Nos. 24-1021 and 24-1113

In the Supreme Court of the United States

CEDRIC GALETTE,

Petitioner,

v.

NEW JERSEY TRANSIT CORPORATION,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

(For Continuation of Caption, See Inside Cover).

BRIEF OF TEXAS, ALABAMA, ALASKA, ARKANSAS, FLORIDA, GEORGIA, IDAHO, INDIANA, IOWA, KANSAS, LOUISIANA, MICHIGAN, MINNESOTA, MISSISSIPPI, NEBRASKA, NEVADA, NORTH DAKOTA, OHIO, PENNSYLVANIA, SOUTH DAKOTA, TENNESSEE, VIRGINIA, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF NEW JERSEY TRANSIT PETITIONERS

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NEW JERSEY TRANSIT CORPORATION, ET AL.,

Petitioners,

v.

JEFFREY COLT, ET AL.,

Respondents.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF NEW YORK

QUESTION PRESENTED

Whether the New Jersey Transit Corporation is an arm of the State of New Jersey for interstate sovereign immunity purposes.

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INTEREST OF THE *AMICI* STATES

Amici are the States of Texas, Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Nebraska, Nevada, North Dakota, Ohio, Pennsylvania, South Dakota, Tennessee, Virginia, and Wyoming.[1] *Amici* States file this brief because few principles of law are more foundational to constitutional federalism than sovereign immunity. States have an interest in avoiding tests that disfavor sovereign immunity or create uncertainty through the unnecessary use of multifactor balancing tests. States can best exercise their police powers when the law is predictable.

Because many tests used to evaluate immunity guarantee unpredictability, *Amici* States submit this brief in support of New Jersey Transit Corporation (NJ Transit) and urge the Court to adopt an arm-of-the State test that accepts a State's characterization of its own entities that may be haled into the courts of another State. Under that rule, this would be an easy case because New Jersey has declared that NJ Transit is "an instrumentality of the State." N.J. Stat. § 27:25-4(a).

SUMMARY OF ARGUMENT

"After independence, the States considered themselves fully sovereign nations" protected by sovereign immunity. *Franchise Tax Bd. of Cal. v. Hyatt*, 587 U.S. 230, 237 (2019). And "as the Constitution's structure, its history, and the authoritative

[1] No counsel for any party authored this brief, in whole or in part. No person or entity other than amici contributed monetarily to its preparation or submission.

interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States . . . retain today." *Alden v. Maine*, 527 U.S. 706, 713 (1999). "The founding generation thus took as given that States could not be haled involuntarily before each other's courts." *Hyatt*, 587 U.S. at 239. "Consistent with this understanding of state sovereign immunity, this Court has held that the Constitution bars suits against nonconsenting States in a wide range of cases." *Id.* at 243–44 (collecting citations).

One such circumstance is that "one State" cannot "hale another into its courts without the latter's consent." *Id.* at 245. This principle of federalism is foundational. Unfortunately, judicial implementation has created significant confusion—particularly with respect to identifying which state-created entities are entitled to sovereign immunity. This question has led to a direct conflict between the highest courts of Pennsylvania and New York with respect to the same entity: NJ Transit.

The answer should be straightforward where, as here, a State has already decreed by statute that an entity is a state instrumentality. States organize themselves in a host of ways and assign similar functions to very different types of entities. States also take different approaches to handling certain activities through government or the private sector. Federalism allows different States to create systems best suited to their own circumstances and policy preferences, including whether to treat different entities as arms of the State for purposes of sovereign immunity. But if States cannot confidently predict what courts will do, the space for policy experimentation shrinks. Lawmakers may be forced to structure their government around mitigating litigation risk.

The factors used by both the Pennsylvania and New York courts illustrate the problem. Both courts balanced factors such as how the State defines the entity, the control the State exercises over the entity, and the effect on the State of a judgment against the entity. As the conflicting results in Pennsylvania and New York illustrate, this multifactor balancing test makes it difficult for States to predict whether an entity will enjoy sovereign immunity.

Amici States submit that state law should determine the scope of immunity enjoyed by state entities. In the same way that the federal government can, as this Court has held, endow a governmental corporation with immunity, States should similarly be allowed to extend immunity to entities created under state law. Any potential exception should be narrowly tailored to protect the sovereignty of the States in a predictable way.

Applying this test, NJ Transit should be entitled to immunity because New Jersey created NJ Transit and decreed by statute that it is "an instrumentality of the State," N.J. Stat. § 27:25-4(a).

If the Court does not hold that the law of the State claiming immunity is determinative, then at the very least a State's law designating the entity as an arm or instrumentality, or otherwise expressing a shared immunity with the entity, should create a strong presumption of immunity. Such laws should control unless rebutted by a compelling showing that a state-created entity's functions have no connection to the State's police powers.

If consideration of multiple "factors" is needed, this Court should indicate which are sufficient criteria to determine that an entity is an arm of the state. The presence of any other factor in favor of immunity along with

the presumption created by the State's law designating the entity as an arm or instrumentality should suffice. This approach is consistent with other tools courts use to protect the sovereignty of the States.

ARGUMENT

I. State Law Should Determine the Scope of Immunity of the Entities It Creates.

Sovereign immunity, by its nature, belongs to the sovereign. A sovereign is thus immune from suit except when it consents to be sued.

The importance of the sovereign managing its own immunity must be safeguarded in the courts. Any consent to be sued is strictly construed to avoid enlarging consent beyond what the sovereign intended. Strict construction applies to federal statutes waiving sovereign immunity of the federal government and is also used by federal courts to determine the extent to which a State has consented to suit in federal court. Similarly, Congress must unequivocally express its intent to abrogate immunity of the States.

Congress determines the scope of immunity that the federal government enjoys. "[T]he scope of immunity that federal corporations enjoy is up to Congress." *Thacker v. Tenn. Valley Auth.*, 587 U.S. 218, 226 (2019).

This rule should extend to the States as well. "In light of our constitutional system recognizing the essential sovereignty of the States," this Court should provide the States with "a reciprocal privilege." *Alden*, 527 U.S. at 749-50. Thus, the scope of immunity that a state-created entity possesses should be governed by that State's law, *i.e.*, its statutes as interpreted by its courts. Any

exception should be narrow and exist only to prevent a clear abuse in the context of interstate sovereign immunity.

A. This Court's precedents demonstrate that the sovereign controls the scope of its own immunity.

"A waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'" *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (quoting *United States v. King*, 395 U.S. 1, 4 (1969)); *see also Lane v. Pena*, 518 U.S. 187, 190 (1996); *Irwin v. Virginia*, 498 U.S. 89, 95 (1990). Over a century ago, this Court described as "an axiom of our jurisprudence" that "[t]he government is not liable to suit unless it consents thereto, and its liability in suit cannot be extended *beyond the plain language* of the statute authorizing it." *Price v. United States*, 174 U.S. 373, 375-76 (1899) (emphasis added). *Price* relies in part on *Schillinger v. United States*, which held:

> The United States cannot be sued in their courts without their consent, and in granting such consent congress has an absolute discretion to specify the cases and contingencies in which the liability of the government is submitted to the courts for judicial determination. *Beyond the letter of such consent the courts may not go*, no matter how beneficial they may deem, or in fact might be, their possession of a larger jurisdiction over the liabilities of the government.

155 U.S. 163, 166 (1894) (emphasis added).

As the Court explained in *United States v. Sherwood*, 312 U.S. 584, 590 (1941), because statutory consent to be sued "is a relinquishment of a sovereign immunity, [it]

must be strictly interpreted." Such consent must be strictly construed because of its importance and unequivocally expressed because of the sovereign's stewardship over its scope.

Similar tools protect the sovereignty of the States in the federal courts. "Thus, [this Court has] held that a State will be deemed to have waived its immunity 'only where stated by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.'" *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239-40 (1985) (second alteration in original) (quoting *Edelman v. Jordan*, 415 U.S. 651, 673 (1974)) (internal quotation omitted). For this reason, a state law creating a department that "is a body corporate with the capacity to sue and be sued" does not constitute "a waiver by the state of its constitutional immunity under the Eleventh Amendment from suit in federal court." *Fla. Dep't of Health & Rehabilitative Servs. v. Fla. Nursing Home Ass'n*, 450 U.S. 147, 149, 150 (1981) (per curiam) (internal quotations omitted).

"Likewise, in determining whether Congress in exercising its Fourteenth Amendment powers has abrogated the States' Eleventh Amendment immunity, [the Court has] required 'an unequivocal expression of congressional intent to overturn the constitutionally guaranteed immunity of the several States.'" *Atascadero State*, 473 U.S. at 240 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) (internal quotation omitted)). "This rule arises from a recognition of the important role played by the Eleventh Amendment and the broader principles that it reflects." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55-56 (1996).

All of these rules appropriately minimize the potential for intruding on the sovereignty of the federal government and the States.

B. Congress may confer immunity on entities it creates.

Consistent with the tools this Court uses to safeguard the federal government's control over its immunity as a sovereign, this Court has repeatedly held that Congress may decide the scope of immunity that federal corporations enjoy.

In the New Deal Era, this Court held that "Congress has full power to determine the extent to which [the Federal Land Banks] may be subjected to suit and judicial process," notwithstanding that the government-owned banks had "many of the characteristics of private business corporations." *Fed. Land Bank v. Priddy*, 295 U.S. 229, 231, 233 (1935). "Whether federal agencies are subjected to suit, and, if so, the extent to which they are amenable to judicial process, is thus a question of the congressional intent." *Id.* at 231; *see also Keifer & Keifer v. Reconstruction Fin. Corp.*, 306 U.S. 381, 389 (1939) ("Congress may, of course, endow a governmental corporation with the government's immunity. But always the question is: has it done so?").

Similarly, the Court held in *Federal Housing Administration v. Burr* that "there can be no doubt that Congress has full power to endow the Federal Housing Administration with the government's immunity from suit or to determine the extent to which it may be subjected to the judicial process." 309 U.S. 242, 244 (1940). This is true even where a government-owned corporation "is something of a hybrid, combining traditionally

governmental functions with typically commercial ones," *Thacker*, 587 U.S. at 221, as with the Tennessee Valley Authority (TVA) under review in *Thacker*.

In *Thacker*, the issue was the extent to which the "sue and be sued" clause applicable to the TVA waived its immunity. The Court determined that the nature of TVA's alleged negligent conduct as governmental or commercial was relevant to determine whether there was an implied exception to the sue-and-be-sued clause. *See id.* at 224-25, 229. "Without such a clause, the TVA (as an entity of the Federal Government) would have enjoyed sovereign immunity from suit." *Id.* at 221. "As this Court explained in *Burr*, the scope of immunity that federal corporations enjoy is up to Congress." *Id.* at 226.

This Court has not required a historical analog to a federal corporation or to activities performed by government at the time of the Founding in order for such entities to share in the federal government's sovereign immunity. Sovereign immunity turns entirely on the judgment of Congress.

C. Like Congress, States should determine the scope of immunity for entities they create.

This Court should adopt an identical rule for the sovereign immunity of state-created entities in the court of sister States.

In *Alden*, this Court held that the States retain immunity from suit in their own courts just as the federal government does. 527 U.S. at 749-50 (reasoning that because "the Federal Government retains its own immunity from suit not only in state tribunals but also in its own courts," and "[i]n light of our constitutional system recognizing the essential sovereignty of the States, we are

reluctant to conclude that the States are not entitled to a reciprocal privilege").

This same principle should apply when entities created by a State seek immunity in the courts of a sister State. *See* Robert H. Long Jr., *State Governmental Corporation Immunity from Federal Jurisdiction Under the Eleventh Amendment*, 72 Dick. L. Rev. 296, 304 (1968) ("It is difficult to see how state governmental corporations can be viewed as having a different relationship with their creators by the lower federal courts."). Following state law when it directly speaks to the issue is perhaps the only way to protect the State's dignity as sovereign. *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002) (*FMC*) ("The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities.").

"Dual sovereignty is a defining feature of our Nation's constitutional blueprint." *FMC*, 535 U.S. at 751 (citing *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991)). "States, upon ratification of the Constitution, did not consent to become mere appendages of the Federal Government." *Id.* "Rather, they entered the Union 'with their sovereignty intact.'" *Id.* (quoting *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991)). "An integral component of that 'residuary and inviolable sovereignty,' The Federalist No. 39, p. 245 (C. Rossiter ed. 1961) (J. Madison), retained by the States is their immunity from private suits." *Id.* at 751-52.

In 2019, the Court overruled *Nevada v. Hall*, 440 U.S. 410, 414 (1979), to restore the understanding that "interstate sovereign immunity is preserved in the constitutional design." *Hyatt*, 587 U.S. at 244. Interstate

sovereign immunity recognizes both the sovereignty of the States and limits on that sovereignty, particularly in their relationships to other States. "[T]he Constitution affirmatively altered the relationships between the States, so that they no longer relate to each other solely as foreign sovereigns." *Id.* at 245. The Court discussed several of these limitations, including that "Article I divests the States of the traditional diplomatic and military tools that foreign sovereigns possess" and limitations stemming from the Full Faith and Credit Clause and Privileges and Immunities Clause of Article IV of the Constitution. *Id.*

Hyatt determined that the "inability of one State to hale another into its courts without the latter's consent" is a constitutional limitation on the sovereignty of its sister States. *Id.* In other words, it is the sovereignty of the State being haled into the other State's courts that prevails. This was true even though *Hyatt*'s upholding of interstate sovereign immunity erased a jury verdict in Hyatt's favor after a 4-month trial on his claim that the California Franchise Tax Board committed intentional torts against him. 587 U.S. at 234-35.

Hyatt does not suggest that there is any limit on the immunity of a State from being haled into a sister State's courts. Consistent with the nature of the federal government's sovereignty, the sovereignty that allows the first State to decide whether it consents to suit in the sister State's courts also includes the power to decide which of the corporations created by it will share in its sovereign immunity. Because one State may not deny the sovereign immunity of another, it follows that one State's courts cannot determine an entity is *not* an arm or instrumentality of another State in contravention of the creating State's law.

In future cases, there may be narrow circumstances in which an exception would be necessary. *Hyatt* recognized that States may not deny other States' sovereignty under our constitutional system. 587 U.S. at 245. For example, one State accepting payment from a product manufacturer to declare it an arm of the State merely for the purpose of immunizing it from product liability law would not be a bona fide declaration of intent by that State. But any exceptions must be narrowly tailored so as not to swallow the rule and fail to adequately safeguard the sovereignty of the State. Absent indications of such an abuse—and there are no such indications here—state law should control.

This predictable rule serves federalism by allowing States to experiment with different structures of government. Because sovereign immunity "is a fundamental aspect of the sovereignty which the States enjoy[]," *Alden*, 527 U.S. at 713, the Court should at least adopt a predictable rule favoring a State's own characterization of the entities it creates. At a minimum, such a characterization should control so long as the entity performs a function within the broad scope of the State's police powers. Because a State could constitutionally vest such functions in an entity indisputably protected by sovereign immunity—like a governor or attorney general—there is no reason in law or logic why courts should second guess a State's vesting of those same functions in a different state entity. After all, under our Constitution, States decide for themselves how to organize governmental authority.

Because States can (and do) decide for themselves how to allocate executive authority, it is a recipe for confusion for out-of-state judges to attempt to define via multifactor balancing tests which entities are entitled to

immunity and which are not. States are too different from each other, and it is too easy for judges who are not familiar with the internal structuring of other States to err. *See, e.g.*, N.J.Br.32 (explaining "state-law quirk" about why an agency may be independent of the department in which it sits). This analysis, moreover, should be unnecessary when the State itself has characterized its own entity. Because States know best what their own law requires and whether state-created entities wield sovereign authority, States are best positioned to say whether state-created entities are protected by the State's immunity. *Cf. Michigan v. Long*, 463 U.S. 1032, 1041 (1983) ("If the state court decision indicates clearly and expressly that [an independent and adequate state ground exists], we, of course, will not undertake to review the decision.").

Governments may exercise sovereign power directly or indirectly. *See, e.g.*, *PennEast Pipeline Co. v. New Jersey*, 594 U.S. 482, 496 (2021) ("Congress 'may, at its discretion, use its sovereign powers, directly or through a corporation created for that object . . . .'") (quoting *Luxton v. N. River Bridge Co.*, 153 U.S. 525, 530 (1894)). Forcing a State to perform sovereign acts through an entity with a particular structure upon the pain of losing (or at least risking the loss of) immunity is an unnecessary burden on flexibility and creativity. This Court should adopt rules that preserve and protect the States' abilities to structure their governments in different ways.

As discussed *supra*, pp. 5-7, adopting the rule urged by the States would comport with this Court's precedent more generally. This Court has "long recognized that a State's sovereign immunity is 'a personal privilege which it may waive at pleasure.'" *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666,

675 (1999) (quoting *Clark v. Barnard*, 108 U.S. 436, 447 (1883)). To prevent confusion on whether such a waiver has occurred, the Court's "'test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one.'" *Id.* (quoting *Atascadero*, 473 U.S. at 241). "Generally, [the Court] will find a waiver . . . if the State makes a 'clear declaration' that it intends to submit itself to [the Court's] jurisdiction." *Id.* at 675-76 (quoting *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944)). Put differently, States do not waive immunity without "unequivocally" saying so. *Pennhurst*, 465 U.S. at 99. Accordingly, a State does not "consent to suit in federal court merely by stating its intention to sue and be sued," *College Savings*, 527 U.S. at 676 (internal quotation marks omitted), and "a waiver of sovereign immunity 'will be strictly construed, in terms of its scope, in favor of the sovereign,'" *Sossamon v. Texas*, 563 U.S. 277, 285 & n.4 (2011) (quoting *Lane*, 518 U.S. at 192). Courts should not conclude that a State instrumentality lacks sovereign immunity absent an equally unequivocal expression from the State.

D. Cases from other contexts do not provide helpful guidance regarding the question presented.

Cases involving sovereign immunity in the context of the balance between the federal government and the States do not provide helpful guidance on the question of *interstate* sovereign immunity at issue here.

Although the circuit courts have "identified . . . an array of multifactor and multistep tests" to decide arm-of-the-state questions in the state sovereign immunity context, *Colt* Pet.App.11 (Court of Appeals of New York collecting cases), these cases concern immunity of a state in

the federal courts, where the balance between the sovereignty of the federal government and the States must be considered. But those considerations are inapposite here, where an entity created by one State seeks immunity in the courts of another State.

The tests developed by the federal courts also often rely on two cases from this Court dealing with so-called "bistate entities": *Hess* and *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979) and *Hess*. *See, e.g.*, *Fresenius Med. Care Cardiovascular Res. v. P.R. & the Caribbean Cardiovascular Ctr.*, 322 F.3d 56, 68-75 (1st Cir. 2003). Given considerations peculiar to bistate entities like the Tahoe Regional Planning Agency, which was "created by Compact between California and Nevada," *Lake Country*, 440 U.S. at 393, and the Port Authority Trans-Hudson Corp., "a bistate railway authorized by interstate compact," *Hess*, 513 U.S. at 32, this Court should not adopt these rules to determine whether an entity created by a single State as sovereign is an arm of that State.[2]

Similarly, this Court's cases involving counties, municipalities, or other political subdivisions are readily distinguishable. This case does not involve such political subdivisions, and the political subdivision cases dealt with suits in federal court or suits "authorized by federal law." *N. Ins. Co. of N.Y. v. Chatham County*, 547 U.S. 189, 193 (2006); *see, e.g.*, *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977) ("The bar of

[2] Even in *Lake Country*, the Court was looking for "good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves." 440 U.S. at 401. But there, the two states filed briefs disclaiming any intent to confer immunity and Congress would have had to agree to any intent to provide immunity. *Id.*

the Eleventh Amendment to suit in federal courts extends to States and state officials in appropriate circumstances, but does not extend to counties and similar municipal corporations." (internal citations omitted)); *Lincoln Cnty. v. Luning*, 133 U.S. 529, 530 (1890) (holding that the Eleventh Amendment did not prevent the county from being sued in federal court, and noting that "[t]he constitution of the state of Nevada explicitly provides for the liability of counties to suit"). Indeed, even though *Alden* cites *Mount Healthy* and *Lincoln County* as limiting state sovereign immunity, this was also in the context of a case about whether Congress had power under Article I to abrogate the States' sovereign immunity. *Alden*, 527 U.S. at 712.

Rather than following these cases from different circumstances, this Court should look to the law governing the application of federal sovereign immunity to entities created by Congress and hold that the States have this same power. *Cf. Springboards to Educ., Inc. v. McAllen Indep. Sch. Dist.*, 62 F.4th 174, 199 n.6 (5th Cir. 2023) (Oldham, J., concurring) ("The States are obviously free to cloak non-State entities with all manner of governmental immunities in *state* court, and as with almost everything in our federal system, the State need not follow federal standards in doing so.").

E. Following New Jersey law, NJ Transit is an arm of the State of New Jersey.

Under *Amici's* proposed test, resolution of this case is straightforward. New Jersey law designates NJ Transit "an instrumentality of the State exercising public and essential governmental functions." N.J. Stat. §27:25-4(a). The New Jersey Supreme Court, in reviewing a similar statute, described as "unassailable" the

conclusion that an entity created using such language is a state agency. *Infinity Broad. Corp. v. N.J. Meadowlands Comm'n*, 901 A.2d 312, 318 & n.2 (N.J. 2006); *see also* N.J.Br.21. New Jersey law should control. Section 27:25-4 is sufficient to resolve the question of immunity in another State's courts. There is no indication in these cases that New Jersey courts interpret this statute to mean that NJ Transit is not an arm of the State for immunity purposes. It is an affront to the sovereignty of New Jersey to have another State's courts declare, contrary to New Jersey's law, that NJ Transit is not an arm of the State of New Jersey.

II. Multi-factor Balancing Tests for Sovereign Immunity Create Uncertainty and Undermine Federalism by Reducing Policy Experimentation.

A multifactor balancing test for sovereign immunity reduces certainty and undermines federalism by restricting policy experimentation. The analysis used by the highest courts of Pennsylvania and New York exemplify the problems that arise when courts apply unpredictable tests even where state law expressly provides that an entity it created is an instrumentality of the State.

Sovereign immunity enables States to engage in the policy experimentation that is a hallmark of federalism—including whether and under what circumstances to waive sovereign immunity, as States often do. Absent such immunity, States would be less able to implement public preferences because lawmakers would be forced to speculate about potential liability rather than focus on innovation.

Sovereign immunity is a context in which predictable rules are especially valuable. Like other forms of immunity, sovereign immunity is immunity from suit, and the value of that immunity can be "effectively lost" if a State is forced to expend significant resources defending the immunity's applicability. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). That point alone counsels in favor of a clear and predictable rule respecting sovereign immunity where a State has characterized its own creations, so all parties can know in advance whether immunity exists. *See, e.g.*, Dan B. Dobbs et. al, The Law of Torts §252 (2d ed.) (explaining that immunities "tend to be—or at least judges want them to be—bright line rules that can intercept the claim early" and that the "value" of immunity from suit "is to save the defendant from the costs and uncertainties of a trial").

Equally important, the benefits of federalism are threatened by unpredictable sovereign-immunity tests. Clear rules allow States to focus on creating beneficial laws rather than avoiding litigation risk. This concern has special force where no one disputes that a State *could* craft a law such that those who implement it are protected by sovereign immunity—for instance, by vesting execution of the law in the governor's hands directly. Where immunity is permissible, everyone benefits if States know what they must do to safeguard—or knowingly waive—their immunity. The value of "predictable and precise rules" for sovereign immunity is apparent. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 759 (1998).

By their nature, however, multifactor balancing tests lead to unpredictability. *See, e.g.*, Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 Harv. L. Rev. 22, 65 (1992) (discussing Antonin Scalia, *The Rule of Law*

as a Law of Rules, 56 U. Chi. L. Rev. 1175 (1989)). This is particularly true when factors may receive different weights in different cases, or some factors point in different directions. *Cf. Axon Enter., Inc. v. FTC*, 598 U.S. 175, 207 (2023) (Gorsuch, J., concurring in judgment) ("[W]hat happens when the factors point in different directions, some in favor and others against immediate judicial review? No one knows. You get to *guess*."); *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 59 (1994) (O'Connor, J., dissenting) ("The Court wisely recognizes that [a] six-factor test . . . ostensibly a balancing scheme, provides meager guidance for lower courts when the factors point in different directions."). When a slew of factors are evaluated and weighed at once, it is more difficult to predict what a court will do. Such unpredictability hinders planning and may require lawmakers to change or jettison projects altogether or at least spend more time designing them to lessen litigation risk.

Given the importance of federalism, courts evaluating whether sovereign immunity is available should use clear rules rather than multifactor balancing tests whenever possible. Without predictable rules, States will be forced to expend more resources in program design, and States and private litigants alike will be forced to expend more resources in litigation. In worst-case scenarios, States will abandon projects altogether, not because they are not worthwhile or because sovereign immunity law could not protect their implementation, but because structuring the program to avoid litigation risk is too difficult. Sovereign immunity should safeguard the "critical flexibility in internal governance that is essential to sovereign authority." *Hess*, 513 U.S. at 62 (O'Connor, J., dissenting).

With a multifactor balancing test, arm-of-the-state determinations may be driven more by a disdain for sovereign immunity limiting remedies (or perhaps only venues) available to citizens, despite it being embedded in our constitutional system. This point also counsels in favor of a predictable rule. *See, e.g.*, Scalia, *The Rule of Law as a Law of Rules*, *supra*, at 1179–80 (explaining how rules "constrain" courts, and that "it displays more judicial restraint" to adopt a general rule "than to announce that, 'on balance,' we think the law was violated here—leaving ourselves free to say in the next case that, 'on balance,' it was not").

Finally, sovereign immunity is jurisdictional. *See, e.g.*, *United States v. Mitchell*, 463 U.S. 206, 212 (1983) ("[T]he existence of consent is a prerequisite for jurisdiction."). Because jurisdiction goes to a court's power to act and may determine whether litigation is even possible, "administrative simplicity is a major virtue." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). As this case confirms, multifactor balancing tests are not easily administered. By contrast, a rule focusing on what the State says about the entities it creates is straightforward.

The Court of Appeals of New York and the Supreme Court of Pennsylvania reached opposite conclusions regarding whether NJ Transit is protected by New Jersey's sovereign immunity. *Compare Colt* Pet.App.1-89 (rejecting immunity) *with Galette* Pet.App.1-24 (upholding it). Both courts used different multifactor balancing tests, which pose more questions than they answer and do not provide clear guidance for future cases.

In *Colt*, the majority of the New York Court of Appeals emphasized three factors: "(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." *Colt* Pet.App.13. The majority, however, also observed that judges "need not give equal weight to each consideration, and the underlying indicia may vary by case and from one party to another." *Id.*

The *Colt* majority determined that the first factor "leans toward according NJT sovereign immunity," *id.* at 16, noting among other things that New Jersey law "characterizes NJT as 'an instrumentality of the State exercising public and essential governmental functions,'" *id.* at 14. The court explained that the second factor "does not weigh heavily in either direction" because "NJT remains beholden to the state in some respects," but "exercises significant independence from New Jersey's control." *Id.* at 16-17. For the third factor, however, the court determined that New Jersey had "clearly disclaimed any legal liability for judgments against NJT, counseling against treating NJT as an arm of New Jersey." *Id.* at 18.[3] The court then explained its final "balancing" of these factors:

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[3] A State's attempt to shield the treasury from judgments against a state-created entity that it nonetheless considers an arm of the State should not weigh against immunity—at least because the uncertainty infecting the current legal landscape makes it entirely reasonable for a State to protect the treasury as best it can in case its law is not respected. Moreover, because "[h]ow power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself," *Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612 (1937), immunity cannot be foreclosed simply by a State "exercising its prerogative to creatively and effectively structure its governmental functions," with some state entities having more autonomy than others. Brief of *Amici Curiae* the States of Kansas et al. in Support of Petitioner at

> 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.

Id.

In *Galette*, the Pennsylvania Supreme Court reached the opposite conclusion but also used a balancing test.[4] Despite correctly acknowledging the "primacy" of the "expression of the sister State's intention in designing the entity in question," *Galette* Pet.App.17, the court reviewed six factors and concluded that three "weigh heavily in favor of concluding that NJ Transit is an arm of the

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16, *Missouri Higher Education Loan Authority v. Good*, No. 24-992 (U.S.) (filed Apr. 17, 2025). "This Court has affirmed that the preeminent purpose of state sovereign immunity is protecting a State's dignity, not its purse. As a legal matter *and as a practical matter*, a test that prioritizes the latter over the former cannot stand." *Id.* at 23.

[4] Specifically, the court considered the six-factor test from *Goldman v. Southeastern Pennsylvania Transportation Authority*, 57 A.3d 1154, 1179 (Pa. 2012): "(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." *Galette* Pet.App.4 (quoting *Galette v. NJ Transit*, 293 A.3d 649, 655 (Pa. Super. 2023)).

state of New Jersey," *id.*, while three others "to some extent indicate that NJ Transit is a separate entity from the State of New Jersey," *id.* at 20. The court ultimately concluded that "[a]s 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." *Id.* at 21.

Even a glance at *Colt* and *Galette*—as well as the lower court decisions in each—shows that there can be almost as many viewpoints on how to balance the totality of factors as there are judges to do the balancing. Even applying similar tests, jurists reach different results, which is unsurprising given the degree of latitude afforded by multifactor balancing tests. This unpredictability undermines federalism and weighs in favor of a predictable test.

CONCLUSION

The Court should hold that state law determines the scope of immunity shared by entities it creates, and that NJ Transit is therefore an arm of the state of New Jersey.

Respectfully submitted.

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