Nos. 24-1021 and 24-1113

IN THE

Supreme Court of the United States

CEDRIC GALLETTE,

Petitioner,

v.

NEW JERSEY TRANSIT CORPORATION,

Respondent.

NEW JERSEY TRANSIT CORPORATION, ET AL.,

Petitioners,

v.

JEFFREY COLT AND BETSEY TSAI,

Respondents.

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

BRIEF OF AMICI CURIAE FEDERAL COURTS SCHOLARS IN SUPPORT OF CEDRIC GALETTE AND JEFFREY COLT, ET AL.

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INTEREST OF AMICI CURIAE[1]

Amici are disinterested professors of federal courts law who study matters related to federal jurisdiction and sovereign immunity. They share an interest in the proper application of the federal law doctrine of sovereign immunity in state courts. Amici are:[2]

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Because the parties agree on the propriety of the three-part test that the courts have derived from *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977)—and amici believe they are right to do so—this brief's principal aim is to address important doctrinal details that will clarify the application of this test in this and future cases. These points include the allocation of the burden of proof and the definition of the three factors, which will greatly aid the lower courts if this Court emphasizes and correctly applies them here.

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[1] Amici certify that no counsel for a party authored this brief in whole or in part and no person or entity, other than amici or their counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] Amici's titles and institutional affiliations are provided solely for identification purposes.

ARGUMENT

I. The three-part inquiry derived from *Mt. Healthy* should be applied to interstate sovereign immunity.

As an initial matter, amici agree with both parties that it makes good sense to use the arm-of-the-state test that this Court has applied for state sovereign immunity in federal court to interstate sovereign immunity as well. That is true for three reasons: (1) It is important for the sound functioning of the legal system; (2) it is logically and doctrinally sound; and (3) it is familiar and so relatively easy for the lower courts to administer.

1. As Judge Halligan pointed out in her New York Court of Appeals concurrence, a key "virtue" of importing the arm-of-the-state test is that it will "ensur[e] that a non-state entity will be made amenable to suit in both federal and state court, or neither, but not suable in one court and immune in the other." Colt Pet. App. 24a-25a. Any alternative to that system would become unworkable, because the immunity of a particular entity would turn on the happenstances of federal jurisdiction and/or removability. Whatever benefits sovereign immunity confers on an entity—and whatever aspects of state sovereignty it is meant to recognize—will be fleeting or illusory if the entity cannot depend on them in both the state and federal systems. The avoidance of mismatch is thus a key point in favor of keeping the same test.

2. Importing the arm-of-the-state test is also logical and supported by precedent. In *Franchise Tax Board of California v. Hyatt*, 587 U.S. 230 (2019) (*Hy-*

att III), this Court held that interstate sovereign immunity is a structural element of the Constitution that predated the Eleventh Amendment's enactment. *See id.* at 241. That reasoning parallels the view this Court took of state sovereign immunity in a State's own courts in *Alden v. Maine*, 527 U.S. 706 (1999), and of immunity before federal agencies in *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002)—both of which extended state sovereign immunity beyond the terms of the Eleventh Amendment.

This aspect of state sovereign immunity doctrine depends upon the historical claim that the Eleventh Amendment was the correction of one specific "blunder" based on a preexisting (and broader) notion of state sovereign immunity, rather than a textual choice to reject broader forms of state sovereign immunity. *See, e.g.*, *Hyatt III*, 587 U.S. at 243. Or, as this Court put it in *Alden*, it takes the view that "the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment." 527 U.S. at 713.

If the principles of state sovereign immunity were not created by the Constitution or its Amendments, then it makes sense that the test would be the same regardless of whether or not a case falls within the literal text of the Eleventh Amendment. The point of these cases is that the form of state sovereignty that existed before the Constitution survived its enactment unless something in the Constitution affirmatively altered it, and that should be as true for interstate immunity as it is for federal-state immunity.

To be sure, it could be the case that the structure enacted by the Constitution would have different implications for the different relationships that a State has with the federal government and its sister States respectively. *See, e.g.*, *infra* n.3. Indeed, *Hyatt III* itself holds that the Constitution's enactment changed the relationship among the States so that they could no longer treat each other the same way that foreign sovereigns would. *See* 587 U.S. at 245. Nothing in *Hyatt III* suggests, however, that this relationship would entail *more* deference to state sovereign immunity from suit at the interstate level than at the federal level (and that would be odd in light of the Supremacy Clause). And in any event, the question of whether a corporate body like the New Jersey Transit Corporation *is even the State* is separate from, and logically prior to, the question of how much immunity the State has in any particular court.

On that point—which is the subject of the arm-of-the-state test—the immunity doctrine that applies under the Eleventh Amendment, non-textual immunity cases like *Alden v. Maine*, and interstate sovereign immunity must all look to the same preexisting sources of law. And so it makes logical and doctrinal sense that the test would be the same.

3. In addition to being workable and logical, the arm-of-state-test has the virtue of being familiar to the lower courts. As this Court noted in *Hyatt III*, state sovereign immunity has been extended to several contexts, *see* 587 U.S. at 244, and looking to that body of case law gives judges a body of preexisting precedent on which to draw. Clarity and manageability in application is particularly important in the con-

text of jurisdictional rules. *See, e.g.*, *Knudsen v. Liberty Mut. Ins. Co.*, 411 F.3d 805, 806 (7th Cir. 2005) ("the first virtue of any jurisdictional rule is clarity and ease of implementation") (citing *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202-203 (1988)). A body of existing precedent here will help not only the judges who have to apply it but also, potentially, the state legislators who want to know whether their choices will or won't lead to an interstate immunity issue.

II. The Court should clarify how the arm-of-the-state test should be applied.

The foregoing establishes that the test the parties have agreed upon is the right one, but as this case itself shows, that leaves ample room for disagreement. To that end, amici believe the court should clarify four points about the application of the test that will aid in both reaching the right outcome here and increasing predictability for lower courts and state legislatures.

A. The burden is on the defendant to show that it is immune at the entity level.

1. The first point that bears clarification is the burden of proof. Amici believe that the burden should be allocated to the facially separate, non-state entity to establish that it is in fact an arm of the state. This is the prevailing view in the lower courts. *See Hennessey v. Univ. of Kan. Hosp. Auth.*, 53 F.4th 516, 529-530 (10th Cir. 2022) (joining the other circuits that had considered the question and holding that it is the entity's burden). And there are several good reasons for this view that the lower courts have given, including that: (1) It is a "defense"; (2) the facts that bear

on the issue are likely to be in the defendant's possession; and (3) placing the burden on the plaintiff may require discovery, which would undermine the very immunity from suit being asserted. *See id.* at 530-531.

An added point is that there are sovereignty interests on both sides of this issue, and in every case at issue, this defense represents an incursion of federal constitutional law into the jurisdiction of a state court. For example, New York has a sovereign interest in adjudicating this case involving a New York citizen tortiously injured in New York. *See, e.g.*, *Bristol-Myers Squibb Co. v. Superior Ct. of Cal.*, 582 U.S. 255, 263 (2017) ("[T]he States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts.") (citation omitted); *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957) (affirming State's "manifest interest in providing effective means of redress for its residents"). That New York citizen will have to satisfy whatever burdens New York law imposes on him, and if he does so, he will validly invoke the judicial power of the State of New York. The New Jersey Transit Corporation would be asking to frustrate that presumptively valid assertion of authority by invoking federal constitutional law, and it makes sense for it to bear the burden of establishing the basis for doing so.

2. Amici also believe that the burden is to establish an entity's sovereign immunity at the entity level; the outcome should not vary based on different functions that the same defendant entity might be carrying out in different cases. This accords with the prevailing view in the lower courts that they should "evaluate immunity at the level of the entity." *Kohn v.*

State Bar of Cal., 87 F.4th 1021, 1031 (9th Cir. 2023). As then-Judge Kavanaugh put it in *Puerto Rico Ports Authority v. Federal Maritime Commission*, 531 F.3d 868 (D.C. Cir. 2008), "an entity either is or is not an arm of the State: The status of an entity does not change from one case to the next based on the nature of the suit, the State's financial responsibility in one case as compared to another, or other variable factors." *Id.* at 873.

The Ninth Circuit's recent decision in *Kohn*, 87 F.4th at 1031-1032—which adopted the D.C. Circuit's test from *Puerto Rico Ports Authority*—is helpful in this regard. As *Kohn* notes, an "entity-based approach . . . better promotes consistency, predictability, and finality because it settles an entity's immunity unless and until there are relevant changes in the state law governing the entity." *Id.* at 1031 (citation and quotation marks omitted). Once an entity has carried its burden of establishing its immunity, that outcome should not depend on case-specific details or potentially strategic pleadings from different plaintiffs. And, conversely, if an entity is deemed not immune after a comprehensive inquiry into its overall nature, it should not get to relitigate that question over and over again.

As this case demonstrates, an entity-level determination also better comports with the three-part test. In attempting to establish the test's first element, New Jersey Transit Corporation focuses almost entirely on functions that are *not* at issue in this case, including operating a police force, using the power of eminent domain, issuing binding regulations, and the like. *See, e.g.*, Pet. Br. 3. And it is right to do so. The test does not ask whether New Jersey created an arm

of the state when it set up the New Jersey Transit Corporation *qua* bus dispatcher; courts need to examine the overall character of the entity to come to an intelligible answer. And this result comports with the paradigmatic example of incorporated municipalities, which are held not to be arms of the state in the Eleventh Amendment context whether they are engaging in commercial activities or exercising their most state-like powers. *See Lake Country Ests. v. Tahoe Reg'l Plan. Agency*, 440 U.S. 391, 401 (1979).

In sum, the first element of the arm-of-the-state test places on the defendant the burden of establishing that it is an entity that is part of the State. Formally speaking, the question should be: "Whether defendant has carried its burden to show that its home state created in it the kind of entity entitled to sovereign immunity."

B. The test's first element asks what kind of entity the State created, not what it intended to create.

This leads to a second critical point: Although courts often frame the first element of the arm-of-the-state test around the "intent" of the State that created the entity, that language may obscure the necessary analysis rather than clarify it. Neither the federal courts nor the courts of sister States should defer to a State's "intent" to bestow sovereign immunity on an entity, whether that intent is expressed legislatively or through state court opinions. What matters is what kind of entity the State has structured and whether its characteristics make it a part of the State itself for purposes of federal constitutional law.

The problem likely stems from the fact that "intent" is clearly relevant in one direction. If we know that a State *did not intend* for an entity to be an arm of the state, then we surely know that it is not entitled to sovereign immunity. After all, sovereign immunity is waivable at the State's election, so it makes no sense to imagine an entity being immune by legislative accident (or being able to claim immunity for itself by somehow escaping the State's actual intent). Considerations of state intent can thus be clarifying in many cases as a way to separate the entities that *might* be immune from those that surely aren't.

But this analysis doesn't go both ways. Sovereign immunity is clearly a question of federal law. *See P.R. Ports Auth.*, 531 F.3d at 872. The answer may depend on an analysis of how state law structured the entity—and absolute deference is due to state court determinations of what that structure looks like in fact. But the application of those legal facts to the ultimate legal question is something federal law must provide itself. As this Court has put it in the Eleventh Amendment context: "[T]he question whether a particular state agency has the same kind of independent status as a county or is instead an arm of the State, and therefore 'one of the United States' . . . , is a question of federal law. But that federal question can be answered only after considering the provisions of state law that define the agency's character." *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 n.5 (1997).

Formally, the point is that the creator State's law (as interpreted by that State's courts) is binding on other courts as to the *eligibility* of an entity for state sovereign immunity. And it is binding on the question of what powers and responsibilities state law in fact

creates or imposes on the entity. But neither state law nor state courts are due deference on the question whether that *kind* of entity is entitled to state sovereign immunity. This is a "characterization question" in which the court is "characterizing the significance or meaning of state law for [federal] constitutional law purposes." Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 Colum. L. Rev. 1919, 1935 (2003). And that characterization is a pure question of federal law that federal or sister-State courts are free to answer for themselves.

New Jersey Transit Corporation appeared to argue otherwise in its petition—accusing the New York Court of Appeals of failing to treat "the creator State [a]s the definitive expositor of its own law," because it did not defer to how New Jersey "views" or "sees its state-created entity." *See* Colt Pet. 25. Its merits brief seemingly retreats from that position, but it continues to emphasize the importance of "state intent," and the alleged indignity of "telling a State that it was *wrong* to view its entity as sharing in its immunity." Pet. Br. 19 (emphasis original).

It is important for this Court to make clear that this line of argument is off base. A State is not free to confer state sovereign immunity on other bodies just because it wants to—it must actually *be* the real party in interest as a matter of federal law. *See Doe*, 519 U.S. at 429. And that is a question of what kind of body it structured, not its "intent." Put another way, a State can be "wrong to view its entity as sharing in its immunity" if it has created an entity that federal law regards as too separate from the State itself. It is always free to correct that error by further integrating

the entity into the State if that is its real "intent." But it is not free to just *say* that it wants the entity to be immune and leave it at that.

In an important moment of clarity, New Jersey Transit Corporation acknowledges that intent really goes to eligibility for immunity rather than immunity itself. As its brief says: "Looking to the State's indications of its intent helps separate the entities it has structured to include within its sovereign scope (typically *eligible* for immunity) from those it did not (*ineligible*)." Pet. Br. 10 (emphases added). That is right, and is the limit of what state intent can teach in and of itself.

Conversely, the real question courts should be asking is the *type* of entity that the State in fact created or structured. And on that point, it is again useful to remember that cities and counties are paradigmatic examples of entities not entitled to sovereign immunity. These entities exercise a lot of governmental powers (they have police forces, eminent domain powers, non-taxable property, and regulatory authority). Compare Pet. Br. 22 (citing all those same powers). Accordingly, it is not typically helpful to ask (as New Jersey Transit Corporation does) whether the State structured an entity to resemble a governmental authority or to exercise traditional state powers.

Instead, the structural elements that matter are the extent to which the entity functions as an arm of the state in the way that an "arm" is fully a part of—and fully subordinated to—the person to whose shoulder it attaches. To that end, incorporating a separate legal entity, giving it the freedom to act in ways that might be contrary to the immediate interests of the State itself, refusing to grant it immunity in the home

State's courts, and establishing a corporate liability shield that prevents plaintiffs from directly pursuing state assets are all key structural indications that New Jersey Transit Corporation is not the State itself. And that means that the real party in interest is the separate entity, not the State, and so it is not entitled to sovereign immunity.

C. The test's second element should look to both structural control and actual state involvement rather than entity structure alone.

The test's second element concerns the extent to which the State controls the operations of the entity at issue. Amici take the position that a court should consider both (i) the structure of the entity and its formal accountability to state officials and (ii) state officials' degree of involvement in the entity's management. This clarification of the second arm-of-state-test factor as articulated by the New York Court of Appeals is consistent with some (though not all) of the lower court jurisprudence, which will consider not only formal structure but also evidence of actual involvement in management. *See, e.g.*, *Manders v. Lee*, 338 F.3d 1304, 1309 (11th Cir. 2003) (asking whether the State "maintains" some involvement in the entity's activities). Particularly in combination with the other factors, attention to whether state actors actually *do* engage in the management of the entity can be an important clue about the type of entity the State created.

A useful analogy can be drawn here to state-action antitrust immunity, which this Court first articulated in *Parker v. Brown*, 317 U.S. 341 (1943). In this context, this Court has stressed that—when the power to

undertake potentially anticompetitive actions is delegated to an entity that is separate from the State—what matters is not just the theoretical ability of the State to control the entity, but the extent of its actual involvement. This requirement sounds in political accountability: It is important that the actions be traceable to and identified as those of the State. As this Court put it, "[i]mmunity for state agencies . . . requires more than a mere facade of state involvement, for it is necessary in light of *Parker*'s rationale to ensure the States accept political accountability for anticompetitive conduct they permit and control." *N.C. State Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494, 505 (2015).

This analogy is useful because political accountability for immunizing tortious conduct is important in much the same way as political accountability for immunizing anticompetitive conduct. The reason neither the States nor the federal government assert the broadest forms of sovereign immunity is the same as the one that keeps them from immunizing anticompetitive market behavior—they *could* do it, but the citizens wouldn't stand for it.

To that end, the active involvement of state officials means that, when bad mistakes happen, citizens know who to blame at the ballot box. But if state officials are not actually involved, they can hide behind the separate entity in local state politics, while the entity hides behind the immunity of the State itself in the sister States' courts (something that, notably, New Jersey Transit Corporation cannot do in New Jersey's own courts). Amici thus believe that, while day-to-day management or constant intervention in

the management of the entity is not necessary, the extent of state involvement is a meaningful consideration in determining whether this element of the arm-of-the-state test favors immunity or not.

This inquiry will also be helpful to lower courts seeking to apply the second element of the arm-of-the-state test. Notably, while concepts of structural control from federal separation-of-powers cases can be useful, they will not always map directly onto different States' political systems or practices. It will certainly be appropriate to consider appointment and removal powers and any veto rights that the State may have over an entity's actions. But it is important to remember that some States do not have unitary executives, and they can have (or adopt) different rules around what it means for someone to be removable at will or for cause. They can also have different rules about whether those rules are enforceable in court. That means that courts applying the second factor must be careful in looking to other executive-control precedents for guidance. And in that context, attending to whether state political officials actually exercise whatever powers they claim to have over the entity can illuminate whether those apparent powers are real or just "a mere facade of state involvement."

D. The third element should not depend on the relief requested or amount at stake.

Finally, amici firmly believe that when it comes to analyzing the third arm-of-the-state factor—which concerns whether a loss will fall on the state treasury—the answer should be based on the formal liability rule and not the extent to which any particular judgment might require funds from the State or have

a practical impact on the public fisc. That is so for three reasons.

First, it is consistent with this Court's precedents. While this Court has cautioned against turning the entire arm-of-the-state test "into a formalistic question of ultimate financial liability," it has described this third factor as being about "the entity's potential legal liability, rather than its ability or inability to require a third party to reimburse it, or to discharge the liability in the first instance." *Doe*, 519 U.S. at 431. Accordingly, this factor should not vary based on the size of the claim, the extent to which it may or may not be covered by an insurance policy, or other case-specific considerations. *See id.; P.R. Ports Auth.*, 531 F.3d at 873. If the State is formally on the hook, this factor favors an assertion of interstate sovereign immunity. And the opposite is true if, instead, there is a formal liability shield between the entity and the State.

Second, this rule is clear and easy to administer. Determining whether a suit against an entity is ultimately making a claim on the state treasury should not require detailed and intrusive factual inquiries into an entity's cash reserves, insurance limits or coverages, shifting annual budgets, or any other "variable factor[]" that departs from the State's potential legal liability for the judgment. *See P.R. Ports Auth.*, 531 F.3d at 873. It would sow enormous confusion and create distorted incentives for plaintiffs if this factor came out differently based on the precise number of dollars sought or whether the entity happened to run at a profit or deficit in the years preceding the suit. The question whether a state court's exercise of its ju-

dicial power will result in a judgment that is enforceable against the other State should not change from case to case, so courts can answer the question consistently by looking to legal sources rather than conducting roving factual inquiries into the practical effects of different kinds of liability in different cases.

Third, this rule avoids an anomalous result that might invite far greater disharmony among co-equal sovereigns than the entity-level rule set forth in *Doe* and then-Judge Kavanaugh's opinion in *Puerto Rico Ports Authority*. From an interstate-sovereignty perspective, it would be far more intrusive for a New York court to tell New Jersey Transit Corporation to change its hiring or driver-training practices, as opposed to simply ordering monetary compensation to an injured New Yorker. But if the third arm-of-the-state element were just a question of the practical risk to the state treasury, it might be possible to conclude that one State's courts could issue programmatic injunctive relief against an entity even when they could not order that same entity to pay monetary damages.[3] Such a case, in which a state court seeks to order programmatic injunctive relief to enforce its own laws against another State's entity, may be rare in practice and limited by other doctrines. But it shows that the arm-

[3] The rule of *Ex Parte Young*, 209 U.S. 123 (1908)—which authorizes suits to enforce federal law through injunctions against state officers—is not to the contrary. That rule arises from "the supreme authority of the United States" under the Constitution, and the need to avoid "official immunity from responsibility" to follow federal law. *See id.* at 167-168. Co-equal States have no such authority over each other, and courts telling each other's governors to follow their substantive commands under state law on pain of contempt is obviously inconsistent with interstate sovereignty.

of-the-state question should not turn on a case-by-case determination of the practical impact of the relief requested. Instead, the proper question under the third factor focuses on "the entity's potential legal liability." *Doe*, 519 U.S. at 431.

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

Properly understood, no element of the arm-of-the-state test points in New Jersey Transit Corporation's favor here.

First, as to structure, the corporation is (unsurprisingly) a separate *corporate* entity, and the governmental powers it exercises are just like those that non-state municipalities employ every day. New Jersey law tells the board members to consider what is best for the separate entity, not the State, and no state official can dismiss board members just because they won't do what that official wants. The Corporation has the traditional feature that makes a corporation separate from the people who created it—*i.e.*, a liability shield. And it is very important that the Corporation is not the type of entity that is immune in the State's home courts. In its home jurisdiction, the New Jersey Transit Corporation answers for its and its employees' acts of negligence primarily at law, not at the ballot box. Particularly in combination with the other structural elements above, this strongly suggests that it is not an arm of the state at home, and should not be able to claim that it is otherwise in neighboring States.

As to control, New Jersey Transit Corporation's case is similarly weak. No state official can remove

the Corporation's board members if they refuse to follow the State's policy directions, and while there is a nominal veto authority, the time is short and the default is approval rather than a pocket veto. That limits the State's involvement, and there is no evidence that it has used this veto authority to meaningfully control the Corporation. This element thus likewise points away from the entity being an arm of the state.

Finally, as to the state treasury, the key point is that there is a formal liability shield between the Corporation and the State. To be sure, the Corporation is important to the State and has recently relied on state funding to cover its budget, and so it is reasonable to believe that the State would be willing to cover the liabilities that court judgments might create. But that does not mean the State itself is liable or that is "the real, substantial party in interest"—which is the ultimate question in this and every case where a defendant seeks to wield the state sovereign immunity shield. *Doe*, 519 U.S. at 429 (citation omitted)

CONCLUSION

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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