

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, ET AL., RESPONDENTS.

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

**BRIEF OF PROFESSORS WILLIAM BAUDE AND
STEPHEN E. SACHS AS *AMICI CURIAE* IN SUPPORT
OF CEDRIC GALETTE AND JEFFREY COLT ET AL.**

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INTEREST OF THE *AMICI CURIAE*

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SUMMARY OF ARGUMENT

This case reduces to a simple question: who is the legal person before the Court, against whom the plaintiffs request relief? The common-law immunity States retained at the Founding was a *personal* immunity, one belonging to specific legal persons, namely the sovereign States. Each State may decide the internal structure of its government; yet each also has power to create separate and distinct legal persons that are *not* sovereign, appearing before courts as creatures of States rather than States themselves.

That is what New Jersey did. It created a new public corporation—petitioner New Jersey Transit Corpo-

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 the preparation or submission of this brief. Harvard Law School and the University of Chicago Law School provide financial support for activities related to faculty members' research and scholarship, which may help defray the costs of preparing this brief. (The Law Schools are not signatories to this brief, and the views expressed here are solely those of the *amici*.) Otherwise, no person or entity other than the *amici* made a monetary contribution intended to fund the preparation or submission of this brief.

ration—whose appearances in court are not appearances of the State, whose judgment debts are not debts of the State, and whose adversely decided issues are not issues decided against the State. And the Corporation in turn created its own subsidiary corporations—including petitioner NJ Transit Bus Operations, Inc.—as legal persons distinct even from itself, still more plainly the sort of “lesser entities” that lack the State’s sovereignty and immunity. *Alden v. Maine*, 527 U.S. 706, 756 (1999).

The only reason this case might seem difficult is that this straightforward historical rule has since been swallowed up by judicial confusion. The Court should restore the original test: whether the requested relief acts against a separate legal person (which is amenable to federal process) or against a sovereign State (which is not). Because the State of New Jersey chose to create the Corporation as a distinct legal person from itself, with neither bound by judgments against the other, the Corporation cannot claim the State’s immunity.

ARGUMENT

I. The common-law immunity the States retained was a personal immunity, not extending to separate legal persons.

A. Founding-era law distinguished sovereign States from suable corporations.

At the Founding, this would have been an easy case. States had sovereign immunity. But corporations, state-created entities authorized to sue and be sued in their own names, did not. This distinction between

sovereigns and corporations was a core principle of the law of immunity: “Sovereign immunity is for sovereigns.” Baude & Sachs, *The Misunderstood Eleventh Amendment*, 169 U. Penn. L. Rev. 609, 658 (2021); accord *P.R. Ports Auth. v. FMC*, 531 F.3d 868, 881 (CA10 2008) (*PRPA*) (Williams, J., concurring); *Springboards to Educ., Inc. v. McAllen Indep. Sch. Dist.*, 62 F.4th 174, 188 (CA5 2023) (Oldham, J., concurring).

1. This distinction was part of the English common law at the time of the Founding—as is apparent from cases such as *Russell v. Men of Devon*, 100 Eng. Rep. 359 (KB 1788). As Lord Chief Justice Kenyon explained, whether a suit could be maintained against the British county of Devon depended on “whether this body of men, who are sued in the present action, are a corporation, or quā a corporation, against whom such an action can be maintained,” for “[a]mong the several qualities which belong to corporations, one is, that they may sue and be sued.” *Id.* at 362. Because the county of Devon at the time had *not* been given such corporate status, it could not be sued. On the other hand, English courts did allow suit against corporations such as the East India Company, stating “that no suit will lie in this Court against a Sovereign Power, for any thing done in that capacity; but I do not think the *East India* Company is within that rule.” *Moodalay v. Morton*, 28 Eng. Rep. 1245, 1246 (Ch 1785).

This distinction was also law in America. Sovereign immunity was a personal immunity, arising from

a rule of personal jurisdiction: the *person* of the sovereign was not amenable to judicial process. See Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 Harv. L. Rev. 1559, 1565–66, 1575–79 (2002). By contrast, corporations endowed with the capacity to sue and be sued *were* amenable to judicial process; that was why they were given such capacity. Indeed, the worry that federal courts might override state immunities was specifically articulated as a fear that States would be thought to “have relinquished all their SOVEREIGNTIES, and [to] have become mere corporations.” *Letter from an Anonymous Correspondent*, *Indep. Chron.* (Phila.), Feb. 13–19, 1791, in 5 *Documentary History of the Supreme Court, 1789–1800*, at 20, 21 (Maeva Marcus ed., 1994) [hereinafter DHSC].

When this Court briefly proved those fears correct in *Chisholm v. Georgia*—before being overruled in the Eleventh Amendment—the Justices articulated the issue in the same way. Members of the majority stated that “[a]s to corporations, all States whatever are corporations or bodies politic,” 2 U.S. (2 Dall.) 419, 468 (1793) (Cushing, J.), while Justice Iredell in dissent rejected the attempt “to apply the common doctrine concerning corporations, to the important case now before the Court,” *id.* at 447. Those who decried the decision agreed with Iredell: to say that a State was a “mere Corporation[]” was to say that it had no sovereign immunity and could be sued without its consent, “tried * * * in the same manner as a Corporation would be treated.” John Hancock, Address to the Massachusetts General Court, *Indep. Chron.* (Boston),

Sept. 18, 1793, in 5 DHSC 416, 417. The *Chisholm* majority was wrong to apply that doctrine to States; but everyone rightly agreed that it applied to *actual* corporations.

2. This Court reinforced the distinction between sovereigns and corporations in the early Republic. In *Bank of the United States v. Planters' Bank of Georgia*, the Court rejected an immunity defense for Georgia's state bank notwithstanding the State's financial and governmental interests: "A suit against the Planters' Bank of Georgia, is no more a suit against the State of Georgia, than against any other individual corporator." 22 U.S. (9 Wheat.) 904, 906 (1824).

In explaining this result, Chief Justice Marshall stressed the personhood of the partly state-owned corporation: "The 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. The State does not, by becoming a corporator, identify itself with the corporation." *Id.* at 907. He also stressed the corporation's capacity to sue and be sued: "The State of Georgia, by giving to the Bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the Bank, and waives all the privileges of that character." *Id.* at 907–08. As Marshall noted, the same principle had been true of the "old Bank of the United States," which did not receive federal sovereign immunity despite having been created and partly owned by federal government: "The government, by becoming a corporator, lays down its sovereignty, so far as re-

spects the transactions of the corporation, and exercises no power or privilege which is not derived from the charter.” *Id.* at 908. Marshall’s observation was borne out by a variety of suits against government banks, which were treated as corporations, not States. *Springboards*, 62 F.4th at 195 (summarizing cases).

3. This doctrine continued throughout the nineteenth century. On the same day that this Court decided *Hans v. Louisiana*, 134 U.S. 1 (1890), recognizing the continued validity of the common-law rule of state sovereign immunity, it also decided *Lincoln County v. Luning*, which reaffirmed that a Nevada county, though vested with various sovereign powers, was a corporation rather than a sovereign itself: “[W]hile the 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. 529, 530 (1890), including the power to sue and be sued, *id.* at 531. What mattered was not the powers vested in the county or their geographic scope but its separate legal personhood: in the two relevant pages of analysis, the phrase “municipal corporation” appears six times. *Id.* at 530–31.

Into the twentieth century, the Court recognized that statewide governmental institutions could be suable so long as they were separate corporations and not the State itself. In *Hopkins v. Clemson Agricultural College of South Carolina*, the Court cited *Luning* for the proposition 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.” 221 U.S. 636, 645 (1911).

And while it denied any relief that might act directly on separate State property, it rested that part of its decision on necessary-party grounds and not immunity, see *id.* at 648–49, acknowledging that the defendant was “created [as] an entity, a corporation, a juristic person, whose right to hold and use property was coupled with the provision that it might sue and be sued, plead and be impleaded, in its corporate name.” *Id.* at 646.

B. Subsequent confusion in modern cases gives no warrant for abandoning the original rule.

Here the original law is quite clear. As Judge Oldham recently summarized, “incorporated entities or entities with sue-and-be-sued clauses did not qualify as ‘the State’ for purposes of sovereign immunity at the Founding. Any ‘arm of the State’ rule must account for this history to properly reflect the common-law immunity that predated and survived the Constitution.” *Springboards*, 62 F.4th at 195. And as Judge Williams put it: “At the time of our founding, the existence of a separate legal person, with the capacity to sue and be sued, was precisely what set certain non-immune state entities apart from the state itself.” *PRPA*, 531 F.3d at 881.

Confusion began to creep into the doctrine in the middle of the twentieth century, when the Court started reading “sue and be sued” clauses as a form of *waiver* of immunity (potentially limited to state courts), rather than a recognition that an entity was

not part of the sovereign and thus *lacked* immunity to begin with. *See id.* at 882–83 (summarizing cases).

The confusion was worse confounded in *Mt. Healthy City School District Board of Education v. Doyle*, when the Court resolved the status of an Ohio school district in one paragraph of analysis—which largely consisted of a recitation of facts that the majority felt sufficient to show that the school district was “more like a county or city than it is like an arm of the state.” 429 U.S. 274, 280 (1977). But this comparison—like asking whether a motor-car is more like a steam boiler than a scaffold or coffee urn, *cf. MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 386–87 (1916)—was doubly unnecessary. *First*, the traditional test would have resolved the case easily, because the school district was a separate corporation with the power “of suing and being sued.” Pet. Br. in No. 75-1278, at 28, 1976 WL 181610 (citing Ohio Rev. Code 3313.17). *Second*, the facts the majority considered ultimately led it back, “on balance,” to the result the traditional test would have reached. *Mt. Healthy*, 429 U.S. at 280.

It is not clear to us that a few sentences of unnecessary dicta should have been read to create a new arm-of-the-State “doctrine” in the first place. But subsequent courts and litigants eventually came to understand *Mt. Healthy* as having created a multifactor balancing test. And as the briefing in this case shows, the result has been an inquiry that wanders rather far from our Founders’ law. Whether one corrects this error by overruling *Mt. Healthy* and its progeny, or simply by recognizing that *Mt. Healthy* should never

have been read to overthrow the traditional test, *amici* submit that *Mt. Healthy*'s supposed test should be consigned to the fate of other similarly unfortunate fads of the 1970s.

C. The Corporation's efforts to recharacterize this history are anachronistic.

The Corporation attempts to muddy the waters by recharacterizing this history, but its characterizations are all anachronistic.

1. The Corporation repeatedly suggests that the real test was the State's "intent" to bestow or withhold sovereign immunity. *E.g.*, Pet. Br. 13, 17–20. But just as proper statutory interpretation turns on what the legislature *did*, not on its unenacted "hopes and dreams," *Williamson v. Mazda Motor of Am., Inc.*, 562 U.S. 323, 343 (2011) (Thomas, J., concurring in the judgment); accord *Gundy v. United States*, 588 U.S. 128, 175 (2019) (Gorsuch, J., dissenting), the law of sovereign immunity turns on the objective question of whether the State has in fact created a separate, suable legal person.

Similarly, the Corporation repeatedly invokes the State's "dignity." Pet. Br. 2, 4, 5, 13, 15, 17, 19, 34, 38, 40. But again, Founding-era law recognized that a sovereign State's dignity is not at issue when the defendant is the State's mere creature, not the State itself. Sovereigns have dignity; corporations do not.

2. Two other cases that the Corporation invokes are distractions. One is *Trustees of Dartmouth College v. Woodward*, in which New Hampshire's ability under the Contracts Clause to reshape the corporate

structure of Dartmouth College depended on whether the corporation were private or public. 17 U.S. (4 Wheat.) 518, 668–70 (1819). Yet this distinction has nothing to do with sovereign immunity: a corporation can be a public corporation (as cities are) without being the same legal person as the State.²

The other is *In re Ayers*, which applied sovereign immunity to a non-sovereign defendant because the State was “the real party against which ‘relief is asked.’” Pet. Br. 6 (citing 123 U.S. 443, 506 (1887)). But *Ayers* concerned a different doctrine, namely that of necessary parties. If the relief sought could be awarded only against the State (such as a judgment payable by the State—or, as in *Ayers*, an “injunction * * * to compel the specific performance of the [State’s] contract,” 123 U.S. at 502–03), then it could not be awarded in the State’s absence. See also *Gov. of Georgia v. Madrazo*, 26 U.S. 110 (1828); *Hopkins*, 221 U.S. 636; *PRPA*, 531 F.3d at 881–82. This doctrine did not make a corporation into a sovereign: on the contrary, the Court held that the case must be dismissed precisely because the defendant was *not* the sovereign and so was not (by itself) the proper defendant. *Ayers* has no relevance to this case, which seeks only relief that the Corporation can provide on its own.

² Public corporations and municipalities can also be *state actors* under the First or Fourteenth Amendments without having sovereign immunity. See, e.g., *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 399 (1995); *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690 & n.54 (1978).

II. New Jersey's choice to establish the Corporation as a separate legal person has real legal consequences, including limits on immunity.

The independent capacity to sue and be sued was once taken as conclusive evidence that an entity is a separate legal person from the State. Perhaps after the modern (and mistaken) caselaw it might no longer be *conclusive* evidence. *Cf.* Pet. Br. 42 (presenting possible counterexamples). Yet that is no reason for this Court to abandon the fundamental consideration that sue-and-be-sued capacity was taken to be evidence *of*: namely, the identity of the legal person before the Court. Like private corporations choosing whether to spin off a division into a subsidiary, States frequently choose to create legal persons that are *not* sovereign States—moving various functions to entities that are separate and distinct from the State with regard to judgments, obligations, and jurisdiction. These considerations confirm the Corporation to be a separate legal person created by the State of New Jersey, with no claim to invoke the State's immunity.

A. Creating a separate legal person is a State's deliberate choice.

The separateness of legal persons is not some quirk of history. Rather, it is a crucial means of delineating the State's sovereignty. New Jersey chose to create the Corporation as a separate legal person, and that choice must be respected.

States make such choices all the time. Instead of a non-sovereign Bergen County, New Jersey could have

created a “Bergen Bureau” within its own Department of Community Affairs, fitting the county government wholly inside the state government. After all, state constitutions can create plural executives, with officials chosen in separate elections (and with “reasonable * * * residency requirements” for voters, *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 625 (1969)); they can allocate different legislative authorities to different bodies; they can give those bodies independent attorneys and independent litigating authority; they can establish separate treasuries to pay separate debts. And they can do the same for every other public corporation—turning the State Hospital into a wing of the Health Department, the State University into a wing of the Education Department, and so on. So why *wouldn’t* States shelter all these entities under their mantle of immunity, drawing every public corporation inside the legal person of the State?

One reason is that the formal distinction among separate legal persons makes a real legal difference. Whatever label may be on the case caption, a single legal person is treated as a single entity for *res judicata* and collateral estoppel, for matching debts and liabilities, and for exercising subject-matter jurisdiction, among other purposes. But by creating Bergen County, the State ensured *its* independence from the county government’s bad decisions, in ways the law would not allow a single legal entity to shrug off the consequences of its own actions.

Similarly, had it wanted to, New Jersey could have run its trains via a “Transit Bureau” and not an independent corporation. But then the State could not

claim to be unaffected by judicial rulings against the Transit Bureau, nor maintain that the Bureau's debts and assets were wholly unrelated to its own, nor that the Bureau could invoke federal diversity jurisdiction to pursue out-of-state parties rather than act for the State in this Court's original jurisdiction.

Indeed, private corporations make similar decisions all the time. A firm might spin off a division into a wholly owned subsidiary, turning what might be called an "arm of the corporation" into a well-controlled but nonetheless fully separate legal person. (The marketing division of General Motors cannot take out its own loans, be bound by its own judgments, and so on; a wholly owned subsidiary can.) This decision turns not only on the economics of grouping different assets together, but also on the advantages or disadvantages of legal personhood: that is, whether the spun-off division runs the sorts of risks or seeks the sorts of rewards that merit different arrangements of governance and financing, arrangements legally impossible to separate within a single corporate body. See Iacobucci & Triantis, *Economic and Legal Boundaries of Firms*, 93 Va. L. Rev. 515, 518–23 (2007).

(That, in fact, is what the Corporation did when it moved certain of its functions to new legal persons of its own, such as NJ Transit Bus Operations, Inc., or ARH III Insurance Company, Inc., a South Carolina corporation established as the Corporation's "non-profit special purpose captive insurance company"—wholly owned by the Corporation, but still deliberately

created as a new legal person. NJ Transit Annual Report 3, 38 (2014), <https://bit.ly/4r0LGYR>; see N.J. Stat. § 27:25-5(r), (u).)

Just as private corporations regularly decide between forming divisions and forming subsidiaries, state governments regularly decide to carve off certain governance functions and to shift them into separate political subdivisions or public corporations. That choice has consequences: when a State creates a new entity as a separate legal person, it “voluntarily strips itself of its sovereign character” and “waives all the privileges of that character” on the new entity’s behalf. *Planters’ Bank*, 22 U.S. at 907–08.

B. New Jersey created the Corporation as a separate legal person.

1. A judgment against the Corporation is not a judgment against the State.

a. The Corporation appears in court as a separate legal person from the State. Not only does it have independent legal capacity to sue and be sued in its own name, using its own independent legal counsel, see N.J. Stat. § 27:25-5(a), (z), but any legal obligations it incurs are wholly its own responsibility, and not any “debt” or “liability * * * of the State.” *Id.* § 27:25-17.

One reason for this separation is that the New Jersey Constitution imposes limits on the debts and liabilities “of the State” and on those of “an autonomous public corporate entity, established either as an instrumentality of the State or otherwise exercising public and essential governmental functions,” N.J. Const. art. 8, § 2, ¶ 3(a)–(b). The latter can avoid those

limits, or the need for a popular vote to exceed them, only if it runs on “an independent non-State source of revenue paid by third persons.” *Id.* ¶ 3(b).

As New Jersey’s courts have recognized, autonomous entities like the Corporation may therefore be created “in but not of” the State’s executive departments. *In re Plan for the Abolition of the Council on Affordable Hous.*, 214 N.J. 444, 462 (2013) (quoting *N.J. Turnpike Auth. v. Parsons*, 3 N.J. 235, 244 (1949)). For example, the Turnpike Authority may have been nominally placed “*in* the State Highway Department,” but in fact it was “established as ‘a body corporate and politic’” separate from the State itself, with its debts “imputed only to the Authority” and not to the State, an “*independent entity*” and not “the alter ego of the State.” *Id.* at 462–63 (quoting *Parsons*, 3 N.J. at 238, 243–44). That is why New Jersey’s courts have described the Turnpike Authority as “an independent public corporation”; though “created by the Legislature to carry out legitimate and important functions of government,” it remained “a body both corporate and politic[,] *analogous in many respects to a municipal corporation*,” including in its power of eminent domain. *City of Newark v. N.J. Turnpike Auth.*, 7 N.J. 377, 381, 385 (1951) (emphasis added). State statutes describe the separateness of the Corporation in very similar terms.

b. These facts matter not only for practical purposes, but also for legal ones, showing that a claim against the Corporation and a claim against the State cannot be the same thing.

Under New Jersey case law, effective notice to the State under the Tort Claims Act is not effective notice to the Corporation, precisely because the latter is “a distinct ‘sue and be sued’ public entity.” See *Torres v. N.J. Transit*, No. A-2993-20, 2022 WL 1561077, at *1 (NJ Super App Div May 18, 2022). That is also why New Jersey’s Treasury Department described the Corporation in the context of tort suits as “separate and distinct from the State of New Jersey.” Letter from N.J. Dep’t of Treas., Bur. of Risk Mgmt., to Jaime Weaver (Feb. 27, 2009), *quoted in Weaver v. N.J. Transit Corp.*, 2011 WL 1261099, at *1 (NJ Super App Div Apr. 6, 2011). The Corporation could not, by settling a claim against it, bind the State of New Jersey to pay; for that reason alone, a suit against the Corporation is not a suit against the State.

The same is true with regard to the Corporation and any of *its* corporate subsidiaries. Indeed, nothing that the Corporation says in its petition or brief supports its argument that petitioner NJ Transit Bus Operations, Inc., the Corporation’s wholly owned subsidiary, is the same legal person as the Corporation, let alone the State. See Pet. App. in No. 24-1113, at 126a. Even if the Corporation’s statutory structure somehow rendered *it* the same legal person as the State, the *only* reason for it to have created new corporations under N.J. Stat. § 27:25-5(u), rather than new operating divisions under § 27:25-5(m), is for those subsidiary corporations to be capable of acting as separate legal persons from the Corporation itself. Neither petitioner NJ Transit Bus Operations, Inc., nor the ARH III Insurance Company has any special statutory status in

New Jersey; none of *their* acts need first be reviewed by the Governor, see *id.* § 27:25-4(f); both are merely nonprofit corporations—with the latter a creature of South Carolina’s law, not New Jersey’s. Under ordinary corporate law, absent fraud or other grounds for veil-piercing, these subsidiaries’ debts and assets are not the Corporation’s debts and assets, their actions are not the Corporation’s actions, and their amenability to process is not the Corporation’s amenability to process. Otherwise *their* subsidiaries too, and *their* subsidiaries, even unto the tenth generation, might equally claim to be the State of New Jersey—except when it suits them not to be. So too for the Corporation itself, created to be a separate legal person from the State.³

c. Not only is the *judgment debt* of the Corporation not judgment debt of the State, but the *preclusive force* of a judgment against the Corporation generally does not apply against the State. If the State and the Corporation were really the same person, then (say) the New Jersey Department of Environmental Protection would not be heard to argue that a given site requires expensive remediation by a private landowner, once the Corporation had made the same argument in an eminent domain cost-recovery action and lost. See, *e.g.*, *N.J. Transit Corp. v. Cat in the Hat, LLC*, 353 N.J. Super. 364, 378 (App Div 2002), *aff’d*, 177 N.J. 29

³ Similarly, relief requested from the pocket of petitioner Ana Hernandez plainly does not act against the State, even if the State might choose to indemnify her. As a natural person and not a sovereign or ambassador, she cannot claim immunity from New York’s jurisdiction for allegedly tortious conduct there.

(2003) (describing such actions). But New Jersey does not appear to treat itself as bound by the Corporation’s positions in litigation, any more than by the losing positions taken by Bergen County.

While “nonmutual offensive collateral estoppel simply does not apply against the government,” nonetheless “the government may be estopped under certain circumstances * * * when the parties to the two lawsuits are the same.” *United States v. Mendoza*, 464 U.S. 154, 162–63 (1984); accord *id.* at 164; *United States v. Stauffer Chem. Co.*, 464 U.S. 165, 170 (1984). Courts have extended this rule to state governments too. See 18 Moore’s Federal Practice—Civil § 132.04[c][v] (2025).⁴

In applying this rule, courts must of course determine whether the new party is the same legal person as the old. The binding force of a judgment against a government extends not just “between the same parties” but also to “those in privity with them,” *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402 (1940); accord *Taylor v. Sturgell*, 553 U.S. 880, 894 & n.8 (2008), and “[t]here is privity between officers of the same government,” *Sunshine Anthracite*, 310 U.S. at 402. Thus a “judgment in a suit between a party and a representative of the United States is *res judicata* in relitigation of the same issue between that party and

⁴ A separate doctrine, judicial estoppel, does not always apply to States that *won* judgments against private parties; they may have good policy reasons for abjuring previously successful positions. See *New Hampshire v. Maine*, 532 U.S. 742, 755–56 (2001). But if a State previously *lost* a case against that party, it may not transform that loss into victory.

another officer of the government”—so long as those officers are litigating in their official capacities and “had authority to represent [the government’s] interests in a final adjudication of the issue.” *Id.* at 402–03 (finding privity between the Commissioner of Internal Revenue and the National Bituminous Coal Commission); accord *First Mortg. Corp. v. United States*, 961 F.3d 1331, 1339 (CAFed 2020) (SEC and Ginnie Mae). Courts therefore generally “bind[] one governmental agency to judgments against another.” 18A Wright & Miller’s Federal Practice & Procedure—Jurisdiction § 4458 & nn.16–17 (3d ed. Sept. 2025) (noting an exception if the first agency lacked the power or statutory mission to decide the question).

Yet the preclusive force of a judgment stops where the legal person against whom it was entered ends. A judgment against one municipal corporation does not bind another, much less the State itself. *Bank of Ky. v. Kentucky*, 207 U.S. 258, 266–67 (1907). And in *Gunter v. Atlantic Coast Line Railroad Co.*, the Court easily concluded that a taxpayer’s prior judgment precluded the counties named as parties in the prior case, 200 U.S. 273, 283 (1906), but did *not* automatically bind the State of South Carolina, which would be precluded only if the officers had also been litigating on its behalf and with its authorization—if they could be “considered as being *pro hac vice* state officers, for the purposes of the controversy which the [prior case] involved.” *Id.* at 285; see also *id.* at 286–87, 289.

Here, there is every reason to conclude that judgments against the Corporation do not generally bind the State, the way that judgments against the New

Jersey Department of Transportation do. Even if the State’s attorney general happens to be litigating in this case, his appearance is not “for and on behalf of the State” (as in *Gunter*, 200 U.S. at 286), but rather for and on behalf of the Corporation, its subsidiary, and its employee, see Pet. Br. ii; the Corporation could have chosen to hire private counsel instead. N.J. Stat. 27:25-5(z).

Moreover, under the relevant New Jersey tort law, “the State is only one category of public entity,” *Muhammad v. N.J. Transit*, 176 N.J. 185, 193 (2003), and the Corporation is merely a “local public entity” more akin to a “county” or “municipality.” N.J. Stat. §§ 59:1-3, :8-2. New Jersey’s courts have interpreted this language to define such “public authorities as entities separate from the ‘State,’” and also as “reiterat[ing] * * * the separateness from the State” of entities “which have statutory power to sue.” *S.E.W. Friel Co. v. N.J. Turnpike Auth.*, 73 N.J. 107, 115 (1977). Like cities or counties, such entities have had some of the “sovereignty possessed by the State parcelled out to [them],” but they remain “independent of the State”—as compared to “[t]he administrative parts * * * listed in the meaning of ‘State,’” which “merely share in * * * sovereignty which the State has retained.” *Id.* at 116 (citation and internal quotation marks omitted).

d. So plainly is a judgment against the Corporation not a judgment against the State that the Corporation often *opposes* the State in litigation—even adding the State as a defendant when the latter has an interest in property the Corporation wishes to condemn. See, e.g., *Cat in the Hat*, 353 N.J. Super. at 364;

Verified Complt. ¶ 10(d), *N.J. Transit Corp. v. Hartz Mountain Dev. Corp.*, No. HUDL440109, 2009 WL 8132799 (NJ Super Law Div Hudson Cnty Aug. 28, 2009); Verified Complt. ¶ 10(a), *N.J. Transit Corp. v. TP Access, LLC*, No. BER-L-008306-21, 2021 WL 12283943 (NJ Super Law Div Bergen Cnty Dec. 20, 2021). Treating the Corporation as an arm of the State would run up against “the long-recognized general principle that no person may sue himself.” *United States v. ICC*, 337 U.S. 426, 430 (1949).

The Court in *ICC* recognized that “a suit filed by John Smith against John Smith might present no case or controversy which courts could determine”; only a suit between “one person named John Smith” and “another John Smith”—another legal person—might present “a justiciable controversy.” *Id.* The Court therefore allowed a suit that, though *in form* between the United States and a government agency (with the attorney general “appear[ing] for the Government as both plaintiff and defendant,” *id.* at 429), was *in substance* a justiciable controversy between the United States and various private railroads, *id.* at 430–31. And when the Court recently allowed an admitted state agency to sue a state officer, it did so only on the *Ex parte Young*-inspired theory that the nominal defendant was “not the State for sovereign-immunity purposes.” *Virginia Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 255 (2011); see also *id.* at 254 (citing *Young*, 209 U.S. 123, 159–60 (1908)). In the same way, suits between the Corporation and the State of New Jersey make sense only to the extent that there is a real difference between the two.

2. Obligations of the Corporation are not obligations of the State.

As noted above, a debt or liability of the Corporation is not a “debt” or “liability * * * of the State.” N.J. Stat. 27:25-17. This statutory distinction between the State and the Corporation makes it impossible to suggest that the two are legally identical, in the way that suing the Department of Community Affairs really is just suing the State, or suing General Motors’ marketing department really is just suing GM.

This distinction is a matter of substance. It is more than merely saying that New Jersey could use sovereign immunity to prevent efforts to collect the Corporations’ debts from the state treasury. Even when sovereign immunity would not apply, the State still would not give up its own money for the Corporation’s debts.

Consider the doctrine of recoupment, under which a State initiating a federal lawsuit waives immunity to certain counterclaims, see *Bd. of Regents v. Phoenix Int’l Software, Inc.*, 653 F.3d 448, 468 (CA7 2011); cf. *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 511 (1940) (federal recoupment), or the doctrine of set-off in bankruptcy, under which a creditor may settle its own accounts with the debtor outside the bankruptcy estate, see, e.g., *In re Turner*, 84 F.3d 1294, 1297–98 (CA10 1996) (construing 11 U.S.C. § 553, and citing *Cherry Cotton Mills v. United States*, 327 U.S. 536, 539 (1946)). The United States is a unitary creditor, such that debts and claims of different agencies may be set off against each other, see *id.*; but if the Corporation’s debts are not the State’s debts, it cannot be treated as the State for such purposes.

Or suppose that the Corporation were indebted to a sovereign State. Say that the Corporation's bus in Manhattan had hit, not petitioner Jeffrey Colt, but the Governor of New York's motorcade—or that the Corporation had sold a train car as scrap metal to the Defense Department and failed to deliver it on time. Sovereign immunity would pose no barrier to such claims, see *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 720–21 (1838); *United States v. Texas*, 143 U.S. 621, 644–45 (1892), yet would the State of New Jersey answer for the Corporation's debts if the Corporation failed to pay? If the answer is yes, then in what sense are the debts and liabilities of the Corporation not debts and liabilities of the State, as required by New Jersey's constitution and statutes? But if the answer is no, then what business has the Corporation pretending to be the same legal person as the State here, but a wholly separate and unrelated person in such suits?

3. Jurisdiction over the Corporation is not jurisdiction over the State.

A sovereign State has special jurisdictional rights under Article III. But jurisdiction over the Corporation is not equivalent to jurisdiction over New Jersey, confirming that the Corporation is not the State.

Consider the scenario above, in which the Corporation were sued by New York. According to the Corporation, New York could not file that suit in federal district court, nor in this Court's state-diversity jurisdiction, for neither States nor arms of States are "citizens" for diversity purposes. See *Moor v. Cnty. of Alameda*, 411 U.S. 693, 717–21 (1973); 28 U.S.C.

§§ 1251(b)(3), 1332(a). Yet the Corporation has sought out diversity jurisdiction to pursue claims against out-of-state contractors, properly describing itself in its pleadings as an ordinary public corporation. See Complaint ¶ 1, *N.J. Transit Corp. v. Harsco Corp.*, No. 2:03-cv-02724 (DNJ filed June 4, 2003) (*Harsco I*) (describing itself as “a non profit corporation, organized and existing under the laws of the State of New Jersey”), *aff’d*, 497 F.3d 323 (CA3 2007) (*Harsco II*); see also *id.* ¶ 5 (describing “the parties [as] citizens of diverse jurisdictions”); accord Amended Complaint ¶¶ 1, 7, *Harsco I* (DNJ filed Feb. 9, 2005); Brief for Appellant at 1, *Harsco II*, 2006 WL 6209786 (filed Nov. 28, 2006).

The Corporation’s assertion of jurisdiction in that case does not estop it from asserting the contrary against different parties here. But it does undermine the Corporation’s claim to be the same legal person as the State, suable by New York only in this Court’s original jurisdiction. For the Corporation cannot be a State defendant in this Court if it could not equally be a plaintiff: either it is a State or it is not. Yet if this Court would not accept an original motion for leave to file a bill of complaint that was signed *only* by the Corporation—or by petitioner NJ Transit Bus Operations, Inc., or by the University of Arkansas (see Pet. Br. 30), then it has already recognized that these entities are not States. *Cf. Alabama v. North Carolina*, 560 U.S. 330, 356 (2010) (permitting a narrow exception for subjects of an “overlapping claim for relief” against a State); *id.* at 360, 362 (Roberts, C.J., dissenting in part) (rejecting that exception).

C. A State may not confer immunity on separate legal persons by decree.

Given that judgments against the Corporation do not bind the State, that liabilities of the Corporation do not oblige the State, and that jurisdiction over the Corporation does not call the State to answer, it is safe to conclude that the Corporation is not the State—both on the historical test described above and for practical purposes too.

Various state *amici*, however, propose that *any* entity “decreed” by a State to be its “instrumentality”—even a city, county, or for-profit corporation like the Bank of the United States—be clothed with the State’s immunity. See Texas et al. Br. 2. This has never been the law. And while simple tests may be preferable to multifactor balancing tests, a test need not only be simple; “it must also be right.” *Citizens United v. FEC*, 558 U.S. 310, 375 (2010) (Roberts, C.J., concurring).

While *Congress* can certainly confer immunity on new types of entities, Texas et al. Br. 7, that is because Congress also controls the jurisdiction of most federal courts, and because federal law is supreme over state law. The States, however, have only as much immunity from federal process as they retained at the Founding, and they cannot create new immunities by legislation.

To avoid the specter of excessive immunization, moreover, these *amici* would require a “bona fide declaration of intent” to immunize an entity. *Id.* at 11. That test is either toothless (the State may *honestly* wish to immunize major cities or major manufacturers

from suit), or else it reopens the door to multifactor balancing tests (to distinguish reasonable extensions of immunity from unreasonable ones). More faithful to the original rule, and far simpler, is the test described here: whether the party against whom relief is sought is the same legal person as the State, across the board.

States may indeed “decide for themselves how to organize governmental authority,” *id.*, but one of those decisions—as for private corporations—is whether to vest authority in the same or in separate legal persons. By creating the Corporation, New Jersey *chose* to offload certain risks to a separate entity that could “fail gracefully,” without endangering the State’s dignity or its legal or financial position. While it is true that, were the Corporation to go bankrupt, the State might well choose to bail it out, the same could be true of Bergen County or the City of Trenton: “[t]he critical inquiry is who may be legally bound by the court’s adverse judgment, not who will ultimately pick up the tab.” *Lewis v. Clarke*, 581 U.S. 155, 165 (2017). New Jersey decided to avoid certain risks by vesting transit authority in a separate corporation, and it must take the bitter with the sweet.⁵

⁵ The Court may wish to ask the Corporation’s counsel at oral argument whether the State is estopped by judgments against the Corporation (and vice versa), whether it must pay the Corporation’s debts if sued by New York, and so on. But given that the State is not on the briefs and that its legislature has not consented to this suit, representations by the attorney general might not actually bind the State in future litigation. Compare Pet. Br. ii with *Gunter*, 200 U.S. at 286 (describing a statute enabling appearance “for and on behalf of the state”).

III. Recognizing the Corporation as suable avoids serious complications.

If the Court agrees that the Corporation is suable, resolution is straightforward: it should affirm in *Colt*, in which the New York Court of Appeals correctly identified no federal barrier to suit, and reverse in *Galette*, in which the Pennsylvania Supreme Court mistakenly held the contrary. 28 U.S.C. § 1257(a).

If, however, the Court were to consider the Corporation to be identical to New Jersey, two complications would arise.

A. If the Corporation were New Jersey, this Court would lack appellate jurisdiction.

Under the Eleventh Amendment, “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State * * *.” U.S. Const. amend. XI. Both *Colt* and *Galette* were “commenced * * * against” the Corporation in state court; both are “prosecuted against” the Corporation here; both are brought “by Citizens of another State,” namely Pennsylvania or New York; New Jersey is “one of the United States”; and a proceeding in this Court requires “the Judicial power of the United States.” See Baude & Sachs, *supra*, at 650–52; *cf. PennEast Pipeline Co., LLC v. New Jersey*, 594 U.S. 482, 511 (2021) (Gorsuch, J., dissenting) (“This case appears to present the rare scenario that comes within the Eleventh Amendment’s text.” (internal quotation marks omitted)). So if the Corporation were New Jersey, the Eleventh Amendment

would divest the Court of appellate subject-matter jurisdiction, requiring it to dismiss both appeals. (State courts exercise the judicial power of their States, not of the United States; they are bound by relevant principles of interstate sovereign immunity, see *infra* Part III.B, but not by the Eleventh Amendment.)

To be sure, in two cases decided more than 25 years ago, this Court held that its own appellate jurisdiction was exempt from the Eleventh Amendment. See *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990); *S. Cent. Bell Tel. v. Alabama*, 526 U.S. 160 (1999). But those holdings were plainly incorrect, see Baude & Sachs, *supra*, at 652–57, and that should be sufficient reason to follow the Constitution instead. See, e.g., *Gamble v. United States*, 587 U.S. 678, 711–12 (Thomas, J., concurring); *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 421 (2024) (Gorsuch, J., concurring); Barrett, *Precedent and Jurisprudential Disagreement*, 91 Tex. L. Rev. 1711, 1728 (2013).

Because this issue is jurisdictional, it does not matter if a party has raised it (though one has, see Colt Br. 46–49). And because the problem goes directly to *this Court’s* appellate jurisdiction, the Court would need to confront it at the threshold, before discussing the jurisdiction of the courts below. “On every writ of error or appeal, the first and fundamental question is that of jurisdiction, *first, of this court*, and then of the court from which the record comes.” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94 (1998) (citation omitted) (emphasis added). While there is “no mandatory sequencing of jurisdictional issues” that *equally*

affect the appellate court and the court below, *Penn-East*, 594 U.S. at 512 (Gorsuch, J., dissenting) (citation and internal quotation marks omitted); accord *Acheson Hotels LLC v. Laufer*, 601 U.S. 1, 4 (2023), distinct problems of appellate jurisdiction *must* be confronted first. (Otherwise the Corporation could equally have taken its sovereign-immunity challenge to the Second Circuit instead—though that court completely lacks “appellate jurisdiction over final state-court judgments,” *Lance v. Dennis*, 546 U.S. 459, 463 (2006)—or have appealed a merely interlocutory order to this Court, notwithstanding § 1257(a)’s restriction to “[f]inal judgments or decrees.” Such chaos is avoided only by each court’s need to establish its *own* jurisdiction before correcting the jurisdiction of *others*.)

B. Interstate sovereign immunity is a common-law doctrine, not a constitutional one.

Were the Court to agree with the Corporation that it is the State of New Jersey, the proper disposition of these cases would be further complicated by the fact that *Franchise Tax Board v. Hyatt*, 587 U.S. 230 (2019), was wrong—or, at least, imprecise in how it described the traditional common-law sovereign immunity in constitutional terms. As *amici* have explained elsewhere, in *Hyatt* “the Court subtly departed from the Constitution’s design,” for the protection the Constitution offers against sister-state judgments lies in “failing to make those judgments *enforceable*,” not “imposing an affirmative constitutional ban

on rendering them.” Baude & Sachs, *supra*, at 622; accord Baude & Sachs Br. in No. 17-1299, at 2–4.

Thus, *if* the Corporation were the State, and *if* the Eleventh Amendment somehow let this Court hear its appeal, the correct resolution of the cases would be to dismiss *Colt* as improvidently granted (for it offends no “right * * * under the Constitution,” § 1257(a)) and to vacate *Galette* (which reached the right common-law result for the wrong federal reason, see *Michigan v. Long*, 463 U.S. 1032, 1040–41 (1983)). The *Galette* judgment could thus be reentered on common-law grounds, and the *Colt* judgment would be unenforceable on Corporation assets in New Jersey, *cf. D’Arcy v. Ketchum*, 52 U.S. (11 How.) 165, 176 (1851) (denying full faith and credit to jurisdictionless judgments)—and, absent arguments of appearance-based waiver, could be resisted even in New York, see *Nathan v. Virginia*, 1 U.S. (1 Dall.) 77 n. (Pa CP 1781), or by a suit in this Court’s original jurisdiction.

Moreover, were the Corporation suable only in New Jersey’s courts, there might be no recovery for out-of-state torts like these, as suits against public agencies are restricted to “the county in which the cause of action arose.” N.J. Ct. R. 4:3-2(a). This raises the same full-faith-and-credit worries as Wisconsin’s refusal to hear out-of-state suits in *Hughes v. Fetter*, 341 U.S. 609, 610–11 (1951). While New Jersey may waive or insist on its immunity as it sees fit, nonetheless (assuming the correctness of *Hughes*) the State “cannot escape this constitutional obligation to enforce the rights and duties validly created under the laws of

other states by the simple device of removing jurisdiction from courts otherwise competent.” *Id.* at 611.

Avoiding these further complications (or a challenge to this Court’s jurisdiction) is not a *reason* to rule against the Corporation. Happily, though, the correct account of its status avoids these matters entirely.

CONCLUSION

The judgment of the Court of Appeals of New York should be affirmed, and the judgment of the Supreme Court of Pennsylvania should be reversed and the case remanded for further proceedings.

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