

Nos. 24-1021, 24-1113

In the Supreme Court of the United States

CEDRIC GALETTE,
Petitioner,

v.

NEW JERSEY TRANSIT
CORPORATION,
Respondent.

NEW JERSEY TRANSIT
CORPORATION, *et al.*
Petitioners,

v.

JEFFREY COLT *and*
BETSY TSAI,
Respondents.

**On Writs of Certiorari to the Supreme Court of Pennsylvania
and the New York Court of Appeals**

BRIEF FOR CEDRIC GALETTE

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QUESTION PRESENTED

The question presented, as rephrased by the Court in its order granting certiorari, is “whether the New Jersey Transit Corporation is an arm of the State of New Jersey for interstate sovereign immunity purposes.”

**PARTIES TO THE PROCEEDINGS
IN NO. 24-1021**

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

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

RELATED PROCEEDINGS

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

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INTRODUCTION

The New Jersey Transit Corporation is a legally separate and almost entirely autonomous corporation that provides transportation services across state lines. It has independent sue-and-be-sued authority, including discretion to retain outside counsel of its own choosing; it bears exclusive responsibility for adverse judgments and other debts, which are not collectible from the state's treasury; its commercial operations are private in nature and do not resemble a core government function in the traditional sense; and its board has broad leeway to run the corporation's affairs as it sees fit.

The framers never would have understood an entity like this to share in New Jersey's sovereign immunity simply because it was created by state law and the governor appoints the board and retains time-limited veto power over certain of its decisions.

On the contrary, the Court held early in the nation's history that when a state creates a corporation by statute, the state becomes like "a partner in any trading company" and thereby "divests itself, so far as concerns the transactions of that company, of its sovereign character." *Bank of Commonwealth of Kentucky v. Wister*, 27 U.S. 318, 323 (1829) (quoting *Bank of the United States v. Planters' Bank of Georgia*, 22 U.S. 904, 907 (1824)). That is so even when the state or its officials retain certain "power in the management of the affairs of the corporation" as "expressly given by the incorporating act." *Id.* at 323-324. By creating the corporation as a distinct entity and "giving [it] the capacity to sue and be sued," the state "voluntarily strips itself of its sovereign character, so far as respects" the conduct of the corporation. *Planters' Bank*, 22 U.S. at 907.

That line of reasoning, which plainly rules out sovereign immunity for NJ Transit, underlies the modern “arm of the state” analysis. The Court’s contemporary cases direct courts to evaluate the same basic factors that set a corporation apart from its corporators: (1) whether the state would be formally liable for a judgment against the entity, (2) whether the entity has formal or practical independence from the state, including sue-and-be-sued power, and (3) whether it serves a traditional governmental function or instead a private one.

Each of these factors weighs decisively against NJ Transit’s claim to sovereign immunity in this case. Indeed, we are unaware of any decision of this Court extending immunity under the arm-of-the-state doctrine to a state-created entity that has sue-and-be-sued power and exclusive liability for judgments against it. This case should not be the first.

In arguing otherwise, NJ Transit insists that its “structure” and the New Jersey legislature’s expressed desire to extend sovereign immunity to NJ Transit alone are enough to make it an arm of the State of New Jersey for federal constitutional purposes. But in taking that position, it focuses on bare legislative pronouncements (labels like “instrumentality” and “essential government function”), alongside characteristics commonly ascribed to municipalities and other local government entities, none of which have ever been understood to enjoy sovereign immunity.

At bottom, it is simply wrong to say that a lawsuit against NJ Transit is, in substance, a suit against New Jersey. The two are separate in all the relevant respects, and a judgment against NJ Transit would not be collectible from the New Jersey treasury. The judgment of the Pennsylvania Supreme Court accordingly should be reversed.

STATEMENT

A. Historical background

1. The interstate sovereign immunity doctrine “is a historically rooted principle embedded in the text and structure of the Constitution.” *Franchise Tax Board of California v. Hyatt*, 587 U.S. 230, 248 (2019) (*Hyatt III*). Under the doctrine, the states retain the same sovereign immunity from suit that they enjoyed before the Constitution’s ratification. *Id.* at 249. Accord *Alden v. Maine*, 527 U.S. 706, 713 (1999).

At the founding, as today, corporations were understood as distinct legal entities. See 1 W. Blackstone, *Commentaries on the Laws of England* 462 (1765) (Blackstone). A corporation’s status as one that “may sue and be sued,” and pay damages “out of [its] corporate estate,” put it “in contradistinction to other persons.” *Russell v. Men of Devon*, (1788) 100 Eng. Rep. 359, 362 (K.B.).

The two main objectives of the “common law conception” of corporations at the founding were practical ones: *First*, to “protect[] members’ assets from * * * [adverse judgments in] lawsuits” against the corporation, and *second*, to confer “institutional autonomy” from the governmental entities that chartered them. Jason Kaufman, *Corporate Law and the Sovereignty of the States*, 73 *American Sociological Review* 402, 410 (2008).

The framers were familiar with this common law understanding of corporations, which played a central role in the debates over the status of the states during the ratifying conventions. Both the Federalists and the Anti-Federalists started from the premise “that corporations were not sovereigns.” *Springboards to Education, Inc. v. McAllen Independent School District*, 62 F.4th 174, 191 (5th Cir. 2023) (Oldham, J., concurring). Where they

diverged was whether “States were akin to corporations.” *Id.* (collecting founding-era sources).

The Federalists contended that the states were akin to “great corporations” and thus lacked “the essential rights of sovereignty.” 1 M. Farrand, *Records of the Federal Convention of 1787* 471 (1st ed. 1911) (quoting James Madison). There was historical support for this position: The original colonies of Massachusetts, Rhode Island, and Connecticut had been established as corporations by royal charters, granting them “unprecedented autonomy from the Crown” and treating them as distinct from the royal government. Kaufman, *supra*, at 411.

Concerned that recognizing the states as corporations would deny them “the least share of sovereignty,” the Anti-Federalists pressed an alternative characterization of the states as independent sovereigns. 2 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 403 (2d ed. 1836) (Thomas Tredwell in the New York convention). As all now know, the Anti-Federalists’ position carried the day: The states were deemed sovereigns, not mere corporations. *Hyatt III*, 587 U.S. at 236-238. And “[a]n integral component of the States’ sovereignty was their immunity from private suits.” *Id.* at 238 (quotation marks omitted). Accord *The Federalist* No. 81, at 487 (Hamilton).

2. It was against this background, not long after the sovereign immunity debate was finally resolved by the Eleventh Amendment, that this Court held that state-created corporations are not entitled to sovereign immunity. In *Planters’ Bank*, for example, the Court declined to extend immunity to a state-created bank because “[t]he State does not, by becoming a corporator, identify itself with the corporation[,]” the clearest evidence of which was that judgments against the bank were “to be

satisfied by the property of the corporation, not by that of the” state. 22 U.S. at 907.

The Court applied *Planters’ Bank* in a series of cases holding that state-created, state-owned, and state-controlled banks were neither subject to the constitutional constraints of the states nor, as a consequence, entitled to their immunity from suit. See *Bank of Commonwealth of Kentucky v. Wister*, 27 U.S. 318, 321 (1829); *Briscoe v. Bank of Commonwealth of Kentucky*, 36 U.S. 257, 314 (1837); *Darrington v. Bank of Alabama*, 54 U.S. 12, 15 (1851); *Curran v. Arkansas*, 56 U.S. 304, 308 (1853). Together, these cases recognize that the states’ use of separate corporate entities to achieve certain practical objectives allowed them to sidestep constitutional limits on their sovereign power, such as Article I’s prohibition on issuing bills of credit. But the approach was a two-way street: Precisely because corporations are financially insulated and politically autonomous, they are not immune from private suits.

Over the next century, the Court adhered to the view that corporations are not entitled to sovereign immunity. Perhaps most notably, the Court held in *Lincoln County v. Luning*, 133 U.S. 529 (1890), that counties are amenable to suit in federal court because a county is a mere “corporation created by * * * the state.” *Id.* at 530. As a corporation, a county is “part of the state only in [a] remote sense,” the same as “any city, town, or other municipal corporation may be said to be.” *Ibid.* In a suit against a county, it simply cannot be said that “the state is [the] real” party-defendant. *Ibid.*

It has been settled since then that “neither public corporations nor political subdivisions are clothed with that immunity from suit which belongs to the state alone by virtue of its sovereignty.” *Hopkins v. Clemson Agricultural College of South Carolina*, 221 U.S. 636, 645 (1911).

Accord *Sloan Shipyards v. United States Shipping Board Emergency Fleet Corp.*, 258 U.S. 549, 567 (1922).

3. The Court more recently reframed these principles in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). There, the Court continued to adhere to the rule that arm-of-the-state status does “not extend to counties and similar municipal corporations.” *Id.* at 280. But rather than relying on corporate status alone as the basis for that proposition, the Court held that Eleventh Amendment immunity depends ultimately on whether a state-created entity “is to be treated as an arm of the State.” *Ibid.* Drawing from corporate law principles, commentators have likened *Mt. Healthy*’s new “arm of the state” inquiry to an inquiry of whether a state-created entity is truly separate from, or instead an “alter ego” of, the state. 13 Wright & Miller, Federal Practice and Procedure § 3524.2 (3d ed.).

The Court has not since announced a single, comprehensive test for determining when a state-created entity qualifies as an “arm” or “alter ego” of the state. But its intervening decisions (and those of the lower courts) have relied on a handful of common themes, including:

- whether the state is liable for or insulated from adverse judgments against the entity;
- whether the entity has independent authority to contract, sue or be sued, raise revenue, expend funds, and acquire and dispose of property; and
- whether the entity serves a traditional governmental function or a private one.

See 13 Wright & Miller, Federal Practice and Procedure § 3524.2 (3d ed. 2008) (collecting sources). These considerations track the Court’s earlier approach: A state-created entity that has sue-and-be-sued power, is solely liable for judgments against it, and serves a function more

akin to a private enterprise—that is to say, entities that have all the qualities of a corporation—generally will not qualify as an arm of the state.

B. Factual background

1. In the decades before NJ Transit’s creation, mass transportation services in New Jersey were provided by “private companies” operating in a “private industry.” NJ Transit Br. 7. Dissatisfied with this “fragmented” approach to mass transit (*ibid.*), the New Jersey legislature created NJ Transit in 1979 to establish, operate, and maintain a unified public transit system throughout the state. See N.J. Stat. §§ 27:25-4, 27:25-5.

NJ Transit is now the largest statewide public transit system in the United States by surface area, operating a 5,300-square-mile area including New York City and Philadelphia. See *How It All Began*, NJ Transit (2025), <https://perma.cc/KS2T-C4BM>. See also *About Us*, NJ Transit (2025), <https://perma.cc/HV6Y-H5Q6>. According to NJ Transit’s 2024 annual report, the corporation earned more than three-quarters of a billion dollars from passenger fares in 2024. See New Jersey Transit Corporation, 2024 Annual Financial Report, at 85 (Table A-3), <https://perma.cc/B4JE-UZDG>.

2. NJ Transit was created by legislature as “a body corporate and politic with corporate succession.” N.J. Stat. § 27:25-4(a). It is “allocated within the Department of Transportation” for state constitutional purposes, “but, notwithstanding that allocation, the corporation shall be independent of any supervision or control by the department or by any body or officer thereof.” *Ibid.* The corporation is instead “governed by a board which shall consist of 13 members.” *Id.* § 27:25-4(b). Eleven of those are voting members, including three ex officio state officials and “eight public members who shall be appointed

by the Governor.” *Ibid.* These eight members may be removed by the governor for cause. *Ibid.*; New Jersey Transit Corporation, *Bylaws of the NJ Transit Corporation*, art. II, § 2 (June 11, 2024), <https://perma.cc/-6GHH-RXHV> (“NJ Transit Bylaws”).

NJ Transit’s board is directed to use its “independent judgment” (N.J. Stat. § 27:25-4.1(b)) in carrying out its duties, to which end it is empowered to “do all acts necessary and reasonably incident to carrying out the objectives of [the] act,” including that it may:

- make and amend its own bylaws;
- sue and be sued, including by retaining outside legal counsel of its own choosing;
- raise funds from fares, gifts, grants, or loans;
- plan, construct, operate, and finance public transportation services, directly or indirectly by contract with any public or private entity;
- purchase, lease, and dispose of real and personal property wherever situated;
- establish its own subsidiary operating divisions and delegate to subordinate officers any powers and duties deemed necessary and appropriate;
- adopt and maintain its own employee benefit plan;
- own and control any corporate entity acquired or formed to carry out its statutory objectives; and
- enter into contracts and do and perform any and all acts or things necessary or convenient to the purposes of the corporation.

Id. § 27:25-5.

NJ Transit has exercised these powers in several ways. To start, it has adopted bylaws, according to which it maintains an independent human resources structure that gives its president and CEO the authority to create

and revise personnel policies, set salaries and benefits, and implement workplace rules. See NJ Transit Bylaws, art. VI, § 2. Employees serve at-will and lack the statutory and procedural protections granted to state employees.

It also has created subsidiary corporations. For instance, it incorporated NJ Transit Bus Operations, Inc. in 1980, to take over the assets of Transport of New Jersey, a privately owned, for-profit bus company that NJ Transit acquired for \$32 million. See Martin Waldron, *Jersey Acquires 2 Key Bus Lines For \$32 Million*, NY Times (Sept. 18, 1980), <https://perma.cc/6T3D-TUD3>. And it created NJ Transit Rail Operations, Inc. in 1983, when it “absorbed the rail assets and employees from Conrail,” another privately owned, for-profit company. Steve Barry, *NJ Transit at 40*, Railfan & Railroad (June 2023), <https://perma.cc/2YB8-MMAR>.

NJ Transit’s finances are segregated from those of the state. N.J. Stat. § 27:25-17. The statute provides that “[a]ll expenses incurred by the corporation in carrying out the provisions of this act shall be payable from funds available to the corporation,” and that “[n]o debt or liability of the corporation shall be deemed or construed to create or constitute a debt, liability, or a loan or pledge of the credit of the State.” *Id.* § 27:25-17.

NJ Transit has a variety of ways to raise funds, including collecting fares, receiving federal and local funding, generating commercial revenue from advertising and leasing, and accepting private gifts, grants, or loans. *Id.* §§ 27:25-5(g), (n).

NJ Transit’s immunity from suit in New Jersey state court is resolved by the New Jersey Tort Claims Act. That statute specifies that a “public entity” is immune from suit in the New Jersey state courts (*id.* § 59:2-1.2), except that it may be sued in state court for torts it proximately

caused (*id.* § 59:2-2(a)). The act defines a “public entity” to include (1) “the State,” and (2) “any county, municipality, district, public authority, public agency, and any other political subdivision or public body in the State.” *Id.* § 59:1-3. It defines the “the State” to include “any office, department, division, bureau, board, commission or agency of the State” but expressly excludes any entity “statutorily authorized to sue and be sued.” *Ibid.* The New Jersey Supreme Court has held that, because NJ Transit is authorized to sue and be sued, it is not a component of “the State” under the New Jersey Tort Claims Act, but rather is a “public entity” akin to a “county, municipality, district, public authority, [or] public agency.” *Muhammad v. New Jersey Transit*, 821 A.2d 1148, 1152-1153 (N.J. 2003).

C. Procedural background

According to the complaint in this case, Galette was a passenger in a vehicle operated by Julie McCrey “when NJ Transit struck the vehicle,” while the vehicle was stopped on Market Street in Philadelphia, Pennsylvania. Pet. App. 2a. Galette alleged that NJ Transit and McCrey were negligent for independent reasons and that their respective acts of negligence caused him injuries. *Ibid.* NJ Transit filed an answer asserting, among other things, that it is an arm of the State of New Jersey entitled to interstate sovereign immunity. It then moved to dismiss Galette’s suit. *Id.* at 2a-3a.

The Court of Common Pleas denied the motion (Pet. App. 38a-39a) and the Superior Court affirmed (Pet. App. 25a-37a). In concluding that NJ Transit is not an arm of the State of New Jersey, the Superior Court applied a six factor test. It concluded that the factors were roughly in equipoise and thus turned to whether a denial of immunity would thwart the doctrine’s primary purposes: preserving

New Jersey's dignity and protecting its treasury. The court held that it would not and thus affirmed the trial court's denial of the motion to dismiss.

The Pennsylvania Supreme Court reversed. Pet. App. 1a-24a. The court placed dispositive focus on "the manner in which [New Jersey] classifies and describes [NJ Transit] within the structure of that State." Pet. App. 17a. It concluded that NJ Transit's statutory mission and structure "weigh heavily in favor of concluding that NJ Transit is an arm of the State of New Jersey." *Ibid.* In particular, according to the lower court, NJ Transit:

- was created to "provide for the operation and improvement of a coherent public transportation system," which New Jersey believes to be an "essential governmental function";
- is authorized to maintain a police department;
- is permitted "to acquire land and property by means of eminent domain"; and
- is subject to control by the political branches of the State of New Jersey, in that:
 - it is "allocated" to an executive department;
 - the board is appointed by the governor;
 - the governor may veto board decisions within ten days of their adoption;
 - the state legislature may override the board's use of eminent domain; and
 - NJ Transit "is required to provide a detailed annual report" to the governor and members of the legislature.

Pet. App. 18a-20a. These considerations, the court concluded, demonstrate "New Jersey's intent to have NJ Transit perform the core, governmental function of pro-

viding public transportation to New Jersey’s citizens,” rendering it an arm of the state. Pet. App. 19a.

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

The court noted further that, although “New Jersey would not be responsible for a judgment entered against NJ Transit,” it would “not place significant weight on this factor.” Pet. App. 20a. “Rather, as we explained above, we view the first factor as the driving force in concluding that NJ Transit is an arm of the State of New Jersey.” Pet. App. 22a-23a. The court thus remanded with instructions to dismiss NJ Transit. Pet. App. 24a.

SUMMARY OF ARGUMENT

NJ Transit would not have been considered an arm of the state of New Jersey by the founding generation. Nor should it be considered so today.

First, arm-of-the-state status has never been extended to an entity with (1) sole responsibility for paying judgments entered against it and (2) operational independence from its state creator, including sue-and-be-sued authority. Those two features track the characteristics of the early public banks, which this Court, in the early nineteenth century and onward, repeatedly held were not entitled to sovereign immunity. See, e.g., *Planters’ Bank*, 22 U.S. at 907. Focus on these two features also tracks the doctrine’s core purpose of shielding the state from the indignity of being compelled to appear before the court of a co-equal sovereign. Here, New Jersey has expressly

insulated itself from NJ Transit's debts, and it has given NJ Transit autonomy at least as extensive as the autonomy that municipal corporations receive. It simply cannot be said that a suit against NJ Transit is in fact a suit against New Jersey itself.

NJ Transit's structure and day-to-day operations confirm that it is functionally independent of the State. The corporation litigates in its own name, retains outside counsel, enters contracts, acquires and disposes of property, adopts and amends bylaws, manages its own personnel and labor relations, and generates substantial operating revenues through fares and commercial activities. These features are the same features that make municipalities independent of their state creators.

Labels and pronouncements like "instrumentality" and "essential governmental function" cannot supply immunity that is otherwise lacking. The federal immunity inquiry turns on substance, not nomenclature—whether the entity can sue and be sued, who is legally liable for judgments, and how the state exercises control over the entity are the key inquiries. If bare legislative characterizations controlled, states could manufacture federal immunity by fiat, erasing the principled limits that safeguard both sovereign dignity and accountability.

The governor's appointment, for-cause removal, and veto authorities do not convert what is a plainly separate commercial enterprise into the state itself. If generalized appointment, removal, or episodic veto powers sufficed, many municipalities would also be entitled to sovereign immunity despite longstanding contrary doctrine.

Finally, NJ Transit does not serve a traditional governmental function, suggesting that it does not stand in the shoes of the state. NJ Transit operates across state lines engaged in a commercial activity, competing with

private enterprise for paying passengers. It has long been recognized that, when a sovereign acts as a market participant rather than as a sovereign performing core governmental functions, it “assum[es] the character of a private individual.” *The Schooner Exchange v. McFaddon*, 11 U.S. 116, 145 (1812). Founding-era history confirms that the framers would not have understood state-subsidized mass transit to be a traditional government function, but rather simple market participation. This confirms that NJ Transit cannot be understood as an arm of the state.

ARGUMENT

INTERSTATE SOVEREIGN IMMUNITY DOES NOT EXTEND TO STATE-CREATED ENTITIES THAT ARE INDEPENDENTLY LIABLE FOR MONEY JUDGMENTS AGAINST THEM AND HAVE AUTONOMY TO SUE AND BE SUED

According to prevailing doctrine, the immunity from suit emanating from the states’ “preratification sovereignty” extends to the state itself and to “arms of the State.” *Northern Insurance Co. of New York v. Chatham County, Georgia*, 547 U.S. 189, 193 (2006).

For the past half-century, the Court has employed a multifactor analysis to determine whether a state instrumentality can invoke sovereign immunity as an arm of the state. Courts have considered how state law “defines the entity and its functions,” the extent of the state’s “power to direct the entity’s conduct,” and the liability of the state to pay judgments against the entity. *Colt v. New Jersey Transit Corp.*, 264 N.E.3d 774, 781 (N.Y. 2024). This Court has said repeatedly that the “most important factor” is whether the state treasury would be liable for an adverse damages judgment against the defendant. *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994).

Although implementation of this multifactor analysis has varied somewhat over the years, its lineage is easily traced to the historical rule that corporations—which limit the liability of their state creators and operate largely independent of them—are not arms of the state. *Cf. Morrissey v. Commissioner of Internal Revenue*, 296 U.S. 344, 360 (1935) (drawing an “analogy to corporate organization” for an entity with “centralized control, continuity, and limited liability”).

Viewing the modern arm-of-the-state test through the lens of these founding-era cases reveals a simple, bright-line rule: Interstate sovereign immunity does not extend to entities that are independently liable for satisfying money judgments against them, with no recourse to the state treasury; and that have general autonomy to run their affairs, including the power to sue and be sued. It especially does not extend to such entities engaged in commercial activity across state lines. NJ Transit meets that description precisely.

A. The treasury factor weighs heavily against sovereign immunity here

The principle reason the Constitution recognizes interstate immunity is the avoidance of judgments entered by foreign courts “that must be paid out of a State’s treasury.” *Hess*, 513 U.S. at 48. Immunity protects a state from being “thrust” by the judgment of a foreign court “against its will, into the disfavored status of a debtor, subject to the power of private citizens to levy on its treasury.” *Alden*, 527 U.S. at 749. That factor points decisively away from immunity in this case.

1. The most important factor is the State’s liability for adverse judgments

a. This Court has long recognized that the state’s legal obligation to satisfy a judgment against a state-

created entity out of the state's own treasury is "of considerable importance" in answering whether the state is an arm of the state. *Regents of the University of California v. Doe*, 519 U.S. 425, 430 (1997); *Hess*, 513 U.S. at 45-51; *Edelman v. Jordan*, 415 U.S. 651, 663 (1974); *Ford Motor Company v. Department of Treasury of Indiana*, 323 U.S. 459, 464 (1945).

The point was most recently reinforced in *Lewis v. Clarke*, 581 U.S. 155 (2017), concerning tribal sovereignty. There, the Court made two points directly relevant here: First, it explained that, "to determine whether sovereign immunity bars the suit," a court must "look to whether the sovereign is *the real party in interest*." *Id.* at 161-162 (emphasis added). Second, it held that the real-party-in-interest question turns on "where the potential legal liability [lies]," and "who may be *legally bound* by the court's adverse judgment." *Id.* at 165 (second emphasis added).

"In making this assessment, courts may not simply rely on the characterization of the parties" as to who is bound by the judgment, but instead "must determine in the first instance whether the remedy sought is truly against the sovereign." *Id.* at 162. When a suit seeks a money judgment that "must be paid out of a State's treasury" (*id.* at 165 n.4 (citing *Hess*)), for example, "the State is the real party in interest and is entitled to invoke" sovereign immunity, "even if the State is not a named party" (*id.* at 162). Indeed, it is only in this circumstance that "an arm or instrumentality of the State generally enjoys the same immunity as the sovereign itself." *Id.* at 162. Accord *Edelman*, 415 U.S. at 663 ("[A] suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment.").

Lewis is consistent on this point with *Hess*. There, the Court described “prevention of federal-court judgments that must be paid out of a State’s treasury” as the principle “impetus for the Eleventh Amendment” near the founding. 513 U.S. at 48. Accord *Lewis*, 581 U.S. at 167 (describing “the concern that originally drove the adoption of the Eleventh Amendment” as “the protection of the States against involuntary liability.”). It thus concluded that the “question * * * whether the Port Authority Trans-Hudson Corporation was a state agency” under the arm-of-the-state test turned foremost on whether “any judgment must be paid out of a State’s treasury.” *Lewis*, 581 U.S. at 165 n.4 (cleaned up) (describing *Hess*). And the Court held that the corporation there was not entitled to immunity in large measure because payment of a “damages judgment would not come from the sovereign.” *Ibid.*

b. The contemporary doctrine’s focus on whether the plaintiff has recourse to the state treasury follows directly from its founding-era forebears.

Take, for instance, Chief Justice Marshall’s discussion of immunity in *United States v. Peters*, 9 U.S. 115, 140-141 (1809). That case was a suit brought against the heirs of the treasurer of Pennsylvania, who, while treasurer, had seized a British vessel and sold it. *Ibid.* The treasurer “had deposited most of the proceeds in his own account, and had not turned them over to the State at the time of his death.” *Welch v. Texas Department of Highways & Public Transportation*, 483 U.S. 468, 491 (1987) (describing *Peters*). Core to the Court’s inquiry was that “‘the suit was not instituted against the state, or its treasurer, but against the executrixes of [the treasurer],’ and that the State ‘had neither possession of, nor right to, the property.’” *Ibid.* (quoting *Peters*, 9 U.S. at 140-141). In other words, the Court declined to extend Eleventh

Amendment immunity because the State would not have had to satisfy the judgment.¹

Cases shortly after *Peters* framed the matter, just as *Lewis* did, in terms of who qualified as the “real party in interest.” In *Osborn v. Bank of United States*, 22 U.S. 738 (1824), the Court examined whether the individual defendants were “to be considered as having a real interest, or as being only nominal parties.” *Id.* at 858. The Court concluded that the defendants had “a real interest in the case” because they had “admitted” responsibility “for the money taken out of the Bank” and “that the interest of the State would not have been an obstacle to the suit of the Bank against the individual in possession” of the amount being sought in the action. *Id.* at 858-859. See *Quern v. Jordan*, 440 U.S. 332, 345 n.17 (“*Osborn* makes it clear that in determining whether a court can grant relief the key inquiry is whether the state officer was in fact the real party in interest * * *.”).

Just four years later, Chief Justice Marshall emphasized this point in *Governor of Georgia v. Madrazo*, 26 U.S. 110 (1828). There, the Governor of Georgia had come into the possession of a vessel carrying slaves, sold the slaves, and delivered the proceeds into the state treasury. *Id.* at 119. The lower court had allowed a suit seeking restitution against the Governor, but the Court reversed because the relief sought came directly from the state

¹ Although “[t]he sovereign immunity of the States * * * neither derives from, nor is limited by, the terms of the Eleventh Amendment” (*Hyatt III*, 587 U.S. at 243 (cleaned up)), both doctrines aim to prevent “suits against nonconsenting States” (*id.* at 243-244) and employ the arm-of-the-state test to determine when a state-created entity qualifies as the state’s alter ego. We therefore rely on Eleventh Amendment cases to shed light on the contours of the arm-of-the-state test for interstate sovereign immunity purposes.

treasury and, therefore, was prohibited by the Eleventh Amendment. *Id.* at 123-124. Unlike in *Osborn*, where the defendants had sole responsibility to pay, the demand in *Madrazo* was “for money actually in the treasury of the state, mixed up with its general funds, and for slaves in possession of the government.” *Id.* at 123. The demand, therefore, was “not made personally, but officially.” *Id.* To put it another way, “it was clear that the action in fact sought relief directly from the state treasury.” *Quern*, 440 U.S. at 345 n.17 (discussing *Madrazo*).

c. The cases concerning state banks also lend strong support for the primary importance of the treasury factor. Those cases emphasized that corporations—which by definition limit the liability of their corporators—must satisfy judgments against them, not the state.

In *Planters’ Bank*, for instance, the Court, in holding that sovereign immunity did not apply, reasoned that “[t]he suit is against a corporation, and the judgment is to be satisfied by the property of the corporation, not by that of the individual corporators.” *Planters’ Bank*, 22 U.S. at 907. And in *Wister*, the Court noted that “by the terms of the act incorporating this bank,” it was the bank and not the state that was “the metaphysical person liable to suit.” 27 U.S. at 323. Similar language is found in *Brisco*, where the Court explained that “[t]he process of execution” of “a judgment against” the bank would be “obtained against the bank” itself and “would not, and need not, go against the state.” 36 U.S. at 265.

In sum, the Court has consistently affirmed the centrality of the treasury factor. It has deep roots stretching back to founding-era decisions, and its importance continues to drive the Court’s modern-day doctrine.

2. *New Jersey is not liable for adverse judgments against NJ Transit*

a. The treasury factor weighs heavily against finding immunity here, because New Jersey is not responsible for the debts of NJ Transit, including adverse judgments.

There can be no dispute about this: NJ Transit’s organic statute provides that “[a]ll expenses incurred by the corporation in carrying out the provisions of this act shall be payable from funds available to the corporation.” N.J. Stat. § 27:25-17. Crucially, “[n]o debt or liability of the corporation shall be deemed or construed to create or constitute a debt, liability, or a loan or pledge of the credit of the State.” *Ibid.* The statute thus plainly insulates the state treasury from any adverse judgment or other liability incurred by NJ Transit in a court proceeding.

NJ Transit’s financial independence from the state is demonstrated further by its authority to raise its own revenues, including by collecting fares, receiving federal grants, selling advertising, leasing property, and accepting private gifts. N.J. Stat. §§ 27:25-5(g), (n). Indeed, the corporation earned \$758.3 million in direct revenue just from passenger fares in 2025, a substantial portion of its operating budget. New Jersey Transit Corporation, *2024 Annual Financial Report*, at 85 (Table A-3), <https://perma.cc/B4JE-UZDG>.

b. NJ Transit resists the relevance of these facts, asserting (Br. 35) that the state “continues to financially backstop NJ Transit” by subsidizing “between 15 and 40 percent of NJ Transit’s operating budget.” In light of its “reliance on state funding to function,” it argues (*ibid.*), “a legal judgment against NJ Transit would ‘necessarily’ impact New Jersey ‘itself.’”

That misunderstands the inquiry. Under the arm-of-the-state test, what matters is the state’s “potential legal

liability” to pay an adverse judgment (*Regents*, 519 U.S. at 431), not the possibility that such a judgment may indirectly “impact” the state’s finances under a separate and entirely voluntary subsidy arrangement (Br. 35).

When the entity named as the defendant “pays its own debts” and the plaintiff cannot demand payment from the state treasury, a judgment against the defendant simply will not implicate “the States’ solvency and dignity.” *Hess*, 513 U.S. at 52. That is so regardless of whether the defendant may later persuade the state voluntarily “to reimburse it.” *Regents*, 519 U.S. at 431. As the Court put it in *Lewis*, “[t]he critical inquiry is who may be legally bound by the court’s adverse judgment, not who will ultimately pick up the tab” as a matter of political discretion. 581 U.S. at 165.

It is on this basis that the Court has consistently rejected the notion that indemnity provisions alter sovereign immunity: An indemnity making the state liable for a judgment against a defendant does not *entitle* the defendant to that state’s immunity (*Lewis*, 581 U.S. at 164-165), any more than an indemnity making a third party liable for a judgment against the state *deprives* the state of its immunity (*Regents*, 519 U.S. at 429-431). Just as a sovereign “buy[ing] insurance to protect itself against potential tort liability” does not cause it to “cease to be ‘one of the United States’” (*Regents*, 519 U.S. at 431), its subsidization of a politically separate entity does not cause the entity to become an arm of the state.

NJ Transit nonetheless insists (Br. 38) that the Court must look not just at the question where “formal legal liability” lies, but further “to the State’s and the entity’s broader financial relationship,” with an eye to whether a lawsuit against the entity would “offend the sovereign’s dignity” by merely *impacting* state finances.

There are three clear problems with that position.

First, there is no squaring it with *Lewis*. The Court there was crystal clear that a sovereign’s “indemnification” of a defendant “does not somehow convert the suit against [the defendant] into a suit against the sovereign.” 581 U.S. at 165. If general financial relationships were what drove the treasury factor, it is hard to see how *Lewis* could have come out the way that it did.

Second, it is inconsistent with what this Court has said about the relationship between legal liability and sovereign dignity. A state’s “immunity from private suits [is] central to sovereign dignity” because it is a grave disrespect among sovereigns for one to be subjected to the “coercive process of [the] judicial tribunals” of another. *Alden*, 527 U.S. at 715, 749. After all, “jurisdiction implies superiority of power.” *Id.* at 715 (quoting 1 W. Blackstone, Commentaries on the Laws of England 234–235 (1765)). Thus, for Pennsylvania to hale New Jersey into the Pennsylvania Court of Common Pleas is for Pennsylvania to treat New Jersey as an inferior entity, subject to its coercive process—a manifest indignity.

Those dynamics simply are not implicated when the actions of one state have a mere indirect “impact” on the finances of another—a near limitless concern.

Rather, the “sovereign dignity” problem would arise only if New Jersey *itself* were compelled to resign to the jurisdiction of Pennsylvania. That is why this Court’s cases have focused on whether the state is in fact “the real party in interest,” legally bound to pay an adverse judgment. *Lewis*, 581 U.S. at 161. In a case like that, no matter who is nominally the defendant, the state itself is “thrust * * * against its will, into the disfavored status of a debtor, subject to the power of private citizens to levy on its treasury.” *Alden*, 527 U.S. at 749.

That does not describe this case here, with respect to NJ Transit. And it simply is not an “indignity” to New Jersey for a separate, independent entity that it voluntarily choses to subsidize to have to pay a money judgment entered by a Pennsylvania court.

Third, NJ Transit’s “financial relationship” test also would be wholly unworkable. Foremost, there is no justifiable standard for a court to determine when a “financial relationship” is sufficiently significant to implicate the sovereign’s dignity. As NJ Transit itself explains (Br. 35), the state’s financial support has fluctuated substantially over the years, ranging from “between 15 and 40 percent of NJ Transit’s operating budget.” That is an almost-threefold variation from year to year. But what if the state’s support of NJ Transit had been a consistent 15%? Would that be enough under NJ Transit’s “financial relationship” test to implicate the state’s dignity? What if it were just 10%? 5%? 1%? 0.01%?

Even if it were possible to draw a logically defensible line, additional complications would follow. For example, if it happens that a 15% subsidy is enough to raise the specter of an offense to a state’s dignity, but 10% is not, would NJ Transit’s entitlement to sovereign immunity turn on and off with its financial performance? Would it enjoy sovereign immunity in 2026 when it receives 15% of its budget from the state, but not in 2027 when fare revenue increases sharply and it needs only 10%?

NJ Transit’s “financial relationship” test also would subject entitlement to interstate sovereign immunity to the shifting winds of local politics. Suppose a new-to-the-scene political figure wins the governor’s mansion on the promise to eliminate funding to NJ Transit, which she characterizes as a bloated and inefficient organization. A later tort judgment against NJ Transit—which no longer would be receiving subsidies at all—would cease to

offend the state's dignity even on NJ Transit's theory. But now suppose this new governor is only a flash in the pan, and she loses re-election to a successor who promises to (and does) bring back NJ Transit's subsidies. This, NJ Transit leads us to believe, would restore not only its funding but also its interstate sovereign immunity, tying application of a federal constitutional doctrine to the whims of gubernatorial politics.

None of that would make sense as a rule of constitutional law. The question posed by the arm-of-the-state test is whether a suit against NJ Transit is in fact a suit against New Jersey itself. The answer cannot turn on mere subsidies, which are given at the grace of the government and necessary shift with political favor and financial fortunes. To repeat the Court from *Lewis*: "The critical inquiry is who may be *legally bound* by the court's adverse judgment, not who will ultimately pick up the tab." 581 U.S. at 165 (emphasis added).

Citations to voluntary subsidies and vague invocations of "dignity" concerns ungrounded in this Court's cases are insufficient to overcome that clear rule. When an entity's own assets are "held responsible for the payment of its debts" separate from those of the state, "it can claim no exemption under the prerogatives of the state." *Briscoe*, 36 U.S. at 327.

B. NJ Transit's operational autonomy and independent sue-and-be-sued authority are not compatible with sovereign immunity

It weighs dispositively against sovereign immunity that, in conjunction with NJ Transit's independent financial responsibility for paying an adverse judgment, NJ Transit is an autonomous entity with independent sue-and-be-sued authority.

1. *NJ Transit is independent of the State of New Jersey in every relevant way*

a. The Court’s contemporary arm-of-the-state cases instruct courts to evaluate the governance structure and functions of a given entity to determine whether it is the kind of instrumentality traditionally treated as an alter ego of the state itself. See *Hess*, 513 U.S. at 43-44; Pet. App. 21. Generally speaking, when an entity is fully “integrated” (NJ Transit Br. 18) within the state’s core executive structure, when it is formally answerable to and thoroughly controlled by the state, and when it serves a traditional governmental function, it is more likely to be an arm of the state than if it is not those things. *Hess*, 513 U.S. at 42-48.

But this inquiry, which is “an uncertain and unreliable exercise,” is of limited standalone importance, and courts must keep focus on the central inquiry under the arm-of-the-state test, which is whether the entity and the state in fact share a single legal identity, so that a suit against the first is really a suit against the second, akin to a corporate alter ego analysis. *Id.* at 47. Cf. *Puerto Rico Ports Authority v. Federal Maritime Commission*, 531 F.3d 868, 883 (D.C. Cir. 2008) (Williams, J., concurring) (noting that *Mt. Healthy* was the “first time” this Court “passed in silence over its former rule that a state’s government corporations, with a general capacity of suing and being sued in their own names, were *ipso facto* completely bereft of sovereign immunity”).

The status of municipalities, cities, and towns under the arm-of-the-state test marks a number of settled rules under this second factor. As a starting point, “the Court has consistently refused” to treat “political subdivisions such as counties and municipalities,” as arms of the state, “even though such entities exercise a slice of state

power.” *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979). Accordingly, it is not enough to make an entity an arm of the state that it operates a police force or has the power of eminent domain, both of which are common to municipalities. Nor is it enough to make an entity an arm of the state that it must conform to some limited degree of “guidance” or supervision from the executive, which is also often true of municipalities. *Mt. Healthy*, 429 U.S. at 280.

In the end, the short-hand question becomes simply whether the defendant “is to be treated as an arm of the State partaking of the State’s * * * immunity, *or is instead* to be treated as a municipal corporation or other political subdivision to which [immunity] does not extend.” *Mt. Healthy*, 429 U.S. at 280 (emphasis added).

b. The relevant considerations under the second factor confirm that New Jersey and NJ Transit do not share a single legal identity, such that an action against NJ Transit is in reality an action against the state. To the extent NJ Transit bears qualities of a state entity at all, it bears the qualities of a corporate municipality that by definition is *not* an arm of the state.

Consider first the powers expressly conferred on NJ Transit by its organic statute. Like a county or city, it has a wide array of very significant powers that it exercises without day-to-day supervision of the executive branch. Indeed, it was created expressly “independent of any supervision or control by the department [of transportation] or by any body or officer thereof” (N.J. Stat. § 27:25-4), and its board is expressly directed to “exercise independent judgment” (*id.* § 27:25-4.1) in the running of its affairs. NJ Transit waives this away (Br. 32) as a mere necessity of state constitutional law, which “caps the number of Executive Branch ‘departments’ at twenty.” But why should the “why” matter? NJ Transit

doesn't dispute that it is, in fact, independent of the state department of transportation.

Further, NJ Transit is granted independent power to raise funds from fares and grants; plan and operate public transportation services, including by contracting with other public or private entities; purchase, lease, and dispose of real and personal property held in its own name; establish subsidiary operating divisions and delegate powers and duties to subordinates; and enter into all other contracts and arrangements as needed to run its "affairs and business." N.J. Stat. § 27:25-5.

Consider next the tremendous independent powers conferred on the president and CEO of NJ Transit. He may unilaterally enter contracts up to \$12.5 million, even without board approval. NJ Transit Bylaws art. VI, § 3. He also may establish and revise personnel policies, set salaries and benefits, and implement workplace rules. *Id.* art. VI, § 2. Consistent with that latitude, NJ Transit is empowered to offer (and does offer) its own healthcare and retirement benefits, which are not folded into the state's benefit programs. See New Jersey Transit Corporation, 2024 Annual Financial Report, at 109-116, <https://perma.cc/B4JE-UZDG>. This autonomous human resource structure reflects NJ Transit's near-complete freedom from state personnel oversight—a factor that stands in stark contrast with, for example, N.J. Stat. § 52:17B-100, which makes the employees of the New Jersey Attorney General's Office employees of "the civil service of the State."

Finally, and perhaps most important, NJ Transit is granted independent sue-and-be-sued power. This includes the discretion to retain outside legal counsel of its own choosing and to settle substantial claims against it without state involvement. See N.J. Stat. § 27:25-5(a), (z); NJ Transit Bylaws art. VI, § 10.

A state-created corporation that is expressly granted wide-ranging authority to run its own affairs and to appear in court at its own discretion, in its own name, and with its own counsel does not remotely suggest an arm of the state. On the contrary, it suggests a municipality or other public corporation, distinct and separate from the state. That is what *Lincoln County* held: A “county is territorially a part of the state, yet politically it is also a corporation created by, and with such powers as are given to it by, the state.” 133 U.S. at 530. And when state law “explicitly provides for the liability of counties to suit” and grants that they “may sue and be sued in all courts in like manner as individuals[,]” then it is “beyond question” that they are not entitled to arm-of-the-state immunity. *Id.* at 530-531. Accord, e.g., *Ashton v. Cameron County Water Improvement District No. 1*, 298 U.S. 513, 543 (1936) (“Neither public corporations nor political subdivisions are clothed with that immunity from suit which belongs to the state alone by virtue of its sovereignty.”) (quoting *Hopkins v. Clemson Agricultural College*, 221 U.S. 636, 645 (1911)). Just so here.

NJ Transit asserts (Br. 41-43) that this Court previously has treated sue-and-be-sued clauses as relevant only to the question of a state’s “waiver” of sovereign immunity. That approach, NJ Transit asserts (Br. 43), “presuppos[es] sovereign immunity to waive in the first place.” But that stretches the cited cases well past their breaking points. In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 676 (1999), the Court merely cited in passing to *Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Association*, 450 U.S. 147, 149-150 (1981) (per curiam), for the proposition that a sue-and-be-sued clause does not, by itself, waive sovereign immunity. But the defendant’s arm-of-the-state status

was assumed in that case (527 U.S. at 671)—an assumption that Justice Stevens characterized as “doubtful” for some of the very same reasons we press in this brief (see *id.* at 691-692). As for *Florida Department of Health*, that was a short per curiam opinion with just eight sentences of legal analysis, and the Court held only that a state does not give an “express waiver of Eleventh Amendment immunity” simply by agreeing “to obey federal law in administering the program.” 450 U.S. at 150. That holding has zero relevance here.

In any event, our point is not that a sue-and-be-sued clause, all by itself, defeats a state-created entity’s claim to sovereign immunity. Nor is it that New Jersey has “waived” NJ Transit’s immunity. It is, instead, that a sue-and-be-sued clause—taken together with a state-created entity’s broad operational autonomy, independent responsibility for paying judgments against it, and performance of a private function—indicates an entity that is, in the truest sense, a separate corporation that is not entitled to sovereign immunity as an arm or alter ego of the state. *College Savings Bank* and *Florida Department of Health* do not call that point into question.

2. NJ Transit’s responses are unpersuasive

a. NJ Transit’s principal instinct in response to these points is to change the topic, shifting focus from substance to labels. It thus asserts (Br. 19) that, “[b]ecause the preeminent purpose of state sovereign immunity is to protect States’ dignity by preventing them from being haled into court without their consent,” the Court should “seek first to understand” whether the state *wanted* the defendant entity to have federal interstate sovereign immunity. That inquiry supposedly turns on the “express characterizations” (Br. 18) and statements of “express intent” (Br. 20) that may appear in an entity’s organic

statute. And the inquiry is central, NJ Transit reasons (Br. 19), because “telling a State that it was wrong to view its entity as sharing in its immunity * * * is itself no small indignity.” See also Br. 20 (it would be an indignity for one state to “incorrectly countermand[] another’s views as to the latter’s own entities”).

In NJ Transit’s view (*id.* at 20-21), courts therefore should give presumptive effect to a state’s expressly stated desire to extend sovereign immunity to its own corporate creations, as indicated by naked labels like “instrumentality” and “essential governmental functions” appearing in the relevant statutes.

The state *amici* put the point even more directly, insisting that “the Court should adopt a brightline rule in favor of immunity where a State itself characterizes the entities it creates as instrumentalities of the State[,]” full stop. *Amicus* Br. of Texas, et al. 3. Under this proposed approach, “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.’” *Id.* at 4 (emphasis added) (quoting N.J. Stat. § 27:25-4(a)).

That is a stunning proposition, completely divorced from first principles. State law is of course relevant here, but only because the “federal question can be answered only after considering the provisions of state law that define the agency’s character.” *Regents*, 519 U.S. at 429 n.5. That is a question of substance, not mere legislative labels or *ipsi dixit*. Simply calling NJ Transit an “instrumentality” and baldly labeling its role a “public and essential governmental functions” (N.J. Stat. § 27:25-4(a)) does not make those things true. Rather, NJ Transit’s character for interstate sovereign immunity purposes is defined by the *powers* that are conferred upon it, the *functions* that it was created to serve, and the *control* that the state maintains over it—to say nothing of the

exclusive liability that it bears to make good on adverse judgments against it.

That leads to a more basic point: The “indignity” against which interstate sovereign immunity guards is not the supposed indignity of subjecting New Jersey’s characterizations to judicial scrutiny under the federal Constitution. The Court’s concern in *Hyatt III* for each state’s “equal dignity and sovereignty under the Constitution” was the concern to prevent “suits against non-consenting States” in the courts of their sister states, which would imply the regulatory inferiority of the state compelled to appear. 587 U.S. at 243-245. That naturally begs the question presented here: Which entities qualify as the state? A substance-driven effort to answer that question, as opposed to simply accepting the states’ self-serving say-so, is not an “indignity.” It is, instead, the federal-law inquiry prescribed by this Court to determine when an indignity might occur.

In pushing a radical “because we say so” test, the states appear to conflate sovereign immunity under state law (over which state legislatures do have say-so power) with sovereign immunity under federal constitutional law (over which they do not). See, e.g., NJ Transit Br. 21, 23 (citing New Jersey Supreme Court cases concerning immunity from suit in New Jersey courts, under New Jersey law). The two are not the same. States often extend *state* sovereign immunity to entities that lack *federal* sovereign immunity. New Jersey offers a prime example, by extending state sovereign immunity under state law to municipalities. See NJ Stat. § 59:2-1 (extending immunity to “public entities”); *id.* § 59:1-3 (defining “public entities” to include municipalities). And, of course, the New Jersey Supreme Court has affirmed NJ Transit’s state-law immunity under that scheme by likening it to a municipality. See *Muhammad v. New Jersey Transit*, 821

A.2d 1148, 1152-1153 (N.J. 2003).²

None of this is to say that the states are powerless to direct whether their organs of government are entitled to immunity under the federal Constitution. Quite the opposite—it is entirely up to the states what functions, affiliations, and powers they confer on their departments, agencies, and offices. The point is a more modest one: While New Jersey is free to dictate the scope of NJ Transit’s federal interstate immunity by shaping the *substance* of the state law defining NJ Transit’s finances and powers, it cannot dictate the applicability of federal interstate immunity by mere pronouncement.

“A state would have too much self-interest in extending sovereign immunity to as many of its agencies and corporate creations as possible to allow local laws to be determinant” of the federal immunity question. *Miller-Davis Co. v. Illinois State Toll Highway Authority*, 567 F.2d 323, 330 (7th Cir. 1977). To say otherwise would mean that New Jersey could override centuries of settled precedent, extending immunity to (for instance) its municipalities and towns by simply labeling them “instrumentalities” that serve “essential governmental functions.” That is not the law.

² Other states likewise extend sovereign or other governmental immunities in their own courts to municipalities, counties, and similar entities, including (to name only a few) Georgia, Missouri, North Carolina, Ohio, Texas, Virginia, and Alabama. See *SP Frederica, LLC v. Glynn Cnty.*, 173 F. Supp. 3d 1362, 1374 (S.D. Ga. 2016); *Crouch v. City of Kansas City*, 444 S.W.3d 517, 521 (Mo. Ct. App. 2014); *Providence Volunteer Fire Department v. Town of Weddington*, 876 S.E.2d 453, 468 (N.C. 2022); *Turner v. City of Toledo*, 671 F. Supp. 2d 967, 971 (N.D. Ohio 2009); *Tarrant Regional Water District v. Johnson*, 572 S.W.3d 658, 663 (Tex. 2019); *Powers v. CSX Transportation, Inc.*, 105 F. Supp. 2d 1295, 1299 n.2 (S.D. Ala. 2000).

b. NJ Transit makes a brief effort to address the substance of its own “structure,” which it says supports sovereign immunity. That effort fails.

First, NJ Transit notes (Br. 22) that the legislature conferred on it “plenary public powers,” including the power to “operate a police force” and to “exercise eminent domain.” In addition, “NJ Transit’s property is deemed untaxable property of the State.” *Ibid.* Moreover, NJ Transit notes (*ibid.*), it “can promulgate regulations that have the force and effect of law” and is subject to “public-meeting laws” and “public-record laws.”

Yet each of those powers or constraints applies just as well to municipal corporations, which all agree are not arms of the state. Under the New Jersey home rule statute, municipalities “may make, amend, repeal and enforce” all “ordinances, regulations, rules and by-laws” that they “may deem necessary and proper for the good government, order and protection of persons and property, and for the preservation of the public health, safety and welfare of the municipality and its inhabitants.” N.J. Stat. § 40:48-2. That includes the power to establish and maintain a “municipal police department” (*id.* § 40:48-1.7; see also *id.* § 40:48-1), to exercise eminent domain (*id.* § 40A:12-5(a)(1)), and to promulgate general regulations with the force and effect of law (*id.* §§ 40:48-1, 40:48-2). Municipalities also are subject to New Jersey’s public-meeting law (*id.* §§ 10:4-8, 10:4-9) and public-records law (*id.* § 47:1A-1.1). And because they are the entities responsible for collecting property tax in New Jersey (*id.* § 54:1-90), their property is nontaxable.

There is thus nothing in these powers or limitations that indicate NJ Transit is an arm of the state—at least not any more than a town or municipality is, which even NJ Transit admits (Br. 45) is not at all.

NJ Transit also observes (Br. 22-23) that it “is entitled to be represented by the New Jersey Attorney General when it wishes.” But that cuts even further against sovereign immunity here, since the decision to invite the Attorney General’s involvement in a given case is NJ Transit’s *option*. In contrast, the Attorney General may displace a county prosecutor at the governor’s request, denying the county a choice in the matter. See N.J. Stat. § 52:17B-106. Even more telling, the Attorney General is *required* by state law to “[a]ct as the sole legal adviser, attorney or counsel, notwithstanding the provisions of any other law, for all officers, departments, boards, bodies, commissions and instrumentalities of the State Government.” *Id.* § 52:17A-4(e). NJ Transit, which, again, may retain its own legal counsel at its “discretion” (*id.* § 27:25-5(z)), notably doesn’t qualify.

Second, NJ Transit places great weight (Br. 30-31) on the facts that the governor appoints the board and may remove board members for cause; and enjoys a ten-day window to veto officially reported board decisions.

None of that advances the ball for NJ Transit. We know this from contemporary cases like *Hess*, where PATH emphasized to no avail that New Jersey and New York “appoint[ed] and [could] remove the commissioners, the Governors [could] veto Port Authority actions, and the States’ legislatures [could] determine the projects the Port Authority undertakes.” 513 U.S. at 47.

And we know it from founding era cases, too, such as *Wister* and *Briscoe*, the cases concerning the Bank of the Commonwealth of Kentucky. There, “all [of the bank’s] officers were appointed by the State, and removable at its pleasure,” and “the state possessed an unlimited power over the corporation.” 36 U.S. at 344 (Story, J., dissenting). In both cases, the Court held that the defendant was not entitled to immunity.

The same conclusion is called for here. Not only is NJ Transit subject to comparatively less robust control than PATH or the Kentucky bank, but in all cases, “ultimate control of every state-created entity resides with the State, for the State may destroy or reshape any unit it creates.” *Hess*, 513 U.S. at 47. “Political subdivisions exist solely at the whim and behest of their State, yet cities and counties do not enjoy Eleventh Amendment immunity.” *Ibid.* (quoting *Mt. Healthy*, 429 U.S. at 280; *Lincoln County*, 133 U.S. at 530). See also *Auer v. Robbins*, 519 U.S. 452, 456 n.1 (1997) (rejecting immunity for the St. Louis Board of Police Commissioners, despite the governor of Missouri appointing four of five board members).

And NJ Transit is wrong, in any event, to say (Br. 29) that the governor’s appointment, for-cause removal, and veto powers “distinguish” NJ Transit “from other entities, such as municipalities, private corporations, and any interstate entities not entitled to their creators’ sovereignty.” In fact, state governors frequently have similar authority over the appointment and for-cause removal of municipal officials. See, e.g., New York City, N.Y., Charter § 9 (authorizing the state’s governor to remove “the mayor * * * upon charges and after service upon him a copy of the charges and an opportunity to be heard”); Fla. Stat. § 112.51 (authorizing the state’s governor to “suspend from office any elected or appointed municipal official” for “malfeasance, misfeasance, neglect of duty, habitual drunkenness, incompetence, or permanent inability to perform official duties” and allowing him to appoint replacement during suspension); S.D. Codified Laws § 3-17-3 (specifying grounds for “removal of local law enforcement officers by Governor”).

State governors also often exercise analytically similar veto or approval powers over municipal actions. See,

e.g., W. Va. Code § 7-23-2 (allowing governor to act on request by “municipalities and county boards of education” for waivers of rules and regulations to the Secretary of Commerce); Mich. Comp. Laws § 117.22 (amendments to city charter “shall be transmitted to the governor of the state” for approval); Ala. Code § 11-85-1 (allowing planning commissions of “any municipality” to “apply to the governor for * * * the appointment of a regional planning commission”). Municipalities in these other states are not converted to arms of the state as a result. Thus and again, NJ Transit at most resembles a municipal corporation, outside the protection of federal sovereign immunity.

C. NJ Transit does not serve a traditional governmental function

If there were any lingering doubt that NJ Transit is not entitled to immunity (there should be none), it would be resolved by the fact that, although NJ Transit provides a valuable public service, it does not serve a traditional governmental function, either by founding-era standards or today’s. It provides a function more akin to a private corporation operating in a commercial market.

a. We begin with the founding era. Around the time of ratification, public transportation (if it could be called that) comprised a system of privately run ferries and stagecoaches. These were almost uniformly private enterprises. In Virginia especially, ferries were “a lucrative business” in which private parties “sought licenses for a specific spot and often obtained long-standing monopolies.” Clara Ann Simmons, *Chesapeake Ferries: A Waterborne Tradition, 1636-2000*, at 15 (2009).

Many of the founders regularly used ferries owned by Virginia entrepreneurs. George Washington “often used [Hooe’s Ferry] journeying south to his brothers at Wake-

field and Bushfield, to visit his friends on other plantations, and to attend the Assembly at Williamsburg.” Paul Wiltstach, *Tidewater Virginia* 295 (1929). Accord 2 Donald Jackson, *The Diaries of George Washington, 14 January 1766–31 December 1776*, at 64 (1976).

George Mason himself owned a ferry on the Occoquan River. In his will, he left “the right and benefit of keeping the ferry” to his youngest son. 2 Kate Rowland, *The Life of George Mason, 1752–1792*, at 465 (1892).

Ferry systems existed in Massachusetts Bay Colony and Plymouth Colony, too. Balthasar H. Meyer, *History of Transportation in the United States before 1860*, at 37, 66 (1917); Anna Augusta & Charles V. Chapin, *A History of Rhode Island Ferries 1640–1923*, at 17 (1925). Although towns could receive a franchise “to operate a ferry,” far “more often * * * an individual was granted an exclusive franchise.” Augusta & Chapin, *supra*, at 18. This licensing system continued in the State of Massachusetts after the Constitution’s ratification. James Austin, *An Exposition of the Rights of the Commonwealth to the Ferries in the Harbour of Boston: Made in Pursuance of an Order of the House of Representatives*, 7 (1833).

In New York, “ferries [were also] private affairs.” Meyer, *supra*, at 67. Likewise, in Rhode Island, the ferries were operated under a franchise system, with the colony having the right “to grant exclusive franchises for ferries and providing for the manner in which they were to be granted.” Augusta & Chapin, *supra*, at 8.³

³ Direct management of ferries by colonies did occur on rare occasions, but these experiments were always short-lived. For instance, in 1748, the colony of Rhode Island operated a ferry line when a private franchise became unprofitable. Augusta & Chapin, *supra*, at 6. This experiment lasted only two years after it “proved unsuccessful and in 1750 the ferries were sold.” *Id.*

Much the same goes for the founding-era stagecoach system. Stagecoach services began to operate privately in the colonies in the early 1700s. Oliver W. Holmes & Peter T. Rohrbach, *Stagecoach East: Stagecoach Days in the East from the Colonial Period to the Civil War*, at 6 (1983). By the mid-1700s, regular stage service flowed “from the three hub cities of Boston, New York, and Philadelphia.” *Id.* at 11. Soon after the British were evacuated following the end of the Revolutionary War, “staging lines expanded rapidly up and down the Atlantic seaboard.” *Id.* at 15. Competition was fierce along these lines, unless entrepreneurs succeeded in obtaining “monopoly privileges” from state governments. *Id.* at 21.

b. Against this background, it would have come as a great surprise to the framers that competing with private interests in the market for public transportation services might be viewed a traditional governmental function, entitling a public corporation to sovereign immunity. *Cf. Federal Housing Administration v. Burr*, 309 U.S. 242, 245 (1940) (in a federal immunity case, holding that “it must be presumed that when Congress launched a governmental agency into the commercial world and endowed it with authority to ‘sue or be sued’, that agency is not less amenable to judicial process than a private enterprise under like circumstances would be”).

Modern developments do not suggest otherwise. To be sure, involvement of state and local governments in mass transportation is more common today than at the founding, but it is still commercially competitive service. NJ Transit hardly could deny this—it acquired its bus and train assets from private companies whose operations it took over in the early 1980s. See Waldron, *supra*; Barry, *supra*. Even today, NJ Transit competes for fare-paying riders with numerous private companies, including ride-

share apps like Uber and Lyft, and traditional bus lines like Greyhound and Peter Pan.

That is not a traditional governmental function, akin to “collecting taxes, running elections,” or other general “use[s] of [the] police power,” supporting sovereign immunity. *Colt*, 264 N.E.3d at 801 (Wilson, C.J., concurring). As Chief Judge Wilson aptly put it in his *Colt* concurrence, “[a] state-created entity operating a billion-dollar interstate transportation enterprise is not a sovereign function of any State” but rather “a commercial enterprise operating in daily competition with myriad private entities that also shuttle riders back and forth between New Jersey and New York.” *Id.* at 791. And it is plainly distinct from building transportation infrastructure (see NJ Transit Br. 25-26), which is a traditional function of government.

c. All of this cuts yet further against NJ Transit, for it has long been settled that a state entity’s participation in a commercial market affirmatively divests the entity of any immunity it might otherwise assert. Drawing from seminal cases like *The Schooner Exchange*, the Court early on recognized “commercial exceptions to state immunity.” Ann Woolhandler, *Interstate Sovereign Immunity*, 2006 Sup. Ct. Rev. 249, 278 (2006). In the bank and railroad cases principally, the Court relied on the non-governmental nature of a states’ participation in “commercial ventures” to conclude that sovereign immunity was inapplicable to a state-created corporation. *Ibid.*

The first of these cases, *Planters’ Bank*, held that sovereign immunity did not apply to the Georgia bank because, “when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen.” 22 U.S. at 907. Five years later, in *Wister*, the Court again relied on the fact

that the State, as a corporator of the bank, had become “a partner in [a] trading company,” and as such laid down “its sovereign character.” 27 U.S. at 323. State high courts later bolstered the point: By “embark[ing] in an enterprise which is usually carried on by individual persons or companies, [the state] voluntarily waives its sovereign character and is subject to like regulation with persons engaged in the same calling.” *Western & Atlantic Rail Road v. Carlton*, 28 Ga. 180, 181 (1859).⁴

New Jersey’s incorporation of an “entity operating a billion-dollar interstate transportation enterprise” (*Colt*, 264 N.E.3d at 791 (Wilson, C.J., concurring)) places it in the same stead. Providing subsidized public transportation services in competition with private market participants simply is not a traditional governmental function. It is instead the opposite: participation in a private market. This factor thus strongly indicates that NJ Transit, created solely to participate in a private, competitive market across state lines, isn’t an arm of the state.

d. A final point warrants mention. If NJ Transit were correct that it is immune from suit in the state courts of Pennsylvania and New York with respect to its out-of-state operations there, it follows that it would be altogether immune from those states’ local regulations.

⁴ See also *Bank of the State of Alabama v. Gibson’s Administrators*, 6 Ala. 814, 816 (Ala. 1844) (“It cannot be endured, that the legislature, which is but the machinery of government, should be allowed to confer upon a monied corporation, established by itself, any portion of the sovereign power, which was inherent in the body politic.”); *Hutchinson v. W. & A. R. Co.*, 53 Tenn. 634, 635-636 (1871) (“By becoming owner or stockholder the State descends from its sovereign dignity to individuality so far as to place it upon an even footing of legal liability with other corporations of like character and purposes.”).

After all, if NJ Transit were an arm of the state of New Jersey (its alter ego), then to place NJ Transit under the regulatory authority of Pennsylvania *at all* would imply Pennsylvania's superiority—its power to command New Jersey to answer for violations of Pennsylvania laws—thus offending New Jersey's dignity. Taking NJ Transit's argument to its logical conclusion thus would mean that NJ Transit not only can't be sued in Pennsylvania court, but also (and as a result) that it would not have to comply with Pennsylvania's bus regulations when it drives a bus over the Benjamin Franklin Bridge into Center City. See Phil. Code § 9-401, *et seq.* (regulations concerning "motor buses" and "passenger carriers"). *Cf.* N.Y. Comp. Codes R. & Regs. tit. 17 § 720.0, *et seq.* (regulations applicable to "regulated passenger transportation" and "municipal passenger transportation").

But respect for the dignity of co-equal sovereigns is a two-way street. And requiring Pennsylvania to endure New Jersey's operation of a transit business across state lines, free from regulation, would be a great offense to Pennsylvania's own dignity.

Pennsylvania authorities adopt ordinances and laws concerning bus stop locations and standards for loading and unloading passengers for the benefit and protection of Pennsylvania's own citizens. The Constitution does not require Pennsylvania to endure New Jersey's incursion across state lines into its own territory, driving buses and trains free from regulation. This perhaps why, whereas the California Franchise Tax Board had 48 states as amici supporting it in *Hyatt III*, NJ Transit here has the support of fewer than half of those.

It is no offense to New Jersey's sovereign dignity to say that, when NJ Transit drives a bus with fare-paying passengers over the bridge from Camden to Philadelphia, it must comply with Philadelphia's regulations concern-

ing bus operations. And if it is not an intolerable offense to New Jersey's dignity for NJ Transit to be subject to regulation in Pennsylvania by Pennsylvania authorities, neither can it be an intolerable offense to subject NJ Transit to private suit there, to enforce its traffic and other laws.

* * *

NJ Transit is not an arm of the state of New Jersey. It is a legally separate corporation made liable for its own debts and empowered to run its own affairs, including with the authority to sue and be sued using private outside counsel. In form and substance, that describes a traditional corporation, with limited liability. And never before has this Court recognized such an entity as an "arm of the state." On the contrary, it has consistently treated such characteristics as markers of independent corporate status, defeating sovereign immunity.

In every relevant respect, NJ Transit resembles the kind of founding-era bank or modern-day municipality that has always been treated as distinct from the state that created it. This case therefore is not a close one—NJ Transit is not an arm of the state, and the contrary judgment of the Pennsylvania Supreme Court must be reversed.

CONCLUSION

The Court should reverse the judgment below and remand for further proceedings.

Respectfully submitted.

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