

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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CEDRIC GALETTE,)
Petitioner,)
v.) No. 24-1021
NEW JERSEY TRANSIT CORPORATION,)
Respondent.)
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NEW JERSEY TRANSIT CORPORATION,)
ET AL.,)
Petitioners,)
v.) No. 24-1113
JEFFREY COLT, ET AL.,)
Respondents.)
- - - - -

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1 P R O C E E D I N G S

2 (10:21 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument this morning in Case 24-1021, Galette
5 versus New Jersey Transit Corporation, and the
6 consolidated case.

7 Mr. Zuckerman.

8 ORAL ARGUMENT OF MICHAEL ZUCKERMAN
9 ON BEHALF OF NEW JERSEY TRANSIT CORPORATION, ET AL.

10 MR. ZUCKERMAN: Mr. Chief Justice, and
11 may it please the Court:

12 Decades ago, New Jersey exercised its
13 autonomy to provide what it saw as an essential
14 public good, a statewide public transportation
15 system. This case asks whether that system is
16 most like a private business, locality, or
17 state agency.

18 NJ Transit's features answer that
19 question decisively. The state gave NJ Transit
20 rulemaking authority subject to our APA. The
21 state gave it law enforcement power for all
22 criminal laws anywhere in New Jersey. The
23 state authorized it to exercise eminent domain
24 anywhere in New Jersey. The state gave the
25 governor a veto over any proposed board action.

1 And the governor appoints all board members,
2 most with advice and consent, and has for-cause
3 or at-will removal power over each.

4 On top of that, New Jersey owns NJ
5 Transit. NJ Transit has no property rights
6 against the state. And the state sharply
7 limited NJ Transit's ability to raise revenue,
8 cut costs, or issue debt, effectively promising
9 to cover its annual deficits, as it always has.

10 To be sure, as this Court wrote of the
11 University of Arkansas some 70 years ago, our
12 legislature called NJ Transit a body corporate
13 and politic. But just as that can't change the
14 answer under precedent, my friends have
15 identified no basis to abandon precedent.
16 Instead, their lead alternative misconstrues
17 original meaning and would convert this Court's
18 inquiry into a game no state knew it was
19 playing.

20 That would render countless agencies,
21 including core cabinet agencies, suable without
22 consent overnight, even though this Court has
23 never suggested that states experiment with
24 efficiency at peril to their sovereignty. And
25 my friends never even cite the stare decisis

1 factors, overlooking the disruption their
2 overhaul would yield.

3 In short, NJ Transit looks nothing
4 like a city or town and little like a private
5 company. It looks a lot like a New Jersey
6 state agency. That means plaintiffs must sue
7 it where the state has consented, in New
8 Jersey.

9 I welcome this Court's questions.

10 JUSTICE THOMAS: What's your best case
11 that this corporation is -- should have the
12 benefit of sovereignty?

13 MR. ZUCKERMAN: Justice Thomas, I
14 think this Court's decision in State Highway
15 Commission of Wyoming versus Utah Construction
16 Company in 1929 is a really, really good case
17 for us. In that case, there was a private
18 company in Utah that had a dispute with a
19 Wyoming entity that had the right to sue and be
20 sued, had incidents of the corporate form. And
21 the Court, in -- in, you know, considering the
22 question whether this entity was, in fact, you
23 know, part of the state and, therefore,
24 couldn't be sued unless the state could be
25 sued, you know, said we don't have to even look

1 at the fact that it has to sue and be -- that
2 it can sue and be sued. That's not part of our
3 analysis. It is obviously part of Wyoming.

4 And so this Court was doing, I think,
5 the kind of substance-based analysis we see
6 from the founding forward, where you look at
7 the entity and you really say: Which bucket
8 does it fall into? Does it fall into the
9 bucket of a state agency? Does it fall into
10 the bucket of a town or, you know, a
11 municipality?

12 JUSTICE THOMAS: Do you have anything
13 more recent than that?

14 MR. ZUCKERMAN: Well, Your Honor, I
15 think there are a lot of cases more recent that
16 would be hard to square with their
17 understanding. So, for example, I don't -- I
18 haven't heard anything from my friends that
19 help -- helps me understand how they would
20 distinguish the federal agencies.

21 So the Court's opinion --

22 JUSTICE THOMAS: No, I mean --

23 MR. ZUCKERMAN: -- in Tennessee versus
24 Meyer --

25 JUSTICE THOMAS: But that's a state

1 agency, isn't it?

2 MR. ZUCKERMAN: So, in -- in --

3 JUSTICE THOMAS: I'm talking -- what
4 I'm asking you is the state creates a
5 corporation, and, historically, they've created
6 corporations in order to do things that the
7 states either can't do or won't do, to borrow
8 money, to run banks, to run businesses, et
9 cetera.

10 And the question then becomes whether
11 or not, when you do that, when you separate an
12 organization from the normal activity of a
13 state, does it still enjoy the sovereignty of
14 the state? So do you have anything that's
15 recent that would suggest that we have said --
16 you -- you -- you put some reliance on stare
17 decisis.

18 So, if you do put reliance on stare
19 decisis, we have to have a case on which -- to
20 which that applies. So do you have any that
21 are on all fours or close to on all fours with
22 your case?

23 MR. ZUCKERMAN: Your Honor, on the --
24 I think we have a number of cases that would
25 be, if not effectively overruled, then at least

1 the -- the rationale of the decision would be
2 overruled.

3 JUSTICE THOMAS: Mm-hmm.

4 MR. ZUCKERMAN: And that's not just
5 the Mt. Healthy line of cases, so Mt. Healthy,
6 Hess, Regents, Lake Country --

7 JUSTICE THOMAS: Okay. Hess was a --
8 that's a recent case, but in that, I think
9 Justice Ginsburg made the point that, look --
10 she started by saying, look, this is a compact
11 case. Those are quite different from
12 sovereignty because they don't bring all the
13 trappings of sovereignty.

14 MR. ZUCKERMAN: So I agree with Your
15 Honor. It certainly was -- that was a bi-state
16 entity case. But this Court in the Mt. Healthy
17 line of cases has always been clear that it's
18 looking at these -- at all of these entities
19 through a common substance-based analysis,
20 where the question is not -- the question is, I
21 think, actually what Your Honor is getting at,
22 which is, is this thing in substance actually
23 separate from its creator?

24 Of course, it can be denominated a
25 corporation, but that denomination isn't what

1 ends the conversation. It can be evidence. It
2 can be relevant. Sometimes you're right, Your
3 Honor, states do create entities that they wish
4 to be separate. And we agree those entities
5 are separate, wouldn't be able to benefit from
6 their creator's sovereignty.

7 The point is that when you look at NJ
8 Transit, when you see what it has, how closely
9 tied it is to New Jersey, and you -- and you
10 analyze its features, under state law, the word
11 "corporation" didn't -- couldn't have meant
12 that kind of separation because we're giving it
13 rulemaking power, we're having it sued in our
14 appellate division the same way you sue every
15 other agency that engages in rulemaking.

16 We have a statewide police department,
17 all of these hallmarks of sovereignty. We have
18 the governor able to veto every single thing it
19 wants to do.

20 JUSTICE JACKSON: Wasn't that true --

21 CHIEF JUSTICE ROBERTS: But --

22 JUSTICE JACKSON: -- also -- oh.

23 CHIEF JUSTICE ROBERTS: I was just
24 going to say but you disclaim liability for the
25 debts and other exposure of -- of the Transit

1 Authority, right?

2 MR. ZUCKERMAN: So your --

3 CHIEF JUSTICE ROBERTS: So, if it's
4 part -- it's kind of hard to say it's part of
5 the state if you're not going to cover it when
6 they get into trouble.

7 MR. ZUCKERMAN: Well, Your Honor, I
8 think that's where I go to Hess and the --
9 the -- this Court's guidance that we look at
10 this both legally and practically. So it's
11 true that in 1979 the legislature wrote this
12 statute that says -- it creates this kind of,
13 you know, escape hatch. We've never used that
14 escape hatch. We fund NJ Transit's deficit's
15 every single year, most years well over \$200
16 million, a recent year over a billion dollars.
17 So New Jersey puts its money where its mouth is
18 on this.

19 And so I would look at Judge Bork's
20 opinion in the WMATA case, joined by then Judge
21 Scalia and Judge Skelly Wright, where he says,
22 you know, yes, technically, Maryland and
23 Virginia have -- their agreement to fund WMATA
24 is voluntary in a -- in a truly literalistic
25 sense, but you can't really call it voluntary

1 in any meaningful sense because, of course,
2 they want this thing to survive. It can't
3 survive without their money. They give it
4 money constantly to keep it afloat.

5 And so it's very different from an
6 entity like the Port Authority in Hess, which
7 hadn't needed any support for 60 years when
8 that case came before this Court.

9 JUSTICE BARRETT: But what if
10 New Jersey says it's going to indemnify all of
11 its officers who are sued, and so it really is
12 on the hook for any judgments that are entered
13 against those officers.

14 We wouldn't say that the fact that
15 New Jersey has made that commitment or has that
16 monetary skin in the game means that those
17 people are arms of the state. We all agree
18 they're not.

19 MR. ZUCKERMAN: Justice Barrett, I
20 agree. I think that's the upshot of Lewis
21 versus Clark. The state can't make something
22 an arm of the state by promising to cover its
23 debts. But I think that's why this sort of
24 treasury factor and a particularly formalistic
25 way of looking at it really has to break down

1 in the sovereign immunity context because what
2 you're trying to figure out is whether this
3 thing -- what -- what bucket does it fall into?
4 Is it a state agency? Is it like a town, where
5 the state can fund it but doesn't have to and
6 doesn't control it? Is it like a private
7 business, where the state is really not, you
8 know, involved and it shouldn't be involved
9 in its decision-making at all?

10 And when you look at the thing from --
11 you know, you look at all the characteristics
12 that this Court has always looked to, not just
13 in the Mt. Healthy cases but going back to the
14 founding, you look at whether the state
15 actually controls it. So it's the -- you know,
16 its -- its decisions, the state is accountable
17 for its decisions, you look at whether the
18 state is effectively there to backstop it.

19 You -- you see that it looks a lot
20 like any other state agency, as New Jersey
21 Transit does, which is why there is no thing
22 that we get, to Justice Thomas's question as
23 well, from it having this formal denomination
24 of a corporate entity.

25 JUSTICE JACKSON: But we want to --

1 JUSTICE SOTOMAYOR: It is -- but it is
2 something very important. We said in both Mt.
3 Healthy and Hess that the corporate form itself
4 is evidence that an entity is not the state,
5 correct? So that factor goes against you.

6 We said in Hess, Regents, and Lewis
7 that formal liability, not informal liability,
8 not indemnity, but formal liability continues
9 to remain centrally important. We've said
10 that, haven't we?

11 MR. ZUCKERMAN: So it is -- it is
12 absolutely true that it's evidence. We're
13 not -- we're not disputing that you can take
14 it into -- into account. What -- what we're --

15 JUSTICE SOTOMAYOR: We've called it a
16 critical factor.

17 MR. ZUCKERMAN: I think Hess had
18 suggested in -- in 1994 that --

19 JUSTICE SOTOMAYOR: In Lewis, we said
20 the same thing.

21 MR. ZUCKERMAN: Well, this Court has
22 looked to -- to it as a very important factor.
23 But you also said in -- in FMC versus South
24 Carolina State Port -- Ports Authority that
25 dignity is the most important factor.

1 JUSTICE SOTOMAYOR: The one thing we
2 have said is that control is a perilous
3 inquiry, and that's all you rely on, because
4 the question of whether you fund the entity or
5 not, what percentage of funding is important?
6 Meaning, would -- if you fund up to only
7 50 percent -- we don't know because this is
8 informal -- at what juncture and where would we
9 look to say that the state is going to
10 informally fund a hundred percent?

11 MR. ZUCKERMAN: Your Honor, I -- I
12 don't think it's a numbers game. And so I
13 think what's important is you look at the
14 structure of this entity, how it was set up.
15 And, here --

16 JUSTICE SOTOMAYOR: But the structure
17 doesn't have a formal commitment.

18 MR. ZUCKERMAN: It has a -- it has
19 what -- what I think Judge Bork rightly called
20 a -- basically a de facto formal commitment,
21 which is this thing can't survive without us
22 funding it as we do year in and year out.

23 JUSTICE JACKSON: But I think what --

24 MR. ZUCKERMAN: And, again, we -- we
25 tie its hands.

1 JUSTICE JACKSON: -- what you seem --
2 what you seem to be doing is discounting or
3 ignoring the fact that the state has chosen to
4 set this up as a corporation, and that has to
5 mean something.

6 I mean, your argument sounds like
7 you're saying: Don't worry about the fact that
8 the state has chosen the corporate form for
9 this entity, just look at what it does. And to
10 the extent that you see what it does is kind of
11 like an agency, that should be enough.

12 And I guess it seemed to me at least
13 from what I've read and looked at that the idea
14 of the corporate form has to be given some
15 meaning and that traditionally the idea was
16 that when a state chooses to set it up as a
17 corporation, it is actually instilling a
18 shield, a corporate shield, between itself and
19 the corporation's actions and liabilities.

20 So New Jersey could have set this up
21 as an agency and perhaps would have preserved
22 the kind of arguments you're talking about,
23 but, instead, it chose corporation. And having
24 done so, at least traditionally, I think the --
25 the analysis was that it also gave up then the

1 ability to instill this entity with something
2 like sovereign immunity.

3 MR. ZUCKERMAN: So, Justice --

4 JUSTICE JACKSON: So how do you --
5 I mean, you -- you -- you're sort of suggesting
6 that this multifactor look at the function of
7 the entity is like how this was always done and
8 that's the way it should be done.

9 And I guess I'm questioning, I
10 thought, originally, the idea was is this a
11 corporation, and if it is, it's sort of
12 presumptively not going to get sovereign
13 immunity.

14 MR. ZUCKERMAN: Justice Jackson, let
15 me respond on a few -- say a few things about
16 that.

17 First, I just want to note at the
18 outset, of course, corporations are -- they're
19 creatures of state creation. So there's no
20 agreement at the founding that states had
21 this --

22 JUSTICE JACKSON: Does that hurt you
23 or help you? My argument is that that hurts
24 you.

25 MR. ZUCKERMAN: I think it helps us

1 because it's -- because New Jersey has the --
2 the ability under its own law, it has the
3 autonomy under its own law to have two
4 different types of corporations.

5 And to take it back to the founding,
6 to -- to Justice Iredell's dissent in Chisholm
7 at page 447 to -48, he actually says: When we
8 say corporations, we mostly are talking about
9 something that's lesser. We're mostly talking
10 about subordinate corporations. And --

11 JUSTICE JACKSON: Right. But I'm
12 talking about the reason. Why did the state
13 choose the corporate form? It was doing
14 something. The Chief Justice alludes to this,
15 right, that it was trying to distance itself
16 from having liability for what this entity is
17 doing.

18 And I appreciate that that corporation
19 might be doing municipal-like functions,
20 government-like functions, but the state wanted
21 to have this distance.

22 And so having done that, it seems a
23 little much to say they then can imbue it with
24 the kind of immunity that would prevent the
25 entity from being sued.

1 MR. ZUCKERMAN: I think, Justice
2 Jackson, the -- the -- the issue here for us is
3 that we don't see where the -- the real
4 distance is. I think, here, the use of the
5 corporate form is a way to achieve some
6 shorthand kind of efficiency that we could have
7 done other ways.

8 So I'll give you an example. We do
9 exempt New Jersey Transit from a number of our
10 civil service requirements. That's our civil
11 service requirements.

12 The legislature, had it anticipated
13 this argument in this case, surely would have
14 just written: NJ Transit is the division of
15 NJ Transit and is hereby not subject to the
16 same civil service requirements that some of
17 our other departments are subject to.

18 So too with the -- the notice of claim
19 rules, you know, the indemnification
20 procedures. It -- it treated it as a different
21 kind of, you know, agency in some ways. It
22 was, I think, hoping and trying to help it be
23 more efficient, deliver, you know, service for
24 the citizens of New Jersey in a cost-effective
25 way and, therefore --

1 JUSTICE SOTOMAYOR: But why -- but why
2 not accept -- what's the difference? If you're
3 saying to me that the state informally is going
4 to pay their debts, why didn't it do it
5 formally? The corporate form is buying it a
6 protection of some sort.

7 MR. ZUCKERMAN: Justice Sotomayor --

8 JUSTICE SOTOMAYOR: So, I mean, I
9 don't understand why you couldn't have
10 everything you had, done everything you did,
11 and then just meet the historical test, except
12 formally that you would pay its liabilities.

13 MR. ZUCKERMAN: So, Justice Sotomayor,
14 as a matter of historical fact, why they wrote
15 those words in 1979, which we've never used or
16 relied on, we've have always funded this
17 entity, you know, I'm -- I'm -- it's a little
18 bit speculative. I think what was maybe going
19 on there --

20 JUSTICE SOTOMAYOR: So why not do it
21 now? So, if we rule against you, you do it
22 now.

23 MR. ZUCKERMAN: Well, but the
24 principle that's important to us is being sued
25 where we've consented to be sued. And I think

1 the upshot of my friend's position on the other
2 side is that if New York or a private citizen
3 in New York or New York wanted to sue NJ
4 Transit to bar it from entering New York unless
5 it upgraded its entire fleet to electric buses
6 or something like that, that would somehow not
7 offend New Jersey's dignity. It could launch
8 that suit not -- not in original jurisdiction,
9 it could launch it in New York trial court, and
10 that would be totally fine for the New York
11 trial court to assert jurisdiction over
12 New Jersey Transit --

13 JUSTICE SOTOMAYOR: That's not what
14 these plaintiffs are looking for. They're
15 looking for recompense for injuries that
16 occurred to them as New York citizens in
17 New York or Pennsylvania citizens in
18 Pennsylvania, correct?

19 MR. ZUCKERMAN: That's absolutely
20 true. And that's why our courts are open to
21 them for that recompense. Our point is simply
22 that jurisdiction --

23 JUSTICE SOTOMAYOR: But they don't
24 live in New Jersey.

25 MR. ZUCKERMAN: But they can sue --

1 JUSTICE SOTOMAYOR: They live in the
2 states they've sued. They were injured in the
3 states they sued.

4 JUSTICE BARRETT: Counsel, I'd like to
5 ask you a question about precedent.

6 You -- you said that we would need to
7 overrule precedent to decide this case in favor
8 of the -- of the plaintiffs.

9 I'm wondering why that is because we
10 haven't had any cases -- and correct me if I'm
11 wrong -- in which we have found the corporate
12 form -- we -- in which we have said that a
13 sue-and-sue -- an entity with a sue-and-be-sued
14 clause that is in the corporate form is immune
15 from suit, correct?

16 MR. ZUCKERMAN: Well, in the Wyoming
17 State Highway Commission case, you did say that
18 makes it Wyoming -- it's Wyoming despite it
19 having the corporate form, despite it being a
20 sue-and-be-sued entity. So --

21 JUSTICE BARRETT: But there's a real
22 party in interest. I mean, we -- we have said,
23 you know, and I think we've made pretty clear
24 that because it's about substance and not
25 formalities, if it really is going to be

1 going -- like in an Edelman versus Jordan way,
2 if it's really going after the state treasury,
3 if it's really going -- if the state is really
4 the real party in interest, that's different.

5 But I guess I just don't see any
6 precedent that would have to be overruled if we
7 decide the case in the plaintiffs' favor.

8 MR. ZUCKERMAN: So, Justice Barrett,
9 I -- I -- to answer your question directly, I
10 think there's a lot of precedent like the, you
11 know, TVA versus Thacker case, FDIC versus
12 Meyer. At least as to Bivens, those would all
13 be gone because, on their theory, those things
14 are not federal agencies at all. They're
15 separate because they're corporations with --
16 with separate bank accounts.

17 But if I could actually respond to the
18 real-party-in-interest exception directly
19 because I think this is really, really
20 important. My friends on the other side have
21 what they say is a solution to this problem for
22 monetary damages, where they say, okay, well,
23 if you sue NJ Transit, you know, if you sue
24 entities that are denominated as corporations,
25 like the Louisiana Department of Public Safety

1 and Corrections, for example, that's formally a
2 corporation under Louisiana law, if you sue it
3 for damages, well, you can still -- you know,
4 the real-party-in-interest exception will kick
5 in.

6 And that's -- that's probably right in
7 the sense that those cases are about judgments.
8 And that's why, even though Commissioner
9 Edelman in Edelman versus Jordan was not an arm
10 of Illinois, and yet you could sue him, get
11 prospective relief under Ex parte Young, and --
12 and be barred from getting financial relief
13 retroactively from the Illinois Treasury, but
14 that didn't convert Commissioner Edelman into
15 an arm of Illinois. The whole reason it worked
16 is that he wasn't an arm of Illinois.

17 So this breaks down entirely for
18 injunctions and any kind of non-monetary
19 relief, as this Court talked about in -- in
20 Federal Maritime Commission in 2002, another
21 case that I think at least that holding is
22 overruled as to the South Carolina Ports
23 Authority if you go with their theory because,
24 under their theory, the Louisiana Department of
25 Public Safety and Corrections is not Louisiana.

1 It's a different thing. Maybe you can't get
2 money from it, from the state coffers, but you
3 can still hale it into court, including in
4 federal court for a state law injunction, if
5 you wanted to because it is not the state.
6 It's a separate thing.

7 And that's a huge, huge flaw in their
8 argument, and it's the same reason the
9 dignitary interests are palpable if a private
10 citizen or the State of New York tried to sue
11 NJ Transit in New York trial court to bar it
12 from entering the island of Manhattan. I don't
13 think anyone would look at that and say, wow,
14 that's a matter for the New Jersey -- for the
15 New York trial court. I think you'd say that
16 should be an original jurisdiction case because
17 that seems like a fight between New York and
18 New Jersey.

19 And so the other cases that are then
20 also going to get overruled if you go with
21 their theory are the original jurisdiction
22 cases, like the 1921 case, New York versus New
23 Jersey, where there's the Passaic Valley
24 Sewerage District, and it has a separate bank
25 account and it has the corporate form. And

1 this Court says, yeah, but, you know, the fight
2 that you're having with its sort of, you know,
3 alleged nuisances and effluents are really a
4 fight with New Jersey, and so it's right to use
5 original jurisdiction to hale it into court
6 before a federal court. It's not like you have
7 some fight with some distinct separate entity.

8 So too for Missouri versus Illinois,
9 where they -- Missouri sues the Chicago
10 Sanitary District, which is a corporation, and
11 yet it's a proper exercise of original
12 jurisdiction because you're looking at the
13 substance of this thing, you're seeing that
14 it's controlled by the -- by the state, it's
15 doing a state function. It doesn't look like a
16 municipality. It doesn't look like a private
17 company. And, therefore, it's a proper use of
18 original jurisdiction to have that fight
19 between Missouri and really Illinois, which is
20 the same thing we're saying here. When you
21 have a fight with NJ Transit, in substance,
22 you're having a fight with New Jersey, which
23 means you have that fight where New Jersey has
24 consented. And in this case, our courts are
25 open for these claims in New Jersey.

1 JUSTICE ALITO: If you don't -- if the
2 state doesn't get any benefit from slapping on
3 the corporate label, why is it important that
4 going forward, New Jersey Transit retain the
5 corporate label? Why doesn't it just get rid
6 of that label and call it something else, call
7 it a special transit entity or whatever name
8 you want to choose?

9 MR. ZUCKERMAN: So, Justice Alito, I
10 think two -- two points in response to that
11 question. I think, realistically, if we had
12 anticipated this case, we probably would have
13 done that long ago. And that just speaks to
14 the disruption across the country because there
15 are lots and lots of entities like this.

16 I mean, I don't know, the Florida
17 Department of Transportation, the Louisiana
18 Department of Justice, nobody really looks at
19 these entities and says, oh, that's what
20 Louisiana and Florida were trying to do, make
21 them separate. You're still going to be doing
22 a -- a sub -- you're going to end up doing a
23 substance-based analysis because, of course, if
24 this Court says this purported bright-line
25 rule -- and I want to get back to why I don't

1 think it's actually that bright line of a
2 rule -- but, if you say this, of course, states
3 will get wise to it, they'll all delete the
4 words "corporate," and then you'll just be back
5 having to do Mt. Healthy again on all of these
6 entities anyway.

7 JUSTICE ALITO: And the -- the term
8 "corporate" was used much more broadly at the
9 founding than it generally is today, and it is
10 somewhat surprising to see that a -- what one
11 would think of as a department of the state
12 government labeled a corporation and have some
13 consequences attached to that.

14 So, if we put that aside, what in
15 substance are we getting at? Can you express
16 as succinctly as you can the reason why an
17 entity other than the state itself should or
18 should not have sovereign immunity?

19 MR. ZUCKERMAN: Absolutely. I'll do
20 my best, Justice Alito.

21 I think anytime you're in this area of
22 cases you -- you know you have three buckets.
23 Leave aside the bi-states. Open up a separate
24 can of worms. You know you have state
25 agencies. You know you have local

1 subdivisions, which don't get sovereign
2 immunity. And you know you have private --
3 private businesses and entities that don't.
4 And you look at this thing. You see
5 how tightly it's tied to its creator because
6 the one thing the states agreed at the founding
7 was that they were going to guarantee a
8 republican form of government, which means they
9 have to tie these things to the state
10 electorate if they are going to really
11 plausibly say they're part of them, part of the
12 state.

13 And states can only do their work
14 through other people. So they need to create
15 these aggregate groups, whether they call it
16 the Department of Transportation, the
17 Department of Corrections, the, you know,
18 Division of New Jersey Transit or New Jersey
19 Transit Corporation that's inside the executive
20 branch and has all of its members appointed
21 with advice and consent and a gubernatorial
22 veto over everything it does, it can't raise
23 revenue or cut costs however it wants to, can
24 do rulemaking, gets treated and -- and
25 challenged for its rulemaking the same way any

1 other agency does, you know, can do eminent
2 domain and law enforcement anywhere in the
3 state.

4 That just looks identical to if we had
5 called it Division of NJ Transit. And so it is
6 a bit of an anachronism that we use the word
7 "corporation." And our point is not that you
8 can't count that as evidence, you can't look at
9 it, but when you look at all the other evidence
10 on the other side of the scale, it's just not
11 that probative here.

12 And so this, I think, can be a fairly
13 simple case under your rubric, where this one
14 falls pretty easily into the state agency
15 bucket, and, you know, that -- that is, I
16 think -- you know, when you look at the New
17 York Court of Appeals opinion, I mean, the one
18 thing they said that I think -- you know, I
19 don't -- I haven't heard anybody try to really
20 defend is that control doesn't cut either way.

21 We have a gubernatorial veto over
22 anything this entity wants to do, which means,
23 when New Jerseyans are mad at NJ transit, who
24 do they get mad at? They get mad at the
25 governor. They don't get mad at, you know,

1 someone inside NJ Transit. It's -- it's highly
2 accountable.

3 JUSTICE JACKSON: But it's not --
4 it -- it -- it's sort of --

5 JUSTICE GORSUCH: Counsel --

6 JUSTICE JACKSON: Don't -- oh, sorry.

7 JUSTICE GORSUCH: No, go ahead,
8 please.

9 JUSTICE JACKSON: Don't we have to
10 look at the statute, though? I mean, not only
11 does the statute say that New Jersey Transit is
12 a body corporate, it calls it a corporation,
13 and it says it "shall be independent of the
14 supervision or control" by the Department of
15 Transportation.

16 So we have this degree of independence
17 that I think would not exist in an agency that
18 you're trying to compare it to. It also says
19 New Jersey Transit can enter into contracts
20 apparently on the other side of the table from
21 New Jersey. It's -- it -- it operates
22 independently of the state in that sense.

23 It says that New Jersey Transit has
24 the power to sue and be sued. And I think it's
25 hard to imagine a state agency that would have

1 that power independent of the state.

2 So I guess I'm still struggling with
3 your -- even your functional comparison.

4 MR. ZUCKERMAN: Justice Jackson, let
5 me try to persuade you and take each of those
6 in turn. On the independence from the
7 Department of Transportation, there's a quirk
8 of state law that in 1947, when they -- we
9 redid our constitution, they capped the number
10 of departments at 20, and so, whenever the
11 legislature wants to create a new department,
12 it's got to put it in one of the existing 20.

13 And so there are lots of state
14 agencies like the Board of Public Utilities,
15 the Motor Vehicle Commission, our State Office
16 of the Public Defender, that live nominally
17 inside other departments but are independent of
18 those departments.

19 What matters is they're not
20 independent of our governor. And, here, you
21 have a direct line to the governor, who can
22 veto anything they want to do, appoints their
23 members, has, you know, removal powers, some at
24 will, some for cause, over -- over all of them.

25 So then you -- you mentioned the

1 contracts across the table. I mean, it's
2 actually quite common for states, as -- as
3 we've looked around the country, to have
4 departments that are doing work for the state
5 that -- that require them to make contracts
6 with other departments.

7 JUSTICE JACKSON: Does the state
8 assume the liabilities of New Jersey Transit?
9 Does the state assume the liabilities?

10 MR. ZUCKERMAN: Functionally, yes, we
11 do have this -- this --

12 JUSTICE JACKSON: Not functionally.
13 Formally.

14 MR. ZUCKERMAN: Well, there's a
15 statute that says we're -- we're technically
16 not on the hook, but we could have accomplished
17 that any other way. I think we all -- everyone
18 in this case actually agrees that states are
19 never --

20 JUSTICE JACKSON: Are the assets the
21 assets of New Jersey Transit or of the state?

22 MR. ZUCKERMAN: Yes, the state -- I
23 mean, NJ Transit holds no superior title to
24 anything independent of the state. If NJ
25 Transit -- it does -- it's not like, if we took

1 their money, they would have a takings claim
2 against us. They never have profits. If they
3 ever did, we could take their profits and use
4 them to fund other things, but -- but they --
5 they don't ever have profits. Instead, it's
6 always us giving taxpayer money to NJ Transit
7 to help keep it going.

8 JUSTICE GORSUCH: Mr. Zuckerman --

9 MR. ZUCKERMAN: State agencies do
10 exercise --

11 JUSTICE GORSUCH: Mr. Zuckerman, I --
12 I have just a real question, and it's a small
13 one, so it shouldn't tarry you long.

14 The Eleventh Amendment, of course,
15 prohibits an individual from suing another
16 state. You didn't make the Eleventh Amendment
17 argument that it deprives federal courts of
18 jurisdiction over this case. Instead, you
19 asserted sovereign immunity, assuming
20 jurisdiction existed, and I'm just curious why.

21 MR. ZUCKERMAN: Your Honor, I -- I
22 think let -- let me take that in a few parts,
23 but I think, basically, to get to the --

24 JUSTICE GORSUCH: No, no. You get one
25 part.

1 MR. ZUCKERMAN: -- the nub of it --
2 yeah, I'll try to do one part then. We don't
3 take the Eleventh -- so we're -- we're very
4 sympathetic to the idea that there are
5 situations where the text of the Eleventh
6 Amendment may --

7 JUSTICE GORSUCH: I mean, it looks
8 bang on point, right?

9 MR. ZUCKERMAN: So there are
10 situations where this is important. I think
11 this is a situation where you have a -- a suit
12 commenced in state court where there's a
13 defense about interstate sovereign immunity,
14 the same posture that arose in Hyatt III --

15 JUSTICE GORSUCH: We're in federal
16 court here, I think.

17 MR. ZUCKERMAN: The two -- we are now.
18 But the state -- but the suit was begun in
19 state court, and that's what I think is so
20 important, because the word in the -- in the
21 amendment is "commenced." And they're thinking
22 about where you start, which is the Chisholm
23 fact pattern.

24 JUSTICE GORSUCH: All right.

25 MR. ZUCKERMAN: You start in federal

1 court.

2 JUSTICE GORSUCH: Okay. I understand
3 your point. Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Justice Thomas, anything further?

7 Justice Alito?

8 JUSTICE ALITO: Do you think the
9 Eleventh Amendment analysis is the same as the
10 sovereign immunity analysis?

11 MR. ZUCKERMAN: We haven't disputed
12 that the two -- I think it would be odd --
13 it -- it -- it would be a little unwieldy to
14 tell the courts they have to do a different
15 arm-of-the-state analysis in the two.

16 I think, if -- if ever it's going to
17 be stronger, it's stronger in the interstate
18 context because, there, you have two co-equal
19 sovereigns, one saying it can assert
20 jurisdiction over another, so you have the same
21 things that this Court noted in Hyatt III like
22 riparian rights disputes or border disputes.
23 One state adjudicating those against the other
24 is a real problem whereas, at least in the
25 federal context, you have a super sovereign

1 neutral third party.

2 But I think it would be confusing for
3 the lower courts to tell them they have to do
4 two different analyses, so we haven't argued
5 for you to have two different tests.

6 CHIEF JUSTICE ROBERTS: Justice
7 Sotomayor?

8 JUSTICE SOTOMAYOR: No. Thank you.

9 CHIEF JUSTICE ROBERTS: Justice Kagan?

10 JUSTICE KAGAN: I've been a bit
11 surprised you haven't mentioned Biden v.
12 Nebraska. Do you not think it helps you?

13 MR. ZUCKERMAN: We think it helps us a
14 lot. We -- we think there are just -- as we go
15 through this Court's line of cases, we think
16 it -- it -- it -- it -- it is one of the good
17 ones, but it is not the only good one. And so
18 I've gone to other ones where you're doing
19 either sovereign immunity or something that
20 sort of sounds in sovereign immunity, like
21 jurisdiction.

22 But, again, I think this Court said
23 things in --

24 JUSTICE KAGAN: I mean, I guess what I
25 would have thought, you're, of course, right

1 that it's not an immunity case, but the key
2 question in the -- in the part, of course, of
3 Biden v. Nebraska that had to deal with
4 standing, the key question was whether MOHELA
5 was a part of Missouri.

6 And I -- I would have think -- I would
7 think it's pretty clearly on point there,
8 right? It's a sue-and-be-sued agency which had
9 exactly the same kind of insulation from
10 liability as -- as -- as this does.

11 And what the Court looked to was
12 intangible aspects of control and directive,
13 you know, who appointed the board of directors,
14 what kinds of functions were they serving, all
15 the kinds of things that you want us to look
16 at, was what the Court said. There was, of
17 course, a dissent as what was -- what the Court
18 said was -- was -- was critical in
19 understanding MOHELA as a part of the state.

20 MR. ZUCKERMAN: I think you're
21 absolutely right, Justice Kagan. I think Biden
22 versus Nebraska is very -- is very good for us.

23 If I could touch on one other that I
24 think is recent and very good for us, it's
25 Association of American Railroads, where Amtrak

1 also is denominated a corporation, has a
2 separate bank account, and yet, for
3 non-delegation purposes -- again, we're not
4 even talking standing or state action.

5 We're talking being able to give it
6 governmental regulatory authority. This Court
7 looked at those exact same features and said,
8 yeah, it's still part of the government for
9 these purposes.

10 You'd be walking into an enormous
11 Carter Coal problem if that hadn't been true.
12 So I think that same substantive analysis,
13 which we think goes back to the founding, I
14 think that's what you see from Chief Justice
15 Marshall's opinion in Dartmouth College, has --
16 has continued on through this Court's cases.

17 And so I -- I think the -- that the
18 U.S. reports are rife with examples of you
19 doing this kind of substantive analysis,
20 including just a couple terms ago in Biden
21 versus Nebraska.

22 CHIEF JUSTICE ROBERTS: Justice
23 Gorsuch?

24 Justice Kavanaugh?

25 JUSTICE KAVANAUGH: This issue,

1 precise issue for this kind of case wouldn't
2 have come up, I guess, in the Nevada v. Hall
3 era, right, so from '79 to 2019, until this
4 Court overruled Nevada v. Hall, right? And
5 that's why this case, one of these cases arose
6 in 2017, and this issue wasn't raised until
7 after Franchise Tax Board, correct?

8 MR. ZUCKERMAN: That's exactly right,
9 Justice Kavanaugh.

10 JUSTICE KAVANAUGH: Okay. And then
11 what -- to pick up on Justice Jackson's
12 questions, how significant should it be, do you
13 think, in the analysis that the state is not
14 directly liable for the judgments of -- of the
15 Transit Authority?

16 MR. ZUCKERMAN: I -- I think it can't
17 be that important in the analysis because -- or
18 I guess two reasons. Let me give you a -- a
19 practical reason and a methodological reason.

20 JUSTICE KAVANAUGH: Not just in this
21 case but in any case.

22 MR. ZUCKERMAN: In any case.

23 JUSTICE KAVANAUGH: Yeah.

24 MR. ZUCKERMAN: Yeah. I think --

25 JUSTICE KAVANAUGH: And you used the

1 word "functionally," and I think Justice
2 Jackson picked up on that, and I think that's
3 an important point here, so have at it.

4 MR. ZUCKERMAN: Yeah. So I don't mean
5 to suggest that it's just totally irrelevant
6 and you can't look at it. What I do mean to
7 suggest is that I think Hess is really clear
8 you look at this practically and not just
9 formalistically.

10 And I think Judge Bork was really
11 clear and wrote a great opinion in the D.C.
12 Circuit on this exact point.

13 JUSTICE KAVANAUGH: He did. He did.

14 MR. ZUCKERMAN: And so, when the
15 structure of it is such that it can't ever turn
16 a profit, it's not designed to make money, no
17 one thinks it can make money, it's doing --
18 it's providing a public good for people who
19 can't afford to take Ubers everywhere, it's
20 doing something that the state thinks in its
21 own sovereign autonomy is really valuable to
22 provide and the state always puts its money
23 where its mouth is and set it up such that it
24 couldn't survive unless the state continually
25 funded it, that is telling you much more about

1 a commitment than the words on the page,
2 especially when those words on the page could
3 have been written a different way. We could
4 have just said, we hereby reserve our rights
5 that everyone acknowledges that we won't
6 enforce any judgments against us that we are
7 constitutionally permitted to not enforce.

8 Everyone agrees states have that kind
9 of backstop, right? None of them ever use it.
10 The citizens would hate it. But -- but it's
11 there.

12 So it's really odd to ding it for
13 having this kind of reservation clause which
14 everyone agrees states retain. In fact, they
15 retained it at the founding specifically
16 because they wanted to be able to protect their
17 treasuries.

18 It's really odd to convert that into
19 kind of a, you know, a point against the state
20 that it actually just said it bluntly instead
21 of saying it in a more indirect way that
22 everyone agrees we -- we could have said.

23 JUSTICE KAVANAUGH: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Barrett?

1 Justice Jackson?

2 JUSTICE JACKSON: But I guess I don't
3 understand why Hess comes out the way it does.
4 I thought, in Hess, we held that there was no
5 state sovereign immunity and the kinds of
6 things you're talking about in terms of the
7 relationship between the state and the entity
8 seemed like it was the same as here.

9 There, the states could appoint and
10 remove the commissioners. The governor could
11 veto the port authority's actions. The facts
12 in Hess included that the state's legislature
13 could determine the projects that the port
14 authority took, and yet we still said no
15 sovereign immunity.

16 So what do we do with that case?

17 MR. ZUCKERMAN: So I actually think --
18 I disagree, Justice Jackson, because I think
19 Hess is actually a pretty good case for us. I
20 think Hess lays out the substantive analysis
21 and then it applies it to an entity that looks
22 a lot different from New Jersey Transit.

23 JUSTICE JACKSON: Different, not the
24 same?

25 MR. ZUCKERMAN: Oh, absolutely.

1 JUSTICE JACKSON: Okay.

2 MR. ZUCKERMAN: I think, first of all,
3 most importantly, it's a bi-state entity and
4 so, oh, right there, you have a diffusion of
5 control, a -- a diffusion of accountability,
6 you have not two but actually three sovereigns
7 in the picture --

8 JUSTICE JACKSON: What does that have
9 to do with whether sovereign immunity should
10 apply, the fact that -- I would think it should
11 apply even more. You have more sovereigns
12 involved.

13 MR. ZUCKERMAN: Well, that argument
14 was made in Hess, and I -- I think it had
15 some -- it had -- you know, I don't mean to
16 disagree with that argument. I think that it
17 had some purchase.

18 But -- but it is -- this Court held
19 and I -- I -- the control features are
20 different and the political accountability
21 features are different when one side, you know,
22 has a veto over its side's stuff and another
23 side has a veto over its side's stuff and then
24 the federal government is somehow -- is -- is
25 in there kind of watching. I mean, that's just

1 a different kind of entity.

2 You can't put it in the bucket of a
3 state agency because it's got three different
4 sovereigns already in the picture. And that's
5 why Lake Country says we're kind of going to
6 presume when we get these odd bi-state entities
7 that they're not all getting the collective,
8 you know, sovereignty that other states do.

9 JUSTICE JACKSON: Is that the major
10 difference? Is that the --

11 MR. ZUCKERMAN: You start at a -- I
12 think you start at an uphill battle in a
13 bi-state.

14 JUSTICE JACKSON: Yeah.

15 MR. ZUCKERMAN: You can still overcome
16 that, which is why WMATA -- I think Judge Bork
17 was right in WMATA. The D.C. Circuit
18 unanimously found WMATA did overcome that, you
19 know, steeper hill.

20 But we don't start there because this
21 is just New Jersey. It's a New Jersey entity
22 that sits in our executive branch, does
23 rulemaking, has a statewide police department,
24 has a gubernatorial veto, doesn't have any
25 superior property rights to the state. We fund

1 it constantly. We've tied its hands. It can't
2 really ever be profitable the way we've set it
3 up to be. You know, it has all of these
4 hallmarks of state agency and no other
5 sovereign in the picture.

6 And then the other thing I'll just say
7 about the port authority, that was more
8 regional. That was discussed a bit. It was at
9 one point even in the compact called a -- I
10 think a municipal corporation or something to
11 that effect, a municipal subdivision.

12 I mean, it was operating in a smaller
13 area, whereas this is a plenary statewide
14 agency that is providing public transportation
15 for all New Jerseyans around the state, so --

16 JUSTICE JACKSON: Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Mr. Kimberly.

20 ORAL ARGUMENT OF MICHAEL B. KIMBERLY
21 ON BEHALF OF GALETTE AND COLT, ET AL.

22 MR. KIMBERLY: Mr. Chief Justice, and
23 may it please the Court:

24 When a state establishes a new public
25 entity, it has a choice. First, it can

1 establish a traditional department, agency,
2 commission, bureau that is an entity of the
3 government itself that uses state employees and
4 state property to perform its functions and
5 relies on the public fisc for its finances.

6 Alternatively, it can establish a
7 public corporation. A public corporation is a
8 state-created entity that bears two key
9 features. First, it has a separate legal
10 identity, and it's thus capable of suing and
11 being sued in court in its own name, in its own
12 discretion. Second, it holds its own assets
13 and liabilities, meaning that it's responsible
14 for paying debts, including adverse judgments,
15 from its own resources.

16 It is entirely the point of creating a
17 public corporation that it is a distinct legal
18 person, separate and apart from the state that
19 creates it. And the reason is that it makes
20 debt financing substantially easier because
21 separate legal entities are not bound by the
22 constitutional limitations on public debt.
23 That's so under New Jersey's debt limitation
24 clause. It's true also, we know, from Briscoe
25 and Wister under the federal Bill of Credit

1 Clause. It's also relatively easier to
2 administer a public corporation's resources,
3 like its human resources, free from the
4 bureaucracy and complications of state
5 government.

6 But, by creating a separate legal
7 entity in this way and achieving these
8 benefits, the state accepts a cost, and the
9 cost is -- it follows from the creation of a
10 separate legal entity, a separate legal person,
11 and that's that it does not share in the
12 state's sovereign immunity.

13 That has been the consistent holding
14 of this Court for the last 200 years, since
15 Planters' Bank in 1824 through the Kentucky
16 Bank cases of the 1830s, Lincoln County in
17 1890, and Hopkins in 1911. Our position is
18 consistent with those cases and with more
19 recent cases like Hess and Lewis. New Jersey
20 Transit's position is not.

21 And I welcome the Court's questions.

22 JUSTICE THOMAS: So I take it that you
23 agree with the arguments in the Colt brief?

24 MR. KIMBERLY: Yes. We are fully
25 aligned. I think the -- the two parties are

1 aligned, yes.

2 JUSTICE THOMAS: What's your response
3 to the reliance on the Missouri -- on the
4 Missouri -- the Nebraska and Missouri case,
5 MOHELA?

6 MR. KIMBERLY: The -- the Biden
7 against Nebraska case?

8 JUSTICE THOMAS: Yeah. Mm-hmm.

9 MR. KIMBERLY: Your Honor, that's a
10 case about standing. And this Court's cases
11 recognize that the constitutional status of
12 entities as state actors varies depending on
13 the constitutional context.

14 You know, Lake Country Estate is a
15 good example. That was a case about a
16 interstate entity that had been sued under
17 1983. The first half of this Court's opinion
18 in that case was it is a state actor for 1983
19 purposes. The second half of the opinion was
20 it is not a state entity for sovereign immunity
21 purposes.

22 CHIEF JUSTICE ROBERTS: Well, isn't it
23 significant that New Jersey does, in fact,
24 cover the liabilities of the Transit
25 Corporation regardless of whether it's a formal

1 commitment, which carries with it consequences
2 that I don't think would be good for either
3 side, but why isn't that what's really
4 significant? They do cover the liabilities.

5 MR. KIMBERLY: Well, they do -- they
6 do, we acknowledge, subsidize New Jersey
7 Transit on a forward-looking basis, Your Honor,
8 but if mere subsidies were enough, I don't know
9 how Lewis could have come out the way that it
10 did. That's the case in which the Court said
11 that a formal indemnity agreement by which the
12 state agrees to pay for the debt of another
13 doesn't make that other entitled to sovereign
14 immunity. And the inverse with Regents, when
15 the state is indemnified, it is not deprived of
16 state sovereign immunity.

17 So the question of who foots the bill,
18 who ultimately picks up the cost isn't the
19 relevant question. The question after Regents
20 and Lewis is who bears actual legal
21 responsibility for the judgment.

22 CHIEF JUSTICE ROBERTS: Well, I know
23 that's one of the many factors that come into
24 play, but it does seem to me that the formality
25 of actually being on the legal hook for all the

1 liabilities isn't necessarily as determinative
2 of what they actually -- what they actually do.

3 I mean, the answer that your friend
4 did not give, perhaps out of graciousness,
5 is -- why aren't you formally liable, probably
6 is, well, because sometimes courts go off the
7 rails and they don't want to sign a blank
8 check.

9 And I -- I wonder if -- if, in fact,
10 they do cover the liabilities at least
11 diminishes the significance of the legal
12 formality of signing on the -- on the --

13 MR. KIMBERLY: Well, I -- I don't
14 think that could be the explanation, Your
15 Honor, because, if New Jersey actually took the
16 step of making New Jersey Transit a part of the
17 government entitled to sovereign immunity, it
18 could cap liability and -- and suits would have
19 to be brought in New Jersey state court
20 according to the waiver of that -- of -- the
21 waiver of sovereign immunity.

22 So, if it's concerned about courts
23 going off the rails, it has legislative means
24 of solving that problem. The reason that it
25 doesn't, though, Your Honor, is because New

1 Jersey Transit borrows substantial sums of
2 money. I believe it's about \$150 million a
3 year. And that money doesn't count towards New
4 Jersey's debt limitation clause, which
5 otherwise would require the issuing of that
6 debt to go to public vote.

7 They don't want to have to deal with
8 that. And the -- and the New Jersey
9 Constitution is crystal-clear that what it
10 calls autonomous public corporate entities,
11 which are distinguished in the constitution
12 from the state, do not -- are not covered by
13 the debt limitation clause and that their debts
14 have to -- are subject to the same limits only
15 when the state by formal legislation agrees by
16 appropriation to pay the principal and debt, in
17 other words, makes itself the real party in
18 interest. And that's not going on here.

19 So, to -- to achieve that benefit,
20 Your Honor, to ensure that its finances are not
21 subject to constitutional limitations on public
22 debt, it has to have a separate legal entity.
23 And as -- as we say and I think as the Court's
24 early cases indicate, the consequence is it's
25 not a part of the state and doesn't enjoy

1 sovereign immunity as a consequence.

2 JUSTICE GORSUCH: Now --

3 JUSTICE KAVANAUGH: Do you agree with
4 or disagree with the opinion that was cited by
5 your friend on the other side that Judge Bork's
6 opinion in Morris --

7 MR. KIMBERLY: No, I -- Your Honor, I
8 take that -- that case to be sort of a product
9 of its time. This was around --

10 JUSTICE KAVANAUGH: So you disagree
11 with it, it sounds like?

12 MR. KIMBERLY: Inasmuch as the entity
13 there was a public corporation and was being
14 held to enjoy sovereign immunity, yes, but, of
15 course, that's not a case binding on this
16 Court.

17 JUSTICE KAVANAUGH: No, I know. But
18 it's -- it's been an important opinion in this
19 area, and it's obviously relied on by the other
20 side. I just want to get your position on it.
21 You disagree with it. That's -- that's fine.
22 I think you have to. I was just curious.

23 MR. KIMBERLY: Yeah. And what I would
24 say, Your Honor, is, in -- in the course of
25 this nation's history, never once of which

1 we're aware has this Court ever held that a
2 public corporation is entitled to the immunity
3 of its state sovereign creator.

4 My friend on the other side offers
5 three cases that he suggests stand for the
6 opposite proposition. But none do. Missouri
7 against Illinois, cited on page 5 of the reply
8 brief, is a lot like Biden against Nebraska.
9 It's really a standing case. It's also a
10 real-party-in-interest case.

11 JUSTICE KAGAN: I mean, why should
12 that make a difference, whether it's a standing
13 case or an immunity case? The -- the question
14 do you have standing was entirely derivative of
15 the question are you part of the state, and so
16 what the Court went about exploring was the
17 question are you part of the state.

18 Now there was, you know, to my mind,
19 an easy way to do that, but the Court rejected
20 that. You're coming forward with a easy way to
21 do that. You look at a couple of things. You
22 look at the corporate structure. You look at
23 the fact that there's insulation from
24 liability, and your -- and your inquiry is
25 done. That is not what the Court did.

1 The Court had a much more
2 multi-factored -- you know, it -- it -- it did
3 what a lot of the cases do in the sovereign
4 immunity context, which it said we're going to
5 look at all kinds of supervision and control
6 and really try to figure out, like, whether --
7 who's pulling the strings here, what the entity
8 is doing, why they're doing that, and so forth.

9 MR. KIMBERLY: And -- and, Your Honor,
10 I think the -- the short answer is simply that
11 the -- the bearing of those considerations on
12 whether the state suffers an injury-in-fact
13 sufficient to bring a lawsuit is not the same
14 inquiry as whether the entity is so bound up
15 with the state that to sue it is to sue the
16 state.

17 I don't -- I don't read Biden against
18 Nebraska as saying a suit against MOHELA would
19 be a suit against Missouri. It's just holding
20 Missouri -- sure, it -- it has an interest in
21 MOHELA's objectives.

22 JUSTICE KAGAN: I think -- I -- I
23 don't know, I read it differently. The -- the
24 opinion says MOHELA is a part of Missouri.
25 That's what allowed the standing to proceed.

1 MOHELA is a part of Missouri.

2 MR. KIMBERLY: Well, I -- I suppose,
3 Your Honor, then I -- I would suggest that,
4 certainly, there's nothing about a ruling in
5 our favor in this sovereign immunity context
6 that would require overruling that holding. It
7 would require simply acknowledging that there
8 is a distinction between injury in fact on the
9 one hand and the classification of an entity as
10 of the state on the other hand.

11 JUSTICE KAVANAUGH: What's the
12 distinction --

13 MR. KIMBERLY: Well, the
14 distinction --

15 JUSTICE KAVANAUGH: -- as relevant to
16 this inquiry that Justice Kagan's raising?

17 MR. KIMBERLY: Oh, well, I mean, I
18 suppose it's, you know, could -- could the
19 shareholders of a corporation assert injury in
20 fact based on a regulation that harms the
21 corporation? I think the answer to that in
22 some circumstances is -- is yes.

23 That doesn't mean that the -- the
24 shareholders or corporators that establish the
25 corporation share a single legal identity with

1 it. And, indeed, it couldn't because it is,
2 again, the whole point of establishing a
3 corporation that you create a new legal person,
4 a new legal person capable of appearing in
5 court in its own name and at its own discretion
6 and with its own assets and liabilities and
7 responsibility for paying debts against it.

8 To deny that that analysis would drive
9 the sovereign immunity inquiry here, the
10 arm-of-the-state inquiry, would really be to
11 deny the corporate form at all, that there --
12 it -- it would be to suggest there's no such
13 thing as a public corporation.

14 JUSTICE ALITO: Now, Mr. Kimberly,
15 when you said -- just out of curiosity, when
16 you said that the WMATA decision was a product
17 of its times, what -- what did you mean by
18 that?

19 MR. KIMBERLY: There was -- following
20 Mt. Healthy, there was a push among the lower
21 courts towards a multifactor test. We see an
22 analytical through-line from cases like
23 Planters' Bank in 1824 through those cases to
24 today and cases like Lewis. And --

25 JUSTICE ALITO: So, in -- in short,

1 you're saying it wasn't a sufficiently
2 originalist decision?

3 MR. KIMBERLY: It certainly was not
4 paying attention to the way that the Court
5 thinks about these issues now and the way
6 that --

7 JUSTICE ALITO: Who was the author of
8 that? What was the composition of the panel?

9 MR. KIMBERLY: I believe it was a
10 Judge Bork opinion for the D.C. Circuit.

11 JUSTICE KAVANAUGH: Joined by Judge
12 Scalia.

13 MR. KIMBERLY: Right. But -- but --
14 but, Your Honor, these were cases that preceded
15 Hyatt, and I --

16 JUSTICE KAVANAUGH: I'm just answering
17 the question. I'm not trying to argue by
18 saying that.

19 (Laughter.)

20 JUSTICE KAVANAUGH: Also by Judge
21 Wright just to be clear.

22 MR. KIMBERLY: Yeah, right. These
23 are -- and -- and, really, the fundamental
24 point is it's -- it's a case that precedes
25 Hyatt III, which tells -- and I think we take

1 it as an instruction to pay attention to the
2 way that the framers would have understood
3 sovereign immunity to operate.

4 And if you look -- I mean, by that --
5 by those lights, Planters' Bank of Georgia,
6 written by Chief Justice Marshall, rather
7 clearly, I think, resolves this question.

8 There, Georgia had established a bank
9 as a separate corporation. The state retained
10 substantial control over the corporation. The
11 Chief Justice, writing for the Court, had no
12 trouble saying that it was a separate entity
13 not entitled to share in Georgia's sovereign
14 immunity.

15 JUSTICE JACKSON: Can I just -- can I
16 just float a way to think about this? As I
17 look at our sovereign immunity cases, it really
18 does seem like the fact that there is a
19 corporation at issue here is driving most of
20 the analysis, that it really matters, you know,
21 in terms of the -- the various factors that
22 people have put forward.

23 It seems as though we sort of start
24 with the idea of is there a legally separate
25 entity, i.e., a corporation, and then the cases

1 that are really looking at arm of the state and
2 doing that kind of analysis tend to be ones in
3 which we don't have a corporation and we're
4 still trying to determine to what extent is
5 this entity bound up with the state such that
6 it could be entitled to sovereign immunity.

7 But it's kind of like the corporation
8 cases are -- you know, is enough to say that
9 it's a corporation to get it outside of the
10 realm of sovereign immunity, and then we have,
11 well, even if it doesn't get sovereign
12 immunity, should we still not have it be liable
13 in this case because of the real-party-in-
14 interest issue? That's the Clemson scenario.

15 MR. KIMBERLY: Right.

16 JUSTICE JACKSON: But the sovereign
17 immunity issue -- I think this is what I hear
18 you saying -- is really about the state's
19 decision to establish a separate entity.

20 MR. KIMBERLY: Right.

21 JUSTICE JACKSON: And where that has
22 happened, we then don't do what it sounds like
23 your friends on the other side are doing here,
24 which is, well, what does that entity really do
25 as a practical matter and does it look like

1 it's doing governing things or not. That
2 doesn't matter. It's the sort of initial idea
3 that you've established this separate entity.

4 MR. KIMBERLY: That's right. And the
5 state is achieving those benefits that I talked
6 about by creating a separate entity, and so
7 it's taking the bitter with the sweet, as Baude
8 and Sachs put it in their amicus brief.

9 JUSTICE ALITO: Well, when you say a
10 separate entity, what if New Jersey, instead of
11 having a department of banking, had labeled
12 that the banking corporation, but everything
13 else was the same?

14 Would that be -- would what is now
15 the department of banking or a department of
16 anything else, department of law and public
17 safety, would those be considered to be
18 subordinate corporations at the founding?

19 MR. KIMBERLY: No, Your Honor. Our --
20 our test is not a label-driven test. It's got
21 to be a bona fide public corporation. And
22 that's why in our --

23 JUSTICE ALITO: What does that mean --

24 MR. KIMBERLY: Well, that --

25 JUSTICE ALITO: -- a bona fide public

1 corporation?

2 MR. KIMBERLY: That's why in our
3 briefing we focused on two factors in
4 particular: Does the entity have a separate
5 juridical, legal identity, separate personhood,
6 so that it can own assets and bear liabilities
7 in its own name without pushing them through to
8 the state, and it, in addition, is able to sue
9 and be sued in its own name and its own
10 discretion.

11 When it has those two things, it is a
12 corporation. And that's why I think the -- the
13 point about the Louisiana departments being
14 denominated corporations doesn't answer the
15 question because employees of those departments
16 are employees of the state. The liabilities of
17 those departments are the liabilities of the
18 state. We wouldn't say that those are bona
19 fide public corporations.

20 JUSTICE KAVANAUGH: If the state were
21 formally liable for the Transit Authority's
22 debts or liabilities, your -- this case would
23 be different in your view?

24 MR. KIMBERLY: I think it would be a
25 lot harder. Frankly, it would -- it would look

1 more like Utah Construction because Utah
2 Construction, the highway commission in that
3 case did have sue-and-be-sued authority. It
4 was -- it was referred to anyway. It's unclear
5 exactly how extensive it was.

6 But the Court relied on the fact that
7 it did not have its own assets and would not
8 have been liable to pay an adverse judgment
9 which would have flowed through to the state.
10 So it was all -- it was a real-party-in-
11 interest point because the state was deemed a
12 party to the contract.

13 JUSTICE KAVANAUGH: So, in some ways
14 then, the case comes down, if taking your last
15 answer, to whether the state's formally on the
16 hook or practically and in the real world on
17 the hook, is that not right?

18 MR. KIMBERLY: Well, I think it is
19 a --

20 JUSTICE KAVANAUGH: Because they say,
21 well, we're not formally on the hook, but we're
22 functionally on the hook --

23 MR. KIMBERLY: Yeah.

24 JUSTICE KAVANAUGH: -- which does seem
25 to be accurate as a matter of practice. We can

1 debate that.

2 But your response to that is, well,
3 they have to be formally on the hook, legally
4 on the hook for it to cross the line into
5 immunity. Is that accurate?

6 MR. KIMBERLY: I -- I think it's -- I
7 feel comfortable saying that is a necessary
8 requirement. And, you know, I would say it --
9 it follows from Lewis. I don't -- I don't see
10 how one could read Lewis --

11 JUSTICE KAVANAUGH: If we ruled your
12 way -- sorry to interrupt -- the state's going
13 to want to know how they can do this to -- and
14 it would be important how we write the opinion.
15 And I'm just -- want to get your --

16 MR. KIMBERLY: Right.

17 JUSTICE KAVANAUGH: -- thoughts on
18 that. You -- you kind of said it would be a
19 harder case. You didn't say it would be a
20 different case.

21 Would it be a different case if they
22 were formally on the hook?

23 MR. KIMBERLY: No, I -- I'm willing
24 to acknowledge that formal liability is a
25 necessary -- formal liability of -- of the

1 agency not passing through to the state is --
2 is a necessary condition.

3 I -- I would add this is a
4 jurisdictional test. And this Court has
5 instructed -- has -- has taught that the law
6 should favor clear jurisdictional tests.

7 JUSTICE GORSUCH: Mr. Kimberly, your
8 test has the virtue of simplicity and clarity,
9 I grant you that. But you acknowledge this
10 real-party-in-interest exception to it. And I
11 just want to follow up on what Justice
12 Kavanaugh was saying.

13 Is that test solely based on formal
14 liability or other factors? Are they relevant?
15 And, if so, do we just create another
16 multifactor balancing test under the
17 real-party-in-interest test?

18 MR. KIMBERLY: I don't -- no. And the
19 real-party-in-interest analysis as it applies
20 to public corporations is not an exception. It
21 presents a different question. If you've
22 got --

23 JUSTICE GORSUCH: However you want to
24 phrase it. I'm -- I'm less concerned about
25 whether we phrase it as an exception --

1 MR. KIMBERLY: Sure.

2 JUSTICE GORSUCH: -- or it's another
3 test.

4 MR. KIMBERLY: No.

5 JUSTICE GORSUCH: It's something we're
6 going to have to ask in these cases, right,
7 even under your approach? And so what I guess
8 I'm asking, again, is: Is it limited to the
9 question of formal liability, or are other
10 factors relevant?

11 MR. KIMBERLY: I -- so I think it's a
12 Rule 19 necessary party sort of analysis. And
13 the question is, if the government, if the
14 state fisc would be in jeopardy in the case and
15 the state would have to pay, or maybe in an
16 injunction case involving property, real
17 property belonging to the state, I think that
18 real-party-in-interest requirement would be
19 met.

20 But the upshot would not be that the
21 public corporation defendant is thereby
22 rendered an arm of the state. It's just to say
23 that the state also has to be in --

24 JUSTICE GORSUCH: No, I -- I
25 appreciate that subtlety. But you think that's

1 the only condition in which a real-party-in-
2 interest test could be satisfied, what you've
3 outlined here?

4 MR. KIMBERLY: I think so, yes, Your
5 Honor.

6 JUSTICE GORSUCH: Okay. All right.

7 MR. KIMBERLY: At least as I've
8 described it.

9 JUSTICE GORSUCH: A slightly different
10 question now. I appreciate your -- your point
11 that injury in fact might be different from
12 being able to assert sovereign immunity as a
13 defense. And I think MOHELA has a footnote on
14 something like this, Footnote 3.

15 But we do treat our cases in the
16 federal agency context, sue-and-be-sued is not
17 the end of the story.

18 MR. KIMBERLY: Mm-hmm.

19 JUSTICE GORSUCH: And you're asking us
20 to do a little something different here than we
21 do there, I think. Maybe -- maybe I'm wrong on
22 that and you can say how it's all perfectly
23 consistent, but I'd like your thoughts.

24 MR. KIMBERLY: Well, I think the --
25 the first answer, Your Honor, is the -- the

1 question of federal sovereign immunity is -- is
2 necessarily different and distinct from state
3 sovereign immunity because, in the federal
4 sovereign immunity context, the Congress sits
5 in the same seat as the state legislature with
6 respect to the immunity that state entities get
7 in state court.

8 Federal Congress has plenary authority
9 over the jurisdiction of the courts and --

10 JUSTICE GORSUCH: Plenary?

11 MR. KIMBERLY: Well, with exceptions
12 for this Court, has near limitless -- and,
13 certainly, among the lower courts --
14 jurisdiction to determine who can be sued,
15 under what circumstances, when, subject to what
16 limits, and so forth.

17 And so the question there is --
18 necessarily differs. In the same way that New
19 Jersey has say-so power over immunity in its
20 courts, the federal Congress has say-so power
21 over immunity in federal courts.

22 JUSTICE KAGAN: What would happen,
23 Mr. Kimberly, if New Jersey, in creating this
24 corporation, had said we wish to bestow upon it
25 our own sovereign immunity?

1 MR. KIMBERLY: I think that would have
2 implications, as I was saying, on a say-so
3 basis for New Jersey state court. It would not
4 drive the analysis for the federal law
5 question that's --

6 JUSTICE KAGAN: And why -- why is
7 that? I mean, if -- or -- or -- I guess this
8 gets to the question that the briefs debate
9 back and forth as to what the role of intent is
10 in this.

11 So I'm taking that kind of provision
12 to be a definitive statement of New Jersey's
13 intent as to what it thinks this agency is and
14 how it wants it to be treated.

15 MR. KIMBERLY: Well, so I think
16 Regents' Footnote 5 is a good directive on this
17 point. Obviously, that was an Eleventh
18 Amendment immunity case, but I think everything
19 that Hyatt III says about this doctrine is
20 consistent with it, which is to say it is a
21 federal law question, and state law is --

22 JUSTICE KAGAN: Well, it's a federal
23 law question. That doesn't necessarily mean
24 that New Jersey's intent doesn't play a
25 powerful role in the inquiry.

1 MR. KIMBERLY: Well, I think what it
2 instructs is that it -- it -- it matters what
3 New Jersey achieves. So the characteristics,
4 the substantive characteristics of the entity
5 as determined by the state -- the state can
6 choose whatever characteristics it likes -- are
7 what drive the analysis. It isn't sort of
8 legislative decree that drives it, nor could it
9 be, because that would effectively convert the
10 federal law inquiry into a state law
11 determination.

12 You -- you know -- and I would say
13 states do exercise this sort of power over the
14 ability to determine the characteristics of an
15 entity all the time. I -- I'd point the Court
16 as an example to the difference among various
17 public universities. In a case called Kovats,
18 the Third Circuit determined that Rutgers is
19 not entitled to sovereign immunity, and it did
20 so by pointing to all the things that we're
21 pointing to here. Its finances and property
22 are separate from the state, it has independent
23 sue-and-be-sued power, and the state would not
24 have to pay judgments against Rutgers
25 University.

1 But, in McAdoo against UNC, the Fourth
2 Circuit came to the opposite conclusion with
3 respect to UNC. It held that UNC is an arm of
4 the state, and it did it for all the reasons
5 that we've been talking about. Its finances
6 really are mixed with the public treasury. Its
7 employees are state employees. Its property is
8 property of North Carolina; it is not its own.
9 And I'll come back to that in a minute because
10 New Jersey Transit does have separate property.
11 And it can't participate in judicial
12 proceedings without the say-so of the attorney
13 general of the state. That in all ways
14 describes an arm of the state, something closer
15 to an agency or a department/division. It's
16 entirely different from Rutgers.

17 A state that wants to extend sovereign
18 immunity to a state university knows how to do
19 it, and those that want to segregate the state
20 university from the state for purposes, for
21 example, of debt fundraising, know how to do
22 it.

23 I would add that it -- it came up a
24 couple of times in Mr. Zuckerman's presentation
25 that the property of New Jersey Transit is not

1 its own. But that is not what New Jersey state
2 law says at all. I'd point the Court to its
3 organic statute. This is 27:25-5, paragraph
4 (j) and (k). And it says that New Jersey
5 Transit may purchase, lease as lessee, or
6 otherwise acquire, own, hold, improve, and use
7 real and personal property in its own
8 discretion on terms that it determines.
9 Paragraph (k) says that it can in turn dispose
10 of real and personal property.

11 For their contrary position, my
12 friends on the other side rely on a tax
13 provision that says -- this is 27:25-16 -- any
14 property owned by the corporation, property
15 owned by the corporation, shall be considered
16 state property for state real estate tax
17 purposes. But tax law and tax doctrine deems
18 things to be contrary to what they are all the
19 time for tax treatment purposes. That doesn't
20 mean that New Jersey holds title to this
21 property.

22 New Jersey Transit is established as a
23 separate corporation. It has its own assets.
24 It has its own liabilities. Those liabilities
25 have to be paid out of New Jersey Transit's own

1 assets. That makes it a separate entity. That
2 is the point of establishing it as a public
3 corporation.

4 I would add, Your Honors, that --
5 Justice Jackson, as you noted, the Department
6 of Transportation is empowered to enter into
7 contracts with New Jersey Transit. If New
8 Jersey Transit were a division within the
9 Department of Transportation, it wouldn't be
10 entering into contracts with it because it
11 would be of the Department of Transportation,
12 which cannot enter into contracts of its own.

13 And there is no question according to
14 New Jersey state law that entities meeting New
15 Jersey Transit's description are in but not of
16 the government and the department in which they
17 are located. This is the Parsons decision
18 cited in the Baude and Sachs brief, decided two
19 years after the adoption of the 1947 New Jersey
20 Supreme Court -- New Jersey Constitution,
21 holding there that the turnpike authority,
22 which is constituted as a public corporation
23 using terms virtually identical to New Jersey
24 Transit's, is in but not of the state highway
25 department. And that fact does not make it any

1 less an independent entity.

2 JUSTICE KAVANAUGH: Can I ask you a
3 question just about the blast radius of your
4 position if it were accepted, because the reply
5 brief of the state says, you know, things like
6 the Illinois Housing Development Authority, the
7 Minnesota Housing Finance Authority, Texas
8 Department of Housing and Community Affairs are
9 all -- you know, and other state agencies like
10 that would all be affected, and they use the
11 word -- and I'm not saying I agree with this; I
12 just want to give you a chance to respond --
13 said this will create "chaos" in those states.

14 So can you just --

15 MR. KIMBERLY: Yeah.

16 JUSTICE KAVANAUGH: -- respond to that
17 so that we have that on the table?

18 MR. KIMBERLY: Sure. It -- I think
19 it's really hard to understand how it would
20 create chaos. As -- as an initial matter, the
21 immunity that those entities get in the courts
22 of their own state is determined by state law.
23 That's not on the table here.

24 The immunity that those entities get
25 in federal court is largely already driven by

1 Ex parte Young with respect to injunctions. So
2 you're not going to see a substantial change
3 there. And with respect to anything like a
4 constitutional tort would be driven by
5 Section 5 abrogation under 1983 or something of
6 the like.

7 The only cases in which this issue
8 comes up is when those entities are reaching
9 out extraterritorially and committing state law
10 torts against non-citizens outside of the
11 state. The range of circumstances in which
12 that comes up are few and far between.

13 And I would note, indeed, that those
14 entities didn't -- as Your Honor noted, that
15 those entities didn't get immunity between 1979
16 and 2019 as it was. So, you know, the sky
17 didn't fall then. There's no reason to think
18 that the sky would fall now.

19 And I -- I would add, really, the --
20 the benefit of ruling in our favor on the
21 grounds that we've put forward is state
22 lawmakers would have a clear constitutional
23 rule. They would understand when, by using
24 the -- the public corporate form in -- in the
25 bona fide sense, when their entities would be

1 entitled to such immunity and when they
2 wouldn't.

3 Under New Jersey Transit's test, it's
4 sort of a mishmash: You know it when you see
5 it. Maybe this is enough control. Maybe it
6 isn't. Maybe this degree of subsidy is enough.
7 Maybe it isn't.

8 That kind of rule for what is
9 ultimately a question of subject matter
10 jurisdiction really is wholly unworkable and is
11 far, I think, more troubling than anything that
12 a ruling in our favor would implicate.

13 JUSTICE KAVANAUGH: When you say it's
14 unworkable, what -- what are your examples?

15 MR. KIMBERLY: Well, I think this case
16 in and of itself --

17 JUSTICE KAVANAUGH: Other than this
18 case. What -- you know, when you say
19 something's unworkable, there's probably lots
20 of confusion out there. Can you cite what you
21 think is confusing?

22 MR. KIMBERLY: Yeah. I mean, Your
23 Honor, the role, for example, that -- so look
24 just at the two decisions in this case. The
25 New York --

1 JUSTICE KAVANAUGH: I said not --
2 apart from this case.

3 MR. KIMBERLY: Well, okay. My
4 apologies. I -- I think they're reflective of
5 the other cases that we cited in the cert
6 petition where courts -- a number of courts
7 place primacy on what -- sort of the state
8 say-so, what the state believes its entity is
9 entitled to. Others place primacy on what's
10 called the treasury factor. Other courts will
11 consider things like the -- the degree of -- of
12 control. Others will downplay that, frankly, I
13 think, as -- as Hess did.

14 It -- when you've got a multifactor
15 test like this where there are no clear lines,
16 it ends up that substantial amounts of
17 resources are spent just litigating whether we
18 can litigate rather than litigating the merits.

19 You know, I -- I would add my friend
20 on the other -- well, I'll -- I'll -- I'll end
21 there, unless there are further questions.

22 CHIEF JUSTICE ROBERTS: We'll find
23 out.

24 MR. KIMBERLY: Thanks.

25 CHIEF JUSTICE ROBERTS: Justice

1 Thomas?

2 Justice Alito?

3 Justice Kagan?

4 Justice Jackson?

5 JUSTICE JACKSON: I'll give you a
6 chance to add if you would like to.

7 MR. KIMBERLY: Well, I was -- I was
8 going to add that New Jersey -- New Jersey
9 Transit asserted in its presentation that its
10 courts are open to resolve suits like this.
11 That -- it's -- it's not at all clear that they
12 have conceded that in their brief.

13 New Jersey Court Rule 4:3-2 states
14 that suit can only be brought where the injury
15 occurs. But, if the injury occurs out of
16 state, there's no forum in state where a case
17 like this could be brought. So the upshot is
18 New Jersey Transit just gets away with it.

19 JUSTICE JACKSON: Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Rebuttal, Mr. Zuckerman.

23 REBUTTAL ARGUMENT OF MICHAEL ZUCKERMAN
24 ON BEHALF OF NEW JERSEY TRANSIT CORPORATION, ET AL.

25 MR. ZUCKERMAN: Let me just start

1 there and -- and be very clear. We did concede
2 that. It's Footnote 2 of our cert reply in the
3 Colt case. We do -- the New Jersey courts are
4 open to claims for events that occur outside of
5 states, a venue rule that my friend,
6 Mr. Kimberly, is talking about. It's not a
7 basis for a motion to dismiss. You can't get a
8 case kicked because of it. So -- so the courts
9 are open.

10 But let me go back to the substance
11 here, which is why I don't think I heard
12 anything from Mr. Kimberly's presentation that
13 makes me think his rule is actually clear at
14 all.

15 So I didn't hear answers to how --
16 what the blast radius is as to standing in
17 MOHELA. I didn't hear how this is going to
18 work for any of the federal entities like
19 Amtrak or TVA or FDIC.

20 I didn't hear an answer that works for
21 the Pennhurst injunctions problem at all. I
22 heard Mr. Kimberly say don't worry, Ex parte
23 Young will take care of it. But what
24 Mr. Kimberly is missing is that state law
25 injunctions are now available in federal courts

1 inside those states as to all of these
2 entities.

3 So the Florida Department of
4 Transportation, to Justice Jackson's question,
5 which does, I think, have all the incidents of
6 corporate form because -- because states often
7 want their entities to be able to engage in
8 MOUs or contracts with other -- you know, with
9 other agencies so that they can carry out their
10 work, subject to the state's plenary control,
11 would now be subject to an injunction in
12 federal court under a state law claim in
13 Florida because it is in their telling just not
14 the state, it's a corporation.

15 Same with the Louisiana Department of
16 Corrections. You could just get a state law
17 injunction contra Pennhurst to try to close a
18 prison in Louisiana because, in their telling,
19 it's not the state.

20 And I think, to try to avoid those --
21 those untenable results, I heard Mr. Kimberly
22 say, well, maybe we're going to pivot to a bona
23 fide corporations test, maybe we're going to
24 bring in real-party-in-interest law or Rule 19
25 law.

1 I -- I think that either just
2 replicates what we're saying has been the rule
3 all along, which is you do a functionalist's
4 analysis, you look at the -- at this thing as a
5 whole and figure out what it really is or not,
6 which means you look behind the formality of
7 using the word "corporate," which we agree
8 with.

9 We did use the word "corporate" and,
10 yet, under state law, it's quite clear we
11 didn't mean a truly separate thing. We meant a
12 state agency that could do all of these things
13 and be a little more efficient in the ways we
14 would have written it a different way had we
15 anticipated this precise argument in -- in
16 1979, which -- which gets back to just the
17 immense, to use Justice Kavanaugh's phrase,
18 blast radius for states who have not known that
19 they were legislating against this new backdrop
20 for the last 50 or even 200 years. Now they're
21 all going to have to figure out how this is
22 supposed to work.

23 And I think it's far, far simpler and
24 not at all unworkable and I haven't heard any
25 serious argument it is unworkable to do what

1 this Court has always done, which say, look,
2 there are three buckets, and I didn't hear
3 Mr. Kimberly say which other bucket he thinks
4 New Jersey Transit could possibly fall into, is
5 it a state agency? Does it -- is it a
6 municipality, or is it a private company?

7 And New Jersey Transit doesn't look
8 anything like a municipality and it's true it
9 doesn't look anything like a private company
10 because no private company could ever have or
11 be subject to the kinds of responsibilities
12 that New Jersey Transit has.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 The case is submitted.

16 (Whereupon, at 11:31 a.m., the case
17 was submitted.)

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