No. 24-1113

IN THE

Supreme Court of the United States

NEW JERSEY TRANSIT CORPORATION, ET AL.,

Petitioners,

v.

JEFFREY COLT AND BETSY TSAI,

Respondents.

On Writ of Certiorari to the
Court of Appeals of New York

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

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

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INTRODUCTION

Whether this Court looks to its Founding-era rule or its more recent decisions, NJ Transit Corporation is not an arm of the State of New Jersey. At the Founding, a corporation liable for its own judgments was not entitled to sovereign immunity—no matter its function or provenance and no matter how much a State funded or controlled the corporation. In recent decades, this Court has introduced other considerations into the analysis, ending up with a three-factor test. But the results have stayed the same: This Court has never granted sovereign immunity to any corporation liable for its own judgments. NJ Transit Corporation should not be the first.

Without support from history or precedent, NJ Transit Corporation is left to incant the word "dignity" (some two dozen times throughout its brief). But it's not clear how that incantation helps NJ Transit Corporation. To the extent it is arguing that "sovereign immunity protects each State from the indignity of being haled into another's courts" (Petr. Br. 1), everyone agrees. But that doesn't answer the question presented: *Is* NJ Transit Corporation the State? And to the extent it is arguing that "dignity" requires extending sovereign immunity to any entity the State intends (Petr. Br. 2), that surely proves too much. No one believes that the State could grant Johnson & Johnson immunity from suit all over the country simply because it was incorporated in New Jersey.

And whatever weight New Jersey's "dignity" holds in the analysis, New York's should hold at least as much. Granting NJ Transit Corporation sovereign immunity would allow it to run over a New Yorker outside the Port Authority Bus Terminal, rear end his car in Midtown, or sideswipe him as he bicycles near the Lincoln Tunnel—all without having to answer to New York's citizens in New York's courts. This Court should not lightly deprive New York of its dignity interest in providing a judicial forum for citizens harmed within its borders.

STATEMENT OF THE CASE

A. Legal background

1. The issue of state sovereign immunity was at the forefront of the constitutional debates. The several States agreed to relinquish their total sovereignty at the Founding. *See Franchise Tax Bd. of Cal. v. Hyatt* (*Hyatt III*), 139 S. Ct. 1485, 1495-96 (2019). However, the States—"heavily indebted as a result of the Revolutionary War"—feared that doing so would leave their treasuries vulnerable to creditors. *Alden v. Maine*, 527 U.S. 706, 716 (1999) (quoting *Nevada v. Hall*, 440 U.S. 410, 418 (1979)).

Beyond the pecuniary effects of suits on the States' coffers, the Framers worried about the indignity of haling a State into court—and about what would happen if the State refused to honor a judgment. The Federalist No. 81 (Alexander Hamilton). The Framers worried that if federal courts entertained creditor suits against the States, enforcing a judgment would require "waging war against the contracting State." *Id.* As a result, they decided the States should be "free from every constraint" but "good faith" in deciding when and how to repay their debts. *Id.*

The doctrine of state sovereign immunity—first from the common law and then from the Eleventh Amendment—assuaged those fears by insulating the state fisc from creditor suits and preventing States from being forced into court.

2. Almost right away, questions emerged about how far the State—and thus, how far sovereign immunity—extended. As the States in the newly created union began to experiment with chartering corporations to carry out government functions, courts soon had to decide whether those corporations were entitled to partake in the States' sovereign immunity.

a. A corporation is an entity legally separate from its creator. *See* 1 William Blackstone, Commentaries *463. At the Founding, as today, a corporation was a separate legal entity characterized by its own legal name, under which the corporation had the ability to "sue and be sued" and "do all legal acts"; hold property separately from its creator; and survive its creator in "perpetual succession." *See id.* at *462.

In the young Republic, corporations took many forms, ranging from banks to canal and turnpike companies to municipalities. But corporations—even those we'd think of today as private—were all creatures of the State, intended for a public purpose. Pauline Maier, *The Revolutionary Origins of the American Corporation*, 50 Wm. & Mary Q. 51, 53-55 (1993).

States relied on corporations precisely because corporations were legally separate from their creators. *See* Oliver Field, *Government Corporations: A*

Proposal, 48 Harv. L. Rev. 775, 777, 782-83, 793 (1935). Take state-created banks. The States needed a way for their citizens to borrow money, a mechanism for printing legal tender, and a source of revenue to grow their fledgling economies. *See* Christine Desan & Nathan Tankus, *Public Banking in the United States: Historical Lessons for Today*, 59 Willamette L. Rev. 331, 341-43 (2023). But Article 1, Section 10, of the Constitution—which bars States from issuing credit—prevented States themselves from carrying out those functions. U.S. Const. art. I, § 10. To get around that constitutional restriction, the States turned to the corporate form. Desan & Tankus, *supra*, at 343. This Court held that, because corporations were legally separate from States, they were not bound by Article 1, Section 10. *Id.*; *see Briscoe v. Bank of Ky.*, 36 (11 Pet.) U.S. 257, 327 (1837).

In the ensuing centuries, States continued to take advantage of the corporate form. For example, States used the corporate form to circumvent state constitutional debt limitations[1] or state civil service laws.[2] In each case, States took advantage of

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[1] *See, e.g.*, *Schulz v. State*, 84 N.Y.2d 231, 243-44, (1994); Lynn Wilson & Clayton Eichelberger, *New York State Public Authority Reform: Where We Have Come From and Where We Need To Go*, 11 Gov't L. & Pol'y J. 15, 16 (2009) ("Public Authorities in New York State were created primarily as a means to circumvent an 1846 constitutional amendment requiring voter approval of State debt.").

[2] *See, e.g.*, Jerome J. Shestack, *The Public Authority*, 105 U. Pa. L. Rev. 553, 564-65 (1957); Field, *supra*, at 777.

corporations' legal separateness to circumvent restrictions on the State itself.

b. The same corporate separateness that meant state-created entities were not bound by the strictures on the State also meant that they could not partake of the benefits of being a State—including, as relevant here, sovereign immunity. *Bank of Ky. v. Wister*, 27 U.S. (2 Pet.) 318, 323-24 (1829); *Bank of U.S. v. Planters' Bank of Ga.*, 22 U.S. (9 Wheat.) 904, 907-08 (1824) (Marshall, C.J.).

At the Founding, then, corporations "did not qualify as 'the State' for purposes of sovereign immunity." *Springboards to Educ., Inc. v. McAllen Indep. Sch. Dist.*, 62 F.4th 174, 195 (5th Cir. 2023) (Oldham, J., concurring); *see also Puerto Rico Ports Auth. v. Fed. Mar. Comm'n* (*PRPA*), 531 F.3d 868, 881 (D.C. Cir. 2008) (Williams, J., concurring) And that rule remained unchanged for the first two centuries of this nation's existence. *See Hopkins v. Clemson Agr. Coll. of S.C.*, 221 U.S. 636, 645 (1911) (surveying case law); *Lincoln Cnty. v. Luning*, 133 U.S. 529, 530 (1890). The only exception was where a judgment was directly enforceable against the State, such that relief "may render the state itself a necessary party." *PRPA*, 531 F.3d at 882 (Williams, J., concurring).

3. By the middle of the twentieth century, this rule had become less of a bright-line. Indeed, when this Court decided *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, in 1977, it "passed in silence" over the Founding-era rule. *PRPA*, 531 F.3d at 883 (Williams, J., concurring). In *Mt. Healthy,* this Court denied the petitioner school board sovereign immunity. 429 U.S. at 280. But rather than relying

solely on the school board's corporate status, this Court looked to a broader array of factors to conclude that "[o]n balance," the board was "more like a county or a city" than "an arm of the State." *Id.*

Over the subsequent decades, this Court's case law coalesced around three factors: the entity's structure, the degree of control exercised by the State over the entity, and whether a judgment against the entity must be paid from the state treasury. *See Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44-52 (1994). This Court has not attempted to reconcile its consideration of additional factors with the Founding-era rule. But the results of the three-factor test have been consistent with the test that prevailed for the first two centuries of the Republic: This Court still has never squarely held that a state-created corporation liable for its own debts is entitled to sovereign immunity.[3]

B. Background on NJ Transit Corporation

1. NJ Transit Corporation was formed in 1979 to acquire and operate the assets of various private rail and bus companies. *See How It All Began*, NJ Transit Corp., https://perma.cc/TA9P-DDGH (archived Nov. 11, 2025).

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[3] In cases where this Court has treated a state-created corporation as an arm of the State, the question presented has asked it to assume as much. *See, e.g.*, *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 432 (2017); *Coll. Savs. Bank v. Fla. Prepaid Postsec. Educ. Expense Bd.*, 527 U.S. 666, 671 (1999); *Fla. Prepaid Postsec. Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 632 n.3 (1999); *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305 (1990).

On the rail side, New Jersey was home to over 250 freight and passenger transport companies in the nineteenth century. N.J. Rail Sys., *New Jersey State Rail Plan*, 1-8 (Dec. 2012) (*Rail Plan*), https://perma.cc/3U2M-P9YX. By the 1960s, four players dominated the industry. *See id.* at 1-12 to 1-14. During this period, the State supported these private companies with financial subsidies and operational assistance. *See id.* at 1-19; *City of Bayonne v. Palmer*, 217 A.2d 141, 146 (N.J. 1966). In the 1970s, the private players' assets were consolidated into a quasi-private rail corporation, then taken over by various successor companies, including NJ Transit Corporation. *Rail Plan*, *supra*, at 1-14 to 1-17; The Wathen Group, A Case Study in Reimagining Transit for a Better Region 4 (2001) (*Reimagining Transit*), https://perma.cc/KX5N-9UZA.

The development of NJ Transit Corporation's bus footprint followed a similar trajectory. As with the passenger rail industry, New Jersey subsidized private commuter bus services throughout the 1970s. *See Reimagining Transit*, *supra*, at 6. By 1978, $35 million of the State's $50 million bus subsidy program was allocated to a single private carrier, Transport of New Jersey. *Id.* Shortly thereafter, the newly created NJ Transit Corporation purchased that carrier's bus assets. *Id.* at 12.

In the course of creating NJ Transit Corporation, New Jersey debated whether it should be part of the government or spun off into a separate legal entity. *See Reimagining Transit*, *supra*, at 9. It settled on the latter. Creating a discrete corporation allowed New Jersey to "differentiate the workforce" from "civil service/state government procedures," give NJ Transit

Corporation its own source of "steady and dependable funding," and "insulate" NJ Transit Corporation "from the short-term political interests that are often a factor in day-to-day State government." *Id.* at 10.

2. Today, NJ Transit Corporation provides commuter bus and rail services in New Jersey and neighboring States. *See About Us*, NJ Transit Corporation, https://perma.cc/8N9S-373Q (archived Nov. 11, 2025). It is structured as a "body corporate and politic," N.J. Stat. Ann. § 27:25-4(a), with wide latitude to undertake the actions necessary to carry out its purpose, *id.* § 27:25-5. NJ Transit Corporation has the power to "[s]ue and be sued"; "acquire," "hold," and "dispose" of property; "[s]et and collect fares, fees," and other payments; enter contracts; and "[m]ake and alter bylaws for its organization," "internal management," and "affairs and business." *Id.* § 27:25-5(a), (c), (j), (k), (n), (r). These powers are consistent with those accorded to private corporations under New Jersey law. *See id.* § 14a:3-1.

NJ Transit Corporation's board is comprised of thirteen members. N.J. Stat. Ann. § 27:25-4(b). The eleven voting members consist of three *ex officio* members and "eight public members who shall be appointed by the Governor," subject to various limitations. *Id.* The eight public board members as well as the two non-voting members may only be removed for cause. *Id.*

NJ Transit Corporation operates "independent of any supervision or control by" departments in New Jersey's executive branch. *See* N.J. Stat. Ann. § 27:25-4(a). The Corporation's board members are directed to exercise their "independent judgment" in carrying out their duties. *Id.* § 27:25-4.1(b)(1). While New Jersey's Governor has an opportunity to veto certain board decisions during a time-limited window, *id.* § 27:25-4(f), the State has no power to compel the Corporation or its board to take any action. *See id.* §§ 27:25-4, -4.1.

NJ Transit Corporation maintains financial operations distinct from those of the State of New Jersey. NJ Transit Corporation accrues substantial revenues from its operations, generating $758.3 million from passenger fares alone in 2024. *See* NJ Transit Corp., New Jersey Transit Corporation Annual Financial Report (Year Ended June 30, 2024), 9 tbl. A-2, https://perma.cc/7ZV5-QPKH (archived Nov. 11, 2025).

By statute, "[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 credit of the State." N.J. Stat. Ann. § 27:25-17. "All expenses incurred by the corporation" are only "payable from funds available to the corporation." *Id.*

C. Factual and procedural background

1. Nearly nine years ago, a NJ Transit Corporation bus struck and seriously injured respondent Jeffrey Colt, a New York resident, as he was crossing a street in New York City. Pet. App. 2a. Mr. Colt, who at the time was an attorney for homeless youth, was walking in midtown Manhattan on his way to see clients at his agency's mother-child shelter. Br. for Plaintiffs-Respondents at 6, *Colt v. New Jersey Transit Corp.*, 264 N.E.3d 774 (N.Y. 2024) (No. 72) (Resp. C.A. Br.).

Mr. Colt stepped into the street when the light turned green and the pedestrian "Walk" sign indicated it was safe to cross. Resp. C.A. Br. 6. The bus driver, Ana Hernandez, nonetheless drove into the crosswalk where Mr. Colt was walking. *Id.* at 7. The bus struck Mr. Colt and knocked him to the ground. Decision & Order on Mot. at 1-2, *Colt v. New Jersey Transit Corp.* (N.Y. Sup. Ct. Jan. 18, 2022) (No. 158309/2017) (Trial Court Order). Mr. Colt lost consciousness. *Id.* When he woke up he was lying on the street in excruciating pain. *Id.* He began screaming for help. *Id.* at 2. Several passersby ran toward the scene of the accident. *Id.* Mr. Colt asked one of the passersby to call his wife, respondent Betsy Tsai. *Id.* Mr. Colt was transported to the hospital. Resp. C.A. Br. 6.

The accident left Mr. Colt with life-changing and permanent injuries. Resp. C.A. Br. 6.

2. In September 2017, Mr. Colt and Ms. Tsai filed suit in a New York state court against NJ Transit Corporation and Hernandez for damages arising from the collision. Pet. App. 2a.

Two years later, this Court issued its decision in *Franchise Tax Board of California v. Hyatt* (*Hyatt III*), 139 S. Ct. 1485 (2019). That case held that state courts must respect sovereign immunity defenses raised by other States. *Id.* at 1498. More than one full year after *Hyatt III*, NJ Transit Corporation raised the sovereign immunity defense at issue here for the first time. Pet. App. 3a.

3. The trial court denied NJ Transit Corporation's motion on the grounds that it had waived any defense

of sovereign immunity by not raising it sooner. Pet. App. 3a.

NJ Transit Corporation appealed. It did not seek a stay pending appeal from the ruling. *See* Pet. App. 3a-4a. Litigation continued apace in the trial court. The trial court granted summary judgment in favor of Mr. Colt on the question of liability, finding NJ Transit Corporation and Hernandez were negligent and leaving only the question of damages for trial. *See* Trial Court Order, *supra*, at 6.

4. Meanwhile, the sovereign immunity question was litigated through New York's appellate courts. The Appellate Division affirmed the trial court on other grounds. Pet. App. 4a. It held that NJ Transit Corporation had not waived the defense of sovereign immunity but nonetheless concluded that granting the motion to dismiss would be "an affront to our sense of justice and cannot be countenanced" and held in Mr. Colt's favor. Pet. App. 100a. NJ Transit Corporation appealed again. Pet. App. 5a.

5. The Court of Appeals of New York affirmed on other grounds, holding that NJ Transit Corporation is not an arm of the State of New Jersey. Pet. App. 2a. Canvassing this Court's modern case law and the practice across the federal circuits, the Court of Appeals identified three factors relevant to the arm-of-the-state analysis: "(1) how the State defines the entity and its functions, (2) the State's power to direct the entity's conduct, and (3) the effect on the State of a judgment against the entity." *Id.* at 10a-13a.

The court examined a raft of "conflict[ing]" evidence regarding the first factor. Pet. App. 14a-15a.

While the court acknowledged that several indicia counseled against holding NJ Transit Corporation to be an arm of the State, it concluded that the factor "lean[ed]" toward sovereign immunity. *Id.* 16a. Finding the evidence on the second factor even more mixed, the court held that control "does not weigh heavily in either direction." *Id.* 17a. The final factor, however, was decisive. The court held that because the State of New Jersey disclaimed "legal liability or ultimate financial responsibility for a judgment" against NJ Transit Corporation, NJ Transit Corporation was not an arm of the State. *Id.* 18a.

Judge Halligan wrote a concurring opinion expressing skepticism that the "nebulous concept of State dignity is useful in determining what types of non-state entities may invoke sovereign immunity." Pet. App. 22a-23a. She agreed with the majority's application of this Court's arm-of-the-state test. *Id.* Chief Judge Wilson, also concurring, concluded that NJ Transit Corporation did not receive protection under interstate sovereign immunity because it committed a tort against Mr. Colt in the exercise of a commercial function beyond its territorial boundaries. *Id.* 33a-35a. Judge Rivera, the lone dissenter, looked to the same factors as the majority but concluded they pointed in favor of sovereign immunity. *Id.* 72a.

SUMMARY OF THE ARGUMENT

NJ Transit Corporation is not an arm of the State of New Jersey. This conclusion is grounded in principles established at the Founding and reaffirmed by this Court's modern precedents: Although this Court's analysis has changed over time, it has never granted sovereign immunity to an entity like NJ

Transit Corporation—a corporation whose liabilities the State has explicitly disclaimed. NJ Transit Corporation provides no good reason to depart from this Court's centuries-old practice.

I. At the time of the Founding and through the middle of the twentieth century, corporations—even corporations created, controlled, owned, and funded by States—were not entitled to sovereign immunity.

A. The Founders understood that there was a sharp distinction between sovereigns, which enjoyed immunity, and corporations, which are separate legal persons liable for their own actions and debts.

Thus, when States used corporations to evade some of the restrictions that applied to States, that decision came with consequences: If corporations were not part of the State for purposes of those limitations, they also weren't part of the State for purposes of the benefits that inure to States, such as sovereign immunity. Beginning under Chief Justice Marshall, this Court declined to extend state sovereign immunity to corporations, even when they were fully owned and controlled by a State. The only exception was when a judgment was directly enforceable against the State, such that the State was the real party in interest.

Under the Founding-era rule, this case is easy: NJ Transit Corporation is not entitled to state sovereign immunity. NJ Transit Corporation is, of course, a corporation. And because New Jersey has expressly disclaimed liability for judgments against NJ Transit Corporation, the narrow real-party-in-interest exception does not apply.

B. NJ Transit Corporation fails to identify a single Founding-era case in which the Court extended sovereign immunity to a corporation liable to pay its own judgments. Instead, NJ Transit Corporation relies on inapposite cases that either do not concern sovereign immunity at all or involve the immunity of foreign or federal entities, rather than state entities.

NJ Transit Corporation ultimately resorts to policy arguments, pointing to a subset of state-created corporations, like the Louisiana Cabinet, that it suggests would not be entitled to immunity under the Founding-era test. But many of NJ Transit Corporation's examples fall within the real-party-in-interest exception to the Founding-era test because the relevant States, unlike New Jersey, remain liable for judgments against those bodies.

II. The analysis under this Court's modern arm-of-the-state test takes a different approach but reaches the same result: NJ Transit Corporation is not an arm of the State. The modern framework consists of a three-factor test that examines (1) the structure of the entity, (2) the degree of control exercised by the State over the entity, and (3) whether a judgment against the entity must be paid from the state treasury. Under that three-factor test, NJ Transit Corporation is not entitled to sovereign immunity.

A. NJ Transit Corporation's structure indicates that it is not entitled to immunity. New Jersey chose to structure NJ Transit Corporation as a corporate entity. It gave NJ Transit Corporation the core characteristics of other corporations under New Jersey law, including the power to sue and be sued and to hold property in its own name. NJ Transit Corporation's powers, duties, and functions resemble those of a municipality or private company, neither of which is entitled to sovereign immunity. And in state laws such as the New Jersey Tort Claims Act, which lays out the terms of the State's sovereign immunity for purposes of tort liability, the New Jersey legislature chose to exclude NJ Transit Corporation from its definition of the "State."

NJ Transit Corporation argues that this Court should, in the name of "dignity," ignore that evidence. But New Jersey's dignity cannot be offended by honoring the State's own choice to structure NJ Transit Corporation as a legally separate entity.

B. New Jersey's level of control over NJ Transit Corporation is well below any level that might counsel in favor of sovereign immunity. New Jersey lacks any power to affirmatively direct NJ Transit Corporation to take particular actions. Nor can it fire the Corporation's board members at will. The State's control over NJ Transit Corporation is limited to the Governor's veto power and the appointment of board members, which itself is subject to limitations. NJ Transit Corporation has near-total discretion to manage its own day-to-day finances and operations.

C. Most importantly, the treasury factor makes clear that NJ Transit Corporation is not an arm of the State because judgments against it are not directly enforceable against the state treasury. This Court's cases establish that, if the evidence on the first two factors is at all mixed, the treasury factor is dispositive. And the treasury factor weighs against sovereign immunity: By statute, New Jersey has disclaimed all legal and financial liability for NJ Transit Corporation.

NJ Transit Corporation protests that it should nevertheless get immunity because New Jersey provides it with some funding and thus might in some practical sense end up contributing to paying the judgment in this case. But this Court has squarely rejected the argument that the practical consequences of a judgment are relevant. Instead, the focus has always been on a State's formal liability.

What's more, New Jersey's partial funding of NJ Transit Corporation is wholly discretionary. And the share of NJ Transit Corporation's budget that's made up of state funds is comparable to the share of the average municipality's budget made up of state funds.

III. To the extent that any doubt remains concerning NJ Transit Corporation's status, this Court should dismiss the writ as improvidently granted. If this Court were to find that NJ Transit Corporation is an arm of the State of New Jersey, it would confront difficult questions about whether it has jurisdiction to vacate the decision below in light of the plain text of the Eleventh Amendment. NJ Transit Corporation thus cannot obtain the relief it seeks from this Court.

ARGUMENT

Sovereign immunity does not attach to an entity that is legally separate from the State itself. At the Founding, no corporation was entitled to sovereign immunity unless a judgment against it was somehow directly enforceable against the State. Accordingly, as a corporation liable for its own judgments, NJ Transit

Corporation is not entitled to sovereign immunity under the Founding-era understanding.

The reasoning of this Court's modern decisions has sometimes departed from that straightforward Founding-era rule by looking to a broader array of factors. But the Court has never applied that approach to grant immunity to a corporation liable for its own judgments, and it should not do so here: New Jersey has structured NJ Transit Corporation as a separate legal entity, lacks affirmative control over NJ Transit Corporation's actions, and has disclaimed responsibility for NJ Transit Corporation's debts and liabilities.

This Court's decision in *Franchise Tax Bd. of Cal. v. Hyatt* (*Hyatt III*), 139 S. Ct. 1485 (2019), didn't change the arm-of-the-State inquiry. In *Hyatt III*, this Court reinstated sovereign immunity for States in other States' courts. 139 S. Ct. at 1499. It did not redefine the shape of that sovereign immunity. As a result, the parties here look to this Court's cases about sovereign immunity in federal court, not just its cases about sovereign immunity in other States' courts. There's no reason to believe the two tests differ, but if they did, we would expect the arm-of-the-state test to be narrower in its grant of immunity in interstate immunity cases because interstate sovereign immunity presents a conflict between two sovereigns. Here, for instance, a too-expansive view of New Jersey's sovereign immunity for activities conducted by a state-created entity in New York encroaches on New York courts' ability to protect New York's citizens. If NJ Transit Corporation is not an arm of the State in federal court, then it certainly isn't one in New York's courts.

I. NJ Transit Corporation is not entitled to sovereign immunity under the Founding-era rule.

At the time of the Founding and for nearly two centuries thereafter, corporations were not entitled to sovereign immunity even if they were created, controlled, owned, and funded by the State. *Springboards to Educ., Inc. v. McAllen Indep. Sch. Dist.*, 62 F.4th 174, 191 (5th Cir. 2023) (Oldham, J., concurring); *Puerto Rico Ports Auth. v. Fed. Mar. Comm'n* (*PRPA*), 531 F.3d 868, 881 (D.C. Cir. 2008) (Williams, J., concurring). The only exception was where, notwithstanding the entity's corporate form, a judgment would be directly enforceable against the State itself. *See Hopkins v. Clemson Agr. Coll. of S.C.*, 221 U.S. 636, 648-49 (1911) (injunction against state-owned property); *Governor of Ga. v. Madrazo*, 26 U.S. (1 Pet.) 110, 123 (1828) (Marshall, C.J.) (money judgment lay against the State).

Under the Founding-era rule, then, this would be an easy case: NJ Transit Corporation is a corporation, and any judgment in this case would not be directly enforceable against the State of New Jersey. NJ Transit Corporation would have no entitlement to sovereign immunity.

A. At the Founding, corporations were not entitled to sovereign immunity, with a narrow exception not applicable here.

1. As Judge Oldham has explained, a core premise of the debate over state sovereign immunity at the Founding was that corporations received no sovereign immunity. "For all that the Federalists and Anti-

Federalists disagreed about," both "drew sharp distinctions between corporations, which weren't immune from suits, and sovereigns, which were." *Springboards*, 62 F.4th at 191 (Oldham, J., concurring) (citing 1 Max Farrand, *Records of the Federal Convention of 1787* (1907)).

The question whether States were akin to corporations—and thus not entitled to sovereign immunity—reemerged in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). While the Court's majority considered States corporations and so allowed suits against them, Justice Iredell rejected that argument. *Id.* at 447-48 (Iredell, J., dissenting). He believed that this Court had "no authority" to "apply the common doctrine concerning corporations" because States possessed "the fullest powers of sovereignty." *Id.* at 447 (Iredell, J., dissenting); *see Springboards*, 62 F.4th at 191 (Oldham, J., concurring).

The Eleventh Amendment was ratified in response to *Chisholm* and embraced Justice Iredell's position. It confirmed that the States were not mere corporations and were entitled to sovereign immunity.

2. Once it was clear that the States themselves retained sovereign immunity after the Founding, the next question was which of their creations were entitled to share in that immunity. Here the corporate form was dispositive. This Court consistently held that a state-created corporation's legal separateness came with practical consequences, both good and bad. As explained *supra* at 3-5, legal separateness meant state-created corporations were not bound by all the same strictures as the States themselves. But it also meant that state-created corporations couldn't receive

all the benefits the States themselves received—including sovereign immunity.

In the seminal *Planters' Bank* case, the Planters' Bank of Georgia sought to claim Georgia's sovereign immunity as its own. *Bank of U.S. v. Planters' Bank of Ga.*, 22 U.S. (9 Wheat.) 904, 907-08 (1824) (Marshall, C.J.). The Marshall Court had no trouble rejecting the argument, reasoning simply that "[t]he suit is against a corporation, and the judgment is to be satisfied by the property of the corporation," not by the State of Georgia. *Id.* at 907. The Court explained that "by giving the Bank the capacity to sue and be sued"—a core characteristic of a corporation—the State of Georgia had ensured that the Bank did not have any "sovereign character." *Id.*

Over the next half century, this Court repeatedly applied that bright-line rule: By virtue of their legal separateness, state-created corporations were not entitled to sovereign immunity. *See, e.g.*, *Bank of Ky. v. Wister*, 27 U.S. (2 Pet.) 318, 323-24 (1829); *Curran v. Arkansas*, 56 U.S. (15 How.) 304, 309 (1853); *Louisville, Cincinnati & Charleston R.R. Co. v. Letson*, 43 U.S. (2 How.) 497, 550-51 (1844). Lower courts, too, applied that rule to a variety of entities, including transit corporations. *See, e.g.*, *Hutchinson v. W. & A. R. Co.*, 53 Tenn. 634, 637 (1871).

By the late 1800s, in an opinion announced the same day as *Hans v. Louisiana*, 134 U.S. 1 (1890), this Court held that it was "beyond question" that a state-created "corporation[] [that] may sue and be sued" was not entitled to sovereign immunity. *Lincoln Cnty. v. Luning*, 133 U.S. 529, 530-31 (1890). It was irrelevant that the entity at issue, Lincoln County, was "created by, and with such powers as are given to it by, the State." *Id.* Its corporate status was sufficient for the Court to hold that it could not claim sovereign immunity. That rule prevailed again and again.[4]

That bright-line rule made sense. Because any judgment would be paid from the corporation's assets, not the State's, suits against a corporation did not raise the Founding generation's fears about "prospective raids on state treasuries." *See Alden v. Maine*, 527 U.S. 706, 720 (1999) (quoting David P. Currie, The Constitution in Congress: The Federalist Period 1789-1801, at 196 (1997)); *supra* at 2. And because a corporation was sued in its own name, the State wasn't being haled into court, and there was no concern that a court would have to "wag[e] war against the State" to enforce a judgment. *See* The Federalist No. 81 (Alexander Hamilton); *supra* at 2-3.

3. Under the Founding-era rule, it didn't matter how entangled the state-created entity was with the State. Corporate form decided the sovereign immunity question.

State ownership didn't matter: A state-created entity could be wholly owned by the State—and still not be entitled to sovereign immunity. *Wister*, 27 U.S. at 323-24.

State control didn't matter: A state-created entity could "exist[] for the sole benefit of the State," such

[4] *See, e.g.*, *Metro. R. Co. v. D.C.*, 132 U.S. 1, 7-8 (1889) (District of Columbia); *Hopkins v. Clemson Agr. Coll. of S.C.*, 221 U.S. 636, 645 (1911) (state college); *Sloan Shipyards Corp. v. U.S. Shipping Bd. Emergency Fleet Corp.*, 258 U.S. 549, 567 (1922) (Emergency Fleet Corporation); *Keifer & Keifer v. Reconstruction Fin. Corp.*, 306 U.S. 381, 388-89 (1939) (finance corporation).

that "all its officers were appointed by the State, and removable at its pleasure" and the State "possessed an unlimited power over the corporation"—and still not be entitled to sovereign immunity. *See Briscoe v. Bank of Ky.*, 36 U.S. (11 Pet.) 257, 343-44 (1837) (Story, J., dissenting) (describing Bank of the Commonwealth of Kentucky); *Wister*, 27 U.S. at 323-24 (concluding Bank of the Commonwealth of Kentucky was not an arm of the State for sovereign immunity purposes).

And the purpose for which a corporation was created didn't matter either. After all, at the time of the Founding, all corporations were required to profess a public purpose. Pauline Maier, *The Revolutionary Origins of the American Corporation*, 50 Wm. & Mary Q. 51, 55 (1993). Even when the corporation had an entirely governmental purpose—a municipality or county, for instance—its corporate form meant it did not have sovereign immunity. *See, e.g.*, *Lincoln Cnty.*, 133 U.S. at 530; *Briscoe*, 36 U.S. at 266.

4. The bright-line rule didn't operate in the other direction. Corporate status was sufficient but not necessary to deny an entity sovereign immunity—some non-corporate entities were also denied sovereign immunity. In particular, state-created entities that were primarily commercial could be denied sovereign immunity whether corporate or not. *See, e.g.*, *Georgia v. City of Chattanooga*, 264 U.S. 472, 482 (1924); Ann Woolhandler, *Interstate Sovereign Immunity*, 2006 S. Ct. Rev. 249, 276-82 (2006). But the corporate form standing alone—even where, as in the case of a municipality, it was not attached to a commercial function—was sufficient to ensure that a state-created entity could not avail itself of the

benefits of sovereign immunity. *See Lincoln Cnty.*, 133 U.S. at 530.

5. The only exception to the rule that a corporation could not invoke the State's sovereign immunity involved cases where the State was the "real party in interest"—that is, where a judgment against the corporation would be directly enforceable against the State. *See PRPA*, 531 F.3d at 881-82 (Williams, J., concurring).

For example, in *Hopkins v. Clemson Agricultural College of South Carolina*, 221 U.S. 636 (1911), the petitioner sued Clemson for damage done to his land due to an embankment the college had built across a river. This Court held that, as a public corporation, the college did not have sovereign immunity. *Id.* at 646. However, the embankment was owned by the State, so a judgment against Clemson ordering the embankment to be moved *would* be directly enforceable against the State. *Id.* at 648-49. This Court concluded that the State's sovereign immunity therefore barred the order. *Id.*; *see also In re Ayers*, 123 U.S. 443, 502-03 (1887).

The same exception applied to money damages. In *Governor of Georgia v. Madrazo*, 26 U.S. 110 (1828), the plaintiff sought restitution from the Governor of Georgia. *Id.* at 123 (Marshall, C.J.). Because the judgment would be paid from funds "actually in the treasury of the state, mixed up with its general funds," the State was the real party in interest—any judgment would be directly enforceable against the State itself. *Id.* at 123-24.

The real-party-in-interest exception was narrow. It applied only where the judgment was directly enforceable against the State, not where the State was paying the judgment only as a practical matter. Even where a corporation was entirely capitalized by a State—such that any judgment would essentially be paid by the State—the corporation was not entitled to sovereign immunity if it was formally responsible for payment of its own debts. *See supra* at 22 (discussing this Court's holdings in *Briscoe* and *Wister*); *Planters' Bank*, 22 U.S. at 907 (finding no sovereign immunity where "the suit is against a corporation, and the judgment is to be satisfied by the property of the corporation").

6. Under a Founding-era understanding of sovereign immunity, this case is easy. All agree that NJ Transit Corporation is a corporation. New Jersey law defines it as a "body corporate." N.J. Stat. Ann. § 27:25-4. It has the core characteristics of a corporation—its own legal name, under which it can "sue and be sued"; the ability to hold property separate from its creator; and perpetual succession—that Blackstone identified many centuries ago. *Compare* § 27:25-5, *with* 1 William Blackstone, Commentaries *463. And the narrow real-party-in-interest exception does not apply here. A judgment against NJ Transit Corporation in this case would not be enforceable against the State of New Jersey. N.J. Stat. Ann. § 27:25-17.

NJ Transit Corporation thus is not an arm of the State of New Jersey.

B. NJ Transit Corporation cannot reconcile its position with the Founding-era rule.

NJ Transit Corporation does not point to a single Founding-era case where this Court extended a State's sovereign immunity to an entity that was both legally separate from the State and as to which the State had disclaimed legal liability for judgments.

1. Start with the case NJ Transit Corporation cites that is at least about the right country and timeframe, *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819). Not once does *Dartmouth* mention sovereign immunity. Instead, that case identifies state control as the line separating public corporations from private corporations. *Id.* at 668. But that line is irrelevant here: Early case law makes clear that *neither* public *nor* private corporations were entitled to sovereign immunity. *See Springboards*, 62 F.4th 174, 194-95 (Oldham, J., concurring).

NJ Transit Corporation's other Founding-era case is about *foreign* sovereign immunity. *See* Petr. Br. 14, 19, 27. That case, too, misses the mark. As a threshold matter, this Court has cautioned against applying foreign sovereign immunity cases in the interstate immunity context: "[T]he Constitution affirmatively altered the relationships between the States, so that they no longer relate to each other solely as foreign sovereigns." See *Franchise Tax Bd. of Cal. v. Hyatt* (*Hyatt III*), 139 S. Ct. 1485, 1497 (2019).

In any event, the foreign case NJ Transit Corporation cites is entirely inapposite. *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), concerned an armed warship, not a corporation. *Id.* at 135. Chief Justice Marshall, the author of *Schooner Exchange*, made clear in *Planters' Bank* that corporations are treated differently for purposes of the sovereign immunity inquiry. *Planters' Bank*, 22 U.S. at 907-08. When courts ultimately addressed foreign corporations (not until the twentieth century), they generally adopted the logic of *Planters' Bank* and gave corporate status significant weight.[5] As New Jersey's own high court put it, "no authority can be found in the books for the proposition that foreign corporations which happen to be governmental agencies are immune from judicial process." *Molina v. Comision Reguladora del Mercado de Henequen*, 103 A. 397, 398-99 (N.J. 1918).

2. NJ Transit Corporation misapprehends the role of the sue-and-be-sued clause in the Founding-era test. Petr. Br. 46-47. It argues that "sue-and-be-sued clauses shed little light on sovereign status" but instead "primarily go to the question of *waiver*—not a question of whether an entity shares its creator State's sovereignty in the first place." Petr. Br. 15. To be sure, sue-and-be-sued clauses aren't *dispositive* of sovereign status. But the corporate form is. And at the Founding, sue-and-be-sued clauses were significant because they were one indicator of corporate separateness from the sovereign. *See* 1 Blackstone, Commentaries at *463; *PRPA*, 531 F.3d at 881 (Williams, J., concurring). Once

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[5] *See, e.g.*, *United States v. Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199, 202 (S.D.N.Y. 1929) (denying immunity to mining corporation majority-owned by the French government because the "company [is] an entity distinct from its stockholders" and "[p]rivate corporations in which a government has an interest . . . are not departments of government"); *Ulen & Co. v. Bank Gospodarstwa Krajowego (Nat'l Econ. Bank)*, 24 N.Y.S.2d 201 (2d Dep't 1940) (denying immunity to a bank majority-owned by the Polish government because it "has all the characteristics of a corporation"). *Cf. Mason v. Intercolonial Railway of Canada*, 83 N.E. 876, 876-77 (Mass. 1908) (immunity for Canadian Railway because it was "not a corporation").

that corporate separateness was established, there was no sovereign immunity to waive.

In any event, for the proposition that sue-and-be-sued clauses effectuate a "limited waiver," NJ Transit Corporation cites modern cases. Petr. Br. 46-47. Cases from the last half century cannot speak to the Founding-era understanding of state sovereign immunity.

Plus, even the modern cases NJ Transit Corporation cites are almost exclusively cases about the arm-of-the-*federal*-government test, not the arm-of-the-*state* test. Petr. Br. 46-47. By the second half of the twentieth century, the two tests had evolved to be quite different. *Compare FDIC v. Meyer*, 510 U.S. 471, 475 (1994), *with Hess*, 513 U.S. at 39-51. That difference makes some sense: The test for whether a federally created entity is an arm of the federal government in federal court is more akin to the test for whether New Jersey's creations can get sovereignty in its *own* courts. Arm-of-the-state cases, by contrast, assess whether a state-created entity can get immunity in *another* sovereign's courts.

3. Absent history or precedent on its side, NJ Transit Corporation is left with policy. It lists a series of state-created corporations it worries would face suit under the Founding-era rule. Petr. Br. 42.

These worries are groundless. Recall that the Founding-era test preserves sovereign immunity where the State is the "real party in interest"—that is, where a judgment would be directly enforceable against the State itself. Most of NJ Transit Corporation's examples appear to fall within that exception. Take the example of the departments of the

Louisiana Cabinet. The Louisiana Constitution establishes that any judgment against Louisiana Cabinet entities may only be paid by "funds appropriated therefor by the legislature"—making the State the real party in interest. *See* La. Const. art. 12, § 10; *Usry v. La. Dep't of Hwys.*, 459 F. Supp. 56, 60 & n.15 (E.D. La. 1978). So, too, with most of NJ Transit Corporation's other examples.[6]

In sum, history and tradition make clear that sovereign immunity did not extend to state-created corporations. NJ Transit Corporation provides no historical evidence that blurs this bright-line rule. And under that rule, NJ Transit Corporation is not entitled to sovereign immunity.

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[6] See, for example, the Alaska Department of Revenue, Alaska Stat § 434.80.010 (providing that where a state department is a necessary party to the proceeding, the State itself is also a proper party to the action); Georgia Department of Transportation, Ga. Code Ann. § 50-21-25 (providing that the "state" is liable for actions brought against state employees, even where the employee's department is the named defendant); Minnesota Housing Finance Agency, Minn. Stat. § 3.736(7) (articulating a mandatory state appropriations process for tort judgments against state agencies); Texas Public Finance Authority, Tex. Civ. Prac. & Rem. Code. Ann. §§ 109.002-109.006 (appropriations process for tort judgments against state agencies); Utah Department of Transportation, Utah Code § 51-4-1 (requiring state departments to deposit revenues with the state treasurer); and Wisconsin Departments of Correction and Safety and Professional Services, *compare* Wis. Stat. § 15.14 (establishing the Department of Corrections) *and id.* § 15.40 (establishing the Department of Safety and Professional Services), *with id.* § 16.50(3) (providing that state departments shall not expend funds in excess of state appropriations).

II. NJ Transit Corporation is not entitled to sovereign immunity under this Court's modern arm-of-the-state test.

In the middle of the twentieth century, this Court began to "pass[] in silence over its former rule" that corporations "were *ipso facto* completely bereft of sovereign immunity." *Puerto Rico Ports Auth. v. Fed. Mar. Comm'n* (*PRPA*), 531 F.3d 868, 883 (D.C. Cir. 2008) (Williams, J., concurring). Rather than looking just to an entity's corporate form and whether the State was the real party in interest, this Court weighed additional factors.

This Court's modern-day arm-of-the-state test has coalesced around three such factors. The first factor is whether the entity is structured to indicate legal separateness. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977); *Lake Country Ests. v. Tahoe Reg'l Plan. Agency*, 440 U.S. 391, 401 (1979). The second is the degree of control the State exerts over the entity. *See Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44, 47 (1994); *Lake Country*, 440 U.S. at 402; *Mt. Healthy*, 429 U.S. at 280. And the third looks to "whether any judgment must be satisfied out of the state treasury." *Hess*, 513 U.S. at 51 (citation omitted); *see also Lake Country*, 440 U.S. at 402. If the first two factors are at all mixed, the treasury factor decides the case. *See Hess*, 513 U.S. at 47-49.

While this Court's approach to the arm-of-the-state inquiry has changed, the goal of the inquiry has remained the same: The question is whether the state-created entity is legally separate from the State. And the results in this Court's modern cases have been consistent with the Founding-era rule: A corporation liable for its own judgments is not entitled to sovereign immunity. Granting sovereign immunity to NJ Transit Corporation here would upend all that.

Throughout its brief, NJ Transit Corporation attempts to complicate the modern test still further by citing a grab bag of cases from various other areas of law. For example, NJ Transit Corporation relies on a case about what counts as a governmental actor for First Amendment purposes. Petr. Br. 25, 28, 30, 42, 46 (citing *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995)). But this Court has made clear that municipalities count as governmental actors for First Amendment purposes and still aren't arms of the State for sovereign immunity purposes. *See, e.g.*, *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938) (First Amendment suit against municipality). To take a second example, NJ Transit Corporation cites *Biden v. Nebraska*, 143 S. Ct. 2355 (2023), a standing case about when injury to a state-created entity counts as injury to the State itself. Petr. Br. 14, 21, 25, 28, 30, 34, 36, 39, 43 (citing *Biden v. Nebraska*, 143 S. Ct. 2355 (2023)). But this Court has made clear that injury to a State's citizens counts as injury to the State for standing purposes, even though those citizens aren't arms of the State. *See Louisiana v. Texas*, 176 U.S. 1, 19 (1900) (discussing *parens patriae* standing). Indeed, *Nebraska* itself cautioned against this mixing of doctrine. 143 S. Ct. at 2368 n.3.

We could continue, but the point should be apparent: Cases that don't focus on arm-of-the-state sovereign immunity are not relevant to the analysis. Once the focus is on the proper body of case law, it's clear that NJ Transit Corporation is not an arm of the State of New Jersey.

A. NJ Transit Corporation's structure as a distinct corporate entity weighs against sovereign immunity.

The first factor examines the structure of the state-created entity to determine whether it is legally separate from the State. *See Mt. Healthy*, 429 U.S. at 280; *Lake Country*, 440 U.S. at 401. This inquiry looks to the entity's legal form, function, powers and duties, as well as how state law describes the entity. *See Hess*, 513 U.S. at 44-45; *Mt. Healthy*, 429 U.S. at 280. The weight of the evidence demonstrates that NJ Transit Corporation is structured to be legally separate from the State of New Jersey.

1. Start with the piece of the puzzle with the most historical warrant: the entity's legal form. An entity's corporate form speaks most directly to whether or not it is legally separate from the State. *See supra* at 13; *Hess*, 513 U.S. at 44-45.

NJ Transit Corporation is explicitly structured as a "body corporate and politic with corporate succession." N.J. Stat. Ann. § 27:25-4. It has the core characteristics that have defined a corporation for centuries and which continue to define corporations under New Jersey law. *Compare id.* §§ 27:25-4, 27:25-5, *with* 1 William Blackstone, Commentaries at *463-64, *and* N.J. Stat. Ann. § 14A:3-1. It has the ability to "[s]ue and be sued," N.J. Stat. Ann. § 27:25-5(a), and to "[p]urchase, lease as lessee, or otherwise acquire, own, hold, improve, use and otherwise deal in and with real or personal property," *id.* § 27:25-5(j).

Because NJ Transit is structured as a corporation, its finances, its employees, and its legal identity are separate from the State. NJ Transit Corporation's finances are beyond the reach of the New Jersey legislature—the State can't raid NJ Transit Corporation's coffers to prop up a failing school, for instance. *See* N.J. Stat. Ann. § 27:25-5(n)-(p). NJ Transit Corporation's employees are distinct from those of the State—NJ Transit Corporation can hire and fire employees "all without regard to" the restrictions that apply to state employees. N.J. Stat. Ann. § 27:25-15. And because NJ Transit Corporation has a separate legal identity from the State of New Jersey, it can make contracts across the table from the State. *See* NJ Transit Corporation, Bylaws of the NJ Transit Corporation art. VI, § 3 (June 11, 2024) (NJ Transit Corporation Bylaws), https://perma.cc/5Z9D-AVE6; N.J. Stat. Ann. § 27:1A-5(d).

2. This Court also looks to whether the function of the entity is a function exclusive to the State or one shared with entities that don't get immunity, such as political subdivisions and private corporations. *See Hess*, 513 U.S. at 45; *Lake Country*, 440 U.S. at 402.

NJ Transit Corporation's express function is to provide "efficient, coordinated, safe and responsive public transportation." N.J. Stat. Ann. § 27:25-2. In *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994), this Court specifically described transit as a function that is not unique to a State: "States and municipalities alike own and operate" all sorts of transit enterprises, including "bus terminals" and "commuter railroads." *Id.* at 45.

Moreover, an entire industry of private companies—Greyhound and Peter Pan, not to mention the various private railroads and bus companies that NJ Transit Corporation purchased in the 1980s—also engage in the business of transit. *See supra* at 7. As New Jersey's own high court has long acknowledged, granting immunity to a state-created entity like NJ Transit Corporation, but not to its private competitors performing identical functions, gives those state-created entities an unfair advantage. *See Molina v. Comision Reguladora del Mercado de Henequen*, 103 A. 397, 399 (N.J. 1918).

3. This Court also looks at an entity's powers and duties. *See Mt. Healthy*, 429 U.S. at 280. Here again, the question is whether these powers and duties are uniquely characteristic of the State or whether they are also shared by entities, such as political subdivisions, that do not receive sovereign immunity. *Id.* Mere exercise of a "slice of state power" of the sort granted to counties and municipalities does not afford the protections of sovereign immunity. *See Lake Country*, 440 U.S. at 401.

The statutory powers that NJ Transit Corporation cites (Petr. Br. 8) are identical to those given New Jersey's municipalities. Municipalities, no less than NJ Transit Corporation, can operate a police force.[7] Municipalities, no less than NJ Transit Corporation,

[7] *Compare* N.J. Stat. Ann. § 40A:14-106 to -117 (county police), *and id.* § 40A:14-118 to -175 (municipal police) *with id.* § 27:25-15.1(a) (NJ Transit Corporation police).

have the power of eminent domain.[8] Municipalities, no less than NJ Transit Corporation, can promulgate rules with "the force and effect of law."[9] And municipalities, no less than NJ Transit Corporation, can hold tax-exempt property.[10] (Indeed, even private entities—like fraternities and religious organizations—share that tax exemption.[11]) The duties imposed on NJ Transit Corporation—things like public record requirements, meeting laws, and a requirement to submit minutes to the Governor before they take effect—are also similar to those imposed on municipalities[12] (and, for that matter, many private entities[13]).

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[8] *Compare id.* § 40:41A-27(d) (county eminent domain power), *and id.* § 40:56-7 (municipal eminent domain power), *with id.* § 27:25-13(c)(1) (NJ Transit Corporation eminent domain power).

[9] *Compare id.* § 40:48-2 (municipal rulemaking authority), *with id.* § 27:25-5(e) (NJ Transit Corporation rulemaking authority).

[10] *Compare id.* § 40:14B-63 (municipal property tax exemption), *with id.* § 27:25-16 (NJ Transit property tax exemption).

[11] *See, e.g.*, *id.* §§ 54:4-3.6, -3.26 (tax exemptions for private entities).

[12] *Compare* N.J. Stat. Ann. § 27:25-4(f) (NJ Transit Corporation required to submit minutes to Governor); *id.* § 27:25-4(g)(1) (public meetings laws apply to NJ Transit Corporation), *and id.* § 27:25-20(c) (NJ Transit Corporation public records requirement), *with id.* § 52:27BBB-64 (certain school boards required to submit meeting minutes to Governor); *id.* §§ 10:4-8, -12 (public meetings laws apply to local governments), *and id.* § 47:2-4 (county and municipal public records requirement).

[13] *See* N.J. Stat. Ann. § 52:13C-22.1 (state reporting requirements for lobbyists).

4. Lastly, the Court has looked to state-law characterizations of the entity to determine whether it is distinct from the State. *See Hess*, 513 U.S. at 44-45.

At several places in its code, New Jersey expressly defines the "State" to exclude NJ Transit Corporation. Most relevantly, the New Jersey Tort Claims Act, N.J. Rev. Stat. § 59:1-1 *et seq.*, which establishes the State's sovereign immunity for purposes of tort liability, defines the "State" to include "any office, department, division, bureau, board, commission, or agency of the State," but to *exclude* entities that, like NJ Transit Corporation, are "statutorily authorized to sue and be sued." *Id.* § 59:1-3. The Tort Claims Act singles out exactly one entity that can sue and be sued—the Palisades Interstate Park Commission—as part of the State. *Id.* It did not create a similar exception for NJ Transit Corporation. The Tort Claims Act's definition of "State" has real consequences: For instance, New Jersey is only required to indemnify employees of the "State." *Id.* § 59:10-1.

As the New Jersey Supreme Court put the point, this provision of the Tort Claims Act "reiterat[es] the separateness from the State of public authorities which have statutory power to sue even if they are nominally within a department of the State." *Muhammad v. New Jersey Transit*, 176 N.J. 185, 193-94 (2003) (citation omitted).

The same distinction applies in the New Jersey Contractual Liability Act. N.J. Stat. Ann. § 59:13-1 *et seq.* There, too, the legislature expressly provided that "entit[ies] which [are] statutorily authorized to sue and be sued," such as NJ Transit Corporation, are not part of the "State." *See id.* § 59:13-2.

5. Against all of that evidence, NJ Transit Corporation relies on prefatory language labeling NJ Transit Corporation an "instrumentality of the State" established to perform "public and essential governmental functions." Petr. Br. 21 (discussing N.J. Stat. Ann. § 27:25-4(a)). Per NJ Transit Corporation, this Court should defer to that label—despite everything else state law says about NJ Transit Corporation's form, function, and powers—"to avoid the indignity of overruling a State's own view regarding how it organized its own government." Petr. Br. 2. That argument fails on multiple levels.

First, the term "instrumentality" has no talismanic significance. This Court's case law has described *all* state-created entities, arms of the State or not, as "instrumentalities." For instance, in *Regents of the University of California v. Doe*, 519 U.S. 425 (1997), this Court framed the question as "*whether* a state instrumentality may invoke the State's immunity," making clear that not all "state instrumentalities" can. *Id.* at 429 (emphasis added).

NJ Transit Corporation protests that the terms "instrumentality" and "public and essential governmental functions" have special significance under state law. Petr. Br. 21. Their evidence is a New Jersey Supreme Court case that was not about sovereign immunity at all. Petr. Br. 21 (discussing *Infinity Broad. Corp. v. N.J. Meadowlands Comm'n*, 901 A.2d 312, 318 & n.2 (N.J. 2006)). The terms that the New Jersey Supreme Court relied upon in that case are used—verbatim—in statutes setting up municipal entities. *Compare Infinity Broad. Corp.*, 901 A.2d at 318 n.2, *with* N.J. Rev. Stat. § 40:14B-20. So even deferring to the New Jersey Supreme Court—as

NJ Transit Corporation urges—can't get us very far. The terms "instrumentality" and "public and essential governmental functions" apparently aren't always indicators that an entity is an arm of the State.

At bottom, NJ Transit Corporation's real argument is that it would be an "indignity" to do anything less than defer entirely to the State's position on whether NJ Transit Corporation is an arm of the State under federal law. *See* Petr. Br. 2. But the "indignity" sovereign immunity protects New Jersey against is the indignity of having the State itself haled into court, not the indignity of having its say-so on an issue of federal law questioned. *See Franchise Tax Bd. of Cal. v. Hyatt* (*Hyatt III*), 139 S. Ct. 1485, 1497 (2019). That's especially so when honoring New Jersey's say-so harms a sister State's dignity. In any case, New Jersey's dignity is not compromised by honoring its choice to structure NJ Transit Corporation as a legally separate entity.

And NJ Transit Corporation surely can't believe that "New Jersey's own view as to which entities share its own sovereignty" should be absolute. *See* Petr. Br. 24. By that logic, New Jersey could simply label Johnson & Johnson, a New Jersey corporation, an arm of the State and render it immune from suit in any other sovereign's courts.

B. The limited control New Jersey exercises over NJ Transit Corporation does not weigh in favor of sovereign immunity.

1. The second factor looks to the level of control the State exerts over the entity. The control factor is entitled to the least weight in this Court's analysis. *See Hess*, 513 U.S. at 47-48. As *Hess* explains,

assessing control is "an uncertain and unreliable exercise." *Id.* at 47 (citation omitted). And control was not "the impetus for the Eleventh Amendment." *Id.* at 48. That's why, historically, a State's level of control over its creation made no difference to the arm-of-the-state analysis. *See supra* at 21-22.

To the extent the control factor matters in the analysis, though, it favors Mr. Colt. The standard for when a State exerts sufficient control over an entity to render it an arm of the State is high. In *Hess*, the State had veto power, appointment power, and for-cause removal power over the entity in question, the Port Authority. 513 U.S. at 47. Indeed, the State could even "determine the projects the Port Authority undertakes." *Id.* This Court nonetheless rejected the proposition that the Port Authority was an arm of the State. *Id.* at 32-33.

2. Given that high bar, New Jersey's level of control over NJ Transit Corporation does not meaningfully favor immunity.

No statute gives New Jersey the power to affirmatively direct NJ Transit Corporation to take any particular action. Instead, NJ Transit Corporation must "exercise independent judgment"—not channel the judgment of New Jersey—in making decisions. N.J. Stat. Ann. § 27:25-4.1(d). NJ Transit Corporation doesn't have to give any more weight to instructions from state officials than from any interested citizen. See *id.* ("The members of the board . . . *may* take into consideration the views and policies of any elected official or body, *or other person* . . . .") (emphasis added). And NJ Transit Corporation may enter contracts under $12.5 million without even consulting its board of directors, let alone the State. *See* NJ Transit Corporation Bylaws, *supra*, art. VI, § 3.

New Jersey's ability to remove NJ Transit Corporation's board members is also limited. As then-Judge Kavanaugh put the point, at-will removal power would allow the State "to directly supervise and control" an entity's "ongoing operations." *PRPA*, 531 F.3d at 877 (Kavanaugh, J.). But the New Jersey Governor doesn't have that power: Ten out of thirteen of NJ Transit Corporation's board members (and eight of eleven of its voting members) can be removed by the Governor only for cause. N.J. Stat. Ann. § 27:25-4(b). As New Jersey's own constitutional convention made clear, a for-cause limitation on the removal power is used precisely in order to *eliminate* the Governor's control. *See, e.g.*, 1 Proceedings of the Constitutional Convention of 1947, at 243-44 (statement of Ronald D. Glass), https://perma.cc/J5TS-3UKB.

3. NJ Transit Corporation's remaining arguments on control don't move the needle.

First, NJ Transit Corporation argues that for-cause removal protection is "consonant with control" in New Jersey because New Jersey is not "structured around a unitary executive." Petr. Br. 31. That doesn't follow. New Jersey can choose to structure its executive branch to give even high-ranking officials for-cause removal protection. But that doesn't mean the Governor has greater control over NJ Transit Corporation. It just means that New Jersey has chosen to give the Governor less control in general.

Second, NJ Transit Corporation notes that the Governor may veto board decisions. Petr. Br. 31. But as this Court has explained, "[t]he power to superintend . . . must imply a right to judge and direct." *See United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1983 (2021) (citing 3 Works of Alexander Hamilton 557 (J. Hamilton ed., 1850)). The right to veto doesn't give the Governor any power to "direct" NJ Transit Corporation to do anything.

Finally, NJ Transit Corporation notes the Governor's appointment power over NJ Transit Corporation board members. This Court has never treated the State's appointment power as a significant lever of control. *See, e.g.*, *Auer v. Robbins*, 519 U.S. 452, 456 n.1 (1997). Besides, the Governor's appointment power is significantly constrained. N.J. Stat. Ann. § 27:25-4(b).

C. That the State of New Jersey cannot be held liable for judgments against NJ Transit Corporation decides this case.

1. The third factor is the "state treasury criterion—whether any judgment must be satisfied out of the state treasury." *Hess*, 513 U.S. 30 at 48. That factor dates back to the Founding: As explained *supra* at 23-24, courts always granted immunity where a judgment was directly enforceable against the State.[14]

This Court's modern cases make clear that the treasury factor is "the most salient factor." *Hess*, 513

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[14] Although this Court's post-*Mt. Healthy* cases have only considered the question in cases involving money damages, this factor would presumably also counsel in favor of sovereign immunity if a judgment in equity could lie directly against the State. *See, e.g.*, *In re Ayers*, 123 U.S. 443, 502-03 (1887).

U.S. at 48.[15] If evidence on the other two factors is at all mixed, the treasury factor decides the case. *Id.* at 48-49. In *Hess*, for instance, this Court found that the structure and control factors did not entirely resolve the question in either direction. It thus endorsed the lower courts' treatment of the treasury factor as "the most salient factor" because it "home[d] in on the impetus for the Eleventh Amendment: the prevention of federal-court judgments that must be paid out of a State's treasury." *Id.* at 48. This Court concluded that Port Authority was not an arm of the State because the States "b[ore] no legal liability for Port Authority debts." *Id.* at 46, 52-53.[16]

2. Here, NJ Transit Corporation is not an arm of the State of New Jersey because judgments are not "paid out of a State's treasury." *See Hess*, 513 U.S. at 48. New Jersey expressly disclaims the legal and financial liabilities of NJ Transit Corporation: "No

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[15] *See also Ford Motor Co. v. Dep't of Treasury of Indiana*, 323 U.S. 459, 464 (1945) (sovereign immunity warranted "when the action is in essence one for the recovery of money from the state"); *Regents*, 519 U.S. at 430 ("[T]he question whether a money judgment against a state instrumentality or official would be enforceable against the State is of considerable importance[.]"); *Edelman v. Jordan*, 415 U.S. 651, 663 (1974) (even when the state is "not named a party to the action," sovereign immunity still applies where "private parties seek[] to impose a liability" against the State); *Lake Country*, 440 U.S. at 402 (compact "provid[ing] that obligations of [the entity] shall not be binding on either State" weighs against immunity).

[16] *Hess* itself involved an entity created by the Compact Clause. *Id.* at 41-42. But the circuit-court consensus it endorsed applied the rule that the treasury factor is "the most salient" in cases involving entities created by a single State. *Id.* at 48.

debt or liability of the corporation shall be deemed or construed to create or constitute a debt, liability, or a loan or pledge of the credit of the State." N.J. Stat. Ann. § 27:25-17.

3. NJ Transit Corporation protests that it should nevertheless get immunity because New Jersey provides it with some funding. Wrong.

a. In NJ Transit Corporation's view, even partial state funding means that a judgment against NJ Transit Corporation has "essentially the same practical consequences as a judgment against the State itself." Petr. Br. 39. That view has no historical warrant: As explained *supra* at 22-23, Founding-era cases uniformly held that corporations were not entitled to sovereign immunity even if they were fully funded by the State.

This Court's modern cases, too, squarely reject the argument that the "practical consequences" of a judgment, Petr. Br. 39, rather than formal legal liability, are what matters. "The critical inquiry is who may be legally bound by the court's adverse judgment, not who will ultimately pick up the tab." *Lewis v. Clarke,* 581 U.S. 155, 165 & n.4 (2017) (citing *Regents*, 519 U.S. at 426, 419-421; *Hess*, 513 U.S. at 48, 51-52).

For instance, in *Regents*, the federal government had "agreed to indemnify [the University of California] against the costs of litigation, including adverse judgments." 519 U.S. at 426. A plaintiff suing the University of California argued that this agreement meant the University of California was no longer an arm of the State because as a practical matter, the State would never pay a penny on a judgment; "ultimate financial liability" lay with the federal government. *Id.* at 431. This Court held that those practical consequences did not matter to the arm-of-the-state analysis: "It is the entity's potential legal liability, rather than its ability or inability to require a third party to reimburse it," that creates an arm-of-the-state relationship. *Id.*

So here, it's New Jersey's lack of "legal liability," not whether it would "reimburse" NJ Transit Corporation for a judgment, that defeats an arm-of-the-state relationship. Indeed, New Jersey isn't even required to "reimburse" NJ Transit Corporation for a judgment.

Indeed, it's not even clear New Jersey *would* "reimburse" NJ Transit Corporation for a judgment. It's certainly not required to do so. And despite bearing the burden of proving sovereign immunity, NJ Transit Corporation introduced no evidence that funding from New Jersey would ever be used to pay such a judgment. *See Hennessey v. Univ. of Kansas Hosp. Auth.*, 53 F.4th 516, 529-31 (10th Cir. 2022) (State's burden to prove sovereign immunity; collecting cases). And from what we can glean—again, absent a record from NJ Transit Corporation—there is no such evidence. Most of NJ Transit Corporation's state funding is allocated for specific purposes and thus could not be used to pay a judgment. S.B. 2026, 221st Leg. (N.J. 2025) (Appropriations Act for fiscal year 2026) (enacted as P.L. 2025, c. 74). And NJ Transit Corporation "need not 'request funds from the state coffers in order to meet shortfalls caused by adverse judgments'" because it can independently raise revenue. *Bolden v. Southeastern Pa. Transp. Auth.*, 953 F.2d 807, 819 (3d Cir. 1991) (Alito, J.) (quoting *Fitchik v. New Jersey Transit Rail Operations, Inc.*, 873 F.2d 655, 661 (3d Cir. 1989)); *see also* N.J. Stat. Ann. § 27:25-5.

b. NJ Transit Corporation notes that *Hess*, in dicta, says that some "transit facilities that place heavy fiscal tolls on their founding States" might be entitled to sovereign immunity. Petr. Br. 37 (citing *Hess*, 513 U.S. at 49). It argues that NJ Transit Corporation is such a transit facility. But whatever doubt there might have been about those transit facilities in *Hess* was resolved by *Regents*: The fiscal toll of a state-created entity doesn't matter; what matters is "liability in the first instance." *Regents,* 519 U.S. at 431.

Moreover, in the "heavy fiscal toll" cases *Hess* cited, the State faced some legal obligation to fund the transit facility in question. *Morris v. Washington Metro. Area Transit Auth.*, 781 F.2d 218, 225-27 (D.C. Cir. 1986) (compact requires costs to be shared among creator States); *Alaska Cargo Transp., Inc. v. Alaska R.R. Corp.*, 5 F.3d 378, 380-81 (9th Cir. 1993) (legislature must pay any money judgment against railroad on pain of returning railroad land to federal government). By contrast, New Jersey could, in theory, stop funding NJ Transit Corporation tomorrow.

NJ Transit Corporation counters that New Jersey would never do so—that it would bail out NJ Transit Corporation rather than let it go bankrupt. *See* Petr. Br. 34-37. But States (including New Jersey) often bail out cities rather than letting them go bankrupt—again, entities that have no claim to sovereign immunity. *See, e.g.*, *Camden and State Reach Fiscal*

Agreement, N.Y. Times, July 23, 1999, https://perma.cc/2LWZ-W5HD.

c. NJ Transit Corporation's emphasis on funding, rather than liability, is also wholly unworkable. The amount of state funding New Jersey provides varies year to year, from as little as 15% of NJ Transit Corporation's budget to as much as 46%. *See* Petr. Br. 35. Surely NJ Transit Corporation doesn't suggest that its sovereign immunity could toggle on and off with each new appropriations bill.

And NJ Transit Corporation doesn't give any principled way to assess how much money is enough money to render an entity an arm of the State. It can't be about the fraction of the entity's budget that comes from the State: One "striking financial detail" is that in some years, *federal* funding for NJ Transit Corporation has exceeded funding from the State of New Jersey. *Fitchik*, 873 F.2d at 660. And most municipalities get roughly a third of their funding from the State (indeed, some New Jersey cities get more than half).[17] That doesn't make municipalities arms of the State.

Nor can sovereign immunity turn on the absolute sum of money a State expends on its creation. Such a rule would privilege urban States with larger budgets over rural States with smaller ones. Plus, New Jersey appropriates large sums of money to subsidize

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[17] *See* Adam G. Levin, Cong. Rsch. Serv., R40638, *Federal Grants to State & Local Governments: Trends & Issues* 4 (June 26, 2025), https://perma.cc/86VJ-YNRJ; City of Camden, N.J., Adopted Budget for the Fiscal Year 2025, at 7 (June 12, 2025), https://perma.cc/J939-3VDY.

entities—municipalities, counties, and even private corporations—that all agree are not arms of the State.[18]

4. Because the treasury factor—the one that "home[s] in on the impetus" for sovereign immunity—squarely cuts in Mr. Colt's favor, this Court should hold that NJ Transit Corporation is not an arm of the State of New Jersey. *See Hess*, 513 U.S. at 48.

III. In case of doubt, this Court should dismiss the writ as improvidently granted because the Eleventh Amendment may prevent NJ Transit Corporation from obtaining relief.

As just explained, NJ Transit Corporation is not an arm of the State, whether this Court looks to Founding-era case law or this Court's more recent precedents. But if this Court has any doubts about that analysis, the proper course would be to dismiss this writ as improvidently granted. NJ Transit Corporation may not be able to get the relief it seeks. If NJ Transit Corporation were, indeed, an arm of the State, this case would fall within the literal text of the Eleventh Amendment. As two members of this Court and leading scholars have explained, this Court would then face difficult questions about whether it had

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[18] *See* Local Government Services User-Friendly Budget Database, N.J. Dep't of Cmty. Affs., https://perma.cc/B7VU-2ZHS (archived Nov. 11, 2025) (to download database, select "View/Download File"); N.J. Office of Mgmt. & Budget, The State of New Jersey Budget in Brief (Fiscal Year 2026), 14, 19 (Feb. 2025), https://perma.cc/M5NB-4TTF; *NJEDA Has Approved Over 500 NJ Businesses for Small Business Improvement Grant Funding*, N.J. Econ. Dev. Auth. (Sep. 30, 2022), https://perma.cc/KT2U-476F.

jurisdiction to vacate the decision below. *See PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2264-65 (2021) (Gorsuch, J., dissenting); Br. for Profs. William Baude & Stephen E. Sachs as *Amici Curiae* Supporting Neither Party at 27-29, *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485 (2019) (No. 17-1299).

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

If NJ Transit Corporation were an arm of the State, this case would "appear[] to present 'the rare scenario' that comes within the Eleventh Amendment's text." *PennEast*, 141 S. Ct. at 2265 (Gorsuch, J., dissenting). Unlike the state courts adjudicating this case below, this Court exercises "the judicial Power of the United States." *See* U.S. Const. art. III, § 1. This case is also a "suit in law . . . commenced . . . by Citizens of another State," U.S. Const. amend. XI: Mr. Colt (a New York citizen) initiated this suit against NJ Transit Corporation for tort damages.[19] And, if NJ Transit Corporation were correct that it is an arm of the State of New Jersey, Mr. Colt's lawsuit would be "against one of the United States." *Id.*

If that's right, the text of the Eleventh Amendment couldn't be clearer about what it means:

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[19] That NJ Transit Corporation petitioned this Court doesn't change who "commenced" the case. *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 408 (1821) ("Whatever may be the stages of its progress, the actor is still the same.").

This Court "shall not entertain this suit." *PennEast*, 141 S. Ct. at 2265 (Gorsuch, J., dissenting) (internal quotation marks omitted). That NJ Transit Corporation is the one seeking to invoke this Court's jurisdiction shouldn't matter: The Eleventh Amendment appears to "admit[] of no waivers, abrogations, or exceptions." *Id.*[20]

2. At first blush, it might seem odd that an amendment intended to protect the States forecloses Supreme Court jurisdiction even when the State is the one seeking it out. But the oddity of that result is a function of the text that the Founding generation

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[20] Where this Court has suggested that the Eleventh Amendment is waivable at the States' option, it has generally done so in dicta (in sovereign immunity cases that do *not* fall within the text of the Eleventh Amendment). *See PennEast*, 594 U.S. at 512 n.2 (Gorsuch, J., dissenting). And though this Court has heard "some appeals that were in fact forbidden by the Eleventh Amendment," it should place "little stock" in such "drive-by jurisdictional rulings." William Baude & Stephen E. Sachs, *The Misunderstood Eleventh Amendment*, 169 U. Pa. L. Rev. 609, 654-55 (2021). The Supreme Court did not "fully confront" the procedural posture presented here until its decision in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Fla. Department of Business Regulation*, 496 U.S. 18 (1990). Baude & Sachs, *Misunderstood*, *supra*, at 653. In *McKesson*, this Court held that the Eleventh Amendment did not apply because an appeal to this Court was not a "suit." 496 U.S. at 26-27. But that distinction "makes no sense." *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 113 n.10 (1996) (Souter, J., dissenting). Exercising "judicial power" over an appeal from a suit is, of course, exercising power over the suit itself. *See id.*; Baude & Sachs, *Misunderstood*, *supra*, at 656. And the Framers surely intended the Eleventh Amendment—famously passed to overturn *Chisholm v. Georgia*, a Supreme Court case—to apply to the Supreme Court. *See Alden v. Maine*, 527 U.S. 706, 721-23 (1999).

chose. An earlier version of the amendment said nothing about the jurisdiction of the federal courts but would have mandated only that "no state shall be liable to be made a party defendant," framing the amendment as a personal privilege that would allow the State to waive into federal court if it so chose. 5 The Documentary History of the Supreme Court of the United States, 1789-1800, at 605-06 (Maeva Marcus ed., 1994). But the Founders changed the text of the amendment to frame it as a limitation on the federal courts' jurisdiction. *See* Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 Harv. L. Rev. 1559, 1602-03 (2002).

Honoring that choice would not leave New Jersey without recourse in other fora or procedural postures. *See* Br. for Profs. William Baude & Stephen E. Sachs at 28, *Hyatt III*, *supra*. But as this case comes to this Court, it's unclear that NJ Transit Corporation has any chance at relief. The proper course, then, is to either affirm the decision below or dismiss the writ as improvidently granted.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed or the writ should be dismissed as improvidently granted.[21]

[21] Whatever this Court decides regarding NJ Transit Corporation's entitlement to sovereign immunity, it should make clear that petitioner Ana Hernandez is not entitled to any federal immunity from suit. *See Lewis v. Clarke*, 581 U.S. 155, 164-65 (2017).

Respectfully submitted,

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