

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 AMICUS CURIAE PUBLIC CITIZEN
IN SUPPORT OF PETITIONER IN NO. 24-1021
AND RESPONDENTS IN NO. 24-1113**

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INTEREST OF AMICUS CURIAE¹

Amicus curiae Public Citizen is a nonprofit consumer advocacy organization founded in 1971. On behalf of its members in all 50 states, Public Citizen appears before Congress, administrative agencies, and courts to promote enactment and enforcement of laws protecting consumers, workers, and the public. Public Citizen has long sought to preserve and expand access to courts for individuals harmed by corporate or government wrongdoing, and to maintain the federal courts' authority to provide appropriate redress efficiently and effectively. Public Citizen has thus filed amicus briefs in this Court that advocate for legal principles that minimize barriers to individuals' access to court remedies. *See, e.g., Martin v. United States*, 605 U.S. 395 (2025); *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382 (2023).

Public Citizen submits this amicus brief because it is concerned about the consequences of extending sovereign immunity to state-affiliated corporate entities engaged in commercial and financial activities. Because this Court's jurisprudence on state sovereign immunity limits Congress's power to abrogate state sovereign immunity, *see, e.g., Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002), and requires the courts of other states to honor a state's sovereign immunity, *Franchise Tax Bd. of Cal. v. Hyatt*, 587 U.S. 230 (2019), treating state-affiliated business entities as arms of the state deprives

¹ This brief was not written in whole or in part by counsel for a party. No one other than amicus curiae or its counsel made a monetary contribution to the preparation or submission of this brief.

individuals harmed by wrongful conduct of those entities of opportunities to obtain judicial redress. That outcome distorts the marketplace by giving state-affiliated enterprises a competitive advantage over private ones, and by disadvantaging consumers who often have little choice but to do business with state-affiliated entities. Moreover, many such entities operate commercial enterprises that enter into transactions with consumers outside of the entities' home states. Out-of-state customers have limited recourse to seek political solutions to problems that would be created if state-affiliated enterprises operating in interstate commerce were able to shield themselves from accountability by using an expansive arm-of-the-state test to invoke their home states' sovereign immunity. Public Citizen submits this brief to assist the Court in understanding that traditional tests for determining whether an entity is an arm of the state avoid these difficulties by presuming that state-affiliated corporate entities are not entitled to sovereign immunity.

SUMMARY OF ARGUMENT

This Court's jurisprudence on state sovereign immunity forecloses private parties from filing lawsuits against a state without the state's consent. With limited exceptions, the Court has held that Congress lacks the power to abrogate state immunity from private lawsuits in federal, state, and administrative fora. In *Franchise Tax Board*, the Court extended the principle of state sovereign immunity to private litigation against a state brought in the courts of other states. As a result, for most claims, private litigants will be unable to sue a state

in any court unless the state consents by waiving its constitutional immunity.

Sovereign immunity, however, is available only to the state itself, and this Court has repeatedly rejected claims of sovereign immunity by entities that, while connected with a state's governmental apparatus, are best viewed as distinct bodies rather than as arms of the state. In many cases, the need to draw this distinction arises because, consistent with worldwide trends, states increasingly establish and make use of corporate entities that are separate from the state to engage in a variety of enterprises of a commercial nature. These state-affiliated businesses enter into transactions and otherwise interact with counterparties and customers located both inside and outside the state, sometimes throughout the nation. And in many instances, consumers have no meaningful choice about whether to do business with a state-affiliated enterprise (as when such a company is designated to service a student loan). When a consumer is injured as a result of the actions of such an enterprise, whether the entity qualifies as an arm of the state will be the principal question that determines whether it can be held legally accountable through the judicial process.

In addressing that question here, this Court should reaffirm the longstanding principle that a state-affiliated corporate entity is presumptively not entitled to invoke a state's sovereign immunity. Historically, a corporate form, which generally entailed the capacity to sue and be sued, indicated that an entity was a distinct person from the state and not entitled to the state's immunity. For instance, in concluding that municipalities and counties do not share the immunity of the state that established

them, the Court has consistently emphasized that the political subdivisions of a state are characterized by a separate corporate existence. The Court has applied a similar analysis in concluding that state-owned banking corporations and federally established corporations do not enjoy immunity from suit.

A presumption that state-affiliated corporate entities do not enjoy immunity does not prevent them from being considered governmental bodies for other purposes. The Court has consistently recognized that such a corporate instrumentality, established as a separate entity from the government itself, may retain that character for certain purposes—such as compliance with constitutional obligations. For example, counties and municipalities reflect the dual character of public corporations as non-immune governmental bodies.

The presumption of separate corporate existence need not be conclusive. The Court has explained that state sovereign immunity serves to protect both the state's treasury from the effects of a money judgment and the state's dignitary interests in avoiding having to answer to a court at the behest of private parties. In certain circumstances, an entity's corporate form may be insufficient under state law to protect the state's financial or dignitary interests. In those situations, it may be appropriate for a court to conclude that a state-affiliated corporate entity may assert immunity because the corporate form fails to meaningfully insulate the state from the entity.

In most cases, however, a state's decision to establish a separate corporate entity to carry out a particular function should not be a basis for treating the entity as the state for purposes of sovereign

immunity. And this Court should be especially reluctant to extend immunity to such corporations in circumstances where their commercial and financial activities broadly affect out-of-state consumers and businesses, who lack a voice in the state political processes that hold state entities entitled to sovereign immunity accountable to the public.

ARGUMENT

I. State sovereign immunity provides sweeping protection, but only to the states themselves.

In *Franchise Tax Board*, this Court held that state sovereign immunity prevents a private plaintiff from naming a state as a defendant in another state’s courts. *See* 587 U.S. at 233. In so holding, the Court overruled *Nevada v. Hall*, 440 U.S. 410 (1979), which regarded such “interstate sovereign immunity” as a question of comity. *Franchise Tax Bd.*, 587 U.S. at 244. Rejecting that approach, *Franchise Tax Board* concluded that interstate sovereign immunity is embedded “within the constitutional design.” *Id.* at 245.

Because this Court had previously held that state sovereign immunity “bars suits against nonconsenting States in a wide range of cases,” *id.* at 243–44, *Franchise Tax Board* closed the door for a private plaintiff to hold a nonconsenting state accountable for many legal wrongs. To begin, it has long been accepted that a state, like any sovereign entity, may not “be sued in its own courts without its consent.” *Hall*, 440 U.S. at 416, *overruled on other grounds*, *Franchise Tax Bd.*, 587 U.S. at 233. And Congress generally lacks authority under its enumerated powers to abrogate state immunity to private lawsuits brought in federal court. *See Seminole Tribe of Fla. v. Florida*, 517 U.S.

44, 47 (1996). The Court has recognized exceptions only when Congress exercises its power under the Fourteenth Amendment or in those limited areas where the “plan of the Convention” effectuated a structural waiver of states’ immunity. *Torres v. Tex. Dep’t of Pub. Safety*, 597 U.S. 580, 587–89 (2022). And because “the States’ immunity from suit is a fundamental aspect of ... sovereignty” that is not “derive[d] from, [or] limited by,” the Eleventh Amendment’s focus on the federal judicial power, the Court has also held that Congress lacks the power to abrogate state immunity in state court, *Alden v. Maine*, 527 U.S. 706, 713 (1999), as well as in federal administrative tribunals, *see S.C. Ports Auth.*, 535 U.S. at 747. By recognizing the constitutional character of interstate sovereign immunity, *Franchise Tax Board* ensured that, except for those few areas where Congress may abrogate state immunity, a state cannot be named a defendant in any private lawsuit unless the state consents to being sued by waiving its immunity.

Although states enjoy nearly blanket protection from being named defendants in private lawsuits without their consent, this Court’s cases recognize important limitations on state sovereign immunity that help preserve “the proper balance between the supremacy of federal law and the separate sovereignty of the States.” *Alden*, 527 U.S. at 757. As this Court has long noted, a state’s immunity extends “only as to suits against a State.” *Lincoln Cty. v. Luning*, 133 U.S. 529, 530 (1890). State sovereign immunity thus prevents a private litigant from prosecuting the state as the “actual party on the record,” *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 857 (1824), without the state’s consent.

In cases such as this one, where “the State is not a named party,” application of state sovereign immunity turns on whether the “action is in essence against a State,” such that the state, and not the named defendant, is “the real party in interest.” *Lewis v. Clarke*, 581 U.S. 155, 162 (2017); *see also Poindexter v. Greenhow*, 114 U.S. 270, 290 (1885) (“[T]he distinction between the government of a state and the state itself is important, and should be observed.”). For instance, state sovereign immunity does not automatically apply to suits against state officials. When sued in an official capacity, the official may invoke the state’s immunity if “the remedy sought is truly against the sovereign.” *Lewis*, 581 U.S. at 162; *see also Alden*, 527 U.S. at 756 (“Some suits against state officers are barred by the rule that sovereign immunity is not limited to suits which name the State as a party if the suits are, in fact, against the State.”). But state sovereign immunity “does not bar certain actions against state officers for injunctive or declaratory relief.” *Alden*, 527 U.S. at 757 (citing *Ex parte Young*, 209 U.S. 123 (1908)). When used to ensure compliance with federal law, rather than seek money damages from the state itself, “official-capacity actions for prospective relief are not treated as actions against the State.” *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985); *see also Hafer v. Melo*, 502 U.S. 21, 30 (1991) (explaining that “the doctrine of *Ex parte Young* does not apply where a plaintiff seeks damages from the public treasury”).

Like state officials, state-affiliated corporate entities are not entitled to assert the state’s sovereign immunity if the state is not the “real party in interest” in the lawsuit. *Lewis*, 581 U.S. at 162. Such “lesser entities” to which constitutional immunity does not

attach include “municipal corporations [and any] other governmental entity which is not an arm of the state.” *Alden*, 527 U.S. at 756. Even when an entity is designated a “state instrumentality,” determining whether the entity has immunity as an arm of the state requires an inquiry “into the relationship between the State and the entity in question.” *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997).

II. States often establish separate corporate entities to engage in interstate commercial activities.

There is a “long history” of governments using the corporate structure to achieve specific objectives. *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 386 (1995). As far back as 1939, this Court noted that “[f]or more than a hundred years[,] corporations have been used as agencies for doing work of the government.” *Keifer & Keifer v. Reconstr. Fin. Corp.*, 306 U.S. 381, 389 (1939).

“Independent corporate facilities” have “advantages” over “conventional executive agencies” when it comes to “the enlarged scope of government in economic affairs.” *Id.* at 390. As a general rule, “a public corporation ... has a legal personality separate from the State.” *Biden v. Nebraska*, 600 U.S. 477, 492 (2023). “The instrumentality is typically established as a separate juridical entity, with the powers to hold and sell property and to sue and be sued.” *First Nat’l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 624 (1983). It is also “run as a distinct economic enterprise,” free from “the same budgetary and personnel requirements with which government agencies must comply.” *Id.* This structure gives state-affiliated corporations the ability “to

manage their operations” with “a greater degree of flexibility and independence from close political control than is generally enjoyed by government agencies.” *Id.* at 624–25. Although connected to the government, these corporate entities remain “separate and distinct, administratively and financially and legally, from the government itself,” which “facilitate[s] their adoption of commercial methods of accounting and financing, avoidance of political controls, and utilization of regular procedures of business management.” *Lebron*, 513 U.S. at 395 (internal quotation marks omitted).

Given these benefits, “governments throughout the world have established separately constituted legal entities to perform a variety of tasks.” *First Nat’l City Bank*, 462 U.S. at 624. The states are no exception to this trend. Today, states establish separate corporate enterprises to conduct activities and enter into transactions that are more commercial than regulatory in nature. For example, Indiana has established a “separate body politic and corporate” to manage its state lottery, which was charged with “function[ing] as much as possible as an entrepreneurial business enterprise.” *Burrus v. State Lottery Comm’n of Ind.*, 546 F.3d 417, 418 (7th Cir. 2008) (internal quotation marks omitted); *cf. Wojcik v. Mass. State Lottery Comm’n*, 300 F.3d 92, 100 (1st Cir. 2002) (concluding that the Massachusetts lottery commission was an arm of the state where, among other things, it was not “separately incorporated”). States have also established corporate entities to engage in the business of servicing student loans across the nation. *See Good v. Dep’t of Educ.*, 121 F.4th 772, 785 (10th Cir. 2024) (servicer established as “public instrumentality and body corporate” was not an arm of Missouri), *cert.*

docketed, No. 24-992 (Mar. 12, 2025); *U.S. ex rel. Oberg v. Pa. Higher Educ. Assistance Agency*, 804 F.3d 646, 654 (4th Cir. 2015) (servicer established as a “body corporate and politic constituting a public corporation and government instrumentality” was not an arm of Pennsylvania (internal quotation marks omitted)), *cert. denied*, 580 U.S. 1047 (2017). Many states, like New Jersey, use separate corporate bodies to provide interstate transportation services, *see, e.g., U.S. ex rel. Fields v. Bi-State Dev. Agency of Mo.-Ill. Metro. Dist.*, 872 F.3d 872, 883 (8th Cir. 2017) (involving bi-state entity); *Elam Constr., Inc. v. Reg’l Transp. Dist.*, 129 F.3d 1343, 1346 (10th Cir. 1997), or to manage port operations, *see, e.g., Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 39 (1994) (bi-state entity found not entitled to immunity); *P.R. Ports Auth. v. Fed. Mar. Comm’n*, 531 F.3d 868, 870 (D.C. Cir. 2008) (concluding that port authority was entitled to immunity).

III. Separate corporate existence weighs heavily against an entity’s status as an arm of the state.

Whether a separate corporate entity established by a state to carry out specific functions shares the state’s sovereign immunity is “a question of federal law.” *Regents*, 519 U.S. at 429 n.5. “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.” *P.R. Ports Auth.*, 531 F.3d at 881 (Williams, J., concurring). Although more recent cases have taken account of other connections between the entity and the state to determine whether the entity shares the state’s immunity, *see Hess*, 513 U.S. at 44–51, this Court has continued to give weight to an

entity's corporate status in assessing whether the entity possesses the state's constitutional immunity.

Consistent with this Court's historical approach, an entity's separate corporate status should presumptively disqualify it from invoking state sovereign immunity. That presumption may be overcome—in effect, the corporate veil may be “pierced”—if other factors indicate that state law meaningfully disregards the corporate form in practice. For example, “whether a money judgment against a state instrumentality ... would be enforceable against the State is of considerable importance” to the question whether a corporate instrumentality is an arm of the state. *Regents*, 519 U.S. at 430. But in the run-of-the-mill case, where the corporate form protects the state from the effects of a court's judgment, the corporate form should be dispositive of the immunity issue. This result would be consistent with the historical understanding of the significance of the corporate form and would mitigate the adverse effects that state immunity doctrine has on out-of-state persons who transact business with state-affiliated corporate enterprises.

A. At common law, a corporation possessed the intrinsic characteristic “of suing and being sued in all things.” *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 667 (1819) (op. of Story, J.). Common law recognized that some corporations were “public corporations”—that is, corporations “founded by the government for public purposes, where the whole interests belong also to the government.” *Id.* at 668–69. These corporations include “towns, cities, parishes, and counties.” *Id.* at 668.

In *Cowles v. Mercer County*, 74 U.S. (7 Wall.) 118 (1869), this Court considered whether a “county established in the State [of Illinois as] a body politic and corporate” could be sued in federal court by a citizen of New York. *Id.* at 118. Concluding that the county could be sued, the Court held that it was “enough for this case that we find the board of supervisors to be a corporation authorized to contract for the county.” *Id.* at 122.

The Court reached a similar conclusion in *Metropolitan Railroad Co. v. District of Columbia*, 132 U.S. 1 (1889). There, the Court considered whether the District had become “a department of the United States government” during a period when the District was managed by a presidentially appointed commission. *Id.* at 7. The Court rejected that argument, concluding that the change in “[t]he mode of appointing its officers does not abrogate its character as a municipal body politic.” *Id.* at 8; *see also Auer v. Robbins*, 519 U.S. 452, 456 n.1 (1997) (holding that Missouri’s Board of Police Commissioners did not share in the state’s immunity, although “the Governor appoints four of the board’s five members”).

In *Lincoln County v. Luning*, 133 U.S. 529 (1890), the Court likewise rejected the assertion that a county shared the state’s sovereign immunity because it was “an integral part of the State.” *Id.* at 530. The Court noted that, “while 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.” *Id.* “In this respect, it is a part of the state only in that remote sense in which any city, town, or other municipal corporation may be said to be a part of the

state.” *Id.* That was insufficient to make the state the “real ... defendant” in the lawsuit. *Id.*²

Likewise, in *Moor v. County of Alameda*, 411 U.S. 693 (1973), the Court held that “a political subdivision of a State, unless it is simply ‘the arm or *alter ego* of the State,’ is a citizen of the State for diversity purposes.” *Id.* at 717 (footnote reference omitted; quoting *State Highway Comm’n of Wyo. v. Utah Constr. Co.*, 278 U.S. 194, 199 (1929)). In reaching that conclusion, the Court relied on cases such as *Lincoln County* and *Cowles* for the principle that “corporations are citizens of the State in which they are formed.” *Id.* at 718. In response to Alameda County’s objection that it was “unlike the counties of most States,” *id.*, the Court undertook “a detailed examination” of California law to ascertain whether the county was a “mere agent” of the state. *Id.* at 719. In rejecting the County’s argument, the Court emphasized, “[m]ost notably,” that, under California law, “a county is given corporate powers and is designated a body corporate and politic,” with the power to “sue and be sued.” *Id.* (internal quotation marks omitted). Alameda County’s “independent corporate character” confirmed that it was not “part of the State itself” but “a citizen of California.” *Id.* at 721.

The weight that this Court has given to an entity’s separate corporate existence has not been confined to the political subdivisions of a state. For instance, in an early case considering the status of state-owned banking corporations, *Bank of United States v.*

² The Court further “observed that the records of this court, for the last 30 years, are full of suits against counties” and that the Nevada constitution provided for the liability of counties to suit. *Lincoln Cty.*, 133 U.S. at 530.

Planters' Bank of Georgia, 22 U.S. (9 Wheat.) 904 (1824), this Court held that Georgia did not imbue a bank with “sovereign capacity,” *id.* at 912, by incorporating the bank and “giving [it] the capacity to sue and be sued,” *id.* at 907; *see also Curran v. Arkansas*, 56 U.S. (15 How.) 304, 309 (1853) (citing early banking cases).

In *Sloan Shipyards Corp. v. U.S. Shipping Board Emergency Fleet Corp.*, 258 U.S. 549 (1922), the Court considered the governmental status of the Emergency Fleet Corporation, a corporation created by the federal government to assist the war effort during World War I. *Id.* at 564. Although the government had delegated to the corporation “enormous powers,” the Court rejected the argument that the corporation “was so far put in place of the sovereign as to share the immunity of the sovereign from suit.” *Id.* at 566. While recognizing that the corporation may act as an “instrumentality of Government,” *id.* at 567, the Court explained that the “plaintiffs are not suing the United States but the Fleet Corporation,” and federal sovereign “immunity does not extend to those that acted in [the United States] name,” *id.* at 567–68.

Similarly, in *Keifer & Keifer*, the Court considered the sovereign immunity of the Regional Agricultural Credit Corporation of Sioux City, Iowa (Regional), an entity chartered by the Reconstruction Finance Corporation, itself a congressionally established corporation. 306 U.S. at 387. An executive order had transferred control of Regional to the Farm Credit Administration before the cause of action arose. *Id.* at 388. Nonetheless, the Court held that Regional did not enjoy sovereign immunity. The Court explained that, “because the doctrine [of sovereign immunity] gives the government a privileged position, it has been

appropriately confined,” and it does not apply to the government’s “agents or instrumentalities because they do the work.” *Id.* (citing *Sloan Shipyards*, 258 U.S. at 567). Without questioning Congress’s authority to create corporations to do “the work of the government,” the Court concluded that establishing a corporate entity alone “would not confer on such corporations legal immunity even if the conventional to-sue-and-be-sued clause were omitted.” *Id.* at 389.

B. A presumption that state-affiliated corporate entities do not have immunity is fully consistent with the conclusion that such entities are part of the government for other purposes. As this Court recently noted, “a public corporation can count as part of the State for some but not ‘other purposes.’” *Nebraska*, 600 U.S. at 493 n.3.

In *Lebron*, for instance, the Court addressed the import of 45 U.S.C. § 541 (since recodified at 49 U.S.C. § 24301), which stated that Amtrak “is not a department, agency, or instrumentality of the United States Government.” The Court noted that this provision was “assuredly dispositive of Amtrak’s status as a Government entity for purposes of matters that are within Congress’s control,” including “depriv[ing] Amtrak of sovereign immunity.” 513 U.S. at 392. Nonetheless, this Court concluded that Amtrak “is an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution.” *Id.* at 394. The Court explained that a corporation could be “an agency of the Government[] for purposes of the constitutional *obligations* of Government” while not governmental for purposes of “the *privileges* of the government,” *id.* at 399 (emphases added; internal quotation marks omitted)—including the privilege of

sovereign immunity. *See, e.g., Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 253 (2011) (describing sovereign immunity as “the privilege of the sovereign not to be sued without its consent”).

Counties and municipalities have long been paradigmatic examples of this distinction. As this Court has explained, “all municipal governments are but agencies of the superior power of the State or government by which they are constituted.” *Metro. R.R. Co.*, 132 U.S. at 8. They are “merely ... department[s] of the state [and] remain[] the creature of the state exercising and holding powers and privileges subject to the sovereign will.” *City of Trenton v. New Jersey*, 262 U.S. 182, 187 (1923). As such, like a state (and like Amtrak), local governments are bound by constitutional obligations. *See, e.g., United Bldg. & Constr. Trades Council of Camden Cty. v. Mayor & Council of Camden*, 465 U.S. 208, 215 (1984) (stating “what would be unconstitutional if done directly by the State can no more readily be accomplished by a city deriving its authority from the State”). But while “ultimate control of every state-created entity resides with the State, for the State may destroy or reshape any unit it creates,” “cities and counties do not enjoy Eleventh Amendment immunity,” *Hess*, 513 U.S. at 47, “even though such entities exercise a ‘slice of state power.’” *Lake Country Ests., Inc. v. Tahoe Reg’l Planning Agency*, 440 U.S. 391, 401 (1979); *see N. Ins. Co. of N.Y. v. Chatham Cty.*, 547 U.S. 189, 193–94 (2006).

The Court’s conclusion in *Nebraska* that Missouri had Article III standing to seek redress for injuries to a state instrumentality does not retreat from the principle that corporate entities affiliated with a state presumptively lack the state’s immunity. *Nebraska’s*

standing analysis does not cite any arm-of-the-state precedents, and it recognizes that a government corporation “has a legal personality separate from the State.” 600 U.S. at 492. Instead, in concluding that an “acknowledged harm to [an instrumentality] in the performance of its public function is necessarily a direct injury to [the state] itself, *id.* at 491, *Nebraska* tacitly reflects the ancient common-law rule that “public corporations are such only as are founded by the government, for public purposes, where the whole interests belong also to the government.” *Trs. of Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 668–69 (op. of Story, J.). The state’s cognizable interest in the performance of its public instrumentalities, however, does not imply that those entities share the state’s immunity. See *Keifer & Keifer*, 306 U.S. at 388 (“[T]he government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work.”); *cf. Hess*, 513 U.S. at 44 (explaining that the bi-state “compact and its implementing legislation do not type [the bistate entity] as a state agency” where “they use various terms” to describe the entity, such as “body corporate and politic”).

C. As noted above, historically, “the only jurisdictional inquiry necessary” to determine whether an entity is an arm of the state “would be to examine the entity’s organic statute and determine whether it was a corporation and legal person capable of appearing in its own name.” *P.R. Ports Auth.*, 531 F.3d at 883–84 (Williams, J., concurring). More recent decisions, however, have considered several factors in deciding whether state-affiliated corporate entities have “the same kind of independent status as a county or [are] instead arm[s] of the State.” *Regents*, 519 U.S.

at 429 n.5; see, e.g., *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977) (considering several factors in concluding that a school board was “more like a county or city than it is like an arm of the State”).

Hess indicates why looking behind an entity’s corporate form may be appropriate. As *Hess* explains, state sovereign immunity serves “twin” goals. 513 U.S. at 47. First, immunity protects the state treasury from money judgments sought by private parties. *Id.* at 39; see *id.* at 48 (explaining that “the impetus for the Eleventh Amendment” was “the prevention of federal-court judgments that must be paid out of a State’s treasury”); *Edelman v. Jordan*, 415 U.S. 651, 663 (1974) (“Thus the rule has evolved that 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.”). In the typical case, the corporate form will ensure that money judgments against a state-affiliated entity will look to the entity’s assets rather than the state fisc. See *First Nat’l City Bank*, 462 U.S. at 626 (stating that “[l]imited liability is the rule, not the exception” (citation omitted)). In situations where state law permits judgment creditors to look to the state’s treasury to pay an entity’s debts, however, a court could conclude that the entity’s corporate form does not resolve the question of its immunity.

Second, *Hess* notes that sovereign immunity seeks to protect the “dignity” of the states. 513 U.S. at 47. As this Court has explained, “[p]rivate suits against nonconsenting States ... present ‘the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.’” *Alden*, 527 U.S. at 749 (quoting *In re Ayers*, 123 U.S. 443, 505

(1887)). As *Alden* indicates, however, the dignity afforded to states does not extend to every governmental entity that is associated with the state: Thus, a state's dignity is not offended when private suits are brought against "a municipal corporation or other governmental entity which is not an arm of the state" or, in some cases, state officials. *Id.* at 756–57.

Nonetheless, to the extent that a state-affiliated corporate entity can show that the corporate form plays no material role in separating the entity from the state itself, a court may consider that showing in deciding whether to look behind the corporate structure and allow the entity to share the state's constitutional immunity. In general, however, when a state establishes a separate corporate entity to carry out a specific function, the Court's precedents establish that private plaintiffs harmed by the entity's conduct "are not cut off from a remedy" by virtue of the state's sovereign immunity. *Sloan Shipyards Corp.*, 258 U.S. at 568.

IV. If sovereign immunity were extended to state-affiliated corporate entities engaged in interstate commerce, the political checks that ordinarily hold states accountable would be ineffective to protect consumers and others who may be harmed by those entities.

Policing the bounds of the arm-of-the-state doctrine in the context of state-affiliated corporate enterprises engaged in interstate commerce is important because the political processes that ordinarily ameliorate the consequences of sovereign immunity are unlikely to be effective with respect to entities of this kind. Out-of-state individuals and

businesses are *likely* to be affected by the commercial and financial activities of these sub-state corporate bodies. Such out-of-state parties, however, are *unlikely* to have influence in the political processes that determine whether persons injured by entities entitled to sovereign immunity will have means of redress.

In holding that Congress lacks authority to abrogate state immunity in state courts, this Court explained that the Constitution “contemplates that a State’s government will represent and remain accountable to its own citizens.” *Alden*, 527 U.S. at 751 (quoting *Printz v. United States*, 521 U.S. 898, 920 (1997)). The “principle of representative government,” the Court stated, encompasses use of “the political process established by the citizens of the State” to determine the optimal “balance between competing interests.” *Id.* And “the allocation of scarce resources among competing needs and interests lies at the heart of the political process,” which in turn depends on “the will of [a state’s] citizens.” *Id.* Indeed, *Alden* recognized that “[m]any States, on their own initiative, have enacted statutes consenting to a wide variety of suits.” *Id.* at 755. Further, “within any single State in our representative democracy, voters may exercise their political will to direct state policy” on the question of the state’s immunity. *Hess*, 513 U.S. at 42.

State-affiliated corporate enterprises, however, often operate well beyond the borders of their states. Such entities can and do transact business with large numbers of out-of-state counterparties and customers. For example, both the state-affiliated student-loan servicer whose immunity was at issue in *U.S. ex rel. Oberg*, 804 F.3d 646, and the one whose immunity

remains at issue in *Good*, 121 F.4th 772, handle mostly debts owed by residents of states other than the ones with which the servicers are affiliated—and those out-of-state residents have no choice about whether a loan servicer affiliated with some distant state will acquire their loan. But while in-state residents have access to the state’s political process to ensure that state-affiliated corporate entities can be held legally accountable, out-of-staters are not represented in the state’s political processes and lack the ability to influence the state’s policy on sovereign immunity waivers for the reasons explained above.

For example, if enough of a state’s voters are concerned about the impact on them of a state-affiliated entity’s activities, their elected representatives may create remedies in the state’s courts or agencies through which injured persons may seek redress, or they may make other efforts to control the entity’s actions. Whether, and to what extent, sovereign immunity may be waived thus will depend on what the state’s political process determines is the appropriate “allocation of scarce resources among competing needs and interests.” *Alden*, 527 U.S. at 751. But the interests of out-of-staters in accessible forums for the pursuit of claims are likely to receive little weight in a state legislature’s accommodation of competing interests, and out-of-state voices are likely to be drowned out by that of the state-affiliated entity and those with an interest in maximizing its revenues.

In other contexts, this Court has recognized that it is a matter of grave constitutional concern when state political processes lead to outcomes that favor in-state economic interests over those of citizens of other states. For example, the Court has held that the Privileges and Immunities Clause bars states from

engaging in certain forms of discrimination against nonstate residents, explaining that unlike state residents who “have a chance to remedy at the polls any discrimination against them, ... [o]ut-of-state citizens have no similar opportunity.” *United Bldg.*, 465 U.S. at 217 (citing *Austin v. New Hampshire*, 420 U.S. 656, 662 (1975)). Similarly, state laws that discriminate or place an undue burden on interstate commerce are viewed skeptically under the dormant Commerce Clause, in part because “[u]nrepresented interests” lack access to “those political restraints which are normally exerted on legislation where it affects adversely some interests within the state.” *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 92 (1984) (quoting *S.C. Highway Dep’t v. Barnwell Brothers, Inc.*, 303 U.S. 177, 185 n.2 (1938)). In the Commerce Clause context, Congress can endorse or override state barriers because the national legislative process ensures that “all segments of the country are represented.” *Id.* Because of the constitutional moorings of state sovereign immunity, however, Congress cannot, except in limited circumstances, step in to countermand a state’s decision on whether and on what terms to waive its immunity.

Accordingly, for potential out-of-state claimants, the arm-of-the-state inquiry is critical: It determines whether they can pursue all available judicial remedies for alleged wrongdoing in a forum of their choice, or whether they will instead be barred altogether from seeking relief or, at best, relegated to lesser remedies in distant forums, devised by processes in which they have no voice. Given these stakes, this Court should not lightly extend arm-of-the-state status to state-affiliated commercial

enterprises that fall outside the traditional scope of sovereign immunity.

CONCLUSION

The judgment of the Supreme Court of Pennsylvania in No. 24-1021 should be reversed, and the judgment of the Court of Appeals of New York in 24-1113 should be affirmed.

Respectfully submitted,

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