

Nos. 24-1021 and 24-1113

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IN THE  
**Supreme Court of the United States**

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CEDRIC GALETTE,  
*Petitioner,*

v.

NEW JERSEY TRANSIT CORPORATION,  
*Respondent.*

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NEW JERSEY TRANSIT CORPORATION, ET AL.,  
*Petitioners,*

v.

JEFFREY COLT, ET AL.,  
*Respondents.*

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On Writs of Certiorari to the Supreme Court  
of Pennsylvania, Eastern District and the  
New York Court of Appeals

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**BRIEF OF AMICUS CURIAE COMMUTER  
RAIL COALITION IN SUPPORT OF NEW  
JERSEY TRANSIT CORPORATION**

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**INTERESTS OF THE AMICUS CURIAE<sup>1</sup>**

The Commuter Rail Coalition (CRC) is the trade organization for commuter railroads in the United States, including NJ TRANSIT. CRC's mission is to advocate for the needs of commuter railroads and their riders to ensure that these railroads can continue to provide vital transportation services, support local economies, and decongest roadways. In 2024, CRC's member railroads carried nearly 345 million passengers, representing nearly ninety-nine percent of U.S. commuter rail ridership. CRC represents the interests of its twenty-six member railroads, along with forty-one industry members who provide operational, maintenance, engineering, design, consulting, and other services to the commuter rail industry. CRC has a significant interest in this Court's decision given its potential impact on CRC's membership.

Despite the importance of commuter railroads to the country's transportation system, commuter railroads are vulnerable. They operate with narrow margins—or with losses covered by public funding—in tightly regulated environments. Safety is paramount and expensive to maintain, and opportunities to increase revenue without significant additional investment are scarce. Adverse changes in governing policy threaten to wreak havoc on commuter railroads. CRC

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<sup>1</sup> Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel for any party, party, or person other than Amicus Curiae, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. New Jersey Transit Corporation is a member of CRC and pays dues to CRC's general fund.

advocates for the interests of commuter railroads to ensure their continued viability.

As a result of a complex history discussed herein, CRC's railroad members are public entities. As such, they are bound not only by the safety regulations applicable to private railroads, but by the additional constraints that both the federal government and State governments impose on government actors. To ensure that commuter railroads can continue providing critical service despite the constraints they face, these railroads rely on the benefits arising from their status as public entities. Interstate sovereign immunity is one such benefit.

Many commuter railroads rely on interstate sovereign immunity. Nine commuter railroads operate outside of their home States, seven of which are constituted as distinct entities outside of a State executive agency.<sup>2</sup> These railroads are susceptible to being haled into another State's court if they are not deemed arms of the State for purposes of determining their entitlement to interstate sovereign immunity.

Commuter railroad operations involve high stakes. A typical commuter rail train can carry hundreds of

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<sup>2</sup> Those seven railroads are NJ TRANSIT, the Commuter Rail Division of the Regional Transportation Authority (Metra), the Massachusetts Bay Transportation Authority, Metro-North Railroad, the Northern Indiana Commuter Transportation District (the South Shore Line), the Southeastern Pennsylvania Transportation Authority, and Virginia Railway Express (VRE). Six of those—all but VRE—operate in two or more States, while VRE operates in Virginia and the District of Columbia. Additionally, the Connecticut Department of Transportation and the Maryland Transit Administration are State agencies that operate interstate services, namely the Hartford Line and the MARC Rail service.

passengers, and a single railcar may be worth several million dollars. As commuter railroads' records reflect, safety is the highest priority for every commuter railroad. Even then, no mode of transportation is wholly free of potential risk. Interstate sovereign immunity fills an important gap.

Interstate sovereign immunity is increasingly becoming essential for commuter railroads because insurers rely on such immunity to provide affordable commuter rail insurance policies. Without insurance, commuter railroads cannot operate, as a practical matter, because the potential exposure due to a catastrophic accident would be too great. General liability insurance typically excludes railroad-related losses, so commuter railroads must acquire specialized—and more expensive—types of insurance, such as railroad liability insurance. Further, most commuter railroads operate on track owned by other railroads (typically freight carriers), which require that their losses be covered through insurance policies and indemnification provisions. Given those constraints, it can be difficult for commuter railroads to pay premiums and, in some instances, even obtain coverage. Commuter-railroad insurers closely track the extent to which the railroads are protected from liability by sovereign immunity, making such immunity essential to many railroads' current insurance schemes and continued ability to operate.

### **SUMMARY OF THE ARGUMENT**

The doctrine of interstate sovereign immunity governs how the States relate to each other as sovereigns. Following the ratification of the Constitution, conflicts between States had the potential to disrupt the federal system, so the

Constitution sought to ensure that direct conflicts between the States would be resolved exclusively through specific processes. Those processes would respect the dignity interests of sovereign States and comport with the law of nations that had previously governed such conflicts. Interstate conflicts would be kept outside of fora in which State dignity might be offended, such as the courts of one State.

The arm of the State doctrine must work towards the same goal of respecting State dignity and preventing conflicts between sovereigns. For that to succeed, a State-created entity must be entitled to sovereign immunity in a foreign State's courts if the entity's home State would see a suit against the entity as a suit against the State. It is the home State's view of the entity that matters, because it is the home State that, as a sovereign entity, will be adversely impacted by and may initiate a conflict with another State if the other State does not respect the home State's dignity interests.

Therefore, outside of straightforward cases such as agencies of a state (entitled to immunity) or counties (not), to determine whether an entity is an arm of the State, a court should look to how the entity is described, empowered, and immunized in the entity's organic statute as enacted by the home State's legislature. That inquiry should focus on whether the State has created the entity in such a way as to allow the entity to share in the State's sovereignty. Specifically, a court should ask whether the State has granted the entity at least some of the attributes of sovereignty, such as immunity from taxation and suit and a mandate to serve the whole State's public. Moreover, it is insufficient to say that no "municipal corporation" or "political subdivision" is entitled to

sovereign immunity, because a State may apply such a label to an entity while still intending to extend to the entity the protections of the State's sovereignty. There are multiple commuter railroads in exactly that situation.

Notably, that test does not rely on the home State's financial liability for the debts of the State-created entity, although such liability is sufficient to establish arm-of-the-State status. Conflicts between States may or may not be financial, so a judgment against a State-created entity for which the State is not liable may create a conflict between States. The distinctive history of commuter railroads further highlights that informal financial links between a State and an entity it creates may be equally as strong as formal financial obligations for debts. Commuter railroads exist in their current forms because States have stepped in with the funding needed to save financially troubled operations. Events since the 1970s have made it clear that commuter railroads are both necessarily public enterprises and too vital for States to let fail. That combination means that a judgment against a commuter railroad will ultimately result in a loss to a State's treasury, regardless of whether the State is formally liable for the commuter railroad's debts, as the State will ensure that the railroad's operations will continue. The history of commuter railroads therefore demonstrates that it makes little sense to base arm-of-the-State determinations on a State's formal financial liability for an entity, because that factor does not encompass the sphere of State concern over which a suit would implicate a State's sovereignty and dignitary interests.

Fulfilling the purposes of interstate sovereign immunity regarding direct conflicts between States

also requires courts to determine if an entity is an arm of the State without reference to the entity's function. Otherwise, courts would be forced to draw incoherent lines. That incoherence is particularly salient for state-created entities devoted to transportation, such as commuter railroads, given historical links between transportation and the maintenance of sovereignty.

As the unique position and history of commuter railroads demonstrate, this Court should determine that NJ TRANSIT is an arm of the State because New Jersey has granted it the attributes of New Jersey's sovereignty and directed it to serve the people of the State. Holding otherwise would misread the purposes of interstate sovereign immunity, unduly limit its role in the federal system, and cause significant disruption to essential public services.

## **ARGUMENT**

### **I. States Convey Arm-of-the-State Status on Public Entities by Granting Them the Immunities and Duties of the State.**

The historical basis for interstate sovereign immunity is the maintenance of State dignity and sovereignty, so whether an entity is an arm of the State for purposes of interstate sovereign immunity must turn on whether a suit against that entity would offend a State's interests in its dignity and sovereignty. The best evidence of a State's view of whether a State-created entity is an arm of the State is the legislation creating that entity. That legislation will demonstrate how a State sees the entity: as something separate from the State because the State truly intends to separate itself wholly from the entity, or as something that is part of the State but

constituted as a separate entity as a formality or accounting technique. Giving effect to State legislative intent respects a sovereign's decisions to define the bounds of the State government as an entity. Accordingly, a court determining whether an entity is an arm of the State should look to how the State statutes establishing that entity describe it and empower it.

Specifically, there are three useful indicators, and the presence of some or all of these can demonstrate a State's view of an entity: whether the State has immunized the entity from suit where it can; whether the State has immunized the entity from taxation; and whether the State has established the entity to serve the general welfare of the State or solely municipal purposes. Each of these indicators is useful because it demonstrates whether a State has granted the entity the attributes of sovereignty. Those attributes are more probative of a State's intent than any particular label a State uses for an entity.

This approach makes particular sense in the commuter rail context. States are free to operate commuter railroads through a State agency instead of establishing a separate entity, and a railroad operated by a State agency is clearly entitled to sovereign immunity. Indeed, two interstate commuter railroads, the Hartford Line in Connecticut and Massachusetts and MARC Train in Maryland and West Virginia, operate in this manner. If Massachusetts or West Virginia haled either of those railroads into their own courts, there would, without question, be a direct conflict between the haling State and Connecticut or Maryland, respectively. It is therefore possible for a commuter railroad to be sufficiently intertwined with a State for a suit against

the railroad to impede the State’s sovereignty. The only way to know whether that is the case is to examine the State’s view of the railroad, as expressed through the State’s decision to constitute it like a sovereign entity or like something different.

**A. An Entity Is an Arm of the State  
Entitled to Interstate Sovereign  
Immunity if the State that Created It  
Sees It as Such.**

Interstate sovereign immunity exists because of the special status of States, and courts faced with questions relating to interstate sovereign immunity must account for that special status. A State’s “immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments.” *Alden v. Maine*, 527 U.S. 706, 713 (1999). As a general matter, that immunity exists because “[t]he suability of a State without its consent was a thing unknown to the law.” *Hans v. Louisiana*, 134 U.S. 1, 16 (1890). A State is, accordingly, immune from suit in federal court, *id.* at 18–19, immune from suit in State court based on federally created causes of action, *Alden*, 527 U.S. at 712, and immune from suit in the courts of other States, *Franchise Tax Bd. of Cal. v. Hyatt*, 587 U.S. 230, 233 (2019). Portions of that immunity are codified in the Eleventh Amendment, but “the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment.” *Alden*, 527 U.S. at 713.

The broad applicability of the general rule that States enjoy immunity from suits to which they do not

consent masks the fact that different types of sovereign immunity have different historical roots. Sovereign immunity derives from two Founding-era doctrines: “common law sovereign immunity” and “law-of-nations sovereign immunity.” *Hyatt*, 587 U.S. at 238. As this Court explained, “[t]he 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.’” *Id.* at 238–39 (quoting 1 W. Blackstone, *Commentaries on the Laws of England* 235 (1765)). By contrast, “[t]he law-of-nations rule followed from the ‘perfect equality and absolute independence of sovereigns’ under . . . international law.” *Id.* at 239 (quoting *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812)). Although the result under each doctrine was the same—the sovereign was immune from suit—the reasons why were different. The Court’s decisions developing each type of sovereign immunity have reflected those historic differences. *Compare id.* at 239–40 (discussing international law cases and principles known to the founding generation), *with Alden*, 527 U.S. at 741–42 (discussing historical practice regarding suits brought by vassals against lords).

Interstate sovereign immunity derives from law-of-nations sovereign immunity. Prior to ratification, the States related to each other as foreign sovereigns. *Hyatt*, 587 U.S. at 245. The sovereignty of one State limited the sovereignty of another by preventing the latter State from haling the former into its courts without the former’s consent. *Id.* Still, there was no formal mechanism preventing a State from declining to recognize another’s sovereignty. The Constitution sought to prevent such “direct conflict[s]” between

States and channel them into particular fora. *Id.* at 246–47. To accomplish that goal, the Constitution “implicitly strip[ped] States of any power they once had to refuse each other sovereign immunity, just as it denie[d] them the power to resolve border disputes by political means.” *Id.* at 247. So, in the federal system, interstate sovereign immunity was maintained as a tool to force States to respect each other as coequal sovereigns. Courts implementing the doctrine should further that aim by preventing “direct conflict” between States.

Coequal sovereign States may come into conflict because of any one of numerous factors. The dispute may concern a State’s financial obligations to another State or its citizens, but it may not. Indeed, the Court’s docket is full of disputes between State parties over nonmonetary issues. In recent years, these have included the certification of federal election results, a State’s participation in an interstate compact, boundary lines, water rights, and the constitutionality of federal statutes. *See, e.g., Texas v. New Mexico*, 602 U.S. 943 (2024); *New York v. New Jersey*, 598 U.S. 218 (2023); *California v. Texas*, 593 U.S. 659 (2021); *Texas v. Pennsylvania*, 141 S. Ct. 1230 (2020). Interstate sovereign immunity prevented the plaintiff States in each of these cases from haling the defendant States into the plaintiff’s own courts, notwithstanding that none of these disputes would have resulted in a judgment against the State. Instead, each dispute was brought before the appropriate forum—this Court.

Therefore, to accomplish the aims of interstate sovereign immunity and redirect disputes between States out of one State’s courts, the arm of the State doctrine must look more broadly than a State’s

financial culpability. Instead, the doctrine must look to whether there is a direct conflict between two States or a State's dignity interest is at risk. That is a question for the States themselves. If a State believes it is in a direct conflict with another State, then for all practical purposes it is, because the State will act as if it is. That is the nature of State sovereignty.

**B. An Entity is an Arm of the State if It  
Enjoys the Immunities and Bears the  
Mandates of a State.**

The conclusion that an entity's status as an arm of the State is determined by the State's classification of the entity raises another question: What specific statutory provisions define an entity as an arm of the State? When an entity is an "agency of a State" or a State "agency," the answer is clear, because State legislators have always acted with the expectation that such an agency shares in the State's sovereignty; a designation as an "agency" is sufficient but not necessary for arm-of-the-State status.

Certain other types of entities require a deeper look. For those entities, three particular indicators of a State's intent are most useful in determining whether an entity is an arm of the State because they demonstrate whether the entity enjoys the privileges of sovereignty: immunity from suit, immunity from taxation, and a mandate to serve a broad public purpose.

First, the best indicator of whether a State would like to extend interstate sovereign immunity to an entity is whether a State *has* extended sovereign immunity to an entity. NJ TRANSIT, like many commuter railroads, is afforded the same protections

from suit as the State of New Jersey under New Jersey law. *See Muhammad v. N.J. Transit*, 821 A.2d 1148, 1153 (N.J. 2003); *see also Harrison v. Mass. Bay Transp. Auth.*, 195 N.E.3d 914, 921 (Mass. App. Ct. 2022). The State itself sees NJ TRANSIT as an arm of the State, and federal courts should not disturb that judgment. That rule should apply broadly. This approach provides a standard, straightforward measure to gauge a State’s intentions.

The Court has previously recognized the usefulness of looking to a State’s own liability scheme. One of the foundational decisions establishing the susceptibility of counties to suit relied on the fact that the constitution of the State whose immunity the defendant county sought to claim “explicitly provide[d] for the liability of counties to suit.” *Lincoln Cnty. v. Luning*, 133 U.S. 529, 530 (1890). And a decision denying sovereign immunity to a school district likewise relied on the fact that the school district was not provided the same protection as the State under the State’s tort claims statute. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977) (citing Ohio Rev. Code Ann. § 2743.01 (1975)).

While State statutory schemes may also extend the same immunity to municipalities under tort claims acts that States and State-created entities enjoy,<sup>3</sup> the indicator is still useful. When a State defines the scope of a new public entity’s immunity from suit, it has the power to determine if the entity is an arm of the State. A State’s choice to extend the State’s

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<sup>3</sup> New Jersey is one such State: It provides NJ TRANSIT the same protection from liability that it provides to “any county [or] municipality.” N.J. Stat. Ann. 59:1-3.

immunity to the public entity in a tort claims act is an indicator that the State would like to extend that immunity. States may also prefer to provide their municipalities with sovereign immunity, but are unable to do so because of the historical practice otherwise. *Lincoln Cnty.*, 133 U.S. at 530 (describing a “general acquiescence” to suits against counties). Moreover, an interstate suit against a municipality could not be considered an affront to a State’s dignity or sovereignty, given the historical acceptance of such suits. That is not the case with potential arms of the State. An immunity act is therefore an expression of whom the State would like to protect, and, when filtered through the lens of historical practice, a useful indicator of where the State may see a risk of a direct conflict with another State.

The second useful indicator is whether the State allows the entity to hold other immunities held by the State. Again, the State of New Jersey is explicit on this point: It has determined that NJ TRANSIT property is exempt from State or local taxation because it is treated as State property. N.J. Stat. Ann. § 27:25-16. Immunity from taxation is an essential attribute of sovereignty, *see McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), and New Jersey is particularly clear that NJ TRANSIT’s immunity is an extension of New Jersey’s own. By conveying that immunity, the State of New Jersey has indicated that NJ TRANSIT has powers derived from its status as part of the State. That immunity indicates that NJ TRANSIT is an arm of the State entitled to the protections of sovereign immunity.

The third and final useful indicator stems from the statement of purpose that the entity serves. New Jersey has indicated that, despite NJ TRANSIT’s

separate corporate existence, it serves an “essential public purpose” and “exercise[s] public and essential governmental functions.” N.J. Stat. Ann. §§ 27:25-2(a), -4(a). That descriptor differentiates NJ TRANSIT from local governments that are not arms of the State. Local governments are expected to act parochially. Indeed, parochialism is a notable feature of local government law in the United States. See generally Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 Colum. L. Rev. 1 (1990). The State, however, acts for the benefit of all of its citizens. So when a State-created entity is not directed to serve solely municipal functions or purposes, it is likely acting as an arm of the State, rather than as a local government.

Some state statutes explicitly tie a mandate to act for a broad public purpose to other attributes of sovereignty. For example, New York gives the Metropolitan Transit Authority, which operates Metro-North Railroad and the Long Island Rail Road, exemption from taxation premised on a finding that the authority “perform[s] an essential governmental function” “for the benefit of the people of the state of New York and for the improvement of their health, welfare and prosperity.” N.Y. Pub. Auth. Law § 1275. Similarly, the immunity from taxation of the Northern Indiana Commuter Transportation District stems from the fact that it performs “essential governmental functions” “for the benefit of the people of Indiana.” Ind. Code § 8-5-15-16.

In sum, what matters is the attributes of the entity that the State has established. When a State has created an entity that looks like the State with respect to sovereignty, because it enjoys the immunities of the State and fulfills a broad public purpose or serves the

general welfare of the State, it is an arm of the State for purposes of interstate sovereign immunity. Regardless of a State's formal liability for a judgment against such an entity, a State would see a suit against the entity as a suit against the State itself.

**C. Labels Such as “Municipal Corporation” and “Political Subdivision” Do Not Prevent an Entity from Being an Arm of the State.**

When States create entities, they typically classify that entity as a particular type, such as an “instrumentality,” “corporation,” or “political subdivision.” It may seem appealing to conclude that, just as a state “agency” is necessarily an arm of the State, a “political subdivision” or similar entity is not.

But that approach risks finding State legislative intention where there is none. A State may use language to label an entity that has an imprecise meaning, or different meanings to different States. For example, the terms “political subdivision” or “instrumentality” may have different implications under the laws of different States. *See, e.g., Mt. Healthy*, 429 U.S. at 280 (“Under Ohio law the ‘State’ does not include ‘political subdivisions’ . . .”). State legislatures likely choose what to label entities they create based on those State-law implications, without regard for the implications of interstate sovereign immunity. That is particularly so of commuter railroads in the United States, as many of them were created during the 40 years when *Nevada v. Hall*, 440 U.S. 410 (1979), was good law. At that time, no State or State-created entity could enjoy interstate sovereign immunity. A State that created a commuter railroad or other entity between 1979 and 2019 was

not considering whether it wished to extend interstate sovereign immunity to the entity, because there was no immunity to extend.<sup>4</sup>

So, State legislatures would choose a label for an entity based on other priorities. In particular, State legislatures may classify entities as political subdivisions to make clear that the State is not formally liable for judgments against an entity. Placing dispositive weight on such a label would therefore effectively mean adopting as a controlling factor a State's formal liability for judgments against an entity. For the reasons expressed herein, *see infra* Section II.A, the Court should not adopt that factor as controlling. That requires finding that some "political subdivisions," "local governments," and "municipal corporations" may be arms of the State.

Moreover, States enjoy the freedom to structure public entities the way they see fit, waiving only certain rights inherent to the State. There is no reason it should be beyond a State's power to create an entity that enjoys only some of the State's privileges, but not all. Allowing States to do so provides States with flexibility to develop different solutions to problems. States, of course, cannot structure a public entity to escape the obligations imposed on them by the U.S. Constitution. But liability is not such an obligation. Instead of refusing to inquire whether a "local government" is an arm of

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<sup>4</sup> With that said, since 2019, State legislatures, insurers, and commuter railroads themselves have acted on the assumption that railroads enjoy sovereign immunity as arms of the state. A decision holding that NJ TRANSIT does not enjoy that immunity would cause significant disruption in this industry and in associated insurance markets.

a State, the Court should look instead to whether other attributes of the “local government” indicate that the State treats it as part of a sovereign. That does not change the result in NJ TRANSIT’s case, because NJ TRANSIT is an “instrumentality” of New Jersey. N.J. Stat. Ann. § 27:25-4(a). In other cases, however, it will ensure that a reviewing court hews closely to a State’s intent.

## **II. Other Tests and Factors Fail to Account for the Reasons Behind Interstate Sovereign Immunity.**

The principal other factors and tests used by the State supreme courts and the plaintiffs below to determine whether NJ TRANSIT is an arm of the State fail to accurately measure whether a suit against a public entity outside of its home State would offend its home State’s dignity interests or bring two States into direct conflict. First, arm-of-the-State status does not turn on a State’s formal liability for the debts of the entity in question. Holding otherwise would wrongfully privilege pecuniary harms over dignity-based harms and would ignore the informal but real pecuniary obligations States undertake with respect to entities that are formally financially independent. Second, a judge in one State should not be free to impose his or her view on what a “core governmental function” is on the government of another State that may answer the question differently. Moreover, any attempt to formulate an objective definition of the concept of a “core governmental function” is doomed to failure.

**A. Whether an Entity Is an Arm of the State Should Not Turn on Whether a Judgment Against an Entity Impacts the State Treasury.**

The suggestion by the plaintiffs below and the majority opinion of the New York Court of Appeals that courts should consider the impact of claims against an entity on the State treasury both misunderstands the important interests underlying sovereign immunity and ignores the relationship between States and the entities they create to fulfill State priorities. There are four reasons why the Court should not look to the impact on a State treasury to determine whether an entity is an arm of the State. Two of these reasons stem from this Court's sovereign immunity jurisprudence, while the other two stem from facts particular to commuter railroads. Those latter facts help demonstrate broader pitfalls of relying heavily on a State's financial obligations when assessing arm-of-the-State status. To be sure, a State's obligation for a judgment is a "*sufficient* condition for sovereign immunity" given a State's interest in its fisc, but it is not a "*necessary* condition." *P.R. Ports Auth. v. Fed. Maritime Comm'n*, 531 F.3d 868, 879 (D.C. Cir. 2008).

*First*, focusing on State finances fails to respect State dignity and sovereignty interests. As discussed above, interstate sovereign immunity is designed to prevent any direct conflict between the States from reaching an inappropriate forum. *Hyatt*, 587 U.S. at 246–47. States have interests that go beyond their treasuries. A State may believe it is in direct conflict with another State if an entity it creates is sued in that other State, regardless of the State's ultimate

financial responsibility for a judgment against the entity. So, the doctrine of interstate sovereign immunity would be ineffective if it failed to reach entities of significant importance to the State solely because the entity's debts were not debts of the State. Only by looking to the State's characterization and treatment of an entity it created can a court be sure of how the State will view the entity.

*Second*, in no other context is sovereign immunity determined solely by a State's financial responsibility to bear a judgment. Sovereign immunity bars actions against a State for injunctive relief. *Cory v. White*, 457 U.S. 85, 90–91 (1982). Even Eleventh Amendment immunity—which is less clearly rooted in State dignity interests than interstate sovereign immunity—“applies regardless of the nature of the relief sought.” *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100–01 (1984) (citing *Missouri v. Fiske*, 290 U.S. 18, 27 (1933)). Sovereign immunity exists because the States are sovereign, not because the federal system has a particular concern for State treasuries. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 60 (1994) (O'Connor, J., dissenting). Nor does the mere fact that a State will expend funds to defend a public entity make that entity an arm of the State. Indeed, NJ TRANSIT's use of the New Jersey Attorney General as counsel forces the State to expend funds to defend this suit, but no one suggests that a State's Attorney General can unilaterally extend sovereign immunity to any entity by taking on its defense. Financial responsibility has never been dispositive.

Even *Hess*, the case in which this Court relied most strongly on the financial links (or lack thereof) between a State and another entity, limited its

reasoning in such a way as to make it inapplicable here. The question in *Hess* was whether a public transportation authority created by an interstate compact was “cloaked with the Eleventh Amendment immunity that a State enjoys.” *Id.* at 32–33. That specific question mattered because the outcome was based on the Court’s conclusion that “the impetus for the Eleventh Amendment” was “the prevention of federal-court judgments that must be paid out of a State’s treasury.” *Id.* at 48. *Hess* did not make the same holding with regard to interstate sovereign immunity. Nor could it have, given the different purposes underlying that doctrine, namely the channeling of State conflicts outside of one State’s courts. *Hess* therefore has little to say about the cases before the Court now, any interstate sovereign immunity case, or the Court’s historic methods of analyzing a judgment’s impact on a State.

*Third*, as a practical matter, the financial barriers between a State and the commuter railroad it creates are illusory. Commuter railroads are simply too important to the regions they serve for a State to allow the railroad to default. The failure of a commuter railroad would have catastrophic effects on a region and its businesses. A significant proportion of workers would be deprived of their routes to work or would turn to the roadways, causing intense congestion. Indeed, States understand the importance of commuter railroads to their economies and have generally ensured they have substantial control over their commuter railroads.<sup>5</sup>

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<sup>5</sup> Commuter railroads, even when they are not formally State entities, are effectively under State control. State officers serve

This is indicative of a broader trend regarding the relationship between States and other public entities within them: States have a vested interest in ensuring the sound financial footing of other public bodies, and will generally expend funds as needed to ensure it.<sup>6</sup> A State can and will effectively backstop another public body without formally pledging its full faith and credit. Indeed, there is a lengthy history of public financial aid to railroads—State aid can be expected because State aid to railroads is a constant feature throughout American history.<sup>7</sup>

The Court has historically recognized that informal financial links between a State and a non-State entity matter in determining whether the State has sovereign immunity. Such is the message of the Court’s line of precedent applying the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908). The Court determined in *Ex Parte Young* and its progeny that a suit seeking injunctive relief against a State officer is typically not a suit against a State barred by the State’s sovereign immunity, because a State officer

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as or appoint many commuter railroad executives or controlling blocs of other railroads’ governing boards. *See, e.g.*, Ind. Code §§ 8-5-15-1, 8-5-15-3; Mass. Gen. Laws ch. 161A, § 7(a); N.Y. Pub. Auth. Law § 1263(1)(a), (4)(a); 74 Pa. Cons. Stat. § 1713(a). States both rely on their commuter railroads to efficiently move people in and out of major cities and implement other policy priorities through their commuter railroads. For example, there is active ongoing litigation regarding immigration enforcement on commuter railroads. *See California v. Dep’t of Transp.*, No. 25-cv-208, 2025 WL 1711531, 2025 U.S. Dist. LEXIS 117033 (D.R.I. June 19, 2025).

<sup>6</sup> DAVID SCHLEICHER, IN A BAD STATE: RESPONDING TO STATE AND LOCAL BUDGET CRISES 31, 70–72, 97, 98, 177–78 n.23 (2023).

<sup>7</sup> JAMES W. ELY, JR., RAILROADS AND AMERICAN LAW 19–30 (2001).

carrying out an unconstitutional action cannot be authorized by the State. *Id.* at 102. Conversely, “a suit by private parties seeking to impose a liability which must be paid from public funds in the State treasury is barred by the Eleventh Amendment,” regardless of who is named as the defendant. *Edelman v. Jordan*, 415 U.S. 651, 663 (1974).

But there is a nuance to the doctrine reflecting a practical view of State financial liabilities: A suit for retroactive injunctive relief that “requires the payment of a very substantial amount of money which . . . should have been paid, but was not,” is treated as a suit for damages. *Id.* at 664–65. If “funds to satisfy [an] award . . . must inevitably come from the general revenues of [a] State,” it is as if the State is liable itself. *Id.* at 665. That result reflects an understanding that State liabilities can arise without there being a monetary judgment against the State. Had the Court adopted a more formalist approach, it would have needed to adopt either one of two approaches: A State is liable only when a claim is directly against it (as in a suit for damages), or a State is liable whenever it expends money, even if it must do so to fulfill the requirements of prospective injunctive relief. Neither of those is the approach the Court adopted. Instead, it asked when the practical impact of a judgment will affect a State’s fisc. That practical approach should apply here too.

*Hess* is wholly consistent with this trend. The Court declined to grant immunity to a public transit authority created by an interstate compact because the authority was “structured . . . to be self-sustaining,” and its debts did not impact any State’s fisc. *Hess*, 513 U.S. at 50. Nonetheless, the Court acknowledged that public transit authorities could be

reliant on State funding, and therefore entitled to sovereign immunity, even if they were separately constituted such that the authority's debt was not a debt of a State. *Id.* at 49 (citing *Alaska Cargo Transp., Inc. v. Alaska R.R. Corp.*, 5 F.3d 378 (9th Cir. 1993); *Morris v. Washington Metro. Area Transit Auth.*, 781 F.2d 218 (D.C. Cir. 1986)). It therefore reflected the same pragmatic approach to State finances that has consistently animated the Court's decisions.

*Fourth*, many of the country's largest and busiest commuter railroads exist because States provided funding to them at a crucial moment to ensure their continued viability. States have already shown their willingness to backstop the finances of commuter railroads, despite a lack of formal responsibility to do so.

Commuter railroads as they exist today in the northeast and Midwest arose out of a series of statutes passed by Congress between 1970 and 1981. Prior to that period, private rail carriers operated commuter service. However, by 1970, the rail industry was in dire financial straits, in part due to rail carriers' obligation to provide unprofitable passenger service. In 1970, Congress relieved private carriers of their obligation to provide intercity service, *see* Rail Passenger Service Act of 1970, Pub. L. 91-518 (codified as amended at 45 U.S.C. §§ 501–651), but that was insufficient to prevent eight major railroads in the northeast and Midwest from entering bankruptcy proceedings in the following years.

In response, Congress enacted the Regional Rail Reorganization Act of 1973, Pub. L. 93-236, 87 Stat. 985 (codified as amended at 45 U.S.C. §§ 701–797m) (the "Reorganization Act"). The Reorganization Act

aimed to create a financially sustainable network of freight and passenger railroads in the Northeast and Midwest. *Nat’l R.R. Passenger Corp. v. Se. Penn. Transp. Auth.*, 56 F.4th 129, 131 (D.C. Cir. 2022) (“*Amtrak*”). To accomplish that goal, Congress created the Consolidated Rail Corporation (“Conrail”), a private, for-profit corporation whose majority owner was the United States. 45 U.S.C. § 741.

The Reorganization Act envisioned that the private rail carriers would no longer operate commuter rail service, which was then unprofitable. Instead, the commuter rail properties, including lines and equipment, would be transferred to Conrail. Conrail was authorized to acquire certain rail properties in the Northeast and Midwest, with those rail properties designated by a separate nonprofit (the United States Railway Association) through a process culminating in the “Final System Plan.” *Id.* §§ 716(c)(1)(A), 742. States or public transportation authorities were able to purchase or lease those properties from Conrail. *Id.* § 716(c)(1)(D). The Reorganization Act permitted State commuter authorities to operate commuter service themselves, through Conrail, or through a third party. Pub. L. 93-236, §§ 302(b), 304(c), 87 Stat. 985, 1005, 1009. Congress subsequently enacted the Railroad Revitalization and Regulatory Reform Act of 1976, which implemented the Final System Plan. Pub. L. 94-210, 90 Stat. 31.

But Conrail fared no better than its private predecessors. It, too, was unable to provide commuter railroad service in a financially sustainable manner. *Amtrak*, 56 F.4th at 132. Accordingly, in the Northeast Rail Service Act of 1981, Pub. L. 97-35, 95 Stat. 643, Congress terminated Conrail’s legal duty to operate commuter services and required Conrail to

transfer its “commuter service responsibilities to one or more entities whose principal purpose is the provision of commuter service” by January 1, 1983, which meant either a commuter railroad or an ill-fated Amtrak subsidiary that never became operational, *id.* § 1133, 95 Stat. at 644–45. So, States and the public authorities that they created took ownership of the commuter railroads, because, despite their lack of profitability, commuter railroads were essential.

By 1983, the modern system of commuter rail had emerged, with States and new commuter rail agencies in the least advantageous position. Private carriers and the United States had shed unprofitable commuter service when Conrail agreed to acquire them, and the United States had done the same and passed the services on to States and State-created commuter authorities. The private carriers had struck a bargain with the United States regarding their intercity services, which is today reflected in Amtrak’s statutory right to dispatching preference over freight rail and its right to access any rail carrier’s facilities, even over the rail carrier’s objection. *See* 49 U.S.C. § 24308(a), (c).

But no such bargain was struck with the commuter operators. When Conrail shed its commuter services, commuter railroads began operating without either Amtrak’s statutory rights or the profit centers held by the freight carriers, with limited exceptions. States took those services on nonetheless, because the regions the commuter railroads served depended on those railroads to function.

In the present cases, a transportation agency that provides commuter rail service is seeking to keep a

benefit afforded to it because of its status as part of a State. It would be unfortunately ironic to strip the agency of that benefit because its debts are not debts of the State, given that New Jersey has already demonstrated its willingness to bail out NJ TRANSIT: It conducted such a bailout when it acquired what are now NJ TRANSIT's rail properties. Moreover, doing so would penalize New Jersey and the other states that have financially supported commuter railroads by increasing commuter railroads' costs—likely drastically so, in the case of insurance premiums—to the extent that further, sustained State aid becomes necessary.

**B. A Test Based on an Entity's Function  
Would Be Incoherent and Would Not  
Serve the Purposes of Interstate  
Sovereign Immunity.**

Interstate sovereign immunity is meant to foreclose an avenue for States to prosecute direct conflicts between them. Therefore, no test for arm-of-the-State status should invite a State to impose its own view of sovereignty and of State government on another's internal operations.

In the present cases, that conclusion requires that the Court reject a test proposed in the New York case that would award an arm of the State sovereign immunity only if it performed “a core governmental function to which sovereign immunity would have extended” “under customary international law and the common law.” *Colt v. N.J. Transit*, 43 N.Y.3d 463, 486 (2024) (Wilson, C.J., concurring). That test “would be impervious to the State's intent, the particular structure created by a State, or the potential magnitude of a judgment.” *Id.* Under that

test, NJ TRANSIT is not entitled to interstate sovereign immunity. *Id.* Such a test may likewise deny sovereign immunity to all commuter railroads on the basis that they do not perform a core governmental function.

The Court should reject this test for several reasons. Most importantly, the idea of a “core governmental function” works at cross-purposes to the doctrine of interstate sovereign immunity by inviting direct conflicts between States, rather than preventing them. States may have diverging views regarding what constitutes a core governmental function. Indeed, in the commuter rail context, certain States have chosen to operate commuter railroads through a State agency (as in Maryland and Connecticut) while others have chosen to constitute commuter railroads outside the State government (as in Indiana and Illinois). If a State that created a public entity understood it to be performing a core governmental function, while another State did not and, accordingly, haled the entity before its courts, a direct conflict would result: The creating State would understand itself as being subjected to judicial process in another State. This test mitigates direct conflicts only to the extent that States understand their own sovereignty in the same way as each other. There is no reason for one State’s view of what constitutes a “core governmental function” to prevail over the view of the State actually performing that function.

This test is also unworkable. It requires the drawing of incoherent lines, as this Court’s own experience with a “core governmental function test” shows. After a brief experiment, this Court wisely stepped away from attempting to distinguish between “traditional governmental functions” and

“nontraditional” ones. Drawing such a line, the Court concluded, “is not only unworkable but is also inconsistent with established principles of federalism.” *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985) (overruling *Nat’l League of Cities v. Usery*, 426 U.S. 833 (1976)). Indeed, the Court has attempted such an exercise more than once and never found the endeavor successful. *Id.* at 542–43.

The proposed new explication of the “core governmental function” test does not save the test from incoherency, as its application to commuter railroads demonstrates. That proposed explication would define “core governmental function” as encompassing only “functions that concern the essential existence and administration of a government *qua* government.” *Colt*, 43 N.Y.3d at 487 (Wilson, C.J., concurring). But transportation networks have been vital to national defense, and thus to maintaining the existence of sovereign governments since the Founding. During the Civil War, the Union’s victory was enabled in part by the army’s superior use of railroads to transport its soldiers and supplies.<sup>8</sup> Half a century later, the Panama Canal enabled the United States to reduce the threat of enemy naval power acting anywhere in its vicinity.<sup>9</sup> And in the mid-twentieth century, then-Vice President Richard Nixon characterized the interstate highway system as necessary to address

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<sup>8</sup> See JOHN ELWOOD CLARK, RAILROADS IN THE CIVIL WAR: THE IMPACT OF MANAGEMENT ON VICTORY AND DEFEAT 2–7, 18–31, 45–47, 57–62 (2001).

<sup>9</sup> See generally A.T. Mahan, *The Panama Canal and the Distribution of the Fleet*, 200 N. AM. REV. 406 (1914).

“the appalling inadequacies [of the then-existing road system] to meet the demands of catastrophe or defense, should an atomic war come.”<sup>10</sup> Transportation is integral to the maintenance of national sovereignty.

Moreover, railroads are often empowered to exercise obviously core governmental functions within their jurisdictions. Beginning in the mid-nineteenth century, State legislatures authorized *private* railroad companies to employ their own police officers who could arrest offenders for crimes on railroad property.<sup>11</sup> Today, commuter railroads around the country have dedicated police forces with the same powers as State and local police. Railroads have also historically exercised the power of eminent domain.<sup>12</sup>

A “core governmental functions” test premised on the “existence and administration of government” ignores this history. The notion that “core governmental functions” can be easily defined is an illusion that will promote interstate conflict. Rather than have a State judge impose that judge’s own notions of sovereignty and understanding of what is “core” on another State, State courts should defer to the duly enacted laws of the other State in determining whether an entity is entitled to the protections of sovereign immunity. After all, “[t]he essence of our federal system is that within the realm

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<sup>10</sup> *Address of Vice President Richard Nixon to the Governors Conference Lake George, New York July 12, 1954*, U.S. DEPT OF TRANSP.: FED. HIGHWAY ADMIN., <https://highways.dot.gov/highway-history/interstate-system/address-vice-president-richard-nixon-governors-conference-lake-0> (last updated June 30, 2023).

<sup>11</sup> ELY, *supra* note 7, at 155.

<sup>12</sup> *Id.* at 35–39; 189–98.

of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else — including the judiciary — deems state involvement to be.” *Garcia*, 469 U.S. at 546. “[T]he States cannot serve as laboratories for social and economic experiment if they must pay an added price when they meet the changing needs of their citizenry by taking up functions that an earlier day and a different society left in private hands.” *Id.* (internal citation omitted).

### CONCLUSION

The judgment of the Pennsylvania Supreme Court should be affirmed. The judgment of the New York Court of Appeals should be reversed.

Respectfully submitted,

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