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 Court of Appeals of New York

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER IN NO. 24-1021 AND RESPONDENTS IN NO. 24-1113

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees. CAC therefore has a strong interest in ensuring that state sovereign immunity is applied in a manner consistent with its historical origins and accordingly has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

To be a corporation is to be amenable to suit. That bright-line rule was axiomatic for centuries in English law; it was embraced by the Americans who ratified the Constitution; and it was consistently applied by this Court in the early Republic as it exercised jurisdiction over state-affiliated corporations. As far as original meaning is concerned, that rule makes this dispute an easy one. In these cases, buses operated by the New Jersey Transit Corporation (NJTC) struck and injured people in New York and Pennsylvania. But when defending against suits to recover damages, the NJTC insisted that it was immune from suit as an arm of the State of New Jersey. Wrong. Because the NJTC is a "body corporate and politic," N.J. Stat. Ann. § 27:25-4(a), it is entitled to no such immunity.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund its preparation or submission. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

In the Founding era, English law regarded the corporation as an "artificial" form distinct from the monarch. 1 William Blackstone, *Commentaries on the Laws of England* 467 (1768 ed.). And since at least the sixteenth century, it was undisputed that the capacity to "sue and to be sued" was integral to corporate status. W.S. Holdsworth, *English Corporation Law in the 16th and 17th Centuries*, 31 Yale L.J. 382, 390 (1922); *see also* 2 Anthony Fitzherbert, *La Graunde Abridgment* Fol. 22 (1577). Amenability to suit was thus "incident" to a corporation's very existence. That meant that an entity could be sued simply by virtue of being a corporation, even without any express provision in its charter authorizing such suits. *See* Holdsworth, *supra*, at 390.

The Framers adopted these principles, "deriv[ing]" their "ideas of a corporation, its privileges and its disabilities . . . entirely from the English books." *Bank of United States v. Deveaux*, 9 U.S. 61, 88 (1809) (Marshall, C.J.). As a result, under American law, the "essence of a corporation" was, *inter alia*, its ability to "sue and be sued," an attribute "necessarily and inseparably incident to" a corporation's creation "by tacit operation, [even] without any express provision" in its charter. 2 James Kent, *Commentaries on American Law* 224 (1827).

Delegates to the Philadelphia and state conventions therefore agreed that corporations fell outside the "traditional immunity" held by sovereigns. *Franchise Tax Bd. of Cal. v. Hyatt*, 587 U.S. 230, 241 (2019) (*Hyatt III*). Throughout the conventions, they consistently distinguished corporations from sovereigns, noting that corporations did not possess even "the least share of sovereignty." 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 403 (Jonathan Elliot ed., 1836) [hereinafter

Elliot's Debates]. Indeed, this is why the Framers ultimately rejected characterizing the states as "mere Corporations" under the new federal Constitution. Because states exercised sovereign power, they could not be regarded as corporate entities.

Consistent with that understanding, this Court recognized early on that state-affiliated corporations were distinct entities for sovereign-immunity purposes. Because states "impart[ed] none of [their] attributes of sovereignty" to the corporations they created, owned, or controlled, *Briscoe v. Bank of Commonwealth of Kentucky*, 36 U.S. 257, 326 (1837), this Court repeatedly rejected invocations of sovereign immunity by state-created banks, even when those entities were created to serve a public purpose.

History therefore dictates the outcome here: The NJTC can be haled into court. State sovereign immunity is rooted in the "traditional immunity" held by states "at the time of the founding." *Hyatt III*, 587 U.S. at 241. And although "the Constitution was understood . . . to preserve the States' traditional immunity from private suits," *id.* at 243 (quoting *Alden v. Maine*, 527 U.S. 706, 723-24 (1999)), that traditional immunity never extended to corporations. Consequently, permitting these plaintiffs to recover for their injuries will not offend New Jersey's "equal dignity and sovereignty under the Constitution." *Id.* at 245. This Court should accordingly affirm in *Colt* and reverse in *Galette*.

ARGUMENT

I. Under English Common Law, Corporations Were Legal Entities Distinct from the Sovereign that Could Sue and Be Sued, Regardless of Whether They Served a Public Purpose.

The concept of a "corporation" emerged from Roman law, which treated certain groups of individuals as a "body corporate"—or "corporation." *See* Blackstone, *supra*, at 467-68. Corporations enjoyed "perpetual succession," a kind of "legal immortality" which enabled corporate bodies to retain rights and privileges even after the death of those comprising them. *Id.* at 467.

As the English common law embraced the concept of corporations, it began to inextricably associate the capacity to sue and be sued with corporate status, as a wealth of scholarly treatises and judicial decisions makes clear.

A. Since at least the sixteenth century, English legal scholars agreed that "if a corporation were created, it had by implication the capacity to sue and to be sued." Holdsworth, *supra*, at 390. Writing in 1577, Anthony Fitzherbert explained that a corporation could be sued simply by virtue of its creation by the king. Fitzherbert, *supra*, Fol. 22. Almost half a century later, Edward Coke echoed that idea from the bench. As he put it, "tacit[ly] annexed" to a corporation and "incident[]" to its creation was the power to "sue and be sued, implead and be impleaded." *The Case of Sutton's Hosp.*, 77 Eng. Rep. 960, 970 (K.B. 1612).

By the end of the seventeenth century, it was undisputed that "included . . . in the very act of incorporating" was the "power to sue and be sued," and that corporations were bound to "answer the law" as

defendants in court. *Proceedings in The King v. City of London (1681–1683)*, 8 How. St. Tr. 1039, 1101-03 (K.B. 1682) (argument of George Treby); *see id.* at 1159-60 (argument of opposing lawyer, Attorney General Sawyer). Even counsel representing corporations as defendants did not question this rule. *See id.* at 1101-03 (argument of George Treby).

This rule endured in the decades immediately preceding the Founding. As one scholar explained, a corporation was called an "Incorporation or Body incorporate, because the Persons are made into a Body which endureth in perpetual Succession; and are of Capacity to grant, sue or be sued, and the like." *The Law of Corporations: Containing the Laws and Customs of All the Corporations and Inferior Courts of Record in England* 1-2 (1702). Like Fitzherbert and Coke, this author noted that when "a Corporation is duly created," the capacity to "implead, or be impleaded" is "tacitly annexed to it" as "[i]ncident[]" to its creation, "sufficient [even] without the [specific] words" in its charter permitting suits. *Id.* at 16. Other scholars similarly defined a corporation as a "collection of many individuals, united into one body" with the capacity of "suing and being sued." 1 Stewart Kyd, *A Treatise on the Law of Corporations* 13 (1793). Indeed, corporate status was so closely associated with suability that some writers found it necessary to clarify that being a corporation meant more than just the "mere" capacity to be sued. *Id.* at 13-14 (citation omitted).

In his *Commentaries*, Blackstone endorsed this traditional common law rule. He explained that the capacity "[t]o sue or be sued, implead or be impleaded . . . by its corporate name" was "inseparabl[e]" from and "incident to every corporation." Blackstone, *supra*, at 475. And like earlier scholars, he observed that as soon as a corporation was "duly erected," the

ability to be haled into court was "tacitly annexed" to it. *Id.* No express provision in its charter was needed.

According to Blackstone, a corporation could be sued even if it served a "public" purpose—the kind the NJTC says it was created to fulfill. *See* NJTC Br. 7. Blackstone acknowledged the "great variety" of functions corporations served, from the "good government of a town or particular district," to the "advancement of religion, of learning, and of commerce," citing as examples the "Bank of England," the "universities of Oxford and Cambridge," and "hospitals for the maintenance of the poor, sick, and impotent." Blackstone, *supra*, at 467-78. But he drew no distinction among them when describing the general rule: Because they were corporations, all could be sued. *See also* Kyd, *supra*, at 28 (explaining that corporations "established for the maintenance and regulation of some particular object of public policy," such as "for regulating navigation," could be sued).

To be sure, the king himself was sometimes referred to as a "sole corporation" (a corporation composed of just one person). *See* NJTC Br. 44 n.14 (quoting Blackstone, *supra*, at 469). But that label was used only to explain why the kingdom endured in "perpetuity," preventing the possibility of an "interregnum" (a "vacancy of the throne") by vesting possessions and rights in a successor "immediately upon the demise of one king." Blackstone, *supra*, at 469-70. Despite this usage, English law recognized a categorical distinction between corporations and the sovereign, who enjoyed immunity from suit. A corporation was merely a creature of law that derived its power through "none but the king" and could exist only by the "king's consent." *Id.* at 472-74. By contrast, the king did "not owe [his] origin" to another sovereign. *Chisholm v. Georgia*, 2 U.S. 419, 448 (1793) (Iredell, J., dissenting). That

rendered the king *sui generis*—a sovereign immune from suit though sometimes described as a corporation for purposes of perpetual succession.

B. Consistent with the longstanding understanding that corporations could be haled into court, corporate entities—including those associated with the Crown, like the East India Company—were sued multiple times in the decades preceding ratification of the Constitution.

In *Moodalay v. Morton*, 28 Eng. Rep. 1245 (Ch. 1785), for example, a bill was filed against the East India Company seeking discovery to enforce a tobacco-supply lease. The Company argued that the "grant of the lease" was "incident to [its] character as a Sovereign Power" and the court thus had no jurisdiction. *Id.* at 1246. The court rejected that argument. It held that "the cases of a corporation and of an individual" are alike: Even though "no suit will lie in this Court against a Sovereign Power," the East India Company was not "within that rule." *Id.*

Likewise, other decisions permitted suits against the East India Company to proceed in the decades before the Founding. In *Wych v. East India Co.*, 24 Eng. Rep. 1078 (Ch. 1734), the Lord Chancellor acknowledged that the administrator of a trust had a "right to sue" the Company for failing to meet its contractual obligations. *Id.* at 1078. He dismissed the suit only because the statute of limitations had passed. *Id.* Similarly, in *Wych v. Meal*, 24 Eng. Rep. 1078 (Ch. 1734), a plaintiff brought a successful action against the East India Company and its officers to discover "some entries and orders in the books of the company." *Id.* at 1078. And in *Ekins v. East India Co.*, 24 Eng. Rep. 441 (Ch. 1717), the court permitted the plaintiff to recover the value of a ship that had been fraudulently acquired by a Company agent, as well as any

accrued interest. *Id.* at 441-42; *see also Skinner v. East India Co.*, 6 How. St. Tr. 710, 724 (H.L. 1666) (ordering the Company to "pay unto Thomas Skinner, for his losses and damages sustained, the sum of 5,000[]" pounds); *Harvey v. East-India Co.*, 23 Eng. Rep. 856, 856 (Ch. 1700) (plaintiff obtained a judgment against the Company for 3,700 pounds).

The only apparent decision during the Founding era declining to exercise jurisdiction over the Company occurred nearly half a decade after ratification of the Constitution. *See Nabob of the Carnatic v. East India Co.*, 30 Eng. Rep. 521 (Ch. 1793). And that case concerned a provincial ruler, three thousand miles away in India, who tried to enforce a contract for military aid. *Id.* at 521. Accordingly, American courts have understood the decision as applying the political question doctrine, not sovereign immunity. *See, e.g.*, *Georgia v. Stanton*, 73 U.S. 50, 71-72 & n.20 (1867) (citing *Nabob* to support a "distinction between judicial and political power" and concluding that courts may not "hear[] and adjudicat[e] upon political questions"); *Baker v. Carr*, 369 U.S. 186, 288 n.21 (1962) (Frankfurter, J., dissenting) (reasoning that the political character of the case, "rather than any attribution of a portion of British sovereignty . . . to the company," explains the decision); *see also* Maurice Finkelstein, *Further Notes on Judicial Self-Limitation*, 39 Harv. L. Rev. 221, 240 (1925) ("[T]he *Nabob* case . . . laid the foundation for the doctrine that the courts will not interfere with political questions . . . . Certainly it cannot be said that the character of the defendant brought about this result, for the East India Company had often been sued in English courts.").

Nor was the East India Company the only corporation affiliated with the state over which British courts exercised jurisdiction. In *Ancher v. Bank of*

England, 99 Eng. Rep. 404 (K.B. 1781), individuals successfully sued the Bank of England to recover money it had negligently paid to an imposter. *Id.* at 404; *see also Glynn v. Bank of England*, 28 Eng. Rep. 26 (Ch. 1750) (suit by testator against Bank to recover on bank notes allegedly lost). In *Child v. Hudson's Bay Co.*, 24 Eng. Rep. 702 (Ch. 1723), a plaintiff sued a corporation with a monopoly over the fur trade in the Hudson's Bay region of Canada, *see* D. Wayne Moodie & John C. Lehr, *Macro-Historical Geography and the Great Chartered Companies: The Case of the Hudson's Bay Company*, 25 Canadian Geographies 267, 268-69 (1981), alleging that the company's by-law permitting it to "seize and detain" its debtors' stock was void, *Child*, 24 Eng. Rep. at 702. And in *Hildyard v. South-Sea Co.*, 24 Eng. Rep. 647 (Ch. 1722), an individual successfully sued the South-Sea Company, a joint-stock company founded as a public-private partnership to reduce the national debt, *see* Terry Stewart, *The South Sea Bubble*, Historic UK, https://www.historic-uk.com/HistoryUK/HistoryofEngland/South-Sea-Bubble/, to recover compensation for shares and dividends that were improperly assigned to another person.

In short, under Founding-era English law, corporate status was synonymous with the ability to be sued. And under that rule, the NJTC would not have been entitled to sovereign immunity, regardless of whether it was created by the sovereign to serve a public function. The outcome would have been the same under the law that prevailed in the early United States, as the next Section discusses.

II. The Framers Embraced the English Rule that State-Affiliated Corporations Could Be Haled into Court.

As Chief Justice Marshall recognized, American "ideas of a corporation, its privileges and its disabilities," were "derived entirely from the English books." *Deveaux*, 9 U.S. at 88. Accordingly, the Framers believed that corporations did not enjoy even "the least share of sovereignty." 2 *Elliot's Debates* 403. Throughout the federal and state constitutional conventions, participants consistently distinguished corporations from true sovereigns. Most notably, Federalist and anti-Federalist delegates debated whether the proposed Constitution treated the states as "sovereignties" or "mere Corporations." 1 *The Records of the Federal Convention of 1787*, at 263-64 (Max Farrand ed., 1911) [hereinafter *Farrand's Records*]. Notwithstanding that disagreement, both sides agreed on the key point here: A corporation could not be a sovereign.

In Philadelphia, delegate John Lansing criticized the proposed Constitution for diminishing the states by rendering them "mere Corporations." *Id.* Federalists initially conceded the point, arguing that "state governments reduced to corporations, and with very limited powers, might be necessary" for a functioning federal government. *Id.* at 298 (Alexander Hamilton). Hamilton even suggested that the states "*as States*" ought "to be abolished," although "subordinate jurisdictions" could persist "as Corporations." *Id.* at 323; *see also id.* at 331 (James Wilson) (characterizing the powers of states as "subordinate corporations or Societies and not Sovereigns"). Madison argued that under the Confederacy, states had "never possessed the essential rights of sovereignty," but were "only great corporations, having the power of making by-laws." *Id.* at 471.

Anti-Federalists vehemently resisted these arguments, advocating for state sovereignty at the state ratifying conventions. In New York, for example, Thomas Tredwell warned that the "sole difference between a state government under th[e proposed] Constitution, and a corporation under a state government, is, that a state being more extensive than a town, its powers are likewise proportionably extended, but neither of them enjoys the least share of sovereignty." 2 *Elliot's Debates* 403. And in South Carolina, Rawlins Lowndes argued that the proposed Constitution threatened "the sovereignty of each state," which would all "dwindle into" "little more than . . . corporation[s]." 4 *id.* 287; *see also id.* ("[One] should value the honor of a seat in the legislature in no higher estimation than a seat in the city council.").

As Judge Oldham has explained, the anti-Federalists prevailed: Federalists "eventually conceded that States were not corporations and hence would retain sovereign immunity." *Springboards to Educ., Inc. v. McAllen Indep. Sch. Dist.*, 62 F.4th 174, 192 (5th Cir. 2023) (Oldham, J., concurring). John Marshall and James Madison reversed their earlier positions, acknowledging that states enjoyed the "sovereign power," and thus could not "be dragged before a court." 3 *Elliot's Debates* 555 (Marshall); *see also id.* at 533 (Madison) (maintaining that states could not be haled into court unless they "should condescend to be a party"); Letter from James Madison to N.P. Trist (Dec. 1831), *in* 3 *Farrand's Records* 517 (Madison remarking that comparing states to corporations was "crude and untenable"). Likewise, in *The Federalist Papers*, Hamilton argued that "every State in the Union" would retain its "sovereignty" and thus would not be "amenable to the suit of an individual without its consent." *The*

Federalist No. 81, at 487 (Clinton Rossiter ed., 1961) (emphasis omitted).

In short, while statesmen at the Founding disagreed on whether the Constitution would reduce the states to mere corporations, they all agreed that corporations were distinct from true sovereigns. Precisely because the states were *not* corporations under the view that prevailed, they would retain their sovereignty and be immune from suit without their consent.

Contrary to the NJTC's argument, then, the Framers *did* consider corporate status "inherently inconsistent with sovereignty," NJTC Br. 44 n.14 (citing *Dixon v. United States*, 7 F. Cas. 761, 763 (C.C.D. Va. 1811)), even rejecting a proposed amendment that would have described the United States as a "Body-corporate and politic," 2 *Farrand's Records* 335. And the NJTC's passing remark that "several States began as corporations," NJTC Br. 44 n.14, only reinforces the conclusion that states are not corporations, because those colonies relinquished corporate rule prior to the Founding. *See* 1 Charles M. Andrews, *The Colonial Period of American History* 178, 424 (1934) (Virginia Company was dissolved in 1623 and Massachusetts Bay Company in 1684); Nikolas Bowie, *Why the Constitution Was Written Down*, 71 Stan. L. Rev. 1397, 1407 n.47 (2019) (Delaware and New York were no longer ruled by the Dutch West India Company after 1674); 1 *Elliot's Debates* 42 (Georgia's charter was dissolved in 1751).

Even as Connecticut and Rhode Island used the language of their charters as their first laws after independence, they distinguished themselves from corporations. Connecticut clarified that it was a "free and independent *State*," *Minutes of the General Assembly of Connecticut* (Oct. 10, 1776), *in* 1 *The Public Records of the State of Connecticut* 1, 3 (1894) (emphasis

added), not a corporation that could "plead and be impleaded," as stated by its corporate charter, 1 *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America* 530 (1909). Similarly, Rhode Island repeatedly referred to itself as the "*state* of Rhode Island and Providence Plantations" when it ratified the Constitution, 1 *Elliot's Debates* 334-35 (emphasis added), claiming in full the sovereign immunity unavailable to mere corporations.

Thus, the Framers were in accord that corporations and sovereigns were fundamentally different, and that while states were immune from suit, corporations were not.

III. Jurists in the Early Republic Understood that State-Affiliated Corporations Were Amenable to Suit, and This Court Regularly Exercised Jurisdiction over Such Corporations.

A. After the Founding, jurists agreed that corporations could be haled into court, regardless of whether they were created and controlled by states.

Start with the infamous case of *Chisholm v. Georgia*, in which this Court held that states did not enjoy sovereign immunity from private suits in federal court. 2 U.S. at 419. Justices in both the majority and dissent acknowledged that corporations could be freely sued. As Justice Iredell explained, states were sovereigns and hence entitled to immunity because they "d[id] not owe [their] origin to" any other sovereign, including "the Government of the United States." *Id.* at 448 (Iredell, J., dissenting). Rather, states derived their authority from the "voluntary and deliberate choice of the people." *Id.* By contrast, corporations were "mere

creature[s]" of the law that "owe[d] [their] existence" entirely to the "authority which create[d]" them. *Id.* Hence they enjoyed no sovereign immunity.

Similarly, Justice Jay—who concluded that states lacked sovereign immunity in federal court—also began with the premise that corporations could be freely sued. To him, the relevant question was why suing the State of Delaware was any different from suing "the Corporation of Philadelphia." *Id.* at 472. In his view, both were equally amenable to suit. Justice Cushing likewise acknowledged that denying immunity to states might "reduce [them] to mere corporations, and take away all sovereignty." *Id.* at 468. The Eleventh Amendment ultimately overturned Justices Jay and Cushing's conclusions, textually enshrining state sovereign immunity in the Constitution, but it did nothing to alter the time-honored consensus that corporations could be haled into court.

After *Chisholm*, jurists remained of one mind that corporate status was synonymous with amenability to suit. In *Bank of United States v. Deveaux*, Chief Justice Marshall suggested that the Bank's power to "sue and be sued, plead and be impleaded, answer and be answered, defend and be defended" was "incident to a corporation" simply by virtue of its creation. 9 U.S. at 85. In *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819), Justice Story explained that a corporation "exist[ed] in contemplation of law, and [was] endowed with certain powers," including that of "suing and being sued." *Id.* at 667. James Kent echoed this rule, explaining that the "essence of a corporation" was, among other things, its ability to "sue and be sued," a property which was "necessarily and inseparably incident to" a corporation's creation "by tacit operation, [even] without any express provision" in its charter. Kent, *supra*, at 224.

Justice Story specified that "public corporations," i.e., those "founded by the government, for public purposes, where the whole interests belong" to "the government," could be sued just like any others. *Dartmouth Coll.*, 17 U.S. at 668-69. Such corporations included "a bank created by the government for its own uses, whose stock [was] exclusively owned by the government," and a "hospital created and endowed by the government for general charity." *Id.* Similarly, "insurance, canal, bridge and turnpike companies" controlled by the government were public corporations, as were "towns, cities, parishes and counties." *Id.* All were equally amenable to suit.[2]

B. In a line of cases after *Dartmouth College*, this Court applied that rule to exercise jurisdiction over state-created corporate banks.

In *Bank of the United States v. Planters' Bank of Georgia*, 22 U.S. 904 (1824), this Court held that a suit against the Planters' Bank, which was partly owned by the State of Georgia and counted the state among its "corporator[s]," was not a suit against the state. *Id.* at 907. Chief Justice Marshall explained that "when a government becomes a partner in any trading company, it devests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen." *Id.* Because a "State does not, by becoming a corporator, identify itself with the corporation," the Court rejected the Bank's invocation of sovereign immunity. *Id.*

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[2] The NJTC suggests that Dartmouth was not a "public" institution because its officers were not under state control. *See* NJTC Br. 27. But Justice Story was clear that even "public" corporations could be sued, as subsequent cases confirmed, making state control irrelevant.

In two subsequent cases against the Bank of the Commonwealth of Kentucky, this Court went even further. *See Bank of Commonwealth of Kentucky v. Wister*, 27 U.S. 318 (1829); *Briscoe v. Bank of Commonwealth of Kentucky*, 36 U.S. 257 (1837). That bank was under even greater state control than the Planters' Bank: It was wholly owned by the Commonwealth of Kentucky; the bank's president and directors were appointed and removable by the legislature; the bank was funded by sales of vacant land in Kentucky; and the bank's president was required to make a report to each session of the legislature. *See Wister*, 27 U.S. at 319; *Briscoe*, 36 U.S. at 314-15. Indeed, the level of control exercised by Kentucky was very similar to the control which the NJTC claims New Jersey exercises over it. *See* NJTC Br. 30-32. And like the NJTC here, the Bank of Kentucky insisted that a suit against it was "virtually against a sovereign state." *Wister*, 27 U.S. at 319. This Court rejected that argument, reasoning that after *Planters' Bank*, the question was "no longer open." *Id.* Holding that the state had "impart[ed] none of its attributes of sovereignty" to the bank, the Court permitted both suits to proceed. *Briscoe*, 36 U.S. at 326.

This Court continued to apply the enduring rule that corporations were amenable to suit in the mid-nineteenth century. In *Darrington v. Bank of Alabama*, 54 U.S. 12 (1851), the Court held that a bank wholly owned by the State of Alabama whose president and directors were appointed by the legislature did not exercise the "sovereignty of the State" and hence was not immune from suit. *Id.* at 15-17. In *Curran v. Arkansas*, 56 U.S. 304 (1853), the Court permitted a suit to proceed against the Bank of Arkansas, which was owned and funded by the state. *Id.* at 309. The Court explained that the bank was "a distinct trading

corporation, having a complete separate existence" from the State of Arkansas, whose affiliation in "no way affected" the bank's obligations. *Id.* at 308. Citing the state bank cases above, the Court reasoned that a state's incorporation and ownership "does not impart to [the] corporation any of [the state's] privileges or prerogatives." *Id.* at 309.

The state bank cases establish that corporations like the NJTC traditionally lacked sovereign immunity, regardless of whether they were subject to significant state control. *Contra* NJTC Br. 27. As a result, these cases squarely foreclose the NJTC's assertion of sovereign immunity here. It is irrelevant that several of the cases began in the lower federal courts, which, unlike the high courts of Pennsylvania and New York, are bound by the Eleventh Amendment. That is because the "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 (quoting *Alden*, 527 U.S. at 713). Instead, the scope of state sovereign immunity, in both federal and state courts, is defined by the immunities that were "well established and widely accepted" when the Constitution was ratified. *Id.* at 238. Thus, the early cases holding that sovereign immunity did not extend to state-created and state-controlled banks establish that corporations like the NJTC are not entitled to such immunity either, in any court.

To be sure, the state-created banks typically had "sue and be sued" clauses in their charters. But contrary to the NJTC's contention, nothing suggests that these clauses were understood to waive a sovereign immunity that otherwise would have applied. Rather, these "sue and be sued" clauses were "general words" that had become "usual in all acts of incorporation" by the 1800s, *Osborn v. Bank of United States*, 22 U.S.

738, 817 (1824), likely out of belt-and-suspenders caution, *see Deveaux*, 9 U.S. at 85. The inclusion of these clauses did not change the traditional understanding that it was "incidental to a corporation to sue and to be sued." *Dixon*, 7 F. Cas. at 763 (Marshall, C.J.); *see also Dartmouth Coll.*, 17 U.S. at 636, 667. Indeed, courts appreciated that "sue and be sued" clauses "express[ed] no more than would have been implied" anyway. *Bank of the United States v. Roberts*, 2 F. Cas. 728, 730 (C.C.D. Ky. 1822). While corporations could not exceed the powers granted in their charters, *see, e.g.*, *Head & Amory v. Providence Ins. Co.*, 6 U.S. 127 (1804), the "very creation of the corporation" gave it "the capacity of suing and being sued," *Roberts*, 2 F. Cas. at 730.

As described above, this rule originated in English law, from which American "ideas of a corporation, its privileges and its disabilities," were "derived entirely," and which American courts frequently "resort[ed to] . . . for aid, in ascertaining [the] character" of corporations. *Deveaux*, 9 U.S. at 88. It is therefore unsurprising that American courts adopted the rule wholesale. And it is equally unsurprising that they continually reiterated the rule's rationale: Corporations were legal entities distinct from the sovereign. *See, e.g.*, *Briscoe*, 36 U.S. at 326 ("[The] Bank of the Commonwealth is not the state, nor the agent of the state."); *Wister*, 27 U.S. at 322 (accepting the argument that the bank is a "legal entity, independent of the state"); *Curran*, 56 U.S. at 308 (the bank is "a distinct trading corporation, having a complete separate existence" from the State of Arkansas).

* * *

For centuries prior to the ratification of the Constitution and for decades immediately afterward, a

"formal division between corporations and sovereigns" prevailed. *Springboards to Educ.*, 62 F.4th at 194 (Oldham, J., concurring). Corporations were not entitled to sovereign immunity, even when under "the sole and exclusive management" of a sovereign. *Briscoe*, 36 U.S. at 328 (Johnson, J., concurring). To be sure, the Court has since strayed from this tradition, but the fact that the "multi-factor test" the Court adopted has wrought confusion in the courts of appeals provides only greater reason to reprise the historical rule. *P.R. Ports Auth. v. Fed. Mar. Comm'n*, 531 F.3d 868, 883 (D.C. Cir. 2008) (Williams, J., concurring). This Court should hold that the NJTC is amenable to suit.

CONCLUSION

For the foregoing reasons, the judgment of the New York Court of Appeals should be affirmed and the judgment of the Pennsylvania Supreme Court should be reversed.

Respectfully submitted,

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