To be Argued by:
JOHN A. STONE
(Time Requested: 30 Minutes)

APL-2023-00060
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Appellate Division–First Department Case No. 2021-01180

Court of Appeals

of the

State of New York

JEFFREY COLT and BETSY TSAI,

Plaintiffs-Respondents,

– against –

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

Defendants-Appellants.

BRIEF FOR DEFENDANTS-APPELLANTS

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DISCLOSURE STATEMENT

Pursuant to 22 NYCRR § 500.1(f), Defendants-Appellants, New Jersey Transit Corporation ("NJ Transit") and Ana Hernandez, respectfully submit this Disclosure Statement. NJ Transit was established pursuant to the Public Transportation Act of 1979, N.J. Stat. Ann. §§ 27:25-1 through 27:25-24, to "acquire, operate and contract for transportation service in the public interest." NJ Transit has four subsidiary corporations, NJ TRANSIT Bus Operations, Inc., NJ TRANSIT Mercer, Inc., NJ TRANSIT Rail Operations, Inc., and NJ TRANSIT Morris, Inc.

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Appellate Division err in rejecting Defendants-Appellants' challenge to subject matter jurisdiction based on the constitutionally mandated defense of interstate sovereign immunity?

   Answer: Yes. The Appellate Division's decision is contrary to established United States Supreme Court precedent as set forth in *Franchise Tax Bd. of Cal. v. Hyatt*, 587 U.S. ___, 139 S. Ct. 1485 (2019).

2. Did the Appellate Division's Order contravene the Full Faith and Credit Clause of the United States Constitution by allowing Plaintiffs-Respondents' lawsuit to proceed against Defendants-Appellants in a sister state?

   Answer: Yes. The Full Faith and Credit Clause of the United States Constitution requires that states respect the laws of sister states and different treatment in similar circumstances is improper.

PRELIMINARY STATEMENT

State sovereign immunity has been a cornerstone of American law since our nation's inception. The doctrine mandates that states and their instrumentalities are immune from private suit without their consent and has been applied to dismiss claims against nonconsenting states in Federal as well as their own courts. In *Franchise Tax Bd. of Cal. v. Hyatt*, 587 U.S. ___, 139 S. Ct. 1485, 1490 (2019) ("*Hyatt III*"), the United States Supreme Court made clear that a state—including agencies and individuals that function as an arm of the state—cannot be sued in the courts of a sister state without its consent. *Hyatt III* expressly overturned *Nevada v. Hall*, 440 U.S. 410 (1979), which had premised interstate sovereign immunity on comity principles. In reversing course, the United States Supreme Court determined that interstate sovereign immunity was, in fact, a fundamental right embedded in the United States Constitution at the time of its framing. Thus, instead of having discretion on the issue, states are now obligated to recognize a sister state's sovereign immunity.

Relying on *Hyatt III*, Defendants-Appellants asked the Appellate Division to dismiss a personal injury action filed against them in New York. Although the Appellate Division correctly ruled that: (i) NJ Transit is an arm of the State of New Jersey, entitled to invoke interstate sovereign immunity; (ii) the New Jersey Tort Claims Act does not provide express consent to suit in another state; (iii) NJ Transit

did not waive sovereign immunity in the instant case; and (iv) NJ Transit employees sued in their official capacity are entitled to avail themselves of the doctrine, the Appellate Division concluded that Defendants-Appellants were not entitled to enforcement of their constitutionally-guaranteed right based on an incorrect belief that Plaintiffs-Respondents could not have brought their claim in New Jersey.[1] That was error.

As the dissent observed, even if the Appellate Division were correct that the action could not be maintained in New Jersey, that would have no bearing on the court's duty to honor NJ Transit's interstate sovereign immunity defense. Indeed, when reaching its decision in *Hyatt III*, the United States Supreme Court was fully cognizant that the action could not have been maintained in the non-forum state.

The Appellate Division's Order is directly contrary to the United States Supreme Court's holding in *Hyatt III* that interstate sovereign immunity is a fundamental constitutional right that bars suit against a state—or arm of the state—in a sister court. Defendants-Appellants now appeal to this Court.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to CPLR §5713 insofar as that provision enables the Appellate Division to grant permission to appeal its own interlocutory Order or Decision to this Court. The Order of the Appellate

[1] As detailed below, the Appellate Division misinterpreted New Jersey's venue rules.

Division dated May 24, 2022 involves substantial constitutional questions, including: (i) whether Defendants-Appellants were entitled to challenge subject matter jurisdiction based on the constitutionally mandated defense of interstate sovereign immunity established by the Supreme Court in *Hyatt III;* and (ii) whether the Appellate Division's Order contravenes the Full Faith and Credit Clause of the United States Constitution by allowing Plaintiffs-Respondents lawsuit to proceed against Defendants-Appellants in a sister state.

STATEMENT OF FACTS

The Accident

On February 9, 2017, Plaintiff-Respondent, Jeffrey Colt, was struck at a crosswalk on 40th Street in New York City by a NJ Transit bus operated by Defendant-Appellant, Ana Hernandez, within the scope of Ms. Hernandez's employment. (R. 6).[2]

The Underlying Action

On September 18, 2017, Plaintiff-Respondent, Jeffrey Colt, commenced suit in the Supreme Court, New York County, seeking recovery for injuries allegedly sustained in the accident. (R. 11). Defendants-Appellants immediately pled

[2] Numbers in parentheses preceded by the letter "R." refer to pages in the Appellate Record.

sovereign immunity and lack of jurisdiction in their Answer—defenses 2, 14, and 18. (R. 34, 37-38).

On July 15, 2020, Defendants-Appellants moved to dismiss the Complaint based on interstate sovereign immunity, as enunciated in the United States Supreme Court's decision in *Hyatt III*. (R. 42-80). The motion was filed before discovery concluded, before the Note of Issue was filed, and before trial. The trial court denied the motion on the mistaken grounds that, *inter alia*, *Hyatt III* permitted suit against a foreign state so long as New York's assertion of jurisdiction was consistent with the Full Faith and Credit Clause. (R. 6-9).

The Appeal to the Appellate Division

On July 6, 2021, upon appeal to the Appellate Division, Defendants-Appellants sought reversal of the trial court's Order. The Appellate Division, however, rejected Defendants-Appellants' request in *Colt v. N.J. Transit Corp.*, 206 A.D.3d 126 (1st Dep't 2022).

Notably, the Appellate Division determined that: (i) it had "previously held that NJ [Transit] is an arm of the State of New Jersey … entitled to invoke the doctrine of sovereign immunity" *Colt*, 206 A.D.3d at 128; (ii) the New Jersey Tort Claims Act is not "an express consent to suit in New York or any other sister State" *Id.*; (iii) NJ Transit "did not expressly and unambiguously waive the sovereign immunity defense" *Id.*; and (iv) NJ Transit "employees sued in their official capacity

are entitled to avail themselves of the doctrine." *Id*. Despite these determinations, which mandate dismissal under interstate sovereign immunity under *Hyatt III*, the Appellate Division nonetheless concluded that jurisdiction in New York was proper based on its misconception that Plaintiffs-Respondents could not have filed suit in New Jersey. *Id.* at 133.

The Appellate Division opined that the *Hyatt III* Court was focused on a "case-specific cost" analysis to support its reasoning, and did not address the issue at hand—the sovereign immunity defense as a trump to an individual's fundamental common law right to seek redress in a judicial forum for injuries inflicted by a tortfeasor. *Colt*, 206 A.D.3d at 132. In reaching its decision, the Appellate Division—applying the legal framework for forum non conveniens—found that "dismissal of this action . . . in the absence of any available judicial forum in New Jersey . . . is an affront to our sense of justice and cannot be countenanced." *Id*.

The dissent disagreed with the Appellate Division on various grounds, including but not limited to the following.

First, the dissent explained that *Hyatt III* had "'dramatically altered' the prior jurisprudence of state sovereign immunity by holding that 'the US Constitution does not permit a nonconsenting state to be sued in another state's Court.'" *Colt*, 206 A.D.3d at 134.

Second, the dissent highlighted that "[e]ven if the majority were correct in its reading of New Jersey's law of venue (which it is not), the majority fails to explain why it is New Jersey Transit's immunity from suit in New York under the United States Constitution, rather than the New Jersey [C]ourt [R]ule governing venue … that should give way to plaintiff's common-law right to a forum in which to seek a remedy." *Colt*, 206 A.D.3d at 137. To that end, the dissent expressed that the Appellate Division's argument "runs athwart the Supremacy Clause of the United States Constitution." *Id*.

Third, the dissent explained that "even if the majority were correct in believing that this action could not have been maintained in New Jersey, that would have no bearing on this Court's duty to honor New Jersey Transit's assertion of its sovereign immunity defense under the United States Constitution, as authoritatively construed by the United States Supreme Court in *Hyatt*." *Colt*, 206 A.D. at 142.

Fourth, the dissent noted that the claim in *Hyatt* could not have been maintained in the home state of the defendant because California had enacted a statute "immunizing the Board from liability for all injuries caused by its tax collection" *Colt*, 206 A.D. at 142 and highlighted that the Appellate Division was wrong in stating that the United States Supreme Court in *Hyatt* "did not address the dilemma of permitting California to have the action dismissed in Nevada based on the sovereign immunity defense and California's immunity from suit, which would

foreclose plaintiffs from suing defendants in California, essentially denying plaintiffs a forum to seek redress for the tortious conduct by California state actors." *Id.* at 142-43. In so doing, the dissent recognized that the United States Supreme Court, "in holding that the action had to be dismissed on the ground of sovereign immunity, was fully cognizant of the fact that the claim in *Hyatt* would not have been maintainable in California. Plainly, under *Hyatt*, whether a claim against a state actor could be maintained in that state has no bearing on the merits of the sovereign immunity defense to an action on the same claim in the courts of a different state." *Id.* at 143.

Fifth, the dissent indicated that the "majority also misunderstands the reason for the *Hyatt* Court's discussion of 'case-specific costs.'" *Colt*, 206 A.D.3d at 143.

> That discussion was part of the United States Supreme Court's consideration of the question of whether to overrule one of its own precedents (as it ultimately did in *Hyatt*) or, alternatively, to adhere to that precedent (which the Supreme Court majority believed to have been wrongly decided) as a matter of stare decisis. In deciding the instant appeal, this Court — the Appellate Division, First Department, Supreme Court of the State of New York — faces no such dilemma."

Id.

Finally, the dissent surmised that the interstate sovereign immunity issue having been authoritatively resolved by the United States Supreme Court in *Hyatt*,

> [I]t is our duty simply to apply the *Hyatt* holding to the case before us. Stated otherwise, there is no occasion for the majority to "resolve this issue" (i.e., whether to dismiss an action on the ground of sovereign immunity when the action cannot be maintained in the defendant

> sovereign's own courts), since that issue has already been resolved for us by the United States Supreme Court in *Hyatt*. Accordingly, the majority's discussion "analogizing [the present issue] to the legal framework for the forum non conveniens doctrine," and weighing the various factors that would have been considered upon a forum non conveniens motion, is completely beside the point. The State of New Jersey enjoys sovereign immunity from suit and has not consented to have its instrumentalities (such as New Jersey Transit) sued in New York. That should be the end of the matter, whether or not the majority chooses to characterize the result as "absurd."

Id.

Notice of Appeal/Proceedings Before this Court

By Notice of Appeal, dated June 21, 2022, Defendants-Appellants appealed to this Court. (R. 649). Pursuant to CPLR § 5713, this Court granted NJ Transit's leave to appeal to the Appellate Division's interlocutory order and "certifie[d] that the following question of law, decisive of the correctness of its determination, has arisen, which in its opinion ought to be reviewed by the Court of Appeals: Was the order of Supreme Court, as affirmed by this Court, properly made?" and "further certifie[d] that its determination was made as a matter of law and not in the exercise of discretion." (R. 649).

ARGUMENT

POINT I.

INTERSTATE SOVEREIGN IMMUNITY BARS PLAINTIFFS-RESPONDENTS' CLAIMS

A. Interstate Sovereign Immunity Is a Fundamental Constitutional Right

State sovereign immunity bars claims by private citizens against state governments and their agencies, except where Congress has validly abrogated that immunity or the state has waived its immunity. *Alden v. Maine,* 527 U.S. 706 (1999). Immunity from suit is a fundamental aspect of sovereign immunity that the states enjoyed before the United States Constitution was ratified. *Hyatt III*, 139 S. Ct. at 1492.[3] "[A]s the [United States] Constitution's structure, and its history, and authoritative interpretations by [the United States Supreme] Court make clear, the states' immunity from suit is a fundamental aspect of the sovereignty which the states enjoyed before the ratification of the [United States] Constitution, and which they retain today." *Alden*, 527 U.S. at 713. Indeed, the Founders assured the citizenry that state sovereign immunity would remain intact.

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the Union.

[3] As explained *infra*, the *Hyatt* matter was brought before the United States Supreme Court on three separate occasions.

Id. at 716-17 (quoting The Federalist No. 81).

The sovereign immunity defense involves broader immunity than that granted by the Eleventh Amendment of the United States Constitution. *See Beaulieu v. Vt.*, 807 F.3d 478 (2d Cir. 2015). Eleventh Amendment immunity protects states from claims for damages brought by private entities in federal courts. It limits the federal judiciary's Article III powers to adjudicate cases. *See Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 54 (1996); *Woods v. Rondout Valley Cent. Sch. Dist. Bd. of Educ.*, 466 F.3d 232, 240 (2d Cir. 2006). Interstate sovereign immunity, however, grants immunity to states in all private suits, whether in state or federal court. *Hyatt III*, 139 S. Ct. at 1492; *Alden*, 527 U.S. at 713.

In 1998, Plaintiff, Gilbert Hyatt, filed suit in Nevada against the Franchise Tax Board of California ("FTB"), a California agency, for torts relating to a tax audit by FTB. FTB countered that under the Full Faith and Credit Clause of the United States Constitution, Nevada was required to apply California law that immunized that agency from suit. The Nevada Supreme Court declined to apply California law.

In *Hyatt I*, *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488 (2003), the United States Supreme Court held that the Full Faith and Credit Clause did not forbid Nevada from applying its own immunity law where California law provided immunity for all injuries committed in the tax collection, while Nevada provided immunity for negligence but not intentional torts. *Id.* at 499.

Following a Nevada state court trial, a jury found the California agency liable and awarded significant damages. The California agency appealed. The Nevada Supreme Court rejected most of the damages, but affirmed a one-million-dollar judgment on some of the counts despite the fact that damages for those same counts would be capped at $50,000 for Nevada state agencies.

In *Hyatt II*, *Franchise Tax Bd. of Cal. v. Hyatt*, 578 U.S. 171, 136 S. Ct. 1277 (2016), the United States Supreme Court held that the Full Faith and Credit Clause required Nevada to apply the same liability cap to the judgment against FTB that it would have applied to its own state agencies. In reaching this decision, the *Hyatt II* Court reasoned that the United States Constitution does not permit Nevada to disregard its own law and imposed damages against a sister state agency, that are greater than it could award against a Nevada agency "in similar circumstances." *Id.* at 176, 180. Both *Hyatt I* and *II* addressed the state's exercise of comity in whether to recognize another state's sovereign immunity.

In *Hyatt III*, the United States Supreme Court held that "a nonconsenting state cannot be sued in the courts of another state." 139 S. Ct. at 1492. Interstate sovereign immunity grants immunity to states or arms of state in all private suits, whether in state or federal court. *Id.* The United States Supreme Court overturned *Nevada v. Hall*, 440 U.S. 410 (1979), a decision that held that interstate sovereign immunity was based upon comity and was not a constitutional right. In rejecting comity as the

basis for interstate sovereign immunity, the United States Supreme Court explained that interstate sovereign immunity was embedded in the Constitution at the time of its framing and is a fundamental right. *Id.* at 1496. The United States Supreme Court concluded that "stare decisis does not compel continued adherence to this erroneous precedent." *Id.* at 1498.

The United States Supreme Court explained that each "State's equal dignity and sovereignty under the Constitution implies certain constitutional limitations on the sovereignty of all sister states." 139 S. Ct. at 1497. "One such limitation is the inability of one State to hale another into its courts without the latter's consent. The Constitution does not merely allow States to afford each other immunity as a matter of comity; it embeds interstate sovereign immunity within the constitutional design." *Id*. In other words, the United States "Constitution implicitly strips States of any power they once had to refuse each other sovereign immunity[.]" *Id.* at 1498. Instead of each state exercising its discretion on whether to recognize a sister state's sovereign immunity, each state is now obligated to recognize the other's sovereign immunity. *Id.* at 1492.

Numerous state courts have dismissed suits based on *Hyatt III*, including claims against NJ Transit. *See, e.g., Farmer v. Troy Univ.*, 879 S.E.2d 124, 126 (N.C. 2022) (an Alabama university was entitled to sovereign immunity); *see also*, *e.g.*, *State v. Great Lakes Minerals, LLC*, 597 S.W.3d 169 (Ky. 2019) (Ohio agency and

Ohio public official were entitled to sovereign immunity); *Marshall v. Southeastern Penn. Transp. Auth., et al.*, --- A.3d ---, 2023 WL 4982166, No. 157 C.D. 2022 (Pa. Commw. Ct. Aug. 4, 2023) (NJ Transit was entitled to sovereign immunity); *Trepel v. Hodgins*, 183 A.D.3d 429 (1st Dep't 2020) (Arizona Board of Regents and an employee of the agency entitled to sovereign immunity); *Reale v. Conn.*, 218 A.3d 723 (Conn. App. Ct. 2019) (*sua sponte* dismissing matter against the State of Rhode Island).

Thus, Defendants-Respondents respectfully submit that because the United State Supreme Court has held that a nonconsenting state cannot be sued in a sister state without its consent, the Appellate Division's Order was error and should be reversed.

B. NJ Transit Is an Arm of the State of New Jersey

The Appellate Division correctly held that NJ Transit is an arm of the state. *Colt*, 206 A.D.3d at 128. This holding is well supported by New Jersey statutes and case law, as well as the case law of other jurisdictions. *See, e.g., Robinson v. N.J. Transit Rail Operations, Inc.*, 2019 U.S. App. LEXIS 3386 (3d Cir. Jan. 31, 2019); *Karns v. Shanahan*, 879 F.3d 504 (3d Cir. 2018);[4] *Dykman v. N.J. Transit Rail Operations, Inc.*, 685 F. Supp. 79, 80 (S.D.N.Y. 1988).

[4] Although *Karns* and its progeny involve Eleventh Amendment immunity (which pertains to states in federal court), the cases interpreting Eleventh Amendment immunity are instructive to appeals involving the defense of interstate sovereign

The New Jersey Legislature established NJ Transit pursuant to the Public Transportation Act of 1979, N.J. Stat. Ann. §§ 27:25-1 through 27:25-24, for the "essential public purpose" of "establish[ing] and provid[ing] for the operation and improvement of a coherent public transportation system in the most efficient and effective manner." N.J. Stat. Ann. § 27:25-2. The Department of Transportation is a principal department with the Executive Branch of the State of New Jersey, under the supervision of the Governor. *See* N.J. Stat. Ann. § 27:1A-2. NJ Transit is established within the Department of Transportation. *See* N.J. Stat. Ann. § 27:25-4(a). NJ Transit was established as a part of New Jersey's executive branch of government as "an instrumentality of the State exercising public and essential governmental functions." *Id*. The New Jersey Legislature determined that the establishment of a public transportation system was "an essential public purpose which promotes mobility, serves the needs of the transit dependent, fosters commerce, conserves limited energy resources, protects the environment and promotes sound land use and the revitalization of our urban centers." N.J. Stat. Ann. § 27:24-2(a).

Moreover, NJ Transit property is considered State property for tax purposes and is exempt from all state taxation. *See* N.J. Stat. Ann. § 27:25-16. NJ Transit also

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immunity. *Edelman v. Jordan*, 415 U.S. 651 (1974); *College Savings Bank v. FL Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675-78 (1999).

has the power of eminent domain[5] under N.J. Stat. Ann. § 27:25-13(a)(c)(1). Additionally, the definition of "state agency" in the Administrative Procedures Act encompasses NJ Transit, *see* N.J. Stat. Ann. § 52:14B-2(a), which is statutorily authorized to adjudicate contested cases and render final agency decisions. *See* N.J. Stat. Ann. § 27:25-5(e). Finally, NJ Transit police officers, like those of the New Jersey Division of State Police, have general police authority throughout New Jersey. *See* N.J. Stat. Ann. § 27:25-15.1(a) (granting NJ Transit police "general authority, without limitation, to exercise police powers . . . in all criminal and traffic matters at all times throughout the State . . . .").

When the New Jersey Legislature passed the Public Transportation act of 1979, it anticipated that NJ Transit would be dependent on funds from the Legislature to meet its operating deficits. *See* Senate Bill 3137, Public Transportation Act of 1979, Fiscal Note, June 8, 1979, at 1. Consistent with the understanding that NJ Transit would run at an operating deficit and be subsidized, Governor Byrne indicated that the "funds appropriated in the fiscal year 1980 budget for bus subsidies will be transferred to the Corporation." Governor Brendan T. Byrne, *Message on Signing the Public Transportation Act of 1979*, July 17, 1979, at

[5] The power of eminent domain is a "hallmark of state sovereignty." *Dep't of Envtl. Prot. v. Gloucester Envtl. Mgmt. Servs.*, 923 F. Supp. 651, 658 (D.N.J. 1995).

2. To this day, the New Jersey Legislature continues to appropriate substantial funds to NJ Transit annually to help cover its substantial operating deficit.

NJ Transit's classification as a state agency is also well established under New Jersey law. *See, e.g., Muhammad v. N.J. Transit*, 821 A.2d 1148 (N.J. 2003) (NJ Transit is "a public entity within the ambit of the [New Jersey Tort Claims Act]" and entitled to immunity); *N.J. Transit Corp. v. Borough of Somerville*, 661 A.2d 778 (N.J. 1995) ("Transit is the state's primary public transportation agency[.]"); *Simon v. Chicago Title Ins. Co.*, 833 A.2d 1110, 1112 (N.J. Super. Ct. App. Div. 2003) ("There the state agency [Transit] acquired property[.]"); *N.J. Transit PBA Local 304 v. N.J. Transit Corp.*, 675 A.2d 1180, 1181 (N.J. Super. Ct. App. Div. 1996 ("New Jersey Transit Corporation (Transit) is a state agency responsible for operating and improving public transportation in New Jersey [.]"); *Travelers Ins. Co. v. Transport of N.J.*, 497 A.2d 900, 902 (N.J. Super. Ct. Ch. Div. 1985) ("Transit is an alter ego of the State.").

In deciding whether an entity is an arm of the State, the United States Supreme Court considers the relationship between the sovereignty and the entity and the "essential nature and effect of the proceeding" in which the entity has been sued. *Regents of Univ. of Cal. v. Doe*, 519 U.S. 425, 429-30 (1997). The United States Supreme Court gives weight to the degree of state control over an entity and its classification under state law. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*,

429 U.S. 274 (1977). The central aim of sovereign immunity is the protection of the state's integrity. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 47-48 (1994).

United States Supreme Court precedent has made clear that the state treasury implication cannot be given more weight than other factors. *See, e.g., Fed. Maritime Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 766 (2002) ("While state sovereign immunity serves the important function of shielding state treasuries . . ., the doctrine's central purpose is to accord the states the respect owed to them as joint sovereigns."); *Regents of the Univ. of Cal.*, 519 U.S. at 431 (holding that "it is the entity's potential legal liability, rather than its ability or inability to require a third party to reimburse it, or to discharge the liability in the first instance, that is relevant," not a "formalistic question of ultimate financial liability."); *Hess*, 3 U.S. at 52-53 ("the States' solvency and dignity" are "the concerns . . . that underpin the Eleventh Amendment.").

Applying these factors, the Third Circuit held that NJ Transit is an arm of the State of New Jersey. *See Karns*, 897 F.3d at 519. To do so, it examined New Jersey's statutes and found that "NJ Transit is statutorily "constituted as an instrumentality of the State, exercising public and essential governmental functions." *Id.* at 517. The Third Circuit—reviewing New Jersey statutes to gauge the agency's degree of autonomy—found that, pursuant to N.J. Stat. Ann. § 27:25-4(b), NJ Transit is, *inter alia*, subject to the control of the Governor who "is

responsible for appointing the entire New Jersey Transit board, which is composed of members of the Executive Branch."[6] *Id.* at 518. In addition, NJ Transit is obligated to annually report its budget and condition to the Governor and New Jersey Legislature. *See* N.J. Stat. Ann. §27:25-20. Also, the Governor has authority to veto any and all actions taken by the Board, N.J. Stat. Ann. § 27:25-4(f), and the New Jersey Legislature retains authority to legislatively overrule proposed acquisitions. *See* N.J. Stat. Ann. § 27:25-13(h). As a result, the Third Circuit concluded that "[a]ll of these facts suggest that NJ Transit is an instrumentality of the state, exercising limited autonomy apart from it." *Karns*, 879 F.3d at 518.

New York Federal courts also have deemed NJ Transit to be an arm of the State. *See Dykman*, 685 F. Supp. at 80; *Williamson v. N.J. Transit Rail Operations, Inc.*, 1987 U.S. Dist. LEXIS 115, *1-2 (S.D.N.Y. Jan. 9, 1987); *Brotherhood of Locomotive Engineers v. N.J. Transit Rail Operations, Inc.*, 608 F. Supp. 1216, 1217-18 (S.D.N.Y. 1985). More recently, the Commonwealth Court of Pennsylvania determined that NJ Transit was an arm of the state and entitled to dismissal per *Hyatt*

[6] NJ Transit is controlled by a seven-member Board appointed by the Governor. *See* N.J. Stat. Ann. § 27:25-4. The Board is composed of the Commissioner of Transportation and the State Treasurer (both of whom are cabinet-level officers within the Executive Branch); another member of the Executive Branch selected by the Governor; and four public members appointed by the Governor with the consent of the Senate. *See* N.J. Stat. Ann. § 27:25-4(b). As Chairman of the Board, the Commissioner of Transportation has power and duty to review NJ Transit's expenditures and proposed budget. *See* N.J. Stat. Ann. § 27:25-20(a).

III. Marshall, 2023 WL 4982166 at *3 n.8 and at *5 n. 14 ("[U]nder New Jersey law, NJ transit is a government entity that can invoke sovereign immunity.").

For all of these reasons, Defendants-Appellants respectfully submit that the NJ Transit is an arm of the State of New Jersey.

C. Defendants-Respondents Have Not Consented to Jurisdiction in New York

Waiver of sovereign immunity must be express and unambiguous. *Edelman v. Jordan*, 415 U.S. 651 (1974) (the United States Constitution forbids constructive or implied waivers of sovereign immunity). The United States Supreme Court has explained that, any purported "constructive consent" is not a doctrine associated with the surrender of constitutional rights, and waiver of a constitutionally protected right will only be found "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." *Id.* at 673 (citing *Murray v. Wilson Distilling Co.*, 213 U.S. 151 (1909)); *see also College Savings Bank*, 527 U.S. at 675-78.

Here, as the Appellate Division correctly found, there was no such consent or waiver. Indeed, NJ Transit raised sovereign immunity as a defense from the outset. And, as the Appellate Division rightly recognized, although the New Jersey Tort Claims Act allows for suit against public entities in New Jersey, it does not provide consent to jurisdiction in New York or any other state. *Colt*, 206 A.D.3d at 129 (citing *Belfand v. Petosa*, 196 A.D.3d 60, 69 (1st Dep't 2021)).

D. The Appellate Division's Order Was Error

Despite the above findings and the United States Supreme Court's decision in *Hyatt III* that private citizens cannot sue state agencies in a sister court, the Appellate Division wrongly concluded that this case should proceed in New York. *Colt,* 206 A.D.3d at 128. In reaching its decision, the Appellate Division misinterpreted New Jersey's Court Rules—specifically its venue rules—as preventing Plaintiffs-Respondents from filing suit in New Jersey. *Id.* at 130. In addition, the Appellate Division's apparent decision to apply a *forum non conveniens* analysis as opposed to the United States Supreme Court's direction concerning interstate sovereign immunity was improper.

1. Venue Rules

A state's issuance, interpretation and application of its courts' procedures, including venue requirements, is an inherent and indispensable part of that state's sovereignty. *See, e.g., Johnson v. Fankell*, 520 U.S. 911, 923 n. 13 (1997) ("it is a matter for each State to decide how to structure its judicial system").

New Jersey Rule of Court 4:3-2 (a) provides as follows:

> Venue shall be laid by the plaintiff in Superior Court actions as follows: (1) actions affecting title to real property or a possessory or other interest therein, or for damages thereto, or appeals from assessments for improvements, in the county in which any affected property is situate; (2) actions not affecting real property which are brought by or against municipal corporations, counties, public agencies or officials, in the county in which the cause of action arose; (3) except as otherwise provided by . . . the venue in all other actions in the Superior Court shall

> be laid in the county in which the cause of action arose, or in which any party to the action resides at the time of its commencement, or in which the summons was served on a nonresident defendant; and (4) actions on and objections to certificates of debt for motor vehicle surcharges that have been docketed as judgments by the Superior Court Clerk pursuant to N.J.S.A. 17:29A-35 shall be brought in the county of residence of the judgment debtor.

Although venue is an important aspect of the administration of justice in New Jersey, as a matter of law, it is *not* jurisdictional. *N.J. Thoroughbred Horseman's Assoc. v. N.J.*, 791 A.2d 320, 326 (N.J. Ch. Div. 2001).

Contrary to the clear language of this Court Rule, the Appellate Division accepted Plaintiffs-Respondents' argument that they could not bring suit in New Jersey because Rule 4:3-2(a)(2) requires suits against municipal corporations to be in the county in which the cause of action arose. *Colt*, 206 A.D.3d at 130. This argument, however, is premised on the erroneous assumption that NJ Transit is a municipal corporation, which it is not. Rather, it is an arm of the State. *Id.* Moreover, as noted above, New Jersey's venue rules are not jurisdictional and do not preclude suit. The New Jersey Superior Court "maintains statewide jurisdiction." *N.J. Thoroughbred Horseman's Assoc.*, 791 A.2d at 136. As a result, "while the proper location of venue remains an important aspect of the administration of justice, it does not rise to the level of jurisdictional debate," and, therefore, the requirement that a lawsuit be venued in the county where the cause of action arose "applies only if . . . the cause of action arises in the county where the governmental body is located." *Id*.

2. Forum Non Conveniens

Theorizing that Plaintiffs-Respondents could not be sued in New Jersey, the Appellate Division utilized a forum non conveniens analysis to retain jurisdiction over the case in New York. *Colt,* 206 A.D. 3d at 132. This analysis was likewise improper. Indeed, as explained by the dissent, "even if the majority were correct in believing that this action could have not been maintained in New Jersey, that would have no bearing on this Court's duty to honor New Jersey Transit's assertion of its sovereign immunity defense under the United States Constitution, as authoritatively construed by the United States Supreme Court in *Hyatt*." *Id*. at 142. Simply put, the Appellate Division's implementation of this analysis conflicts with the holding of the United States Supreme Court in *Hyatt III* that interstate sovereign immunity is a fundamental constitutional right that bars suit against a state or arm of the state in another state's courts.

E. Appellate Division Decisions Regarding Waiver Are Inapplicable

Defendants-Appellants acknowledge that the Appellate Division has recently weighed in on other lawsuits brought by individuals against NJ Transit. *See, e.g.*, *Henry v. N.J. Transit Corp.*, 195 A.D.3d 444 (1st Dep't 2021), *app. dism'd*, 2023 N.Y. LEXIS 495 (March 21, 2023); *Belfand*, 196 A.D.3d at 60; *Fetahu v. N.J. Transit Corp.*, 197 A.D.3d 1065 (1st Dep't 2021); *Taylor v. N.J. Transit Corp.*, 199 A.D.3d 540 (1st Dep't 2021). As demonstrated below, the Appellate Division

rejected the defense of interstate sovereign immunity because it found that NJ Transit's affirmative litigation conduct constituted the waiver of sovereign immunity. These cases are inapplicable because there has been no affirmative litigation conduct that would constitute the waiver of sovereign immunity.

In *Henry*, the Appellate Division concluded that NJ Transit's litigation conduct amounted to a waiver of the defense of sovereign immunity. 195 A.D.3d at 444. This Court dismissed the appeal on the ground that NJ Transit did not preserve its argument that interstate sovereign immunity barred suit because it did not raise the argument in the trial court. *Henry v. N.J. Transit Corp.*, 2023 N.Y. LEXIS 495 (Court of Appeals March 21, 2023). In *Belfand*, although the Appellate Division held that the New Jersey Tort Claims Act did not provide consent by New Jersey to be sued in New York, the Court decided that NJ Transit's litigation conduct in New York was an abandonment of a known right. 196 A.D.3d at 69. In *Fetahu*, NJ Transit raised sovereign immunity six (6) years after the action was commenced in New York. The Appellate Division found that NJ Transit waived its sovereign immunity defense by engaging in litigation conduct that amounted to an "inescapably [] clear declaration to have [New York] courts entertain this action." 197 A.D.3d at 1065. Finally, in *Taylor*, the Appellate Division found that NJ Transit's 15-month delay from the commencement of the action to its motion to dismiss based upon sovereign immunity constituted a waiver of sovereign immunity. 199 A.D.3d at 541.

These decisions are inapposite because, here, NJ Transit asserted sovereign immunity at the outset of the litigation. Moreover, sovereign immunity is based on the Court's subject matter jurisdiction, and may be raised at any time—including for the first time on appeal. *See, e.g.*, *Goffredo v. City of New York*, 2007 N.Y. App. Div. LEXIS 5975 (1st Dep't 2007); *Morrison v. Budget Rent a Car Systems, Inc.*, 230 A.D.2d 253 (2d Dep't 1997).

In *Goffredo*, the petitioner raised a preemption challenge for the first time in his motion to reargue the Appellate Division's order affirming the lower court. Despite not having raised the preemption challenge at the trial level or even in the initial appellate briefing, the Appellate Division granted re-argument, finding that the constitutional challenge spoke to subject matter jurisdiction: "[a] judgment or order issued without subject matter jurisdiction is void, and that defect may be raised at any time and may not be waived." *Goffredo*, at *2 (citing *Editorial Photocolor Archives v. Granger Collection*, 61 N.Y.2d 517, 523 (1984)).

Other Departments have followed suit. The Third Department specifically permitted the State of New York to raise the defense of sovereign immunity for the first time on appeal, following the conclusion of trial. *See Pollard v. State*, 173 A.D.2d 906 (3d Dep't 1991). Likewise, the Fourth Department permitted the State of New York to raise the issue of sovereign immunity for the first time on appeal. *See Heisler v. State*, 78 A.D.2d 767, 768 (4th Dep't 1980). The Fourth Department

permitted the defense "[s]ince sovereign immunity brings into question jurisdiction of the subject under the Court of Claims, it may be raised [by the State] at any time. *Id.* at 768. *Heisler* cited *Buckles v. State*, 221 N.Y. 418 (1917), in which the Court of Appeals permitted the State of New York to raise the defense for the first time at trial. *Id.* at 424. These long-standing cases allow sovereign immunity to be raised at any time.

Defendants-Appellants respectfully submit that since they properly raised interstate sovereign immunity—as enunciated by the United States Supreme Court in *Hyatt III*, at the outset of the litigation—the Appellate Division's rejection of Defendants-Appellants' challenge was error.

POINT II.

THE APPELLATE DIVISION'S ORDER CONTRAVENES THE FULL FAITH AND CREDIT CLAUSE

The Full Faith and Credit Clause states that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. Const. art. IV § 1.

In *Hyatt II*, the United States Supreme Court held that while the Full Faith and Credit Clause "does not require a State to substitute for its own statute . . . the statute of another State reflecting a conflicting and opposed policy," the decision by a state not to apply another state's statute on this ground must not evince a "policy of hostility to the public Acts of that other State." *Hyatt II*, 136 S. Ct. at 185. The United

States Supreme Court found a violation of the Full Faith and Credit Clause because Nevada had attempted to impose liability on the California agency above the statutory cap applicable to Nevada agencies. As the United States Supreme Court explained, Nevada had applied a "special rule of law applicable only in lawsuits against its sister states . . ." and thus "reflect[ed] a constitutionally impermissible policy of hostility to the public Acts of a sister State." *Hyatt II*, 136 S. Ct. at 1282-83 (internal quotation marks omitted).

Although the United States Supreme Court, after overturning *Hall*, vacated the judgment against FTB, its reasoning that Nevada's actions violated the Full Faith and Credit Clause as an impermissible policy of hostility to the acts of a sister state remains and supports the conclusion that the Appellate Division's ruling here also evinced hostility to a sister state and should be reversed.

The Full Faith and Credit Clause argument expressed in *Hyatt II* has been applied by other courts post *Hyatt III*. *See, e.g., Pittman v. Rutherford*, 2020 U.S. Dist. LEXIS 202837 (E.D. Ky. Oct. 30, 2020). In *Pittman*, the plaintiffs sought leave to amend their complaint to add Brown County, Ohio as a defendant. Their claims stemmed from alleged misrepresentations made by Brown County employees regarding the sexual abuse history of a foster child placed in their home. After the case was removed to federal court in Kentucky, the county defendants moved to dismiss the complaint on the ground that Brown County was immune from suit. The

District Court held that Brown County was immune from suit because Kentucky courts would defer to Ohio immunity law. *Id.* at *16-17. The court also determined that, even if Ohio law did not apply, the Full Faith and Credit Clause required Kentucky to find immunity because failing to do so would amount to an unconstitutional policy of hostility because Kentucky counties would be immune under these circumstances. *Id*. The District Court adopted the reasoning of the Supreme Court as expressed in *Hyatt II*. *Id*.

In *Hyatt III*, the United States Supreme Court also expressly recognized that a litigant's loss of a claim does not bar or limit a State's sovereign immunity from being "haled into" another State's Court.

> Because of our decision to overrule *Hall*, [Mr.] Hyatt unfortunately will suffer the loss of two decades of litigation expenses and a final judgment against the Board for its egregious conduct. But in virtually every case that overrules a controlling precedent, the party relying on that precedent will incur the loss of litigation expenses and a favorable decision below. Those case-specific costs are not among the reliance interests that would persuade us to adhere to an incorrect resolution of an important constitutional question.

Hyatt III, 139 S. Ct. at 1499. *See also Wichita & Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 777 (D.C. Cir. 1986) ("dismissing an action where there is no alternative forum" is "less troublesome" when dismissal is compelled by sovereign immunity because the loss of forum results not from "some procedural defect such

as venue" but from "the fact that society has consciously opted to shield [sovereigns] from suit without ... consent").

For these reasons, Defendants-Appellants respectfully submit that the Appellate Division's rejection of New Jersey Transit's interstate sovereign immunity defense was error because it runs afoul of the Full Faith and Credit Clause of the United States Constitution.

CONCLUSION

For all of the foregoing reasons, Defendants-Respondents respectfully request that this Court enter an Order reversing the Appellate Division's Order dated May 24, 2022, which affirmed the Trial Court's denial of Defendants-Appellants' motion to dismiss and dismiss Plaintiffs-Respondents' Complaint as against Defendants-Appellants.

Dated: New York, New York
August 28, 2023

DECOTIIS, FITZPATRICK, COLE & GIBLIN, LLP

By: _____

John A. Stone, Esq.

NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On August 28, 2023

deponent served the within: **Brief for Defendants-Appellants**

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Sworn to before me on August 28, 2023

Mariana Braylovskiy

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Qualified in Richmond County
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