowing [the] 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.” 2024 WL 4874365, at *7. The court thus held that NJ Transit is not entitled to interstate sovereign immunity and remanded for trial. *Ibid.* That is the polar opposite of the Pennsylvania court’s holding below.

2. The only other court to address the status of NJ Transit under federal immunity doctrine is the U.S. Court of Appeals for the Third Circuit in *Karns*.

Prior to *Karns*, the Third Circuit had held that NJ Transit “is not an arm of the state,” “not the alter ego of New Jersey,” and not entitled to Eleventh Amendment immunity. *Fitchik v. New Jersey Transit Rail Operations*, 873 F.2d 655, 658 (3d Cir. 1989). But it reconsidered that holding in light of this Court’s intervening decision in *Regents of the University of California v. Doe*, 519 U.S. 425 (1997). See 879 F.3d at 515.

After *Regents*, the Third Circuit declined to “ascribe primacy to the state-treasury factor.” *Id.* at 513. The court instead applied a multifactor test. In doing so, it downplayed NJ Transit’s autonomy, explaining without substantial explanation that “NJ Transit is subject to several operational constraints by the New Jersey Legislature and the Governor,” with only “limited autonomy” to conduct its own affairs, which “weighs in favor of immunity.” *Id.* at 518.

Balancing the various considerations, the Third Circuit concluded “that NJ Transit is an arm of the state” and thus entitled to immunity from suit in federal court under the Eleventh Amendment. *Id.* at 519.

3. The different analytical approaches applied by the lower courts cannot be reconciled in either form or outcome. As the New York court rightly noted, this Court “has not yet endorsed any particular * * * formulation of

the arm-of-the-state test.” *Colt*, 2024 WL 4874365, at *5. The resulting confusion is clear:

- Whereas the New York court surveyed New Jersey law and concluded that NJ Transit enjoys substantial autonomy in relevant respects, the Pennsylvania court and Third Circuit—reviewing the same provisions of New Jersey law through different analytical lenses—came to the opposite conclusion.
- Whereas the New York court placed tie-breaking emphasis on the fact that the State of New Jersey bears no financial responsibility for judgments against NJ Transit, the Pennsylvania court declined to “place significant weight on this factor,” and the Third Circuit refused to give “primacy” to that consideration.
- Whereas the New York court rejected the idea that public transportation is a traditional function of the State suggestive of immunity, the Pennsylvania court placed great weight on the contrary view.

These divergent analytical approaches have produced opposite outcomes. Plaintiffs alleging that NJ Transit negligently caused them injury will be denied judicial review in diversity in federal court and the state courts of Pennsylvania. But if their cases arise in New York, their claims will be allowed to proceed. That is so despite that the same federal constitutional inquiry governs the immunity question in all three jurisdictions. Such disparate application of federal constitutional law is intolerable.

B. The question presented is important

1. The petition should be granted for the additional reason that the question presented is a matter of tremendous practical importance.

NJ Transit is an enormous transit system. It operates more than 250 bus lines that serve almost 16,000 stops; 12 commuter rail lines that serve 165 stops; and three

light rail lines that serve 86 stops. Altogether, it has an annual ridership approaching a quarter of a billion riders, carrying them more than two billion passenger miles. And it sends hundreds of buses, trains, and ferries into and out of Pennsylvania and New York every day.

For a system so large, accidents are an unfortunate and daily occurrence. Whether those who are injured in daily accidents can recover at law should not turn on the luck of geography.

2. This Court’s resolution of the question presented also will shed much-needed light on the arm-of-the-State inquiry more broadly. The inquiry is frequently litigated. A search of the Westlaw database indicates that the issue has been raised thousands of times in federal court in the last decade alone, producing more than 100 reported court-of-appeals decisions.

And like the Pennsylvania and New York high courts, the federal courts of appeals have adopted varying tests for resolving the inquiry. As a result, “[t]he jurisprudence over how to apply the arm-of-the-state doctrine is, at best, confused.” *Mancuso v. New York State Thruway Authority*, 86 F.3d 289, 293 (2d Cir. 1996).

Some courts of appeals—following the same analytical approach as the New York court in *Colt*—engage in a multifactor test that tends to place primary emphasis on the autonomy of the entity and the impact of a judgment on the State’s treasury, or lack thereof. See, e.g., *Good v. U.S. Department of Education*, 121 F.4th 772, 819 (10th Cir. 2024), certiorari petition docketed (U.S. No. 24-992); *In re Entrust Energy, Inc.*, 101 F.4th 369, 383 (5th Cir. 2024); *Grajales v. Puerto Rico Ports Authority*, 831 F.3d 11, 18 (1st Cir. 2016).

Other courts of appeals—more closely following the approach of the Pennsylvania court below and the Third Circuit in *Karns*—instead prioritize the manner in which

the entity is characterized by state law, while giving reduced weight to the entity’s autonomy or the impact of judgments on the State’s treasury. See, e.g., *Kohn v. State Bar of California*, 87 F.4th 1021, 1026 (9th Cir. 2023) (en banc); *Puerto Rico Ports Authority v. Federal Maritime Commission*, 531 F.3d 868 (D.C. Cir. 2008) (*FMC*).

These different approaches are producing similarly conflicting outcomes on indistinguishable facts. For example, the D.C. Circuit held in *FMC* that the Puerto Rico Ports Authority is entitled to Eleventh Amendment immunity. But the First Circuit held in *Grajales* that it is not, faulting the D.C. Circuit for not giving sufficient consideration to whether or not “the pending action places the Commonwealth’s fisc at risk,” which it believed “dispositive” of the inquiry. 831 F.3d at 19. Granting review of the question presented here thus would provide the Court with an opportunity to provide critically important guidance concerning the arm-of-the-State inquiry—including as applied to entities beyond just NJ Transit.

C. This is a clean vehicle for review

This is an appropriate vehicle for review. The question presented is the sole issue addressed and resolved in the opinion below. And as a result of the lower court’s decision, Galette’s suit against NJ Transit is over. The sovereign immunity question is finally resolved, and Galette’s suit against NJ Transit cannot proceed.¹

¹ Although the Pennsylvania Supreme Court nominally remanded for further proceedings against Julie McCrey, the driver of Galette’s car (App., *infra*, 24a), McCrey has never made an appearance, and remand will involve at most the ministerial entry of a default judgment. In other words, “the case is for all practical purposes concluded.” *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479 (1975). Even if more substantial proceedings were to take place (they will not), McCrey is a private individual not employed by the State, and she is sued on a necessarily distinct theory of negligence. Thus,

We anticipate that NJ Transit may seek this Court’s review in *Colt*. It has applied for extensions of time to do so. See *NJ Transit v. Colt*, U.S. No. 24A797. But for two reasons, that case is a less suitable vehicle: First, because the New York court denied sovereign immunity, it remanded for further proceedings on the merits against NJ Transit. Second, the court’s denial of sovereign immunity will make no practical difference in the course of remand proceedings in *Colt*, or to its ultimate outcome.

The plaintiffs there sued both the NJ Transit and the bus driver in his individual capacity. NJ Transit has indemnified the driver. It therefore has retained a single outside law firm to represent both itself and the driver, and it will bear the cost of litigation and any judgment in *Colt* regardless of whether it has immunity. See *Farid v. Smith*, 850 F.2d 917, 923 (2d Cir. 1988) (“the law is clear that a state’s voluntary decision to indemnify its public servants does not transform a personal-capacity action against a state official into an official-capacity action against the state”). Not so here.

D. NJ Transit is not an arm of the State, and it is not entitled to sovereign immunity

The crisp presentation of an important question that has divided the state supreme courts is reason enough to grant the petition. The fact that the lower court’s decision is wrong counsels further in favor of certiorari review.

1. Courts classify state governmental bodies according to a dichotomy in which arms of the State enjoy sovereign immunity, but political subdivisions such as counties and cities do not. See *Mt. Healthy*, 429 U.S. at 280.

nothing that even theoretically could take place on remand would affect NJ Transit or the Pennsylvania Supreme Court’s sovereign immunity holding, which “will survive and require decision regardless of the outcome of future state-court proceedings.” *Moore v. Harper*, 600 U.S. 1, 16 (2023) (quoting *Cox Broadcasting*, 420 U.S. at 480).

Generally, when a state entity's organic statute indicates that the State "created an agency comparable to a county or municipality," the entity should not be accorded sovereign immunity. *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979).

That is the case here. NJ Transit bears the characteristics of an independent political subdivision, not a government agency exercising core, traditional state powers as an "alter ego" of the State itself. See 13 Wright & Miller, *Federal Practice and Procedure* § 3524.2 (3d ed.).

The evidence on this point is overwhelming. To start, the statute establishing NJ Transit states expressly that it is "independent of any supervision or control" by the executive department in which it is located. N.J. Stat. § 27:25-4(a). The balance of the statute backs that up: NJ Transit is governed by an independent board with broad powers to (among other things) create and amend its own bylaws; sue and be sued using outside counsel; collect and expend its own funds from fares, gifts, grants, and loans; enter into cooperative arrangements with other public and private entities; acquire and dispose of real and personal property; and maintain its own employee fringe benefit plan. *Id.* § 27:25-5. It may do all those things free from almost any supervision by the State. Those facts paint a picture of an independent, autonomous entity, not one that is a mere alter ego of the State.

Beyond that, NJ Transit's debts are expressly *not* the debts of the State, so a judgment against NJT Transit is not collectible from the New Jersey treasury. *Id.* § 27:25-17. And to top it off, the NJTCA provides expressly that NJ Transit is *not* "the State" but rather a general "public entity," lumped together with "other political subdivision[s]," such as a "county, municipality, district, public authority, [or] public agency." *Id.* § 59:1-3. If that express classification does not qualify NJ Transit as a state entity "comparable to a county or municipality" under state law

(*Lake Country Estates*, 440 U.S. at 401), it is hard to imagine what would.

2. None of the considerations that drove the Pennsylvania Supreme Court’s or Third Circuit’s contrary decision is persuasive. To begin with, neither a police force nor the power of eminent domain suggests that a public entity is an “arm of the State.” See App., *infra*, 19a-20a. Cities and counties typically also have police forces and exercise eminent domain power, and they are quintessentially *not* arms of the State. *E.g.*, *Norther Insurance Company of New York v. Chatham County, Georgia*, 547 U.S. 189, 194 (2006).

Nor was the Pennsylvania court correct that providing public transportation is a traditional State function. See App., *infra*, 18a (characterizing public transportation as an “essential governmental function of the State”). To be sure, States often establish and maintain state highway and public transportation systems. But private entities and municipalities likewise “own and operate bridges, tunnels, ferries, marine terminals, airports, bus terminals, industrial parks, [and] commuter railroads.” *Hess*, 513 U.S. at 45. Public transportation assuredly was not an essential function of the State at the time of the Founding. It certainly would have surprised the Framers to imagine that a politically and financially independent corporation operating a vast public transportation system would enjoy sovereign immunity simply because the corporation was established by state law. *Cf. Hyatt*, 587 U.S. at 238 (the Constitution protects the common law immunities that were “well established and widely accepted at the founding”).

It does not change the outcome that NJ Transit’s board members are appointed by the governor, the governor can veto the board’s decisions, the legislature can veto its exercise of eminent domain, or the board must submit annual reports. See App., *infra*, 18a-19a. These

sorts of limits and duties often apply to municipalities and other political subdivisions, as well, and they do not render those entities arms of the State.

And such considerations do not suggest “a significant degree of control over NJ Transit” (App., *infra*, 18a) in any event. Although board members are appointed by the governor, once they take their positions, they cannot be removed except for cause. N.J. Stat. § 27:25-4(b). And it is simply wrong that “the board can take no action without seeking the Governor’s approval following a meeting.” App., *infra*, 22a. In fact, N.J. Stat. § 27:25-4(f) states simply that a formal decision of the board made at a public hearing “shall [not] have force or effect” until 10 days elapse, to allow the governor time to consider whether to exercise his statutory veto power. But once the 10 days elapse, the board may act; it need not obtain approval.

That leaves annual reporting (which is not a form of control at all) and the legislature’s veto power over NJ Transit’s exercise of eminent domain power. Supervision of a politically sensitive power like eminent domain by the legislature makes good sense, especially with respect to a non-elected body like NJ Transit. And whatever might be said about this limit, it does almost nothing to undermine the more basic points, which are that (1) NJ Transit has broad autonomy over virtually every aspect of its daily operations and governance, (2) it is classed by state statute as akin to a municipality and not “the State,” and (3) it bears singular responsibility for any judgments entered against it, which cannot be collected from the State’s treasury. NJ Transit is, in short, not an alter ego of the State of New Jersey entitled to sovereign immunity.

CONCLUSION

The Court should grant the petition and reverse.
Respectfully submitted.

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