To Be Argued By:
BRIAN J. SHOOT
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New York County Clerk's Index No. 158309/2017
Appellate Division, First Department Case No. 2021-01180

Court of Appeals

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 PLAINTIFFS-RESPONDENTS

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Preliminary Statement

Defendant New Jersey Transit (hereinafter "NJT") claims that it has a "fundamental right," "embedded in the United States Constitution," to come into New York, maim or even kill New Yorkers when it does so, violate New York's laws on New York soil, and destroy New York property … and then insist that its victims travel to New Jersey if they wish to seek redress or hold NJT accountable. App. Br. at 2-3. It has that "fundamental right," NJT maintains, because it is purportedly an "arm of the State [of New Jersey]" within the meaning of the Eleventh Amendment to the United States. App. Br. at 14-20.

NJT further argues that its employee bus driver, defendant Ana Hernandez, is also an "arm of the State," and that she too can violate New York's law on New York soil and then insist that her victims bring suit in New Jersey. App. Br. at 2-3.

Perhaps most remarkably of all, NJT maintains that, despite what this Court may have said not even a year ago in *Henry v New Jersey Tr. Corp.*, 39 NY3d 361, 372 [2023], its purportedly embedded right not to be held accountable in New York for anything it or its employees may do in New York deprives New York's courts of "subject matter jurisdiction," is not susceptible to waiver, "and may be raised at any time — including for the first time on appeal." App. Br. at 25.

NJT's arguments lack merit … for multiple reasons.

First, as is shown in Point I of this brief, NJT is simply not an "arm of the State" within the meaning of the United States Supreme Court's precedents. Nationwide, with only two very distinguishable exceptions, every other governmentally operated common carrier and transportation authority has been deemed *not* to be an 'arm of the State" in each case the question has arisen. And, while NJT obviously feels no particular need to divulge the existence of contrary case or even statutory authority, a Pennsylvania appellate court ruled earlier this very year that *this* defendant — New Jersey Transit — is also not an "arm of the state" for purposes of interstate immunity. *Galette v NJ Tran.*, 2023 PA Super 46, 293 A3d 649, 657-658 [Pa Super Ct 2023], *rearg denied* [May 30, 2023].

More than that, the New Jersey Tort Claims Act (L. 1972, c 45) — which is the law that governs the tort liability of all of New Jersey's "public entities"— *specifically defines* the term "State" to *exclude*, with the single exception of the Palisades Interstate Park Commission, any "agency of the State" "which is statutorily authorized to sue and be sued." NJSA § 59:1-3. And even the PIPC is authorized to call itself the "State" only with respect to the PIPC's "employees, property and activities within the State of New Jersey." NJSA § 59:1-3, emphasis added.

Second, as is demonstrated in Point II of this brief, even if NJT actually were an "arm of the State," such would not even arguably constitute a defense for the

defendant-driver under the governing federal law, a defendant who was here sued individually for her own negligence in causing the subject collision.

Third, and as is shown in Point III of this brief, New Jersey waived any immunity NJT could have otherwise claimed by, *inter alia*, a) expressly stating that each and every "public entity" in New Jersey stands liable in tort "in the same manner and to the same extent as a private individual under like circumstances" (NJSA § 59:2-2[a]), and, b) further requiring, without any listed exception, that any action not affecting real property brought against a public agency be commenced "in the county in which the cause of action arose" (NJ Rule of Court 4:3-2[a]).

Fourth, as is noted in Point IV of this brief, even entities that actually are "arms of the State" within the meaning of the Eleventh Amendment will waive their interstate immunity by failing to timely assert it, and NJT plainly waived the immunity it claims to possess by first asserting its alleged right to evade New York's jurisdiction almost three years into the case, and only after multiple court conferences and depositions.

Finally, with respect to the NJT's argument that failure to allow it to maim New Yorkers without ever be held accountable in a New York court would somehow contravene the Full Faith and Credit Clause of the United States Constitution (App. Br. at 26-29), it is the result defendants now seek that would contravene the Full Faith and Credit Clause. This is because *there is no New Jersey statute* or *even any New Jersey common law* which, a) accords either of the defendants immunity, or, b) provides that either of

these defendants can be sued only in New Jersey. But there are two very real New Jersey statutes which provide:

> 1) public entities are liable "in the same manner and the extent as a private individual under like circumstances" (NJSA § 59:2-2, subd. (a), quoted in full below), and,
>
> 2) with the sole exception of the PIPC, the term "State" "shall not include" any office, department or agency of the State "which is statutorily authorized to sue and be sued" (NJSA § 59:1-3, quoted in pertinent part below).

It is only by *failing* to credit those actually existent statutes, and others as well, that one can conclude that NJT is "one of the United States" within the meaning of the Eleventh Amendment and thereby immune from suit in New York.

Questions Presented

1. Is Defendant New Jersey Transit an "arm of the State," and thus entitled to be sued absent consent only in its home state, within the meaning of the Eleventh Amendment to the United States Constitution?

Plaintiffs submit the answer should be No. Point I, *infra*.

2. Assuming, *arguendo*, that New Jersey Transit is an "arm of the State," is its individually sued driver, defendant Ana Hernandez, also an "arm of the State"?

Plaintiffs submit the answer should be No. Point II, *infra*.

3. Did New Jersey, or NJT itself, affirmatively renounce any interstate immunity which NJT could have asserted?

Plaintiffs submit the answer is Yes. Point III, *infra*.

4. Assuming, *arguendo*, that the defendants actually had any immunity to waive at the inception of this action, did they do so by first asserting their claimed "interstate immunity" almost three years into the action?

Plaintiffs submit the answer is Yes. Point IV, *infra*.

Statement of Facts

The subject accident occurred in Manhattan, at the intersection of Dyer Avenue and 40th Street (R.134 [Hernandez], R.383-384 [Colt], R.470, 474 [Steel]), on the afternoon of February 9, 2017 (R.242).

Plaintiff Jeffrey Colt, And His Testimony Concerning The Subject Collision

Plaintiff Jeffrey Colt was and is an attorney (R.380). At the time of the accident, he was counsel for the Covenant House New York Homeless Youth Shelter (R.380).

Colt testified that he was walking from his office to a homeless mother-child shelter facility (R.382). He was walking east on the north side of 40th Street when he reached that street's intersection with Dyer Avenue (R.242, 382). The "Walk" signal was in his favor when he reached the corner (R.383).

Colt testified that he "stepped off the curb," "began to walk across the street," and "felt some sort of wallop" (R.383). He next remembered "waking up on the ground" (R.383), alongside one of the front tires of defendants' bus (R.388). He was thereafter taken to Bellevue Hospital, where the doctors diagnosed multiple fractures (R.395).

The Defendant-Driver's Testimony

Defendant Ana Hernandez said she had dropped her passengers off at the Port Authority bus terminal (R.129) and was scheduled to pick up a new load of passengers at the Port Authority (R.129), but the subject accident intervened (R.132-133).

Hernandez testified that she drove east on 40th Street to that street's intersection with Dyer Avenue (R.134). She waited for the light to turn green, and then began to turn left onto Dyer Avenue (R.134). She was "like halfway" through the turn when, "I heard a sound in the middle of the bus and I checked my left mirror and I saw a person on the ground" (R.134). She had not observed the pedestrian prior to the impact (R.151, 158).

Hernandez admitted that, because the light was green for her left-turning bus, the pedestrian necessarily had a "Walk" signal in his favor (R.142). She further admitted that, even after she had stopped, "around half" of the bus was "in front of the crosswalk" and "[t]he other half" was "behind the crosswalk" (R.145-146).

Hernandez contended the pedestrian was "about two feet" north of the crosswalk when she first saw him prone on the pavement (R.157-158). However, she conceded that, since she had not seen the pedestrian prior to the impact, she could not say if his body had been moved as a result of the impact (R.158).

Hernandez was, perhaps, less forthright with respect to one particular. Notwithstanding that NJT's own accident report said "the left side middle of the bus

struck a male pedestrian" (R.191), and notwithstanding that Hernandez admitted that it was the sound of an impact that caused her to stop (R.134, 151), Hernandez claimed, "I don't think any part of the bus struck him, to tell you the truth" (R.172). The story, evidently, was that the pedestrian must have coincidentally fainted, or perhaps suffered a heart attack or stroke, just as the bus passed (R.172-173) … and yet somehow sustained multiple fractures of his right foot (R.369-370, 395) as a result of *not* being struck by defendants' bus (R.172-173).

The Co-Worker's Testimony

The accident, or at least part of it, was witnessed by NJT bus driver Antwone Steel (R.476-477).

Steel testified he saw Hernandez begin her left turn after "[h]er light had obviously turned green" (R.477). Her bus "stopped very abruptly," for some reason, "during the turn" (R.484) Steel said he first saw the pedestrian, prone on the pavement on the left side of the bus, only after the bus had stopped (R.488, 498-499).

Steel initially claimed that the pedestrian was "maybe 50 feet or more" beyond the crosswalk when he first saw the pedestrian prone in the roadway (R.525). He then decided it was more like "5 to 10 feet" north of the crosswalk (R.526-527). However, Steel had to admit that, having not observed the pedestrian prior to the collision, he could not say whether the pedestrian was in the crosswalk prior to the subject collision (R.527).

The Proceedings Below

Commencement Of the Action, And The Defendants' Motion For Summary Judgment … Almost Three Years Later

Plaintiffs commenced this action on September 18, 2017 (R.10-18). Defendants ultimately moved for dismissal in July of 2020, almost three years later (R.42-57).[1]

Defendants therein declared that NJT was "Part of the State of New Jersey" and that "a State may not be sued in the courts of another State" (R.50). The defendants' cited authority for those claims was the Third Circuit's ruling in *Karns v Shanahan*, 879 F3d 504 [3d Cir 2018].

With respect to defendant-driver Hernandez, defendants argued that "Hyatt and its progeny" — referring to the Supreme Court's ruling in *Franchise Tax Bd. of California v Hyatt*, 139 S Ct 1485, 203 L Ed 2d 768 [2019] (hereinafter *Hyatt III*) — required "that a defendant State's immunity from suit in a sister State's court applies to that defendant State's employees" (R.51). In reality, the Supreme Court made no such ruling, either in *Hyatt III* or in any other case, and has instead said the very opposite. *See* Point II, *infra*.

As for the fact that defendants were moving to dismiss almost three years after commencement of the action, defendants proclaimed that "[]l]ack of subject matter jurisdiction may not be waived" (R.56).

[1] What occurred between plaintiffs' commencement of the action and defendants' motion to dismiss is detailed in Point IV of this brief.

Plaintiffs' Opposition, In The Proverbial Nutshell

In opposing defendants' motion, plaintiffs demonstrated, amongst other points:

1) defendant NJT was not "the State" because, amongst other reasons, the New Jersey Tort Claims Act *specifically provided* that public entities with the power to sue and be sued are *not* "the State" (citing NJSA § 59:1-3) (R.88-89),

2) plaintiffs could not have brought suit in New Jersey even if they had wanted to do so inasmuch as New Jersey law requires that suit against "public agencies" be commenced in the county in which the cause of action arose (R.88-89, citing NJ Rule of Court § 4:3-2[a]), and,

3) defendants should, in any event, be estopped from contending that they were immune from suit inasmuch as they had "vigorously litigated the case for nearly 3 years" before asserting such immunity (R.93).

Supreme Court's Ruling

Defendants' motion was heard and denied by the Honorable Adam Silvera (Supreme Court, New York County). Justice Silvera concluded that defendants' argument was "unavailing as the facts of this case are not analogous to that of *Franchise* [*Hyatt III*]" (R.7). Amongst other differences, *Hyatt* was a case in which the defendants "fought jurisdiction in Nevada from the inception of the suit," whereas this was a case

in which it had "taken defendants three years to raise a jurisdictionally based objection" (R.8-9).

Justice Silvera added that "[t]o hold NJT immune from suit for negligence in motor vehicle accidents in New York would constitute a miscarriage of justice to the victims of accidents involving NJT vehicles, which operate in New York on a daily basis" (R.8-9).

The Appellate Division's Rulings In The NJT Cases Which Preceded That Court's Ruling Herein

Unfortunately, this was not the first of the recent wave of "NJT" cases to reach the Appellate Division. Still more unfortunately, NJT's claim that it was an "arm of the State" was not contested in either of the first two NJT cases to reach the Appellate Division. Nor did the plaintiffs in any of those cases challenge NJT's legally unsupportable thesis that "arm of the State" immunity extends not only to the purported "arm of the State" but also to its individually sued employees. Nor did NJT's appellate briefs in any of those cases disclose that it is, in fact, statutorily excluded from calling itself the "State." NJSA § 59:1-3.

So, while NJT lost each and every one of the First Department's NJT rulings which preceded the ruling herein, it did so on other grounds, essentially on the ground that it had waived its purported interstate immunity. *Henry v. New Jersey Tr. Corp.*, 195 AD3d 444, 445 [1st Dept 2021], *appd. dsmd.*, 39 NY3d 361 [2023]; *Belfand v Petosa*, 196

AD3d 60, 61, 72-73 [1st Dept 2021]; *Fetahu v New Jersey Tr. Corp.*, 197 AD3d 1065, 1065-1066 [1st Dept 2021]; *Taylor v New Jersey Tr. Corp.*, 199 AD3d 540, 541 [1st Dept 2021]; *but see Nimzomov v Jones*, 2023 WL 6853989 [2d Dept October 18, 2023] (post-*Colt*, holding that NJT did not waive interstate immunity -- without in any way acknowledging this Court's ruling in *Henry*).

As the Court knows, one of those precursor NJT rulings ended up in this Court … briefly. In *Henry*, 39 NY3d 361, wherein NJT contended that its alleged interstate immunity went to "subject matter jurisdiction" and therefore could be raised at any time, this Court ruled by 4 to 2 vote that,

> a) "[t]he history and nature of interstate sovereign immunity guide us to the conclusion that the doctrine more closely aligns with jurisdiction over a party, rather than over all subject matter concerning that party" (39 NY3d at 372),
>
> b) the defense therefore could be waived, and was "waivable based on litigation conduct" (*id.* at 371-372),
>
> c) the defense was, in consequence, subject "to the general preservation requirement" (*id.* at 372), and,
>
> d) NJT's claim of sovereign immunity therefore could not be heard (*id.* at 373).

Having held that the Court could not entertain the only issue in the appeal, the *Henry* majority reached no other issue.

In contrast, while the two dissenters also declined to address whether NJT actually had any immunity in the first instance,[2] they would have ruled that "[t]o the extent that NJT might be entitled to a sovereign immunity defense, it and the state of New Jersey consented to New York jurisdiction in three ways … First, NJT waived sovereign immunity by its litigation conduct … Second, NJT waived any claim of sovereign immunity it might have had by operating a multimillion-dollar business within the State of New York. Third, the state of New Jersey waived any sort of sovereign immunity defense on NJT's behalf by subjecting it to liability in New Jersey." *Henry*, 39 NY3d at 389 (Dissent).[3]

Yet, while NJT's quest for immunity foundered in *Henry* and all of the other cases which reached the Appellate Division before the case at bar, its basic claim that it was an "arm of the State," which could therefore be sued only in New Jersey absent New Jersey's consent or NJT's waiver of its alleged immunity, went essentially unchallenged. In *Belfand*, the Appellate Division said, in a footnote, "plaintiff concedes that New Jersey Transit is 'an arm of the state.'" *Belfand*, 196 AD3d at 63 n.2. By the time *Fetahu* was

[2] The dissent noted: "Neither the majority nor my dissent addresses whether NJT is entitled to sovereign immunity at all." *Henry*, 39 NY3d at 376 n.1.

[3] To be clear, the *Henry* majority did not disagree with any of those conclusions. It simply did not reach those issues.

decided two months later, this had progressed to the one-sentence statement that NJT "is an 'arm of the State,'" for which the Court cited the Third Circuit ruling in *Karns*, 879 F3d 504 and nothing else. *Fetahu*, 197 AD3d at 1065-1066.

At no point in any of its NJT rulings did the Appellate Division indicate, a) it had any inkling that the great majority of governmentally operated common carriers and transportation authorities had been held *not* to be "arms of the State," b) it was aware that New Jersey had, by statute, specifically provided that, with the sole exception of the PIPC, any entity that can sue and be sued was *not* to be treated as "the State" (NJSA § 59:1-3), or, c) it had any idea that New Jersey has *expressly disowned* any and all responsibility for NJT's debts and liabilities (NJSA § 27:25-17).

The Appellate Division kept that streak intact in its ruling in the case at bar.

The Appellate Division's Ruling Herein

The Appellate Division here ruled by 3 to 2 vote that defendants had waived their immunity defense. *Colt v New Jersey Tr. Corp.*, 206 AD3d 126, 131-132 [1st Dept 2022].

The majority observed that New Jersey law required suit to be brought in the county in which the cause of action arose. The Court added that NJT's "litigation conduct and strategy in this action and in *Taylor*, *Fetahu*, *Henry* and *Belfand*" had convinced it that NJT would "vigorously object to any litigation in New Jersey for injuries arising outside of New Jersey," that such would leave "our plaintiffs and other

similarly situated plaintiffs are without a judicial forum," and that such an "absurd result" would constitute "an affront to our sense of justice and cannot be countenanced." *Colt*, 206 AD3d at 131, 133.

The Appellate Division dissenters charged that the majority's assumption that the action could not have been venued in New Jersey was "strange," "flatly wrong" and "erroneous" (*Colt*, 206 AD3d at 135-136, 139-140, 142) and, at least three different times, that the venue limitation was in any case not "jurisdictional" (*id.* at 136, 139, 141-142).

One may wonder what the dissenters would have said had they known — which they plainly did not — that the same party-defendant which here urges that the venue provision is inapplicable to NJT (App. Br. at 22) and is in any event "not jurisdictional" (*id.*) has elsewhere argued — *successfully* argued — that the venue provision *does* apply to NJT and *is* jurisdictional. *See* pages 68 to 69, *infra*.

The Pertinent New Jersey Statutes

All of the New Jersey statutes that are cited in this brief are here collected and quoted in relevant part.

New Jersey Tort Claims Act

The tort liability of all "public entities" in New Jersey is governed by the New Jersey Tort Claims Act (NJSA § 59:1.1 *et. seq.*) which was enacted in 1972. L. 1972, c. 45.

NJSA § 59:1-3 defines the terms "Public entity" and "State" as follows:

> **NJSA 59:1-3. Definitions**
>
> As used in this subtitle:
>
> * * *
>
> "Public entity" includes the State, and any county, municipality, district, public authority, public agency, and any other political subdivision or public body in the State.
>
> "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. "State" also means the Palisades Interstate Park Commission, but only with respect to employees, property and activities within the State of New Jersey.
>
> Emphasis added.

NJSA § 59:2-2, entitled "Liability of public entity," provides in pertinent part:

> **59:2-2. Liability of public entity**
>
> a. A public entity is liable for injury proximately caused by an act or omission of a public employee within the scope of his employment in the same manner and to the same extent as a private individual under like circumstances.

Emphasis added.

NJSA § 59:9-1, entitled "Manner of Trial," states:

> **59:9-1. Manner of Trial**
> Tort claims under this act shall be heard by a judge sitting without a jury or a judge and jury where appropriate demand therefor is made in accordance with the rules governing the courts of the State of New Jersey.

NJSA § 59:8-7 sets the requirements "for presentation of claim" — that is, what New York calls the Notice of Claim — all depending on whether the claim is, 1) "against the State," or, 2) against a "public entity" other than "the State." If the former, the claim must be filed with the Attorney General or "the [State] department or agency involved in the alleged wrongful act or omission." If the latter, the claim must be filed with the applicable "public entity."

New Jersey Public Transportation Act Of 1979

New Jersey's Supreme Court recently observed, in *Maison v New Jersey Tr. Corp.*, 245 NJ 270, 289, 296-297, 245 A3d 536 [2021], that NJT's distant predecessor went into the transportation business when it initially "acquired the privately owned bus company, Transport of New Jersey …" "Sixty-four years and several mergers later"

NJT now has "a near monopoly on mass public transit, operating 2,221 buses along 251 bus routes and 1,231 trains and 93 light rail vehicles along 12 rail lines." *Id.*

The currently existing iteration of the New Jersey Transit Corporation was created by the New Jersey Public Transportation Act of 1979. NJSA § 27:25-1 *et. seq.*

As appellants note, NJSA § 27:25-4[a] makes NJT part of New Jersey's Executive Branch, and more specifically part of its Department of Transportation. App. Br. at 15. What appellants fail to disclose is that the same statute — indeed, *the very same sentence* of that statute — expressly says it is "independent of any supervision or control by the department [of Transportation] or by any body or officer thereof." The subsection states, in its entirety:

> **27:25-4. New Jersey Transit Corporation; establishment; allocation within Department of Transportation; board; members; powers; approval of actions by Governor**
>
> a. There is hereby established in the Executive Branch of the State Government the New Jersey Transit Corporation, a body corporate and politic with corporate succession. For the purpose of complying with the provisions of Article V, Section IV, paragraph 1 of the New Jersey Constitution, the corporation is hereby allocated within the Department of Transportation, but, notwithstanding that allocation, the corporation shall be independent of any supervision or control by the department or by any body or officer thereof. The corporation is hereby constituted as an instrumentality of the State exercising public and essential governmental functions, and the exercise by the corporation of the powers conferred by this act shall be deemed and held to be an essential governmental function of the State.

Emphasis added.

NJSA § 27:25-5, entitled "Additional powers and duties," details other powers and attributes of the NJT. The statute, which goes on for more than five pages single-spaced, is here quoted only in part:

> **27:25-5. Additional powers and duties**
>
> In addition to the powers and duties conferred upon it elsewhere in this act, the corporation may do all acts necessary and reasonably incident to carrying out the objectives of this act, including but not in limitation thereof the following:
>
> a. Sue and be sued;
>
> * * *
>
> h. … finance either directly or by contract with any public or private entity, public transportation services, capital equipment and facilities or any parts or functions thereof, and other transportation projects …
>
> * * *
>
> j. Purchase, lease as lessee, or otherwise acquire, own, hold, improve, use and otherwise deal in and with real or personal property, or any interest therein, from any public or private entity, wherever situated;
>
> * * *
>
> n. Set and collect fares and determine levels of service for service provided by the corporation …
>
> * * *

v. … do and perform any and all acts or things necessary, convenient or desirable for the purposes of the corporation, or to carry out any power expressly or implicitly given in this act;

Emphasis added.

NJSA § 27:25-17, entitled "Liability for expenses of corporation," specifically states, as follows, that New Jersey is *not* responsible for any of NJT's debts or liabilities:

27:25-17. Liability for expenses of corporation.

All expenses incurred by the corporation in carrying out the provisions of this act shall be payable from funds available to the corporation therefor and no liability or obligation shall be incurred by the corporation beyond the extent to which moneys are available. No debt or liability of the corporation shall be deemed or construed to create or constitute a debt, liability, or a loan or pledge of the credit of the State.

Emphasis added.

New Jersey's Venue Provision For Actions "Brought By Or Against," Amongst Others, "Municipal Corporations" And "Public Agencies"

New Jersey Rule of Court 4:3-2[a] states in pertinent part:

4:3-2. Venue in the Superior Court

(a) Where Laid. Venue shall be laid by the plaintiff in Superior Court actions as follows: … (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; …

Emphasis added.

POINT I

NJT IS NOT "THE STATE" OR AN "ARM OF THE STATE" UNDER THE ACTUALLY GOVERNING UNITED STATES SUPREME COURT PRECEDENTS, AND IT THEREFORE HAD NO INTERSTATE IMMUNITY TO WAIVE IN THE FIRST PLACE.

Appellants devote much of their brief to discussion of the Supreme Court's ruling in *Hyatt III*, 139 SCt 1485. App. Br. at 2-3, 4-9, 10-13, 19, 21, 23. Appellants also wax eloquent about "state sovereign immunity" being "a cornerstone of American law since our nation's inception. *Id.* at 2. Yet, except in the sense that the Supreme Court's 180° turn in *Hyatt III* provides the principal incentive for NJT to claim that it should be treated as if it actually were "one of the United States" within the meaning of the Eleventh Amendment, *Hyatt III* did not address any of the issues presented in this appeal.

There is nothing in *Hyatt III* which bears on the question of whether New Jersey Transit and/or its employee-driver is, or should be treated as if, they were the State of New Jersey. *Galette*, 293 A3d 649, 655 n.3 (noting that the ruling in *Hyatt III* "did not include any discussion of the determinative issue in the instant appeal, *i.e.*, whether a particular entity qualifies as an instrumentality of a State for the purposes of sovereign immunity").

Plaintiffs below demonstrate that NJT is not "the State" or an "arm of the State" within the meaning of federal law and that the question is not a close one. NJT's entire

"arm of the State" argument is premised upon categorical disregard of statutes which cannot be reconciled with its claimed interstate immunity, disregard of the sole Supreme Court ruling which actually addressed whether a common carrier performing governmental functions was thereby an "arm of the State," and disregard of contrary rulings in which it was the party-defendant.

A. The Eleventh Amendment Immunity From Suit Extends Only To The States And To "Arms" Of The States, Not To All "Public" Or "Governmental" Entities.

The Eleventh Amendment to the United States Constitution -- which is conspicuously not quoted at any point in an appellants' brief that is largely about the Eleventh Amendment -- literally states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.
>
> Emphasis added.

Thus, the Amendment does not purport to apply to suits against any and all "governmental" or "public" entities. Rather, "the protection afforded by that Amendment is only available to 'one of the United States'" and to State agencies where such extension is "permitted to invoke the Amendment in order to protect the state treasury from liability that would have had essentially the same practical consequences

as a judgment against the State itself." *Lake Country Estates, Inc. v Tahoe Regional Planning Agency*, 440 US 391, 400-401 [1979].

This is not a new development. The limitation has existed for well over a century. *Lincoln County v. Luning*, 133 US 529, 530 [1890] ("[t]he eleventh amendment limits the jurisdiction only as to suits against a state").

As is demonstrated below, each Circuit has developed its own test, based upon that Circuit's construction of the Supreme Court precedents, to distinguish those governmental entities that are "arms of the State" from those governmental entities that are not.

But the point to be made at the outset is that when appellants argue that they are entitled to the protection of the Eleventh Amendment and/or interstate immunity because the governing statutes characterize NJT as a "public entity" (App. Br. at 10-11), such is a false dichotomy. Of course, NJT is a "public entity." So is every county, city, village, and public authority in the State of New Jersey.

By way of example, the Southeastern Pennsylvania Transportation Authority, the New York State Thruway Authority, and the Port Authority Trans-Hudson Corporation (*i.e.*, PATH) are all public entities. Yet, all have been held *not* to be "arms of the State" for the purposes of the Eleventh Amendment, the latter by virtue of the United States Supreme Court's correction of an erroneous Third Circuit ruling. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 US 30, 44-54 [1994]; *Mancuso v New York State Thruway*

Auth., 86 F3d 289, 292-296 [2d Cir 1996]; *Bolden v Southeastern Pennsylvania Transp. Auth.*, 953 F2d 807, 817-818 [3d Cir 1991].

Indeed, as the Court will soon see, in almost every case in which the issue has arisen, publicly operated common carriers and transportation authorities have been deemed *not* to be arms of the State.

B. New Jersey Statutes Specifically Provide That NJT Is "Independent" Of State Control, That New Jersey Is Not Responsible For Any Of NJT's Debts And Liabilities, And That, With The Single Exception Of The PIPC, The Term "State" "Shall Not" Include Any Entity With The Capacity To Sue And Be Sued.

Although NJT is part of the Executive Branch of the State of New Jersey, it is an undeniable fact that NJT is by statute "independent" of the "supervision or control" of the Executive Branch. NJSA § 27:25-4[a].

It is also indisputable that New Jersey has *expressly disowned* any responsibility for NJT's debts and liabilities. NJSA § 27:25-17, quoted in full on page 20 of this brief.

Perhaps most importantly, NJSA § 59:1-3, which is part of the New Jersey Tort Claims Act (hereinafter "the TCA"), the statute that governs NJT's tort liability, states that essentially every governmental entity is a "public entity" but, with the single exception of the Palisades Interstate Park Commission, and then only with respect to the PIPC's "activities within the State of New Jersey," the term "State" "*shall not* include any such entity which can sue and be sued." NJSA § 59:1-3, which is quoted in relevant part on page 16.

In this context, consider, if you will, the extent to which NJT's current quest for immunity, an immunity that is supposedly required in order to accord "Full Faith and Credit" to New Jersey's laws (App. Br. at 2, 26-29), in fact depends upon outright rejection of New Jersey's law.

New Jersey has singled out one entity, the Palisades Interstate Park Commission, as the only entity with the capacity to sue and be sued which is entitled to call itself "State." Yet, even the PIPC is statutorily barred from calling itself the State *unless* the subject PIPC "activity" occurred "within the State of New Jersey."

In contrast to the PIPC, NJT was not even partially exempted from the statutory directive that entities that can sue and be sued are *not* to be regarded as the State. Yet, NJT argues that its entitlement to call itself the "State" is *broader* even than that of the PIPC. And, turning the statute on its head, NJT argues that this Court would be failing to accord "Full Faith and Credit" to New Jersey's law unless it flat-out ignores the provisions of NJSA § 59:1-3 and instead gifts NJT an immunity which a New Jersey statute dictates it should not have.

C. Each Federal Circuit Has Its Own Multi-Prong Test As To Whether And When A Particular Governmental Entity Is "One Of The United States" Within The Meaning Of The Eleventh Amendment.

Whether a given entity is "the State" or an "arm of the State" within the meaning of the Eleventh Amendment is a question of federal law. *E.g.*, *Woods v Rondout Val. Cent. School Dist. Bd of Educ.*, 466 F3d 232, 236-237 [2d Cir 2006]; *Fresenius Med. Care*

Cardiovascular Resources, Inc. v Puerto Rico and Caribbean Cardiovascular Ctr. Corp., 322 F3d 56, 61 [1st Cir 2003].

Of course, this and all New York courts are "bound by the United States Supreme Court's interpretations of Federal statutes and the Federal Constitution." *People v Kin Kan*, 78 NY2d 54, 59 [1991]. However, when "there is neither a decision of the Supreme Court nor uniformity in the decisions of the lower Federal courts, a State court required to interpret a Federal statute is not bound to follow the decision of the Federal courts or precluded from exercising its own judgment." *423 S. Salina St., Inc. v City of Syracuse*, 68 NY2d 474, 489 [1986]. In such an instance, the rulings of lower Federal courts "may serve as useful and persuasive authority" but are not binding authority. *People v Garvin*, 30 NY3d 174, 182 n.6 [2017], *quoting Kin Kan*, 78 NY2d at 59-60).

The United States Supreme Court has on several occasions addressed whether a particular entity was an "arm of the State" within the meaning of the Eleventh Amendment. *See* pages 27 to 29, *infra*. However, "[t]he Supreme Court has not articulated a clear standard for determining whether a state entity is an 'arm of the state' entitled to sovereign immunity." *Leitner v Westchester Community Coll.*, 779 F3d 130, 134 [2d Cir 2015]. In consequence, the Circuits have had to develop their own tests. Those tests are different, and in some respects very different, from each other.

1. The Supreme Court's "Arm Of The State" Rulings

The Supreme Court of the United States has on five occasions been confronted with the question of whether a particular entity was "a State" or an "arm of the State" for purposes of the Eleventh Amendment and/or interstate immunity.

In *Ford Motor Co. v Dept. of Treasury of State of Indiana*, 323 US 459 [1945], the Court unsurprisingly held that Indiana's Treasury Department, which collected income taxes on the State's behalf, was a "State" within the meaning of the Eleventh Amendment. The Court explained that "when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest … even though individual officials are nominal defendants" (*id.* at 464).

The Supreme Court's next "arm of the State" ruling came in *Mt. Healthy City School Dist. Bd. of Educ. v Doyle*, 429 US 274 [1977]. There, an untenured teacher contended that a school board's "refusal to renew his contract … violated his rights under the First and Fourteenth Amendments to the United States Constitution" (429 US at 276). The Court concluded "that a local school board such as petitioner is more like a county or city than it is like an arm of the State" and was therefore "not entitled to assert any Eleventh Amendment immunity …" (*id.* at 280-281).

Thereafter, in *Lake Country Estates, Inc.*, 440 US 391, the Supreme Court ruled that the Tahoe Regional Planning Agency, an entity "created by Compact between California and Nevada" (440 US at 393), was *not* an "arm of the State" (*id.* at 400-402).

The Court observed, *inter alia*, that "regulation of land use," the function that "gave rise to the specific controversy at issue in this litigation," is "traditionally a function performed by local government" (*id.* at 402). The Court also stressed that the Compact "expressly provide[d]" that the TRPA's obligations "shall *not* be binding on either State" (*id.*, emphasis by the Court).

The Supreme Court's next "arm of the State" ruling, in *Hess*, 513 US 30, was plainly its most significant ruling for present purposes since the sole issue was whether a governmentally operated transit system constituted an "arm of the State."

The two cases paired in *Hess* each involved personal injury claims asserted against PATH, a wholly owned subsidiary of the Port Authority. In rejecting the Third Circuit's conclusion that PATH was "an arm of the State," the Supreme Court noted that the facts pointed in different directions. On the one hand, the Port Authority's commissioners were state appointees (*id.* at 44) and the two States had each agreed to appropriate sums to cover PATH's expenses (*id.* at 37). On the other hand, the dollar amounts of those contributions were "notably modest" (*id.* at 37-38).

The *Hess* Court ultimately concluded that where the "indicators of immunity point in different directions," "the Eleventh Amendment's twin reasons for being" should be "our prime guide" (513 US at 47-48). Those reasons, the Court said, are, 1) safeguarding of the State's purse (*id.* at 48), and, 2) preservation of the State's "dignity" (*id.*). The *Hess* Court concluded that those factors dictated that PATH *not* be afforded

Eleventh Amendment protection. First, PATH mostly paid its own way and the "Eleventh Amendment's core concern" was therefore "not implicated" (*id.* at 51). Second, it could not, in the circumstances, be deemed an affront to PATH's dignity to appear in federal court (*id.* at 41).

The Supreme Court's next and last "arm of the State" ruling came in *Regents of the Univ. of California v Doe*, 519 US 425 [1997]. A New York plaintiff brought suit against the University of California Regents and several individual defendants (519 US at 426). The Court was "concerned only with respondent's breach-of-contract claim against the University," wherein the plaintiff alleged that "the University agreed to employ him as a mathematical physicist …" (*id.*). In concluding that the University was an "arm of the State," the *Regents* Court stressed one dispositive determinant: it was "undisputed" that the State would stand liable for any judgment entered against the University (*id.* at 430).

2. The Circuit Courts' Various, And Very Different, "Arm Of The State" Tests

As will soon be apparent, the Circuits have fashioned very different multi-prong tests to determine whether a given public entity is an "arm of the State." There is, however, one point of universal agreement. All courts that have addressed the issue have held that it is the burden of the public entity which claims to be an arm of the State to prove the claim. The plaintiff is not required to prove the negative. *Leitner*,

779 F3d at 134 ("All Circuits to have considered the question, including our own, require the party asserting Eleventh Amendment immunity to bear the burden of demonstrating entitlement"); *United States ex rel. Fields v Bi–State Dev. Agency of the Missouri–Illinois Metro. Dist.*, 872 F3d 872, 876-877 [8th Cir 2017], *cert. den.*, 583 US 1057 [2018] ("[A]ll of our sister circuits to address the issue have recognized that an entity asserting Eleventh Amendment immunity bears the burden of showing its entitlement to such immunity").

The First Circuit Court of Appeals has a "two-step analysis" that it developed in *Fresenius*, 322 F3d 56 and later applied in *Grajales v Puerto Rico Ports Auth.*, 831 F3d 11 [1st Cir 2016].

The "first step" "'pays deference to the state's dignitary interest in extending or withholding Eleventh Amendment immunity from an entity'" by examining 'how the state has structured the entity.'" *Grajales*, 831 F3d at 17, *quoting Fresenius*, 322 F3d at 65. This entails a "broad range of structural indicators" that include "how state law characterizes the entity" and "how much control the state exercises over the operations of the entity" (*id.* at 17-18).

If those indicators "point in different directions," the Court proceeds to the "second step." *Grajales*, 831 F3d at 18. There, the "dispositive question" concerns "'whether the state has legally or practically obligated itself to pay the entity's indebtedness' in the pending action." *Id.*

In *Grajales*, the alleged "arm of the State" was the Puerto Rico Transportation Authority, a "public corporation" empowered "to develop and improve, own, operate, and manage any and all types of air and marine transportation facilities and services … to and from the Commonwealth of Puerto Rico …" *Grajales*, 831 F3d at 13-14. Applying the first ("dignity"/"structural") step of the analysis, the Court observed that the entity's enabling act described it as "a governmental instrumentality and public corporation" but also as one that was "'separate and apart' from the 'Government." *Id.* at 21-22.

Those "mixed signals" triggered "the second step," where "the picture [was] quite clear" (*id.* at 29). There was "no basis for concluding, that the Commonwealth would, as a legal matter, be liable for a judgment against PRPA in this case" (*id.* at 29). The Court accordingly concluded "that PRPA has not met its burden to show that it is an arm of the Commonwealth entitled to immunity from this suit" (*id.*).

Application of the same test in *Orria-Medina v Metro. Bus Auth.*, 565 F Supp 2d 285 [DPR 2007] dictated that the Metropolitan Bus Authority ["MBA"] was also not an arm of the State (*id.*). The Court particularly stressed that the MBA's enabling act "specifically states that the Commonwealth will not assume as debt the bonds issued by the MBA" (*id.*) and that "[t]he Commonwealth's subsidy of the MBA's operation has not only been voluntary but also not particularly substantial" (*id.* at 299).

The Fourth Circuit delineated its "arm of the State" test in *Ram Ditta v Maryland Nat. Capital Park and Planning Com'n*, 822 F2d 456 [4th Cir 1987].[4] Under the Fourth Circuit test, "the most important consideration is whether the state treasury will be responsible for paying any judgment that might be awarded" (*Ram Ditta*, 822 F2d at 457). "Other important inquiries … include, but are not necessarily limited to, whether the entity exercises a significant degree of autonomy from the state, whether it is involved with local versus statewide concerns, and how it is treated as a matter of state law" (*id.* at 457-458).

The Fourth Circuit has apparently not had occasion to apply its test to a governmentally operated common carrier or transportation authority.

The Fifth Circuit has a six-factor test which it applied in *Puerto Rico Ports Auth. v M/V Manhattan Prince*, 897 F2d 1, 9 [1st Cir 1990] and *Williams v Dallas Area R.T.*, 242 F3d 315 [5th Cir 2001]. The six factors are,

> (1) whether the state statutes and case law characterize the agency as an arm of the state;
> (2) the source of funds for the entity;
> (3) the degree of local autonomy the entity enjoys;
> (4) whether the entity is concerned primarily with local, as opposed to statewide, problems;
> (5) whether the entity has authority to sue and be sued in its own name; and
> (6) whether the entity has the right to hold and use property.

[4] The Second and Third Circuit tests are discussed below in greater detail. *See* pages 41 to 50, *infra.*

Williams, 242 F3d at 319.

In *Williams*, the Fifth Circuit ruled that Dallas Area Rapid Transit ("DART") was not an "arm of the State." In doing so, the Court observed that "[t]he statutory characterization of DART as a "governmental unit" was not probative "for Eleventh Amendment purposes …" (*id.* at 319) inasmuch as every municipal corporation and public authority is a "governmental unit" (*id.* at 318 n.1).

The Sixth Circuit has a "four-factor" test, recently applied in *Guertin v State*, 912 F3d 907, 936-937 [6th Cir 2019], regarding whether an entity is an "arm of the State." Those factors are,

> (1) the State's potential liability for a judgment against the entity; (2) the language by which state statutes, and state courts refer to the entity and the degree of state control and veto power over the entity's actions; (3) whether state or local officials appoint the board members of the entity; and (4) whether the entity's functions fall within the traditional purview of state or local government.

Guertin, 912 F3d at 937.

The first factor is "foremost" and "most salient." *Guertin*, 912 F3d at 937. If the State itself will not stand liable for the judgment, the entity should not be deemed "an arm of the State" unless the other three factors "far outweigh the first factor [internal quotation omitted]." *Id.* at 937.

It appears that the Sixth Circuit has not had occasion to apply its test to a governmentally operated common carrier or transportation authority.

The Seventh Circuit has a two-factor test: "(1) the extent of the entity's financial autonomy from the state; and (2) the 'general legal status' of the entity." *Burrus v State Lottery Com'n of Ind.*, 546 F3d 417, 420 [7th Cir 2008]. The first is "the most important factor." *Id.* at 420.

It does not appear that the Seventh Circuit has had occasion to apply its test to a governmentally operated common carrier or transportation authority.

The Eighth Circuit has a two-stage approach. *Fields*, 872 F3d 872. It first applies a six-factor test to determine "the nature of the entity created by state law" (*Id.* at 877). The six factors are "(1) whether the compacting states characterize the agency as an arm of the compacting states or as a local governmental entity; (2) whether the compacting states fund the agency; (3) whether the compacting states are financially responsible for the liabilities and obligations the agency incurs; (4) whether the agency's commissioners are appointed by the compacting states or by local governments; (5) whether the functions the agency performs are traditionally state or municipal; and (6) whether the compacting states can veto the agency's actions" (*id.*).

If those factors "'point in different directions'" (*Fields*, 872 F3d at 882, *quoting Hess*, 513 US at 47), the Court then "turn[s] to the "Eleventh Amendment's twin reasons for being" (*id.*).

Fields involved the Bi-State Development Agency, "an interstate compact entity that own[ed] and operate[d] public transportation services" in Illinois and Missouri (*id.* at 876). The Court determined that its six-factor test pointed in "different directions" (*id.* at 822). It then ruled that the second-stage factors did not favor immunity, noting, *inter alia*, that "'the most important factor'" was whether a judgment could be satisfied against a State's treasury and Bi-State's "funding comprises less than two percent of its operating budget, in contrast with 'the situation of transit facilities that place heavy fiscal tolls on their founding States.'" *Fields*, 872 F3d at 883, *quoting Hess*, 513 US at 48, 49.

The Ninth Circuit has a five-factor test:

> [1] whether a money judgment would be satisfied out of state funds, [2] whether the entity performs central governmental functions, [3] whether the entity may sue or be sued, [4] whether the entity has the power to take property in its own name or only the name of the state, and [5] the corporate status of the entity.

Crowe v Oregon State Bar, 989 F3d 714, 731 [9th Cir 2021], *cert denied sub nom. Gruber v Oregon State Bar*, 142 S Ct 78 [2021] and *cert denied,* 142 S Ct 79 [2021]. Whether the judgment would be paid from state funds is "the first and most important" factor. *Id.* at 733.

The Ninth Circuit ruled in *Alaska Cargo Transp., Inc. v Alaska R.R. Corp.*, 5 F3d 378 [9th Cir 1993] that the defendant railroad was an "arm of the State." However, it did so because federal law *required* Alaska to provide rail service (otherwise real property

conveyed to Alaska would revert back to the United States) and because the railroad's "fisc" was "in substantial respects … dependent upon and controlled by the will of the governor and the legislature" (5 F3d at 381). The United States Supreme Court would later distinguish the Ninth Circuit's ruling in *Alaska Cargo* and the DC Circuit's ruling as to WMATA (discussed on page 38, below) from its own ruling concerning PATH on the ground that the two Circuit Court rulings concerned "thinly capitalized" ventures that were dependent on a steady influx of state funding. *Hess*, 513 US at 49-50.

In *Morrison-Knudsen Co. Inc. v Massachusetts Bay Transp. Auth.*, 573 F Supp 698 [D Idaho 1983], the Court ruled that the Massachusetts Bay Transportation Authority, a governmental entity "charged with maintaining and operating a public mass transit system for the greater Boston area" (573 FSupp at 699), was not an "arm of the State" (*id.* at 705).

In *Michaeledes v Golden Gate Bridge, Highway and Transp. Dist.*, 202 F Supp 2d 1109 [ND Cal 2002], the Court determined that the defendant District was also not an "arm of the State."

The Tenth Circuit has a four-factor test, recently applied in *Couser v Gay*, 959 F3d 1018 [10th Cir 2020]:

> (1) "the character ascribed to the [defendant] under state law";
> (2) "the autonomy accorded the [defendant] under state law;
> (3) "the [defendant's] finances"; and
> (4) "whether the [defendant] in question is concerned primarily with local or state affairs."

Couser, 959 F3d at 1024, internal quotation marks omitted.

In *Elam Const., Inc. v Regional Transp. Dist.*, 129 F3d 1343 [10th Cir 1997], the Tenth Circuit ruled that the defendant, "which provide[d] public transportation services in the Denver regional area" (129 F3d at 1344), was "not an arm of the state of Colorado" (*id.* at 1345). The Court noted, *inter alia*, "that the public fisc of the state of Colorado is not responsible for judgments entered against RTD" (*id.* at 1346) and also that "RTD has been vested with nearly total responsibility for its own funding" (*id.*).

The Eleventh Circuit has a four-factor test. Those factors are,

> (1) how state law defines the entity; (2) what degree of control the State maintains over the entity; (3) where the entity derives its funds; and (4) who is responsible for judgments against the entity.

McAdams v Jefferson County 911 Emergency Communications Dist., Inc., 931 F3d 1132, 1135 [11th Cir 2019], *quoting Manders v Lee*, 338 F3d 1304, 1309 [11th Cir 2003].

The Eleventh Circuit test has a special wrinkle. The factors "'must be assessed in light of the particular function in which the defendant was engaged when taking the actions out of which liability is asserted to arise.'" *McAdams*, 931 F3d at 1135, *quoting Manders*, 338 F3d at 1308. It is thus possible for an entity to be "an arm of the State" when liability arises from one function (perhaps alleged police misconduct) but not "an

arm of the State" when liability arises from another function (perhaps negligent operation of a bus).

The Eleventh Circuit does not appear to have applied its test to a governmentally operated transportation authority or common carrier.

The DC Circuit is the only Circuit apart from the Third Circuit to have a three-prong test, although its three prongs differ from the Third Circuit's three factors. The DC factors are "(1) the State's intent as to the status of the entity, including the functions performed by the entity; (2) the State's control over the entity; and (3) the entity's overall effects on the state treasury." *Puerto Rico Ports Auth. v Fed. Mar. Com'n*, 531 F3d 868, 873 [DC Cir 2008], *cert. den.*, 555 US 1170 [2009].

The DC Circuit ruled in *Morris v Washington Metro. Area Tr. Auth.*, 781 F2d 218 [DC Cir 1986] that defendant WMATA was an "arm of the State." In doing so, it stressed that "fare revenues have never come close to covering WMATA's costs" and that it was "clear that the practical result of a judgment against WMATA here would be payment from the treasuries of Maryland and Virginia" (*id.* at 225).

Overall, it is thus clear that there is no one "arm of the State" test. Each Circuit has its own test, ranging from two factors (the Seventh Circuit) to six factors (the Second, Sixth and Eighth Circuits). Some of the tests (those of the First, Second and Eighth Circuits) call for a two-stage analysis, and others do not. Almost all deem the risk (or absence of risk) to the State treasury to be the most important single factor, but

there is disagreement as to whether it is of overriding importance or merely the first of several factors.

Additionally, this Court fashioned its own nine-prong test, which it said was based in part on "federal precedent on the Eleventh Amendment immunity of States," in assessing whether a given entity qualifies as "an 'arm' of an Indian tribe" for purposes of tribal immunity. *Sue/Perior Concrete & Paving, Inc. v Lewiston Golf Course Corp.*, 24 NY3d 538, 550 [2014]. The Court there said that "the most significant factor is the effect on tribal treasuries, just as 'the vulnerability of the state's purse' is considered 'the most salient factor' in determinations of a State's Eleventh Amendment immunity." *Id.* at 550, *quoting Hess*, 513 US at 48.

Even apart from the issue of what factors should or must be considered in determining whether an entity is an "arm of the State," there is the further issue of whether the factors (whatever they might be) are specific to "the particular function in which the defendant was engaged when taking the actions out of which liability is asserted to arise." *McAdams*, 931 F3d at 1135.

As has been noted, the Eleventh Circuit has repeatedly said that the calculus varies with the act or omission from which the alleged liability arises. *McAdams*, 931 F3d at 1135; *Manders*, 338 F3d at 1308. The Fourth Circuit has reached the same conclusion. *Foremost Guar. Corp. v Community Sav. & Loan, Inc.*, 826 F2d 1383, 1388 [4th Cir 1987].

That would be consistent with the laws of both New York and New Jersey inasmuch as both States determine governmental liability based upon the specific act or omission from which the claim arises. *Connolly v Long Is. Power Auth.*, 30 NY3d 719, 728 [2018] ("'[w]hen the liability of a governmental entity is at issue, it is the specific act or omission out of which the injury is claimed to have arisen and the capacity in which that act or failure to act occurred which governs liability'"), *quoting Miller v State*, 62 NY2d 506, 513 [1984]; *Lieberman v Port Auth. of New York and New Jersey*, 132 NJ 76, 86, 92-93, 622 A2d 1295, 1300, 1303-1304 [1993] (same).

New Jersey's high court has also said "[a] public body may be considered an agency of the State for some purposes but not for others." *Bunk v Port Auth. of New York and New Jersey*, 144 NJ 176, 187, 676 A2d 118, 123 [1996].

On the other hand, the DC Circuit has emphatically said that "an entity either is or is not an arm of the State: The status of an entity does not change from one case to the next …" *Puerto Rico Ports Authority*, 531 F3d at 873.

There is thus substantial disagreement amongst the Circuits as to what factors should or must be considered, and, also, whether the inquiry is case-specific (as in the Fourth and Eleventh Circuits) or is an entity-specific inquiry (as in the DC Circuit).

Fortunately, those distinctions are less critical at bar since, as plaintiffs now demonstrate, NJT's quest for Eleventh Amendment and/or interstate immunity would fail under any Circuit's test, including accurate application of the Third Circuit's test.

D. NJT Is Most Certainly Not "One Of The United States" Under The Second Circuit's "Arm Of The State" Test.

The Second Circuit has its own two-stage, "arm of the State" test. In the first stage, the court considers the following six factors:

> (1) how the entity is referred to in the documents that created it; (2) how the governing members of the entity are appointed; (3) how the entity is funded; (4) whether the entity's function is traditionally one of local or state government; (5) whether the state has a veto power over the entity's actions; and (6) whether the entity's obligations are binding upon the state.

Mancuso, 86 F3d at 293.

The inquiry ends there only if "these factors all point in one direction." *Woods*, 466 F3d at 240; *Leitner*, 779 F3d at 135. The court otherwise proceeds to the second stage, where it "must focus on the two main aims of the Eleventh Amendment, as identified by the Supreme Court: preserving the state's treasury and protecting the integrity of the state." *Leitner*, 779 F3d at 137.

In *Mancuso*, 86 F3d 289, the Second Circuit ruled that the New York State Thruway Authority, which surely comes closer to the concept "arm of the State" than does NJT, was *not* an "arm of the State" within the meaning of the Eleventh Amendment. At the first stage, the factors pointed in both directions. On one hand, the Thruway Authority provided "a function that a state would normally provide." *Id.* On the other, there was no indication that the State currently funded the Authority's

operations (*id.* at 295) and the Authority "provided no evidence" "it would have any difficulty in satisfying a judgment in this case" (*id.* at 296).

The *Mancuso* Court accordingly proceeded to the second stage. Because "the state treasury [was] not even minimally at risk," the "protection" determinant did not dictate immunity (*id.* at 296). As to the "dignity" determinant, the Court ruled that "New York State has given the Thruway Authority an existence quite independent from the state" and that it was "unable to conclude that subjecting the Thruway Authority to suit in federal court would be an affront to the dignity of New York" (*id.*).

It cannot be reasonably doubted that NJT is not an "arm of the State" under the Second Circuit's test. The bare fact that NJT's obligations are "not binding on the State" (NJSA § 27:25-17), the sixth *Mancuso* factor, of itself means that NJT could *at best* survive to reach the second stage of the two-stage inquiry. But it could not possibly win that stage.

There are only two determinants in the second stage: (1) whether immunity is necessary to preserve the State's fisc, and (2) whether the State's "dignity" would be compromised by the defendant's forced appearance in the foreign court. *Mancuso*, 86 F3d at 296.

Here, the first of those two variables cannot be reasonably disputed. NJSA § 27:25-17 specifically states that "[n]o debt or liability of the corporation shall be deemed

or construed to create or constitute a debt, liability, or a loan or pledge of the credit of the State."

The entire matter would thus come down to the "question" of whether it would would unduly tarnish the State of New Jersey's "dignity" if the "independent" by law NJT (NJ Stat Ann 27:25-4[a]) were compelled to appear in a New York court "merely" because NJT operated its buses in New York and injured New Yorkers when it did so. The obvious answer is No but even that would not particularly matter.

Even if one were to conclude that it *would* offend New Jersey's dignity for the independent-by-law NJT to be compelled to defend in the State where it caused injury, the Second Circuit's rule holds that "[i]f the outcome still remains in doubt [after the second stage]," "then whether a judgment against the governmental entity would be paid out of the state treasury generally determines the application of Eleventh Amendment immunity." *Woods*, 466 F3d at 241.

E. Even Under The Third Circuit's Flawed Three-Factor Test, Defendant NJT Should Not Qualify As An "Arm Of The State."

As is demonstrated below, the Third Circuit's test is inconsistent with governing Supreme Court precedent. Yet, NJT should lose even under the Third Circuit's test. It prevailed in *Karns*, 879 F3d 504 only because the Third Circuit erroneously credited, amongst other dubious assertions, NJT's patently false representation that the term "public entity" was synonymous with the term "State" under New Jersey law.

1. The Third Circuit's Three-Prong Test, Unaffected By And Inconsistent With *Hess*

The Third Circuit set forth its three-prong "arm of the State" test in *Fitchik v New Jersey Tr. Rail Operations, Inc.*, 873 F2d 655 [3d Cir 1989] (*en banc*), *cert. den.* 493 US 850 [1989]. The three determinants are,

> 1) "whether any judgment would be paid from the state treasury," which the *Fitchik* Court said was "the most important" factor but was not "dispositive" (873 F2d at 659);
>
> 2) "whether state law treats an agency as independent, or as a surrogate for the state" (*id.* at 662); and,
>
> 3) "the degree of [the entity's] autonomy from the State" (*id.* at 663).

Based upon those determinants, the Third Circuit ruled in *Port Auth. Police Benev. Ass'n, Inc. v Port Auth. of New York and New Jersey*, 819 F2d 413, 415 [3d Cir 1987] that the Port Authority *was* an "arm of the State." It then ruled in *Fitchik*, 873 F2d 655 that NJT *was not* an arm of the State.

In reaching the latter conclusion, the Third Circuit decided that the first *Fitchik* factor counted against NJT because "NJT is self-insured, has set aside funding to meet its liabilities for injury and damage claims, and has the authority to purchase liability insurance" (*Fitchik*, 873 F2d at 660). The *Fitchik* Court said that consideration of the second factor did not "significantly help" "[b]ecause NJT's status under New Jersey

law" was "uncertain" (*id.* at 662). It concluded that the third factor was equivocal because "in terms of autonomy, NJT lies somewhere between Rutgers [which it had previously said *was not* an "arm of the State"] and the Port Authority [which it had previously said *was* an "arm of the State"]" (*id.* at 663).

The United States Supreme Court afterwards ruled, in *Hess*, 513 US 30, that the Third Circuit had erred in ruling that PATH was an "arm of the State" and the Second Circuit was correct in reaching the opposite conclusion. Did the United States Supreme Court's rejection of the Third Circuit's conclusions concerning the Port Authority and PATH convince the Third Circuit that its own, unique-to-itself "arm of the State" test might warrant some modification? It did not. The Third Circuit afterwards retained the same three-prong test. Still worse, the Third Circuit later recalibrated the test so as to *de-emphasize* the very factor that the *Hess* Court deemed one of the Eleventh Amendment's "twin reasons for being," preservation of the State's fisc. *Hess*, 513 US at 47.

The Third Circuit acknowledged in *Maliandi v Montclair State Univ.*, 845 F3d 77 [3d Cir 2016] that its test was not consistent with *Hess*. It nonetheless concluded, in a footnote, that it *was bound by its own rulings* and therefore could not deviate from its *Fitchik* test. *Maliandi*, 845 F3d at 84 n.3.

That brings us to *Karns*, 879 F3d 504, wherein the Third Circuit reversed itself and ruled (over a dissent) that the same entity it previously determined not to be an arm

of the State in *Fitchik*, 873 F2d 655 was an arm of the State, at least in the context of that case. The stated excuse for the flip was the premise that the Supreme Court's decision in *Regents*, 519 US 425 changed the calculus and required the *Karns* Court to de-emphasize the risk, if any, to the State's fisc. *Karns*, 879 F3d at 513-514.

Ironically, the *Regents* Court had considered one and only one variable in determining that the University of California was an arm of the State. The determinant was that California would stand liable for any judgment entered against the University. *Regents*, 519 US at 530-531.

2. The Fallacies Credited In *Karns*, And Why NJT Should Not Qualify As An "Arm Of The State" Even Under The Third Circuit's Test

Karns was a civil rights action against NJT and two individually named NJT police officers. The case arose from an incident in which the two officers "arrested Karns and Parker for defiant trespass and obstruction of justice after Karns and Parker refused to vacate the NJ Transit train platform on which they were preaching without the required permit" (879 F3d at 510). The plaintiffs alleged violations of the First, Fourth, and Fourteenth Amendments.

The Third Circuit returned to its *Fitchik* factors, a test it knew to be inconsistent with *Hess* (*Maliandi*, 845 F3d at 84 n.3), but this time held that those factors dictated that NJT was an arm of the State. It did so by, a) disregarding statutory realities that

could not be reasonably disputed, particularly including that the TCA *specifically defined* "State" to *exclude* entities like NJT, and, b) crediting defense claims that were flatly erroneous, particularly including that the terms "public entity" and "arm of the State" were synonymous under New Jersey law.

Regarding the first *Fitchik* factor, whether "any judgment would be paid from the State treasury" (*Fitchik*, 873 F2d at 659), the *Karns* Court noted that it had previously "concluded that NJ Transit is financially independent" and said that the parties had not offered any proof "to undermine this assessment." *Karns*, 879 F3d at 515-516. In fact, NJSA § 27:25-17 (quoted above) flatly says that the State will not honor any "debt" or "liability" incurred by NJT, which should have rendered the parties' proof immaterial.

Regarding the second *Fitchik* factor, "whether state law treats an agency as independent, or as a surrogate for the state" (*Fitchik*, 873 F2d at 662), whereas the *Fitchik* Court deemed the answer equivocal (*id.* at 662), the *Karns* Court now observed that NJT was "'allocated within the Department of Transportation,'" that it was statutorily defined as "'instrumentality of the State exercising public and essential governmental functions,'" and that New Jersey's Supreme Court had in the interim declared "that NJ Transit 'is a public entity within the ambit of the [TCA].'" *Karns*, 879 F3d at 517, *quoting* NJSA § 27:25-4 and *Muhammad v New Jersey Tr.*, 176 NJ 185, 194, 821 A2d 1148, 1153 [2003].

What the Third Circuit utterly failed to acknowledge or consider in deciding that state law did *not* treat NJT as "independent" was,

> a) the *very same provision* that allocated NJT to the State's Department of Transportation flatly said "notwithstanding that allocation, the corporation shall be independent of any supervision or control by the department or by any body or officer thereof" (NJSA § 27:25-4[a], emphasis added), and,
>
> b) literally every county, city, village and other governmental unit is a "public entity" within the meaning of TCA (NJSA § 59:1-3).

In essence, the Third Circuit credited NJT's false claim that any entity that was a "public entity" was thereby "an arm of the State" within the meaning of New Jersey law. *Karns*, 879 F3d at 517. And it did so even though New Jersey's high court had rejected that claim in *the very decision* the *Karns* Court cited in support of its ruling in NJT's favor. *Muhammad*, 176 NJ at 193 ("As defined by the TCA, however, the State is only one category of public entity … Public entity is not limited to the State or one of its subdivisions …").

Very simply, while NJT argued and the Third Circuit accepted that NJT's status as a "public entity" meant that it was thereby an "arm of the State," the TCA expressly provides otherwise (NJSA § 59:1-3) and New Jersey's high court has specifically said otherwise. *S.E.W. Friel Co. v New Jersey Turnpike Auth.*, 73 NJ 107, 117-118, 373 A2d

364, 369 [1977] (holding that the New Jersey Turnpike Authority was not "the State" notwithstanding that it had been placed within the Department of Transportation … but that it was a "public entity").

The *Karns* Court went on to conclude, regarding the third *Fitchik* factor, that the State exercised substantial control over NJT (879 F3d at 518) -- in the process utterly ignoring, a) that NJT's enabling act specifically said "the corporation shall be independent of any supervision or control by the department or by any body or officer thereof" (NJSA § 27:25-4[a]), and, b) that all of the facts it cited as support for its finding of "substantial control" had been equally present in *Hess*, 513 US at 44, 49, wherein the United States Supreme Court had ruled that the Third Circuit had *erred* in concluding that PATH was an "arm of the State."

Plaintiffs submit that, irrespective of the ruling in *Karns*, NJT should not be deemed an "arm of the State" even under the Third Circuit's test because each of the three *Fitchik* elements are conclusively negated by New Jersey statutes.

Regarding the first factor, "whether any judgment would be paid from the state treasury" (*Fitchik*, 873 F2d at 659), the answer is No because NJSA § 27:25-17 flat-out says, "No debt or liability of the corporation shall be deemed or construed to create or constitute a debt, liability, or a loan or pledge of the credit of the State."

Regarding the second factor, "whether state law treats an agency as independent, or as a surrogate for the state" (*Fitchik*, 873 F2d at 662), the statute that defines the term

"State" for purposes of the TCA specifically says that, with the single exception of the Palisades Interstate Park Commission, the term "State" "shall not include any such entity which is statutorily authorized to sue and be sued." NJSA § 59:1-3.

Regarding the third factor, "the degree of NJT's autonomy from the state" (*Fitchik*, 873 F2d at 663), NJSA § 27:25-4[a] expressly says "the corporation shall be independent of any supervision or control by the department or by any body or officer thereof."

F. NJT's Current Arguments For "Arm Of The State" Interstate Immunity Lack Merit.

NJT's principal brief does not disclose that NJT is by statute "independent" (that very word) from executive control (NJSA § 27:25-4[a]), nor that New Jersey is by statute not responsible for any of its liabilities or debts (NJSA § 27:25-17), nor that the TCA itself specifically provides that, with the sole (and only partial) exception of the PIPC, the term "State" shall *not* include any public entity with the capacity to sue and be sued (NJSA § 59-1.3).

NJT also does not disclose that, in the great majority of cases in which the issue arose, governmentally operated common carriers and transportation authorities have been held *not* to be arms of the State (*see* pages 30 to 43, above) and that result was the same in the only such case to reach the Supreme Court (*see* pages 28 to 29 above).

Without revealing any of the above, NJT nonetheless argues that it should be deemed an "arm of the State," and thereby endowed with "interstate sovereign immunity," because,

1) it is "established within the Department of Transportation" and "'exercis[es] public and essential governmental functions'" (App. Br. at 15);

2) it is a "public entity" within the meaning of New Jersey law (*id.* at 17);

3) it is "exempt from all state taxation" and "has the power of eminent domain" (*id.* at 15-16);

4) its "police officers," whose conduct is of course not in any way in issue in this case, "have general police authority throughout New Jersey," and,

5) the Third Circuit ruled in *Karns*, 879 F3d 504, that it is an "arm of the State" (*id.* at 18-19), as have "New York Federal Courts" and "the Commonwealth Court of Pennsylvania" (*id.* at 19-20).

As plaintiffs now demonstrate, those arguments are uniformly lacking in merit … which is why they were rejected earlier this year in a detailed appellate ruling.

First, that NJT is a "State agency" and a "public entity" does not mean it is "the State" or an "arm of the State" inasmuch as literally every city, county, water authority, and village is a "public entity." NJSA § 59:1-3.

Similarly, while NJT says it is an arm of the State because it fulfills a public purpose, is exempt from State taxes, and can exercise eminent domain, every or virtually every municipal entity and public authority is exempt from state taxes,[5] can exercise eminent domain,[6] and enjoys those advantages because it serves a public purpose. For example, the New York State Thruway Authority is exempt from taxation (NY Pub. Auth. Law § 371), can and does exercise eminent domain (*City of Albany v State*, 21 AD2d

[5] *See*, *e.g.*, NY Pub. Auth. Law § 1163 (the Onondaga County Water Authority "shall not be required to pay any fees, taxes, special ad valorem levies or assessments of any kind, whether state or local" because "its corporate purposes is in all respects for the benefit of the people of the state of New York and is a public purpose"); NY Pub. Auth. Law § 1216 (the same, for the New York City Transit Authority); NY Pub. Auth. Law § 1391 (the same, for the Ogdensburg Port Authority); NY Pub. Auth. Law § 1570-m (the same for the Harrison Parking Authority); NY Pub. Auth. Law § 3566 (the same, for the Roswell Park Cancer Institute); 16 McQuillen Mun. Corp. § 44:73 [3d ed.] (noting that "]m]unicipal property is generally not subject to federal, state, county, township or school district taxation, or to taxation by another municipality").

[6] *See*, *e.g.*, *In re City of New York*, 11 NY3d 353, 359-360 [2008] (City of New York could acquire property by eminent domain); *Port Auth. Trans-Hudson Corp. v Hudson Rapid Tubes Corp.*, 20 NY2d 457 [1967] (concerning PATH's acquisition, by eminent domain, of the privately owned Hudson Tubes); *Westchester Cr. Corp. v New York City School Const. Auth.*, 98 NY2d 298 [2002] (concerning New York City School Construction Authority's exercise of eminent domain); *Saratoga Water Services, Inc. v Saratoga County Water Auth.*, 83 NY2d 205 [1994] (concerning the Saratoga County Water Authority's exercise of eminent domain; 51 N.Y. Jur. 2d Eminent Domain § 16 (noting that "it has long been settled that municipal corporations and other governmental subdivisions of the State may be authorized by legislative act to take property by eminent domain").

224 [3d Dept 1964], *affd,* 15 NY2d 1024 [1965]), and serves a public function … but is nonetheless not an arm of the State of New York. *Mancuso*, 86 F3d at 292-296.

Second, while NJT argues that it is an arm of the State because it has a police force, so does the Port Authority and so does the New York City Transit Authority. Yet, NJT below admitted that the Transit Authority is not an "arm of the State." NJT's Principal App. Div. Br. at 43-44. And the United States Supreme Court ruled that the Port Authority is also not an arm of the State. *Hess*, 513 US at 44-53.

Third, while NJT boasts that it has been deemed an "arm of the State" by "New York Federal Courts" (App. Br. at 19-20), the three cited rulings by the "New York Federal Courts" are all trial-level rulings, all at least 30 years old, and all decided before *Hess*, 513 US 30. Further, while NJT represents that "the Commonwealth Court of Pennsylvania determined that NJ Transit was an arm of the state [emphasis added]" in *Marshall v Southeastern Pennsylvania Transportation Auth.*, 300 A3d 537, 540 [Pa Commw Ct 2023] (App. Br. at 19), what that court actually said was that the plaintiffs therein "filed a response, conceding that NJ Transit 'is an arm of the state.'"

In fact, a Pennsylvania appellate court considered and rejected NJT's "arm of the State" defense earlier this very year, in *Galette*, 2023 PA Super 46. *Galette* arose from a collision, in the City of Brotherly Love, between one of NJT's buses and a private car. The plaintiff brought suit in Pennsylvania, where the accident occurred.

Interestingly, the Superior Court was apparently unaware that the TCA specifically defines the term "State" to exclude entities, like NJT, that can sue and be sued. But it nonetheless concluded, on other grounds, that NJT was not an "arm of the State" for purposes of "interstate sovereign immunity."

The *Galette* Court began its analysis with the observation that NJT was "mistaken to the extent it suggests *Karns* or other holdings from the Third Circuit controls the result here," adding that "the holdings of the Third Circuit are not binding upon this Court, even in the context of a question of federal law" (293 A3d at 655-656). The *Galette* Court instead applied the six-part "arm of the State" test previously fashioned by Pennsylvania's Supreme Court in *Goldman v Southeastern Pennsylvania Transp. Auth.*, 618 Pa 501, 543, 57 A3d 1154, 1179 [2012], a test which that Court had extrapolated from the United States Supreme Court's "arm of the State" rulings (*Goldman*, 618 Pa at 533-543).

The *Galette* Court decided that the *Goldman* factors cut both ways. On the one hand, NJT was identified by statute as performing an "essential governmental function" (sixth *Goldman* factor, citing NJSA § 27:25-4) and was classified by New Jersey statute as "an instrumentality of the State of New Jersey" (first *Goldman* factor, also citing NJSA § 27:25-4).[7] *Galette*, 293 A3d at 656. On the other hand, NJT was "independently

[7] As has been noted, the *Galette* Court was apparently unaware that the TCA commands that entities that can sue and be sued are *not* to be treated as the State (NJSA § 59:1-3), and

empowered to raise revenue through several different avenues" (third *Goldman* factor) and a monetary obligation of NJT was not binding on the State of New Jersey (fifth *Goldman* factor, citing NJSA § 27:25-17).

Concluding that the *Goldman* six-factor test was "not dispositive," the *Galette* Court turned, per the *Goldman* test (which in this respect is identical to the Second Circuit's *Mancuso* test), to the two variables which the United States Supreme Court had identified as "'the two principal purposes of the Eleventh Amendment,' namely, 'the protection of [New Jersey's] dignity as a sovereign [S]tate and the protection of [New Jersey's treasury] against involuntary depletion from suits brought by private persons'" (293 A3d at 656-657).

Those factors led to one obvious conclusion. The *Galette* Court found that "any potential judgment against NJ Transit would have no discernible impact upon the New Jersey treasury" (293 A3d at 658). It further found that it could "discern no risk to the sovereign dignity of New Jersey in permitting a suit against NJ Transit to proceed" (*id.*).

In conclusion, even if one were unaware of or chose to disregard that the TCA itself commands that NJT is not to be treated as tantamount to the "State" (NJSA § 59:1-3) — which is ultimately the simplest answer to whether this "independent" by law entity (NJSA § 27:25-4) should be deemed an arm of the State of New Jersey in a

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presumably would have scored the "legal classification" variable differently had NJT disclosed that statute's existence.

TCA case — any fair analysis of the variables that the United States Supreme Court has deemed pertinent to the determination should lead to the same conclusion.

G. NJT Has Itself Used The Very Fact That The TCA Mandates That It *Not* Be Deemed "The State" As A Means To Evade Tort Responsibility.

Plaintiffs have already demonstrated, a) NJT should not be deemed an "arm of the State" under the Supreme Court precedents that govern that determination (*see* pages 22 to 50, above), and, b) NJT's various arguments to the contrary lack merit (*see* pages 51 to 56, above).

Yet, what makes NJT's current arguments so remarkable is that NJT knows and affirmatively urges that it is not "the State" … when it is in NJT's interest not to be the State of New Jersey.

Consider, for example, what befell the would-be plaintiff in *Weaver v New Jersey Tr. Corp.*, A-2826-09T1, 2011 WL 1261099 [NJ Super Ct App Div Apr. 6, 2011]. The plaintiff therein was a passenger in an NJT bus which "rear-ended the car in front of it." New Jersey law provides that timely filing of a presentation of claim (equivalent to a notice of claim in New York) is prerequisite to any suit against a public entity. The plaintiff timely served one on the State of New Jersey's Bureau of Risk Management. Except that NJT is, by statute, not the State of New Jersey.

NJT successfully urged that the action in *Weaver* — brought in a New Jersey state court, arising from an accident in which a NJT bus rear-ended another vehicle — therefore had to be dismissed. Citing the very statute NJT here declines to acknowledge, NJT argued that its status "as a State Department or Agency" was "unavailing" because "it is, by statutory definition, excluded from the meaning of the State" (2011 WL 1261099, 3).

The same thing occurred in *Torres v New Jersey Tr.*, A-2993-20, 2022 WL 1561077 [NJ Super Ct App Div May 18, 2022]. After plaintiff's vehicle collided with an NJT bus, the plaintiff served notice of claim on the State of New Jersey … enabling NJT to obtain outright dismissal of the potentially meritorious claim since NJT is, under NJSA § 59:1-3, statutorily excluded from being "the State."

To be fair, NJT is not the only New Jersey "public entity" that urges dismissal whenever the would-be plaintiff mistakenly equates the entity with the State of New Jersey. *See O'Donnell v New Jersey Turnpike Auth.*, 236 NJ 335, 199 A3d 786 [2019]. However, it is, to the best of our knowledge, the only such entity that also claims to be "the State," without in any way acknowledging the TCA's clear statutory distinction, when it deems the distinction to be antithetical to its immediate interests.

POINT II

DEFENDANT HERNANDEZ PLAINLY HAS NO ELEVENTH AMENDMENT OR INTERSTATE IMMUNITY FROM SUIT … AND WOULD NOT HAVE HAD ANY SUCH IMMUNITY EVEN IF NJT ACTUALLY WERE "ONE OF THE UNITED STATES."

Given that NJT is itself not a "State" within the meaning of the Eleventh Amendment (Point I, above), it logically follows that its bus driver, Ana Hernandez, is also not a State. That aside, even if NJT actually were a State and Ms. Hernandez were thus a State employee, she would *still* not be entitled to interstate immunity.

First, it is crystal clear, from the United States Supreme Court on down, that the Eleventh Amendment and the doctrine of interstate immunity do not extend to State employees sued in their individual (as opposed to official) capacities. *Hafer v Melo*, 502 US 21, 23, 29, 31 [1991]; *Ying Jing Gan v City of New York*, 996 F2d 522, 529 [2d Cir 1993] ("To the extent that a state official is sued for damages in his official capacity, such a suit is deemed to be a suit against the state, and the official is entitled to invoke the Eleventh Amendment immunity belonging to the state … As to a claim brought against him in his individual capacity, however, the state official has no Eleventh Amendment immunity"); *Guillemard-Ginorio v Contreras-Gomez*, 585 F3d 508, 530-531 [1st Cir 2009] (same).

The proof of the pudding is defendants' star case: *Karns*, 879 F3d 504. There, the fact that NJT was deemed an "arm of the State" did not bar suit against the NJT

police officers who were sued in their individual capacity for their individual actions. The defendant officers prevailed, but they did so on the merits. *Id.* at 519-522.

Second, while defendants below sought to muddy the waters by equating "official capacity" with "scope of employment" — their theory being that any individual who is sued for conduct that occurred in the scope of his or her employment is thereby being sued in the individual's "official capacity" (R.51-54) — the argument was premised upon a fundamental misconception of the term "official capacity."

The distinction between "official capacity" and "individual capacity" depends on "the capacity in which the state officer is sued, not the capacity in which the officer inflicts the alleged injury." *Hafer*, 502 US at 26. As the United States Supreme Court recently noted in the course of explaining why a tribal employee could be sued individually notwithstanding that the tribe itself was immune, "[i]n an official-capacity claim, the relief sought is only nominally against the official and in fact is against the official's office and thus the sovereign itself." *Lewis v Clarke*, 581 US 155, 162 [2017]. "This is why," the *Lewis* Court said, "when officials sued in their official capacities leave office, their successors automatically assume their role in the litigation." *Id.*

For these reasons, while an individual who is sued for his or her own conduct can be sued even if the individual has since left the employment, the same does not hold true for an individual sued in his or her "former official capacity." Indeed, "[a]

claim against a person 'in his former official capacity' has no meaning." *Mathie v Fries*, 121 F3d 808, 818 [2d Cir 1997].

Here, Ms. Hernandez is not being sued as a representative of NJT. She is being sued because she personally struck the plaintiff-pedestrian with her bus. In fact, as a bus driver, Mr. Hernandez was not a "public official" and had no "official capacity" in which she could be sued. *Pavelka v Carter*, 996 F2d 645, 649-650 [4th Cir 1993] (notwithstanding that suit against the defendant bus driver's employer was barred by sovereign immunity, "public official" immunity did not extend to the driver herself … even if the government would end up paying the claim).

Third, while defendants below argued that the fact that NJT was obligated to indemnify its employees for any liability they might incur "practically" required that its alleged immunity be extended to its employees (R.50), the courts, including the United States Supreme Court, have consistently rejected that very argument.

Thus, in *Hafer*, 502 U.S. at 21, where the defendants argued that failure to extend the State's Eleventh Amendment immunity to the individually sued officers would undermine the immunity, the Supreme Court answered that "such concerns are properly addressed within the framework of our personal immunity jurisprudence" and "[i]nsofar as respondents seek damages against Hafer personally, the Eleventh Amendment does not restrict their ability to sue in federal court." *Hafer*, 502 US at 31.

The Supreme Court made essentially the same point in *Lewis*, 581 US 155. There, Connecticut's Supreme Court had reasoned that the Mohegan Tribe's immunity should extend to the Tribe's individually sued employee because "'he was acting within the scope of his employment for the Mohegan Tribal Gaming Authority'" and failure to extend the immunity would "'eviscerate' the protections of tribal immunity" (581 US at 161). A unanimous United States Supreme Court instead ruled that "sovereign immunity 'does not erect a barrier against suits to impose individual and personal liability'" and there was "no reason to depart from these general rules in the context of tribal sovereign immunity" (*id.* at 163, *quoting Hafer*, 502 US at 30-31).

To the extent it matters, the Circuits have repeatedly and consistently ruled the same way. The fact that the State is required to or has agreed to reimburse its individually sued employee does not transform the employee into "one of the United States." *State Emp. Bargaining Agent Coalition v Rowland*, 718 F3d 126, 137 [2d Cir 2013], *cert. den.*, 571 US 1116 [2013], *quoting Berman Enterprises, Inc. v Jorling*, 3 F3d 602, 606 [2d Cir 1993], *cert. den.*, 510 US 1073 [1994] ("'[w]here a complaint 'specifically seeks damages from [] defendants in their individual capacities[,] ... the mere fact that the state may reimburse them does not make the state the real party in interest'"); *Farid v Smith*, 850 F2d 917, 923 [2d Cir 1988] ("the law is clear that a state's voluntary decision to indemnify its public servants does not transform a personal-capacity action against a state official into an official-capacity action against the state"); *Wilson v Beebe*, 770 F2d

578, 588 [6th Cir 1985] (same); *Benning v Bd. of Regents of Regency Universities*, 928 F2d 775, 778-779 [7th Cir 1991] (same); *Duckworth v Franzen*, 780 F2d 645, 650 [7th Cir 1985] ("every court that has considered this issue has rejected, rightly in our view, the argument that an indemnity statute brings the Eleventh Amendment into play").[8]

Fourth, while defendants below cited *Will v Michigan Dept. of State Police*, 491 US 58 [1989] as holding that a State's immunity automatically extends to its employees, *Will* instead dealt with the issue of whether state officials "acting in their official capacities" are outside the class of "persons" subject to liability under 42 U.S.C. § 1983. What is more, the United States Supreme Court specifically rejected the thesis that "*Will's* language concerning suits against state officials … establish[ed] the limits of liability under the Eleventh Amendment." *Hafer*, 502 US at 29.

Finally, the State of New Jersey has no obligation to indemnify Ms. Hernandez for any liability she may incur. It is NJT which would indemnify defendant Hernandez … and NJSA § 27:25-17, quoted above, plainly states the State of New Jersey *does not* stand responsible for any of NJT's expenses or debts.

Ultimately, even if NJT actually were an "arm of the State" of New Jersey — which it is not (Point I, above) — such would still not render Ms. Hernandez immune

[8] Parenthetically, that street goes both ways. Where the suit is directly against the State itself, the fact that the State obtained insurance coverage and would be fully reimbursed for any liability does not render the Eleventh Amendment inapplicable. *Regents of the University of California*, 519 US at 426, 431.

from the alleged inconvenience of having to defend her conduct in the same state in which she caused the subject injuries.

POINT III

ASSUMING, *ARGUENDO*, THAT NJT COULD NOT BE SUED IN NEW YORK FOR CONDUCT THAT OCCURRED IN NEW YORK ABSENT ITS OR NEW JERSEY'S CONSENT, THEY PLAINLY PROVIDED SUCH CONSENT.

For the reasons stated in Point I of this brief, NJT had no interstate immunity which it or the State itself could waive. Be that as it may, New Jersey and its purported "arm" plainly consented to New York's jurisdiction, both statutorily and by their conduct in this State.

A. New Jersey And Its Purported "Arm" Have By Their Conduct In New York Consented To New York's Jurisdiction.

The *Henry* dissent, which addressed the consent issue the majority declined to reach, concluded that the State of New Jersey "consented to New York jurisdiction in three ways" and one of the ways it did so was "by operating a multimillion-dollar business within the State of New York." *Henry*, 39 NY3d at 389.

Inasmuch as plaintiffs cannot improve upon the *Henry* dissent's detailed analysis of the point, plaintiffs would, instead, respectfully adopt it. We would, however, add that North Carolina's high court recently reached a similar conclusion as to an alleged "arm of the State" … and did so in far less compelling circumstances.

Plaintiffs refer to the ruling in *Farmer v Troy Univ.*, 382 NC 366, 879 SE2d 124 [2022], *cert denied,* 143 S Ct 2561 [2023], a ruling that defendants appear to have

misconstrued. Defendants proclaim that "[n]umerous state courts have dismissed suits based on *Hyatt III*." They then string-cite five cases, of which *Farmer* is listed first. App. Br. at 13-14. Defendants add the explanatory blurb: "an Alabama university was entitled to sovereign immunity." *Id.*

In reality, the *Farmer* Court held that the defendant, an Alabama university that also had an office in Fayetteville, North Carolina (382 NC at 367), "waived its sovereign immunity from suit in this state" when it engaged in business in North Carolina (*id.* at 371). Of course, here NJT's activities within the State of New York go well beyond its operation at a single, New York location.

B. New Jersey Statutorily Waived Any "Arm Of The State" Immunity That NJT May Have Otherwise Asserted.

The *Henry* dissenters concluded that "the state of New Jersey waived any sort of sovereign immunity defense on NJT's behalf by subjecting it to liability in New Jersey" (39 NY3d at 389). The dissent observed that NJT's claimed interstate immunity "would provide NJT treatment not only more favorable than New York applies to its own transit authorities but also more favorable than NJT would receive in its own home-state court" (39 NY3d at 397).

Once again, being unable to improve upon the *Henry* dissent's analysis, plaintiffs would respectfully adopt it with one additional observation: there is actually a shorter route to the same destination.

The "statutory" issue addressed by the *Henry* dissent was, in essence, whether New Jersey had globally waived *its* interstate immunity when its legislature provided that each public entity within the state, including "the State" itself, would henceforth stand liable to the same extent as a private person in like circumstances. NJSA § 59:2-2. However, New Jersey is not a defendant herein. The defendants are NJT and its bus driver.

Irrespective of whether New Jersey waived whatever interstate immunity *it* possessed when it expressly made all public entities including itself liable to the same extent as similarly situated private persons (NJSA § 59:2-2[a]), its legislature surely waived whatever "arm of the State" immunity NJT could have possibly claimed when the legislature expressly provided that, with the single exception of the Palisades Interstate Park Commission, and then only with respect to the PIPC's "activities within the State of New Jersey," any entity that was "statutorily authorized to sue and be sued" should *not* be deemed "the State" for purposes of the TCA. NJSA § 59:1-3.

C. New Jersey Consented To New York's Jurisdiction Over Cases Arising From Accidents That Occur In New York When It Required That Any Suit Against NJT Be Commenced Where The Cause Of Action Arose.

The Appellate Division majority noted that New Jersey Rule of Court 4:3-2[a] required that any action against a public agency be commenced "in the county in which the cause of action arose." The Court then ruled that it would not leave "our plaintiffs

and other similarly situated plaintiffs are without a judicial forum" in this case in which NJT's "litigation conduct and strategy" here and in the precursor NJT cases had convinced it that NJT would "vigorously subject to any litigation in New Jersey for injuries arising outside of New Jersey." *Colt*, 206 AD3d at 131, 133.

Defendants now argue that the Appellate Division's analysis was "erroneous" and "improper" (App. Br. at 22-23) because, 1) NJT is not a "municipal corporation" and the venue provision is therefore purportedly inapplicable, and, 2) "New Jersey's venue rules are not jurisdictional and do not preclude suit" (*id.* at 22).

First, the venue provision does not apply solely to "municipal corporations." It also applies to "public agencies or officials." NJT's own brief to this Court says that it is both a "state agency" and a "public entity." App. Br. at 15, 17.

Second, the same entity that here represents that suits against NJT are not governed by the subject venue provision has *successfully* urged otherwise in New Jersey's courts. *Soto v Awan*, 2017 WL 10669635 [NJ Super Ct Law Div, Hudson County 2017] (granting *New Jersey Transit's* motion to change venue on the basis of "Rule 4:3-2" and stating, "Because the accident occurred in Hudson County, the action must be venued in Hudson County").

Finally, while NJT tells this Court that the venue requirement is not "jurisdictional" (App. Br. at 21-22), it has *successfully* obtained dismissals on the asserted ground that the provision *is* jurisdictional.

Plaintiffs would respectfully refer the Court to the ruling, and to NJT's brief, in *Astorino v New Jersey Tr. Corp.*, 2006 PA Super 297, 912 A2d 308 [Pa Super Ct 2006]. *Astorino* arose from a NJT train derailment that occurred in New Jersey. The plaintiffs in the case were Pennsylvania residents who brought the suit in their home state based upon NJT's substantial activities in Pennsylvania.

The action in *Astorino* was brought years before the Supreme Court's about-face in *Hyatt III*, 139 SCt 1485. One might have therefore supposed that NJT would not have had any grounds to object to being sued in Pennsylvania, and certainly no grounds to claim that it had a constitutional right to be sued only in New Jersey. However, NJT had the venue provision to work with, *i.e.*, the same venue provision it here says is inapplicable to suits against NJT.

Even though a venue provision is not of itself jurisdictional, NJT argued in *Astorino* that "N.J.S.A. 59:9-1 requires that all claims brought pursuant to the New Jersey Tort Claims Act be heard in accordance with the New Jersey Rules of Court," that N.J. Court Rule 4:3-2(a) was one of the those Rules of Court, and that the plaintiffs' non-compliance with the venue provision thus deprived the "Pennsylvania Courts" of "subject matter jurisdiction." *Giovanni ASTORINO and Sandra Astorino*, *Appellants, v. NEW JERSEY TRANSIT CORP. a/k/a New Jersey Transit Rail Operations*, Appellee, 2006 WL 2968420, at *5-8.

That argument *prevailed*, with the *Astorino* Court concluding, at NJT's behest, that the "trial court properly applied the New Jersey Tort Claims Act and found that it lacked subject matter jurisdiction to hear the instant case." *Astorino*, 912 A2d at 310. The Court added that while any suit in New Jersey was "probably barred both by lack of notice and the statute of limitations," that made "no difference." *Id.*

Astorino was neither the only nor the first case in which NJT successfully parlayed NJSA § 59:9-1 and the here-claimed-to-be-inapplicable venue provision into outright dismissal of a case that had not been commenced in the county in which the cause of action arose. It had previously obtained the same result in *Flamer v New Jersey Tr. Bus Operations, Inc.*, 414 Pa Super 350, 607 A2d 260 [Pa Super Ct 1992]. It is impossible to tell how many unreported and never appealed dismissals followed from the two reported, appellate rulings in *Flamer* and *Astorino*.

Admittedly, there are no doubt better grounds for denial of defendants' motion to dismiss … starting with the fact that NJT is not an "arm of the State" (Point I, above) and that its bus driver would not be an "arm of the State" even if she were a state employee, which she is not (Point II, above). That said, the subject venue provision requires that action be commenced where the cause of action arose and NJT has in the past successfully urged that non-compliance with the venue requirement *is* jurisdictional.

POINT IV

ASSUMING, *ARGUENDO*, THAT NJT HAD ANY INTERSTATE IMMUNITY TO WAIVE, IT PLAINLY DID SO BY FAILING TO PLEAD SUCH IMMUNITY AND BY FAILING TO TIMELY MOVE FOR DISMISSAL.

Plaintiffs commenced this action on September 18, 2017 (R.10-18), approximately seven months after the subject accident (R.382). The defendants did not move for dismissal on the basis of their alleged immunity until July of 2020 (R.42-57), almost three years later.

Because defendants answered without seeking dismissal, the parties proceeded to discovery, the matter was repeatedly conferenced, and scheduling orders and/or "so-ordered" stipulations were issued on June 20, 2018, November 15, 2018, February 11, 2019, April 29, 2019, June 24, 2019, and September 20, 2019 (R.354-355).

Defendants thereafter filed a motion in November of 2019, not for dismissal, but instead to compel discovery (R.42). There then followed three further "so-ordered" stipulations — on November 20, 2019, January 27, 2020 and March 2, 2020 (R.355) — making a total of nine (9) orders of "so-ordered" stipulations from June 20, 2018 until March 2, 2020. During that period, plaintiff Jeffrey Colt, defendant Ana Hernandez, and witness Antwone Steel were all deposed (R.99, 377, 441).

Defendants now argue, 1) that "NJ Transit [here] asserted sovereign immunity at the outset of the litigation" (App. Br. at 25), and, 2) that there can be no waiver

because the Appellate Division has held that "sovereign immunity goes to "subject matter jurisdiction" and therefore "may be raised at any time—including for the first time on appeal" (*id.* at 25-26).

First, while it would have been easy enough for defendants to plead that they had "interstate immunity" or "Eleventh Amendment" immunity, this as opposed to being "immune" irrespective of whether they were sued, they here failed to do so. Three of the defendants' 31 pleaded defenses claimed an alleged lack of "jurisdiction" or that defendants were purportedly "immune from suit" (R.38).[9] However, defendants pleaded nothing that would indicate to the court or to the plaintiffs that, a) the claimed lack of "jurisdiction" concerned something other than a purported lack of *in personam* jurisdiction, or, b) the defendants claimed only to be immune from suit *in New York* as opposed to being "immune from suit," which is what their answer *literally* claimed (R.38).

Further, were defendants to now argue that plaintiffs should have *deduced* that defendants *meant* to claim "*interstate* immunity" from the fact that New Jersey had

[9] Those pleaded defenses were, in their entirety:

> "2. Plaintiffs' recovery, and/or claims in this litigation, against Defendants is barred by lack of jurisdiction over NJT" (R.34).
>
> "14. Plaintiffs' recovery should be barred as this Court lacks jurisdiction" (R.37).
>
> "18. Defendants are immune from suit" (R.38).

statutorily waived its sovereign immunity (NJSA § 59:2-2[a]) and from the circumstance that it would have been beyond frivolous for NJT to argue that its substantial activities in the State of New York did not amount to transaction of business within the meaning of the "single act" standard of CPLR § 302[a] (*State v. Vayu, Inc.*, 39 NY3d 330 [2023]), this was the same answer in which the defendants also pleaded, amongst other claims:

> 1) plaintiffs' cause of action, asserting that defendants were liable in tort for the defendant-driver's negligent operation of her bus, did not state a cause of action known under New York law (R.33),
>
> 2) plaintiffs' claims had become "time barred" in the less than eight months between the accident and plaintiffs' commencement of the action (R.36),
>
> 3) plaintiffs' suit was barred by, amongst other doctrines, "the doctrine of avoidable consequences" and "the doctrine of superseding and intervening cause" (R.37-38),
>
> 4) the bus driver's alleged conduct was "in the nature of discretionary activity … and accordingly, no liability may be imposed upon Defendants" (R.39), and,
>
> 5) recovery was purportedly "barred by the failure of plaintiffs to give timely Notice of Claim" (R.38) … notwithstanding that plaintiffs had

actually filed presentation of claim, with NJT, literally within a month of the subject accident (R.236-242).

Second, while defendants continue to proclaim that "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" (App. Br. at 25), it remains that *this Court* ruled earlier this year in a case in which NJT was a party-defendant that,

1) "[t]he history and nature of interstate sovereign immunity guide us to the conclusion that the doctrine more closely aligns with jurisdiction over a party, rather than over all subject matter concerning that party" (39 NY3d at 372), and,

2) the defense therefore can be waived "based on litigation conduct" (*id.* at 371-372).[10]

Third, lack of jurisdiction "of the person of the defendant," the defense which this Court said was analogous to NJT's claimed interstate immunity (*Henry*, 39 NY3d at 372), is a defense that may be waived simply by appearing, even informally, without raising the defense by answer or pre-answer motion to dismiss. *Rubino v City of New*

[10] The two *Henry* dissenters agreed that the defense was waivable (39 NY3d at 382-383) — meaning the Court was unanimous on that point.

York, 145 AD2d 285, 288 [1st Dept 1989]; *HSBC Bank USA, N.A. v Whitelock*, 214 AD3d 855, 856-857 [2d Dept 2023].

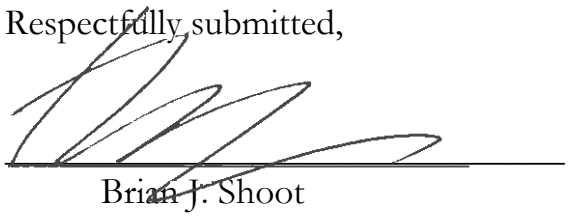
Even assuming that the defense of alleged interstate immunity is, for whatever reason, less easily waived and that a defendant must do more than appear before it can be deemed to have waived the defense of interstate immunity, plaintiffs respectfully submit that three depositions, one discovery motion (interposed *by* the allegedly immune defendants), and nine so-ordered stipulations qualifies as "something more" than an appearance in the case.

Conclusion

The order below should be affirmed.

Dated: New York, New York
October 23, 2023

Respectfully submitted,

By: 

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Dated: New York, New York
October 23, 2023

Respectfully submitted,

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