No. 24-1113

IN THE

Supreme Court of the United States

NEW JERSEY TRANSIT CORPORATION, NJ TRANSIT BUS OPERATIONS, INC., AND ANA HERNANDEZ,

Petitioners,

v.

JEFFREY COLT AND BETSY TSAI,

Respondents.

On Petition for a Writ of Certiorari to the New York Court of Appeals

BRIEF IN OPPOSITION

Brian J. Shoot
Eric K. Schwarz
SULLIVAN PAPAIN BLOCK MCMANUS COFFINAS & CANNAVO P.C.
120 Broadway
27th Floor
New York, NY 10271

Jeffrey L. Fisher
Counsel of Record
Easha Anand
Pamela S. Karlan
STANFORD LAW SCHOOL SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081
jlfisher@stanford.edu

QUESTION PRESENTED

New Jersey Transit Corporation (NJT) is a state-created transportation entity. One of its buses struck respondent Jeffrey Colt while he was crossing an intersection in New York City. In the decision below, the New York Court of Appeals held that NJT could not invoke New Jersey's interstate sovereign immunity and was therefore subject to suit in New York court for injuries arising from that incident. The court based that holding on numerous features of New Jersey law, including a provision explicitly stating that NJT is not the State of New Jersey for purposes of tort liability. *See* N.J. Stat. § 59:1-3.

The question presented is whether the New York Court of Appeals erred in holding, based on its assessment of New Jersey law, that NJT is subject to liability in the courts of New York for a tort committed in New York.

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BRIEF IN OPPOSITION

A commercial bus operated by New Jersey Transit Corporation (NJT) struck Jeffrey Colt, a New York resident, in a Manhattan crosswalk. After applying the same basic sovereign-immunity factors as every other court and carefully analyzing the full array of New Jersey statutes relevant to the issue, the New York Court of Appeals determined that NJT could be sued in New York state court for that tortious act.

NJT asks this Court to grant review here or in *Galette v. New Jersey Transit Corp.*, No. 24-1021, because the Pennsylvania Supreme Court recently held in that case that NJT's legal status entitled it to assert New Jersey's sovereign immunity to suit. But the disagreement between these courts does not turn on federal law; the Pennsylvania Supreme Court applied the same legal test for sovereign immunity as the New York Court of Appeals. Rather, their disagreement turns entirely on how they interpreted *New Jersey* law. Such a dispute over state law is not for this Court to resolve. Besides, a complete understanding of New Jersey law (including of statutes the Pennsylvania court overlooked) makes crystal clear that the decision of the New York Court of Appeals is correct.

What's more, the practical concerns NJT identifies with respect to subjecting it to tort suits in New York but not Pennsylvania are substantially overblown. NJT is *already* subject to tort liability rules within New Jersey itself. Thus, even if this Court were to hold that NJT enjoys sovereign immunity in New York and Pennsylvania, its immunity from suit would still "toggle[] on and off at different points along [interstate] route[s]." Pet. 2.

For all of these reasons, the Court should deny certiorari both in this case and in the parallel petition filed in the Pennsylvania matter. But if the Court were to decide that the question whether NJT is entitled to immunity warrants review, it should not follow NJT's suggestion to grant certiorari only in the Pennsylvania case. There are important features of this case that differ from that one: The opinions below are more thorough and discuss New Jersey statutes that were not brought to the attention of the Pennsylvania court; NJT is making arguments seeking to immunize its employee bus driver that are in tension with its own argument for sovereign immunity; and only this case features arguments concerning the original understanding of sovereign immunity. The Court should have the benefit of these features if it takes up either or both of the questions NJT presents for review.

STATEMENT OF THE CASE

1. In 2017, respondent Jeffrey Colt was walking across a street in Manhattan, crossing with the traffic signal. Pet. App. 91a. Yet a bus owned and operated by NJT struck him while in the process of making a left turn. *Id.* 2a. Colt suffered multiple fractures as a result of the collision.

2. Colt and his wife, respondent Betsy Tsai, sued NJT and the bus driver, petitioner Ana Hernandez, in New York state court. Pet. App. 2a. They alleged state-law claims for negligence, negligent hiring, and loss of consortium. *Id.*

After nearly three years of discovery and other pretrial process, NJT and Hernandez—both repre-

sented by private counsel—moved to dismiss, asserting that they were entitled to interstate sovereign immunity. Pet. App. 2a-3a. The trial court denied the motion, reasoning that "by waiting three years from the inception of the action to raise a jurisdictionally based objection, defendants had waived their right to assert a sovereign immunity defense." *Id.*

3. The Appellate Division affirmed. It rejected the trial court's waiver conclusion but determined that it would be "an affront to our system of justice" to grant NJT and Hernandez sovereign immunity in this case. Pet. App. 100a. The court reached that view partly because it found that New Jersey did not provide any remedy in New Jersey courts for New Yorkers injured by NJT. *Id.* 94a-95a. The court also reasoned that NJT "would not be prejudiced, given that it waited three years to move to dismiss on the ground of sovereign immunity." *Id.* 99a. Two justices dissented. *Id.* 116a.

4. The New York Court of Appeals affirmed "on different grounds." Pet. App. 5a.

a. The court's majority held that NJT was not an arm of the State entitled to New Jersey's sovereign immunity. The court recognized that this Court's decision in *Franchise Tax Board of California v. Hyatt*, 587 U.S. 230 (2019) (*Hyatt III*), "fundamentally altered the landscape of interstate sovereign immunity" by giving States the ability to invoke it in other States' courts. Pet. App. 5a-6a.

Implementing that extension, the New York Court of Appeals distilled from this Court's "arm-of-the-

state jurisprudence" in the Eleventh Amendment context—most notably, *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994)—three factors to guide whether a state-created entity was entitled to state sovereign immunity: "(1) how the State defines the entity and its functions, (2) the State's power to direct the entity's conduct, and (3) the effect on the State of a judgment against the entity." Pet. App. 10a-13a.

The court held that the first factor—"how the State defines the entity and its functions"—might "lean[] toward[s] according NJT sovereign immunity." Pet. App. 13a-14a, 16a. Canvassing a number of New Jersey statutes defining NJT and its role, the court explained that "the State's own characterization of NJT conflicts somewhat as to whether it envisions NJT as a separate corporation serving the public or an extension of the State." *Id.* 14a. The court highlighted in particular that "NJT is not included within" New Jersey's tort statute's "law's definition of a 'State.'" *Id.* 15a; *see* N.J. Stat. § 59:1-3.

The court next held that the second factor—"whether the State directs the entity's conduct such that the entity acts at the State's behest"—did "not weigh heavily in either direction." Pet. App. 16a-17a. Again, it canvassed a number of New Jersey statutes, explaining that NJT was "beholden to the State" in some respects but not in others, and noting that statutes give it "independence" from New Jersey's executive agencies. *Id.* 16a.

That left the final factor: "whether the entity's liability is the State's liability." Pet. App. 17a. And there,

the court found a "clear[]" answer: New Jersey "disclaimed any legal liability for judgments against NJT." *Id.* 18a; *see* N.J. Stat. § 27:25-17.

Putting it all together, the court found that clarity on the third factor outweighed a lack of clarity on the first two factors. It therefore determined that "allowing this suit to proceed would not be an affront to New Jersey's dignity because a judgment would not be imposed against the State, and the entity that would bear legal liability has a significant degree of autonomy from the State." Pet. App. 18a. And the court rejected as a "strawman" the argument "that the practical impact of a judgment is our 'primary consideration.'" *Id.* 18a n.6. "[T]he impact of individual factors," the court made clear, "will vary from case to case." *Id.*

Lastly, having rejected NJT's claim of interstate sovereign immunity, the court held that it necessarily followed that Hernandez, whose claim "depend[s] on NJT's status as an arm of New Jersey," also fails. *Id.* 18a.

b. Judge Halligan issued a concurring opinion. She underscored her support for a "unitary conception of state sovereign immunity," under which the "arm of the state" analysis that prevails under the Eleventh Amendment also applies the same way where, as here, a state-created entity asserts interstate sovereign immunity. Pet. App. 25a. She added that "[e]arly decisions" of this Court denied sovereign immunity to any "state-created corporate entity," and that "[s]ome have recommended reviving" that historical approach. *Id.* 23a & n.1.

c. Chief Judge Wilson issued an opinion concurring in the result. Although he agreed with the majority's bottom-line holding that NJT is not entitled to sovereign immunity, he disagreed with the majority's conclusion that the Eleventh Amendment's arm-of-the-state jurisprudence should also control interstate sovereign immunity. He noted that *Hyatt III*'s rationale for recognizing interstate state immunity arose from the notion that such immunity had existed at common law prior to the Founding. Pet. App. 35a-36a.

Accordingly, he wrote that "the correct test" for such immunity must turn on "whether the function performed by the entity would, under customary international law and the common law" that prevailed at the Founding, "be considered a core governmental function to which sovereign immunity would have extended." Pet. App. 34a. Surveying Founding-era sources at length, he concluded that NJT did not exercise such a function, because it engaged in "commercial operations that, though undeniably important, would not have been clothed with sovereign immunity" under the law of nations and the common law. *Id.* 54a; *see id.* 48a n.6.

d. Judge Rivera dissented. She would have found that "New Jersey controls NJT to such extent and in such a manner that a suit against NJT is the intended equivalent of a suit against the State." Pet. App. 77a. She therefore disagreed with the majority's assessment of "both of the first two factors" it examined. *Id.* 83a. She also disagreed that the "third factor" (concerns about financial liability) should be dispositive. Although she acknowledged that the treasury factor

"weighs heavily . . . in an Eleventh Amendment analysis," she would not have applied it in the context of "interstate sovereign immunity." *Id.* 84a.

ARGUMENT

I. There is no conflict worthy of this Court's review.

The petition frames two questions presented relating to NJT's immunity. Pet. i. The first is methodological: "Whether a State's formal financial liability for a judgment against a state-created entity carries more weight in assessing whether that entity is an arm of the State than other factors, including the State's own characterization of that entity." The second is case-specific: "Whether NJ Transit is an arm of the State of New Jersey for interstate sovereign immunity purposes." Neither warrants certiorari.

1. The methodological question does not require this Court's review because it does not implicate any conflict and is not, in any event, presented in this case.

a. It has been just six years since this Court overhauled state courts' approach to interstate sovereign immunity. Previously, those courts could decide whether to grant immunity to a different State's entity based on "prevailing notions of comity." *Franchise Tax Bd. of Cal. v. Hyatt*, 587 U.S. 230, 236 (2019) (*Hyatt III*) (internal quotation marks omitted). Now, state courts *must* give immunity to any entity that is "one of the United States"—but need not afford immunity to certain state-created entities such as "municipalities," even though they "exercise a 'slice of state power.'" *Lake Country Ests., Inc. v. Tahoe Reg'l Plan.*

Agency, 440 U.S. 391, 400-01 (1979). Thus, *Hyatt III* requires state courts to assess when a sister State's entity *is* the State (and so receives immunity) or is merely a creation of the State (and so does not).

In the short time since *Hyatt III* was decided, no meaningful methodological conflict has developed on how to answer that question. Indeed, "[b]ecause interstate sovereign immunity was a matter of comity before *Hyatt III* . . . few decisions explored which parties, other than a State itself, are entitled to invoke sovereign immunity in another State's courts." Pet. App. 6a. And the few courts that have all use multifactor tests that are materially identical.

This case and the Pennsylvania Supreme Court's decision in *Galette* prove the point. Below, the New York Court of Appeals "distill[ed] from *Hyatt III* and other federal cases" three "factors": "(1) how the State defines the entity and its functions, (2) the State's power to direct the entity's conduct, and (3) the effect on the State of a judgment against the entity." Pet. App. 13a. These factors are materially identical to those the Pennsylvania Supreme Court applied in *Galette*: "(1) the legal classification and description of the entity within the governmental structure of the State, both statutorily and under its caselaw; (2) the degree of control the State exercises over the entity; (3) the extent to which the entity may independently raise revenue; (4) the extent to which the State provides funding to the entity; (5) whether the monetary obligations of the entity are binding upon the State; and (6) whether the core function of the entity is normally performed by the State." *Galette* Pet. App. 4a (internal quotation marks omitted). Pennsylvania's

first two factors are identical to New York's first two factors; its third, fourth, and fifth factors are just elaborations of New York's second and third factors; and its sixth factor collapses into New York's first.

The similarity between these tests is unsurprising. In the related context of determining whether state-created entities are entitled to Eleventh Amendment immunity in federal court, the federal courts of appeals also apply multifactor analyses that sometimes vary in nomenclature but basically amount to the same overall inquiry. The First and Seventh Circuits have a "two-step" or "two-factor" test.[1] The Third, Ninth, and D.C. Circuits use a "three-part" inquiry.[2] A four-factor test applies within the Fourth, Sixth, Tenth, and Eleventh Circuits.[3] And the Second, Fifth, and Eighth Circuits look to "six factors."[4] Despite the various numbers of factors, all of these tests

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[1] *Grajales v. P.R. Ports Auth.*, 831 F.3d 11, 17 (1st Cir 2016); *DuPage Reg'l Off. of Educ. v. U.S. Dep't of Educ.*, 58 F.4th 326, 339 (7th Cir. 2023).

[2] *Karns v. Shanahan*, 879 F.3d 504, 513 (3d Cir. 2018); *Kohn v. State Bar of Cal.*, 87 F.4th 1021, 1031 (9th Cir. 2023) (en banc); *P.R. Ports Auth. v. Fed. Mar. Comm'n*, 531 F.3d 868, 873 (D.C. Cir. 2008) (Kavanaugh, J.).

[3] *Cash v. Granville Cnty. Bd. of Educ.*, 242 F.3d 219, 224 (4th Cir. 2001); *Ernst v. Rising*, 427 F.3d 351, 359 (6th Cir. 2005); *Hennessey v. Univ. of Kan. Hosp. Auth.*, 53 F.4th 516, 526 (10th Cir. 2022); *Monroe v. Fort Valley State Univ.*, 93 F.4th 1269, 1279 (11th Cir. 2024).

[4] *Leitner v. Westchester Cmty. Coll.*, 779 F.3d 130, 135 (2d Cir. 2011); *United States ex rel. Fields v. Bi-State Dev. Agency of Mo.-Ill. Metro. Dist.*, 872 F.3d 872, 877 (8th Cir. 2017); *see Springboards to Educ., Inc. v. McAllen Indep. Sch. Dist.*, 62 F.4th 174, 178-79 (5th Cir. 2023).

ask essentially the same questions: What does state law say about the entity? What powers does the entity have, and who controls the exercise of those powers? And is the entity financially independent from the State? *See DuPage*, 58 F.4th at 345 ("Despite the various formulations found in the case law of the circuits, the basic approach is very similar, looking to factors such as control, state-law characterizations, and funding sources.").

b. NJT seemingly recognizes that there is no point to asking this Court to pick and choose between interchangeable tests. So instead, NJT suggests that the Court decide whether one factor—what it calls the "treasury factor," Pet. 13—should dominate the analysis.

That question is not presented here. Despite NJT's insistence to the contrary, the New York Court of Appeals below did not "giv[e] primary (if not dispositive) weight to the 'treasury factor.'" Pet. 13. In fact, the court expressly rejected that understanding of its opinion when it was raised in Judge Rivera's dissent. *See* Pet. App. 84a. The court wrote: "We reject the dissent's strawman argument that the practical impact of a judgment is our 'primary consideration.' As with all balancing tests, the impact of individual factors will vary from case to case." *Id*. 18a n.6 (citation omitted). It found the treasury factor most important in this case only because it concluded that the other factors provided "relatively weak support" to NJT's arguments. *Id*. 18a.

This Court should not grant certiorari based on a premise, drawn from the dissent, that the court below disavowed as a "strawman." As Judge Friendly put it

years ago, "dissenting opinions are not always a reliable guide to the meaning of the majority; often their predictions partake of Cassandra's gloom more than of her accuracy." *Loc. 1545, United Bhd. of Carpenters v. Vincent*, 286 F.2d 127, 132 (2d Cir. 1960). All the more so where, as here, the majority makes clear the dissent is misunderstanding its reasoning.

NJT also overstates any variance in terms of how other courts weigh the treasury factor more broadly. True, different courts of appeals have sometimes characterized the treasury factor in divergent terms. But it is not correct to suggest that "the methodological split is well-trodden." Pet. 15. For example, NJT places then-Judge Kavanaugh's opinion in *Puerto Rico Port Authority* and the First Circuit's opinion in *Fresenius Medical Care* on opposite sides of the split. Pet. 14-15. Yet Judge Kavanaugh's opinion explained that it looked at the treasury factor "in much the same way as did Judge Lynch's thorough First Circuit opinion in *Fresenius Medical Care*." 531 F.3d at 874. And NJT points to no case from any of the courts of appeals that would have come out differently if the factors had been weighed as some other court supposedly weighs them.

2. Nor is the case-specific question of NJT's legal status worthy of certiorari. The New York Court of Appeals and Pennsylvania Supreme Court applied nearly identical legal tests. *See supra* at 8-9. And their disagreement on how those tests apply to NJT primarily turns on different readings of New Jersey statutes. There is no need for this Court to review how

state courts read state law. And, contrary to NJT's repeated rhetoric, there is no obvious on-the-ground problem with allowing the rulings below to stand.

a. The New York Court of Appeals and Pennsylvania Supreme Court agreed that one line of inquiry—the treasury factor—cut against NJT's immunity. *See* Pet. App. 17a-18a; *Galette* Pet. App. 20a. But they disagreed on the extent to which the other factors favored New Jersey. Each disagreement is solely about New Jersey state law. And indeed, each disagreement is easily explained by the fact that the plaintiff in the Pennsylvania case did not brief whether NJT is an arm of the state and thus did not present the relevant statutes to the Pennsylvania Supreme Court.[5]

Start with "how the State defines the entity and its functions." Pet. App. 13a. The New York court thought that "the State's own characterization of NJT conflicts somewhat as to whether it envisions NJT as

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[5] Instead of disputing NJT's claim that it is an arm of the state, the plaintiff argued that NJT had no immunity because "the negligent actions of its employee, bus driver, under New Jersey law are ministerial actions." *See* Br. for Appellee, *Galette v. NJ Transit*, No. 4 EAP 2024, 2024 WL 4453827, at *15 (Pa. June 27, 2024); *see also* Reply Br. for Appellant, *Galette*, 2024 WL 4453822, at *7-8 (Pa. July 26, 2024) ("NJ Transit respectfully submits that Galette's failure to respond to these questions, including whether NJ Transit is an arm of the State of New Jersey . . . supports reversal."). The Pennsylvania Supreme Court rejected that argument, reasoning that New Jersey's waiver of sovereign immunity for ministerial acts in New Jersey court does not "evince[] New Jersey's express consent to be sued in Pennsylvania courts pursuant to Pennsylvania law." *Galette* Pet. App. 24a. And the plaintiff does not renew that argument in this Court.

a separate corporation serving the public or an extension of the State," Pet. App. 14a, while the Pennsylvania court saw no such crosscurrents in New Jersey law, *Galette* Pet. App. 17a-18a.

Those different takeaways reflect the New York court's attention to the New Jersey Tort Claims Act, N.J. Stat. § 59:1-1 *et seq*. That statute governs tort claims against New Jersey public entities and so is obviously relevant to whether New Jersey law treats NJT as possessing the State's immunity to tort suits. And the text of the law indicates that New Jersey does *not* regard NJT as the State for this purpose. It provides that "'State' shall mean the State and any office, department, division, bureau, board, commission or agency of the State, but shall *not* include any such entity which is statutorily authorized to sue and be sued." *Id.* § 59:1-3 (emphasis added). And the Act expressly states that NJT may "[s]ue and be sued." *Id*. § 27:25-5. The Pennsylvania Supreme Court, by contrast, was not told about, and did not mention, the statute.

The New York and Pennsylvania courts similarly placed different weight on New Jersey's level of control over NJT. The New York Court of Appeals thought that this factor did "not weigh heavily in either direction," Pet. App. 17a, while the Pennsylvania Supreme Court believed that it "weigh[ed] heavily" in favor of immunity, *Galette* Pet. App. 17a. But that difference, too, is explained by the courts' divergent views of state law. The New York court focused on state statutes providing that NJT operate "independent of any supervision or control" by the Department of Transportation; requiring NJT board members to

act with "independent judgment"; and permitting NJT to manage its own day-to-day operations. Pet. App. 16a; *see* N.J. Stat. §§ 27:25-4, -4.1, 27:25-5. The Pennsylvania court mentioned only one of those statutes and did so only in passing—again, because the issue was not briefed to it. *See Galette* Pet. App. 18a.

In short, the New York and Pennsylvania decisions came to different conclusions because they focused the inquiry on different New Jersey statutes. Presented with further briefing on the state statutes of which it was apparently unaware, it is possible the Pennsylvania Supreme Court could reconsider its position and eliminate the split between the two state courts. Regardless, which New Jersey laws shine the most light on NJT's legal status is not "an important federal question." S. Ct. R. 10(b). All the more so because if New Jersey is unsatisfied with the outcome here, its political branches can amend New Jersey law to eliminate the statutory features that led the New York Court of Appeals to deny NJT interstate sovereign immunity.

b. NJT nonetheless insists that this Court should grant review because the conflicting New York and Pennsylvania rulings create "an untenable situation in which NJ Transit enjoys different immunity, across different state courts, depending on where otherwise identical conduct occurs." Pet. 15. That concern is overblown in multiple respects.

For starters, NJT never acknowledges that, under its preferred rule, it would *still* enjoy different immunity across different state courts. New Jersey has waived NJT's immunity for tort suits filed in New Jersey, subject to certain exceptions. Pet. 7; *see* N.J. Stat.

§ 59:1-3. So even if New Jersey prevailed in this Court, its buses would still be subject to different tort-liability regimes "at different points along the route." Pet. 2. NJT never explains why the status quo, in which it is also subject to tort litigation in New York but not in Pennsylvania, adds any additional complexity that is meaningful. Nor does it ever explain why New Jersey cannot solve this practical problem by opening its own courts to out-of-state residents injured by NJT.[6]

Moreover, as NJT itself stresses, splits of authority about the status of particular sub-governmental entities are not uncommon. NJT notes that, since 2016, "the First and D.C. Circuits come to conflicting answers on whether the Puerto Rico Ports Authority is an arm of the Commonwealth." *Galette* BIO 13. And it observes that, since 2015, "Kentucky's student-loan body has been found to be an arm of Kentucky within the Sixth Circuit, but not in courts within the Third." *Id.* These entities have managed whatever operational difficulties those divides entail for nearly a decade. NJT points to no reason it cannot do the same.

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[6] It is doubtful that New Yorkers and Pennsylvanians can currently sue NJT in New Jersey court for harms occurring outside of New Jersey. *See* Pet. App. 94a-96a, 102a-104a. The Appellate Division majority concluded that New Jersey venue rules would prohibit such a suit, *see* N.J. Ct. R. 4:3-2(a) (tort suit "against municipal corporations, counties, public agencies or officials" must be filed "in the county in which the cause of action arose"), and noted that NJT did "not challenge this assertion . . . or otherwise address it," Pet. App. 94a-95a.

II. The decision below is correct.

The New York Court of Appeals correctly held that NJT is not entitled to assert interstate sovereign immunity. Pet. App. 18a. That conclusion follows both from this Court's modern "arm of the state" precedent and from the older precedent reflecting the original understanding of state sovereignty.

1. As already explained, *see supra* at 8-10, courts across the country look to an overlapping set of factors to assess whether a state-created entity is entitled to the State's immunity. Those factors are drawn from this Court's decision in *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994), in which the Court considered whether the Port Authority Trans-Hudson Corporation was an "arm of the State" within the meaning of the Eleventh Amendment. *Id.* at 32-33. There, the Court explained that "[i]ndicators of immunity" include whether the State "structured" the entity "to enable it to enjoy the special constitutional protection of the States themselves"; whether the State wields "actual control" over the entity; and the entity's "actual financial independence." *Id.* at 43-44, 47, 49. None of those indicators aids NJT.

a. To start, New Jersey law makes clear that NJT is *not* the State of New Jersey. Its tort-liability statute is explicit that "'State' shall mean the State and any office, department, division, bureau, board, commission or agency of the State, but shall not include any such entity which is statutorily authorized to sue and be sued." N.J. Stat. § 59:1-3. NJT can "[s]ue and be sued," and so New Jersey law does not include it within the definition of "the State." *Id.* § 27:25-5.

NJT never acknowledges this fundamental problem with its immunity theory. Instead, it points to statutes and judicial decisions explaining that NJT is an "instrumentality of the State," N.J. Stat. § 27:25-4(a), that it serves an "essential public purpose," *id.* § 27:25-2(a), and that it is "a public entity," *Muhammad v. N.J. Transit*, 821 A.2d 1148, 1153 (N.J. 2003). *See* Pet. 25. All true, but all irrelevant: not every "state instrumentality may invoke the State's immunity." *Regents of Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997). And not every public entity or entity serving public purposes is entitled to immunity either; for example, municipalities fall outside of sovereign immunity's protections. *See Hess*, 513 U.S. at 43; *cf. Muhammad*, 821 A.2d at 1152-53 ("Public entity is not limited to the State or one of its subdivisions."). Rather, the question is whether the entity is "one of the United States." *Hess*, 513 U.S. at 43 (internal quotation marks omitted). The answer, under New Jersey law, is that NJT is not New Jersey itself.

b. New Jersey also lacks meaningful "control" over NJT. *Hess*, 513 U.S. at 47. Again, the best indicator is New Jersey law. NJT is directed by statute to be "independent of any supervision or control by the department [of transportation] or by any body or officer thereof." N.J. Stat. § 27:25-4(a). Its board members are to exercise "independent judgment in the best interest of [NJT], its mission, and the public." *Id.* § 27:25-4.1(b).

Consequently, while New Jersey's governor may "veto" NJT actions he dislikes, he lacks the authority to compel the board members to take any particular action. *See id.* § 27:25-4(f). And board members are

protected from removal except "for cause," meaning that the governor cannot simply replace them to compel the actions he desires. *Id.* § 27:25-4(b). In the federal context, this Court has observed that such for-cause-removal protection means that officials are not "meaningfully controlled" by politically accountable actors. *Seila Law LLC v. CFPB*, 591 U.S. 197, 225 (2020). The same is true in this case: NJT's board is not controlled by the State.

Here, too, NJT obscures the critical issues. It insists that NJT is subject to political control because the governor appoints members to the NJT board, even if he cannot remove them. Pet. 26. That is not how this Court analyzes the control question in the federal-government context. In that context, the "power of remov[al]" is also "essential" to establishing control. *Seila Law*, 591 U.S. at 214 (internal quotation marks omitted)). NJT gives no good reason why the same should not be true in this context.[7]

Nor does NJT's insistence that the power of veto is enough to establish control, and that the power of direction is not required, track the way the Constitution sensibly understands control in the federal context. *See* Pet. 26. As this Court has explained, quoting Alexander Hamilton, "[t]he power to superintend . . . must imply a right to judge *and direct*." *United States v. Arthrex, Inc.*, 594 U.S. 1, 19 (2021) (quoting 3 Works

[7] NJT stresses that this Court relied on the appointment power in *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995). *See* Pet. 26. But that case is not about Amtrak's "sovereign immunity from suit," but rather concerns whether Amtrak was subject to the First Amendment. 513 U.S. at 392.

of Alexander Hamilton 557 (J. Hamilton ed. 1850)) (emphasis added). If the governor cannot direct NJT to adopt his preferred policies, he does not control NJT.

Finally, NJT does not advance its case by pointing to powers it wields, like "police powers" and "eminent domain authority." Pet. 27. As it admits, those are powers that "municipalities typically exercise . . . as well." *Id.* Yet municipalities are not entitled to sovereign immunity. What's more, the Port Authority wields "police powers," possesses "eminent domain" authority and, like NJT, operates trains and transportation terminals. *See, e.g.*, N.J. Stat. § 32:1-35.9. But *Hess* held that the Port Authority is not entitled to sovereign immunity either. 513 U.S. at 30.

c. And then there is the treasury factor. As *Hess* explains, this factor reflects "the impetus" for sovereign immunity: preventing "the award of money judgments against the states." 513 U.S. at 48 (internal quotation marks omitted). NJT does not dispute that this factor cuts against its sovereign immunity, because New Jersey law provides that "[n]o debt or liability of [NJT] shall be deemed or construed to create or constitute a debt, liability, or loan or pledge of the credit of the State." N.J. Stat. § 27:25-17.

Instead, NJT launches an array of arguments for why the treasury factor does not deserve the weight the court below gave it. Those arguments fail. NJT argues, for example, that the treasury factor "fails[] to capture harms to each State's dignity and coequal status." Pet. 21. But dignity, as the State conceives of the concept, is not the sole touchpoint. *Hess* itself said that whether a suit threatens a State's "solvency" is a

concern that bears on the immunity analysis. 513 U.S. at 52. And regardless, it respects States' dignity to honor the choices they have made in structuring their governments. Because New Jersey has decided to distance itself from NJT's finances—as well as to specify in its own state code that NJT is not the State itself—it does not offend New Jersey's dignity to recognize the consequences of its choice.

NJT fares no better when it argues that New Jersey "bears financial responsibility" for NJT through subsidies and appropriations. Pet. 23. States subsidize and appropriate funds to "cities and counties" too, but those entities do not enjoy sovereign immunity. *Hess*, 613 U.S. at 47. That is why this Court has already held that "[t]he proper focus is not on the use of profits or surplus, but rather is on losses and debts." *Id.* at 51.

NJT's final argument is that the State would not "simply walk away from its public-transit system" if NJT's debts became overwhelming. Pet. 23. Perhaps not. But again, surely the same is true of Atlantic City, the Newark Public School District, or any number of other state-created entities. Those entities are practically important to New Jersey, just as NJT is. But that practical importance does not make them "one of the United States."

2. As a matter of original meaning, this case is even more straightforward. In persuasive concurrences, Judges Stephen F. Williams, Andrew Oldham, and Caitlin Halligan have explained that "[a]t the time of our founding, the existence of a separate legal person, with the capacity to sue and be sued, was precisely what set certain non-immune state entities

apart from the state itself." *Puerto Rico Ports Auth.*, 531 F.3d at 881 (Williams, J., concurring); *see Springboards to Educ.*, 62 F.4th at 188 (Oldham, J., concurring) (same); Pet. App. 23a n.1 (Halligan, J., concurring) (discussing argument).

Those jurists have found it "evident that at common law, both in England and the early American Republic, incorporated entities were not entitled to sovereign immunity." *Springboards to Educ.*, 62 F.4th at 191 (Oldham, J., concurring). "This rule applied regardless of whether the corporations were private or public and regardless of whether they exercised governmental functions." *Id.*

The first two centuries of this Court's case law are consistent with their historical conclusions. This Court long ago declared that "when a government becomes a partner in any trading company, it devests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen." *Bank of U.S. v. Planters' Bank of Ga.*, 22 U.S. (9 Wheat.) 904, 908 (1824). In *Lincoln County v. Luning*, 133 U.S. 529 (1890), the Court therefore explained that a county was subject to suit because "politically it is also a corporation created by, and with such powers as are given to it by, the State," such as the power to "sue and be sued in all courts in like manner as individuals." *Id.* at 530-31. And "*Lincoln County* was only one in a long train of cases holding that sovereign immunity does not extend to corporations that the sovereign (i.e., a state or the federal government) has created as separate legal persons." *Puerto Rico Ports Auth.*, 531 F.3d at 882 (Williams, J.,

concurring) (collecting additional cases); *see Springboards to Educ.*, 62 F.4th at 194-95 (Oldham, J., concurring) (same).

Not until 1977 (in a case involving Eleventh Amendment immunity, not interstate sovereign immunity) did this Court express openness to an immunity claim raised by a state-created corporation. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280-81 (1977). The Court did not analyze the prior, categorical precedents of this Court. And the Court eventually held in that case that the entity was not immune. *See id.* But subsequent decisions have assumed that corporations can be treated like States for immunity purposes. *See, e.g.*, *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 633 n.3 (1999). Still, no decision of this Court has ever squarely held that a state-created corporation, with the capacity to sue and be sued, can assert sovereign immunity. *Cf. Alden v. Maine*, 527 U.S. 706, 736-37 (1999) (reasoning that analysis of sovereign immunity cannot be controlled by silent assumptions in prior decisions about whether a state-created entity is amenable to suit). Much less has any modern case overruled or renounced *Planters' Bank*, *Lincoln County*, and the other opinions making clear that corporations are categorically not sovereigns.

There is no need in this case to choose between this Court's two lines of precedent, for both point in the same direction here. The original understanding of corporate separateness supports *Hess*'s holding—which the New York Court of Appeals followed in this case—that the treasury factor deserves significant

weight. But if (as NJT presumably believes) it matters here which line of cases the Court follows, the Court should repudiate *Mt. Healthy*'s dicta and apply "the old learning" in the Court's post-Founding cases that state-created corporations do not enjoy sovereign immunity. *Puerto Rico Port Auth.*, 531 F.3d at 881 (Williams, J., concurring).

That result would also capture the point, expressed in Chief Judge Wilson's separate opinion, that immunity is not proper for state-created entities engaging in purely commercial behavior. *See* Pet. App. 35a. The corporate form's limitations on liability enable profit-seeking activities that would not be possible otherwise. *Cf.* Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. Chi. L. Rev. 89, 94-97 (1985). New Jersey would not run buses into New York without shielding its treasury through a separately incorporated entity. So holding that corporations, by definition, lack sovereign immunity—as they did at the Founding—would also address the oddity of giving a state-created entity immunity for engaging in activities "indistinguishable from those customarily undertaken by private parties." Pet. App. 43a.

At a minimum, this Court should not deviate in the context of *interstate* sovereign immunity from the original understanding of sovereign immunity. As the Court explained in *Hyatt III*, the interstate context presents a "direct conflict between sovereigns." 587 U.S. at 246-47. Here, New York has a sovereign interest in protecting its citizens from tortious commercial behavior within its own borders. That interest should prevail, at least when another State engages in such

activity that is no different from what ordinary private businesses customarily do as well.

III. The Court should not grant certiorari in *Galette* alone.

If the Court were to disagree with the arguments above and believe one or both of the questions presented warrant review, it should reject NJT's suggestion (Pet. 11-13) to grant plenary review only in *Galette*. It should instead either grant such review in both cases or only this one.

There are several reasons why the Court should not grant review only in *Galette*. To start, the exceptionally thorough decisions below air views that are absent from the Pennsylvania Supreme Court's opinion in *Galette*. As noted above, the court below discussed aspects of the New Jersey statutory scheme that went unmentioned by the Pennsylvania court because they were not part of the case below. *See supra* at 12-14. And the decisions below include thoughtful majority, concurring, and dissenting opinions presenting a panoply of perspectives on the question presented. *See supra* at 3-7.

Furthermore, as set out above, this case involves more than just a theory of sovereign immunity based on "arm-of-the-state" factors. Respondents also endorse an alternative approach noted in Judge Halligan's concurring opinion, related to Chief Judge Wilson's concurrence in the judgment, and rooted in the original understanding of sovereignty. *See supra* at 20-23. For whatever reason, the petitioners in *Galette* have not raised that argument. If this Court chooses to consider either or both of the questions NJT raises,

it should have this historically-based argument in front of it as well.

Finally, this case has another important feature absent from *Galette*. Respondents here are suing not only NJT, but also petitioner Ana Hernandez, the driver of the bus that struck Jeffrey Colt. *See* Pet. App. 2a. According to NJT, "Hernandez's ability to invoke sovereign immunity as a defense in New York courts will [] rise and fall with NJ Transit's." Pet. 20. This is so, NJT argues, because New Jersey law requires that NJT indemnify Hernandez, *id.* at 19 (citing N.J. Stat. § 59:2-2(a)), and New Jersey, in turn, "bears financial responsibility" to NJT through subsidies and appropriations, *id.* at 23.

In the context of Eleventh Amendment immunity, that argument would be a nonstarter: In that setting, "an indemnification provision cannot, as a matter of law, extend sovereign immunity to individual employees who would otherwise not fall under its protective cloak." *Lewis v. Clarke*, 581 U.S. 155, 164-65 (2017). But NJT appears to believe that the rule should be different as to interstate sovereign immunity, Pet. 19—in other words, that who must pay any monetary judgment against an individual defendant should control whether the defendant is entitled to sovereign immunity.

That argument is hard to square with NJT's insistence elsewhere in its brief that the "treasury factor" should be of little consequence in sovereign-immunity analysis. *See supra* at 19-20. Either monetary liability is important (and thus NJT is not immune because New Jersey bears no monetary liability for

this claim), or it is not (and thus Hernandez is amenable to suit because she is indisputably not the State).

As noted above, the petition does not ask this Court to resolve whether Hernandez is entitled to sovereign immunity. Instead, petitioners merely seek a remand for further proceedings on that issue if this Court were to hold that NJT is entitled to such immunity. *See* Pet. 19-20. Respondents have no objection to that proposal. But this Court should not take up the question whether NJT is entitled to sovereign immunity without requiring petitioners to face and explain the considerable tension between their arguments in this case concerning the relevance of the treasury factor—especially because there is nothing at all unusual about a plaintiff suing both an employer and an individual employee for injuries. If anything, that is the norm, not the employer-only situation in *Galette*.

CONCLUSION

For the foregoing reasons, the Court should deny the petition. If, however, the Court believes either or both of the questions presented warrant review, it should not grant plenary review only in *Galette v. New Jersey Transit Corp.*, No. 24-1021.

Respectfully submitted,

Brian J. Shoot
Eric K. Schwarz
SULLIVAN PAPAIN BLOCK MCMANUS COFFINAS & CANNAVO P.C.
120 Broadway
27th Floor
New York, NY 10271

Jeffrey L. Fisher
Counsel of Record
Easha Anand
Pamela S. Karlan
STANFORD LAW SCHOOL SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081
jlfisher@stanford.edu

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