

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

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Appellate Division—First Department Case No. 2021-01180

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**Court of Appeals**  
*of the*  
**State of New York**

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JEFFREY COLT and BETSY TSAI,

*Plaintiffs-Respondents,*

— against —

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

*Defendants-Appellants.*

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**REPLY BRIEF FOR DEFENDANTS-APPELLANTS**

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## **DISCLOSURE STATEMENT**

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

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## **PRELIMINARY STATEMENT**

The United State Supreme Court’s decision in *Franchise Tax Bd. of Cal. v. Hyatt*, 587 U.S. \_\_\_, 139 S. Ct. 1485 (2019) (“*Hyatt III*”) makes clear that states—and arms of the state—cannot be sued in a sister state’s courts except in very limited circumstances involving consent or waiver. This Court is bound by that decision. In a futile effort to avoid *Hyatt III*’s explicit prohibition, Plaintiffs-Respondents incorrectly argue that New Jersey Transit Corporation (“NJ Transit”) is not an arm of the State of New Jersey and, even if NJ Transit is an arm of the State of New Jersey, it either consented to suit in New York and/or waived its right to assert interstate sovereign immunity in the instant case. Each argument fails.

A review of NJ Transit’s enabling statute establishes that it is an instrumentality of the State of New Jersey designed to perform essential government functions. Moreover, case law in state and federal courts in New Jersey and New York has long confirmed that NJ Transit is an arm of the State of New Jersey. This Court should look no further.

In an attempt to call NJ Transit’s treatment into question, Plaintiffs-Respondents point to various arm-of-the-state tests by Circuit Courts involving the Eleventh Amendment. Interstate sovereign immunity, however, does not arise from nor is it limited by the Eleventh Amendment. Instead, interstate sovereign immunity

is embedded within the constitutional design at its very founding. Thus, such cases are instructive rather than controlling.

Even if this Court were to seek instruction from such cases, the Third Circuit has already found that NJ Transit is an arm of the State of New Jersey. This determination should suffice and, again, this Court should look no further. But, even if this Court were to seek instruction from the Second Circuit as Plaintiffs-Respondents encourage—which it should not as it is in a different Circuit than where NJ Transit is located—the result would be the same. Moreover, Plaintiffs-Respondents’ insistence that NJ Transit has previously argued that it is independent of state control is based on a fundamental misunderstanding of applicable statutes and case law.

Plaintiffs-Respondents’ arguments regarding consent and waiver fare no better. The mere fact that NJ Transit conducts business in New York, even a lucrative one, does not provide the requisite consent sufficient to overcome interstate sovereign immunity as recognized by the United States Supreme Court in *Hyatt III*. Likewise, merely defending a matter is not an affirmative invocation of jurisdiction, especially here where it is undisputed that NJ Transit asserted its immunity defense at the very outset and moved to dismiss while the case was still pending with the

lower court (though it bears noting that an interstate sovereign immunity defense can be raised at any point, even on appeal).

Plaintiffs-Respondents' contention that the defendant bus driver is not entitled to immunity because she was sued in her individual capacity as opposed to official one conflates federal law surrounding immunity with vicarious liability under state tort law. Generally, state employees acting within the scope of their employment, like here, are entitled to same immunity as the state. Individual versus official capacity matters for purposes of Section 1983 cases because states cannot be held vicariously responsible for deprivation of rights under federal law. It has no bearing in cases involving state law claims of negligence. Indeed, since *Hyatt III*, courts have routinely dismissed suits against defendant employees, including NJ Transit employees.

Defendants-Appellants respectfully submit that the Appellate Division's recent determination involving NJ Transit, *Nizomov v. Jones*, 220 A.D.3d 879 (2d Dep't 2023), is directly on point and its reasoning should be adopted by this Court.

## **ARGUMENT**

### **POINT I**

#### **NJ TRANSIT IS AN ARM OF THE STATE OF NEW JERSEY**

##### **A. NJ Transit Is An Arm Of The State Of New Jersey**

Plaintiffs-Respondents devote a significant portion of their opposition brief to an assessment of tests involving whether an entity is an arm of the state under the Eleventh Amendment. (Opp. Br. at 25-40).<sup>1</sup> Plaintiffs-Respondents' assessment is unnecessary because it presumes the Eleventh Amendment cases are controlling rather than instructive and fails to consider that the cited cases utilized the test of the Circuit in which the entity was located<sup>2</sup>—in this case—the Third Circuit, which has already determined that NJ Transit is an arm of the State of New Jersey. And the

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<sup>1</sup> Defendants-Appellants cite to Plaintiffs-Respondents' Opposition Brief as (Opp. Br. at \_\_\_\_).

<sup>2</sup> See, e.g., *Grajales v. Puerto Rico Ports Auth.*, 831 F.3d 11 (1st Cir. 2016) (First Circuit's test - Puerto Rican entity); *Sue/Perior Concrete & Paving, Inc. v. Lewiston Golf Course Corp.*, 24 NY.3d 538 (2014) (Second Circuit's test - New York entity); *Bolden v. Southeastern Pennsylvania Transp. Auth.*, 953 F.2d 807 (3d Cir. 1991) (Third Circuit Test - to Pennsylvania entities); *Ram Ditta v. Maryland Nat. Capital Park and Planning Com'n*, 822 F.2d 456 (4th Cir. 1987) (Fourth Circuit's test - Maryland entity); *Phillips v. Whittington*, 497 F. Supp. 3d 122 (W.D. La. 2020) (Fifth Circuit's test - Louisiana entity); *Guertin v. State*, 912 F.3d 907 (6th Cir. 2019) (Sixth Circuit's test - Michigan entity); *Burrus v. State Lottery Com'n of Ind.*, 546 F.3d 417 (7th Cir. 2008) (Seventh Circuit's test - Indiana entity); *Crowe v. Oregon State Bar*, 989 F.3d 714 (9th Cir. 2021) (Ninth Circuit's test - Oregon entity); *Couser v. Gay*, 959 F.3d 1018 (10th Cir. 2020) (Tenth Circuit's test - Kansas entity); *McAdams v. Jefferson County 911 Emergency Comm. Dist., Inc.*, 931 F.3d 1132 (11th Cir. 2019) (Eleventh Circuit's test - Alabama entity);.

cases involving the Port Authority of New York and New Jersey do not support Plaintiffs-Respondents' arguments because, by joining that compact, both New Jersey and New York "surrendered a portion of their sovereignty" to "a regional polity and of a national union." *Hip Heightened Independence and Progress, Inc. v. Port Authority of New York and New Jersey*, 693 F.3d 345, 357 (3d Cir. 2012) (quoting *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 40 (1994)). That is not the case here.

Moreover, Plaintiffs-Respondents' reference to other Circuit tests, including but not limited to the Second Circuit, is improper because imposition of another's Circuit's test to determine whether NJ Transit is an arm of the State of New Jersey would infringe on New Jersey sovereignty. *Hyatt III*, 139 S. Ct. at 1497-98 (states may not adopt a policy of hostility to the public Acts of a sister state based on each state's sovereignty under the United States Constitution).

Under its own enabling statute, NJ Transit is recognized as an instrumentality of the State of New Jersey. The New Jersey Legislature established NJ Transit pursuant to the Public Transportation Act of 1979, N.J. Stat. Ann. §§ 27:25-1 through 27:25-24, for the "essential public purpose" of "establish[ing] and provid[ing] for the operation ... of a coherent public transportation system ...." N.J. Stat. Ann. § 27:25-2. The NJ Transit was established as a part of New Jersey's

executive branch of government as “an *instrumentality of the State* exercising public and essential governmental functions.” N.J. Stat. Ann. § 27:25-4 (emphasis added). The New Jersey Legislature determined that a public transportation system was “an essential public purpose which promotes mobility, serves the needs of the transit dependent, fosters commerce, conserves limited energy resources, protects the environment and promotes sound land use and the revitalization of our urban centers.” N.J. Stat. Ann. § 27:25-2(a).

Accordingly, NJ Transit respectfully submits that this Court is obligated to recognize NJ Transit’s assertion of interstate sovereign immunity. *See Hyatt III*, 139 S. Ct. at 1497-98 (“The Constitution implicitly strips States of any power they once had to refuse each other sovereign immunity.”); *see also Chesapeake & O. Ry. Co. v. Martin*, 283 U.S. 209, 221 (1931) (“The determination by this [C]ourt of [a federal] question is binding upon the state courts, and must be followed, any state law, decision, or rule to the contrary notwithstanding.”). Indeed, a state’s ability to classify its own agencies is a fundamental constitutional principle underlying interstate sovereign immunity that should not be disturbed by sister states. *See Hyatt III*, 139 S. Ct. at 1497 (states are prohibited from “adopt[ing] any policy of hostility to the public Acts” of a sister state because of and to protect and preserve “[e]ach State’s equal dignity and sovereignty under the Constitution.”); *Gregory v. Ashcroft*,



501 U.S. 452, 460 (1991) (“Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign.”).

Defendants-Appellants respectfully submit that the above analysis supports a finding that NJ Transit is an arm of the State of New Jersey. But, even if an arm-of-the-state analysis is considered, NJ Transit has been recognized by courts as an arm of the State of New Jersey for purposes of sovereign immunity. *See, e.g., Karns v. Shanahan*, 879 F.3d 504 (3d Cir. 2018); *Robinson v. N.J. Transit Rail Operations, Inc.*, 2019 U.S. App. LEXIS 3386 (3d Cir. Jan. 31, 2019).

In deciding whether an entity is an arm of the state, the United States Supreme Court considers the relationship between the state and the entity and the “essential nature and effect of the proceeding” in which the entity was sued. *Regents of Univ. of California v. Doe*, 519 U.S. 425, 429-430 (1997). The United States Supreme Court gives weight to the degree of state control over the entity and its classification under state law. *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) (court considered status of school district under Ohio law). The central aim of sovereign immunity is the protection of the state’s integrity. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 47-48 (1994).

Although arm-of-state cases decided under the Eleventh Amendment are instructive, the cases are not controlling on the outcome of this appeal. Indeed, the United States Supreme Court has explained, interstate sovereign immunity “neither derives from, nor is limited by, the terms of the Eleventh Amendment.” *Hyatt III*, 139 S. Ct. at 1496-97. Eleventh Amendment immunity protects states from claims for damages brought by private entities in federal courts, thereby limiting the federal judiciary’s Article III powers to adjudicate cases. *See Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 54 (1996); *Woods v. Rondout Valley Cent. Sch. Dist. Bd. of Educ.*, 466 F.3d 232, 240 (2d Cir. 2006). Interstate sovereign immunity, however, grants immunity to states in all private suits, whether in state or federal court. *Hyatt III*, 139 S. Ct. at 1492.

In *Hess*, which is factually distinguishable as it involved a bistate agency, not NJ Transit, the United States Supreme Court decided that “when indicators of [sovereign] immunity point in different directions, the Eleventh Amendment’s twin reasons for being remain [the Supreme Court’s] prime guide”—protecting the state treasury and protecting state dignity. 513 U.S. at 34. A court deciding whether an entity is an arm-of-state that can assert interstate sovereign immunity, however, does not have to consider the aims of the Eleventh Amendment. *Id.* Thus, Plaintiffs-Respondents’ insistence that the Third Circuit test in *Karns* is somehow inconsistent

with *Hess* (Opp. Br. at 44-46), albeit incorrect, is irrelevant. Instead, a court should consider the entity's status in own state and its autonomy from the state in concluding whether an entity is an arm-of-state. *See, e.g., Karns*, 879 F.3d at 513-20 (NJ Transit is an arm of State of New Jersey even though it is not entirely reliant on state funds as it is part of New Jersey's executive branch, is an instrumentality of State of New Jersey, and State of New Jersey exercises fairly substantial control over NJ Transit).

For these reasons as well as those set forth in the Opening Brief, Defendants-Appellants respectfully submit that the Appellate Division correctly held that NJ Transit is an arm of the State of New Jersey. *Colt v. N.J. Transit Corp.*, 206 A.D.3d 126, 128 (1st Dep't 2022).

**B. NJ Transit Is An Arm of the State Of New Jersey - The Third Circuit**

Even if this Court were to look for instruction in Eleventh Amendment cases, Defendants-Appellants respectfully submit that this Court should find NJ Transit is an arm of the State for purposes of interstate sovereign immunity based on the Third Circuit's decision in *Karns*.

In *Karns*, plaintiffs brought a federal civil rights action against NJ Transit and its police officers who arrested them for preaching on a train platform without permits. 879 F.3d at 510. The District Court dismissed the action based upon the

Eleventh Amendment, finding that NJ Transit was an arm of the State of New Jersey. *Id.* The Third Circuit applied a three-factor test to determine whether NJ Transit was an arm of the state: “(1) whether the payment of the judgment would come from the state [the state treasury factor]; (2) what status the entity has under state law; and (3) what degree of autonomy the entity has.” *Id.* at 513. The Third Circuit ruled that these factors supported a finding that NJ Transit was an arm of the State of New Jersey. *Id.*

In so doing, the Third Circuit found that: (i) pursuant to N.J. Stat. Ann. § 27:25-4(b), NJ Transit is subject to the control of the New Jersey legislature and the governor who is “responsible for appointing the entire NJ Transit board, which is composed of members of the Executive Branch”; (ii) pursuant to N.J. Stat. Ann. § 27:25-20(a), “The Commissioner of Transportation, an Executive branch official who is chairman of the NJ Transit governing board, has the power and duty to review NJ Transit’s expenditures and budget”; (iii) pursuant to N.J. Stat. Ann. § 27:25-20, NJ Transit is obligated to annually report its budget and condition to the governor and the New Jersey Legislature and is subject to audit at their whim; (iv) pursuant to N.J. Stat. Ann. § 27:25-4(f), the governor has the authority to veto any and all actions taken by NJ Transit’s governing board; (v) pursuant to N.J. Stat. Ann. § 27:25-13(h), the New Jersey Legislature retains the authority to legislatively

overrule proposed acquisitions. *Karns*, 879 F.3d at 518. The Third Circuit concluded that, “[a]ll of these facts suggest that New Jersey Transit is an instrumentality of the state, exercising limited autonomy apart from it.” *Id.*

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

**C. NJ Transit Is An Arm of the State Of New Jersey - The Second Circuit**

Even if this Court were to look for instruction by utilizing the Second Circuit’s six-factor test set forth in *Mancuso v. NYS Thruway Authority*, 86 F.3d 289 (2d Cir. 1996), which it should not as New Jersey is situated in the Third Circuit, Defendants-Appellants respectfully submit that this Court should find that NJ Transit is an arm of the State of New Jersey.

In determining whether an entity is an arm of a state, the Second Circuit first applies a six-factor test: (i) how the entity is referred to in the documents that created it; (ii) how the governing members of the entity are appointed; (iii) how the entity is funded; (iv) whether the entity’s function is traditionally one of local or state government; (v) whether the state has a veto; power over the entity’s actions; and (vi) whether the entity’s obligations are binding upon the state. *Mancuso*, 86 F.3d at 293. “If these factors point in one direction, the inquiry is complete. If not, a court

must ask whether a suit against the entity in federal court would threaten the integrity of the state and expose its treasury to risk.” *Id.* at 296.

Here, the first-stage factors establish that NJ Transit is an arm of the State of New Jersey because: (i) NJ Transit was “created by the New Jersey Public Act of 1979...and established in the Executive Branch of the State Government.” N.J. Stat. Ann. § 27:25-4; (ii) NJ Transit’s governing board is appointed by the Governor of New Jersey and is composed of members of the Executive Branch of New Jersey. N.J. Stat. Ann. § 27:25-4(b); (iii) NJ Transit may not incur a deficit or raise money through the sale of its own bonds, and all property of NJ Transit is deemed by statute to be state property, N.J. Stat. Ann. § 27:25–16. Therefore “State funds” are “require[d]” to “flow freely into the coffers of New Jersey Transit as needed to prevent a deficit. This substantial and continuing contribution of State money to New Jersey Transit’s budget is a sufficiently direct effect on the State Treasury to support a finding that New Jersey Transit is the alter ego of New Jersey.” *Brotherhood of Locomotive Engineers*, 608 F. Supp. 1216 (S.D.N.Y 1985); (iv) Public transportation is a traditional State function. *Mancuso*, 86 F.3d at 295; (v) The Governor of New Jersey has veto power of NJ Transit’s Board, N.J. Stat. Ann. § 27:25-4(f), precluding autonomy from the State; and (vi) a judgment “will have a significant impact on” and is therefore binding on the State of New Jersey because “the fiscal realities of

operating a public transportation system, coupled with the inability of [NJ Transit] to incur debt or to raise money through the sale of its own bonds, dictates the continuation of appropriations of State Funds to New Jersey Transit.” *Worrell v. N.J. Transit Bus Operations*, 1987 WL 4400, at \*2 (D.N.J. Jan. 29, 1987).

Because all six (6) factors weigh in favor of NJ Transit being an arm of the State of New Jersey, the second stage need not be considered. However, if this Court were to consider the second stage, Defendants-Appellants respectfully submit that this Court should find that NJ Transit is an arm of the State of New Jersey

NJT was established in 1979 by the Public Transportation Act, N.J.S.A. 27:25–1 to 24, “to address the problem of a heavily subsidized, but inefficient, private mass transportation system” by “converting New Jersey’s mass-transit system from one of private enterprise to one owned and operated by the State.” *See Matter of N.J. Transit Bus Operations, Inc.*, 592 A.2d 547 (N.J. 1991). Judgments against NJ Transit necessarily would impact New Jersey’s mass transportation because monies earmarked for public transportation would be used to pay the Judgment—even if the State of New Jersey is not directly legally liable. Thus, even if the additional stages of the Second Circuit’s test are analyzed, New Jersey’s sovereign dignity renders NJ Transit an arm of the State.

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

**D. NJ Transit Is Not Independent Of State Control**

Plaintiffs-Respondents' arguments that NJ Transit is independent of state control (Opp. Br. at 18, 24-25, 48-50) are without merit.

First, Plaintiffs-Respondents incorrectly contend that NJ Transit is independent of state control based on its own enabling statute. (Opp. Br. at 24). Although NJ Transit is separate from direct supervision by the Department of Transportation, the plain language of the statute establishes that it is an instrumentality of the State.

[A]llocated 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*.

N.J. Stat. Ann. § 25-4(a) (emphasis added).

Moreover, NJ Transit is not independent of Executive Branch control. The New Jersey Governor appoints the seven-member Board that controls NJ Transit, which includes, *inter alia*, the Commissioner of Transportation and the State



Treasurer. N.J. Stat. Ann. § 27:25-4(b). As Chairman of the Board, the Commissioner of Transportation has the power and duty to review NJ Transit's expenditures and proposed budget. N.J. Stat. Ann. § 27:25-20(a). The Governor can veto Board actions. N.J. Stat. Ann. § 27:25-4(f). Moreover, NJ Transit's Board is subject to operational constraints and has responsibilities to the State. For example, the Board must annually report the condition of NJ Transit and present its annual budget to the Governor and the Legislature. N.J. Stat. Ann. § 27:25-20(b), (d); *see also Kashani v. Purdue University*, 813 F.2d 843, 845-46 (7th Cir. 1987) (noting that requirement for the entity to file a statement of expenditures with state budget agency demonstrates state supervision). NJ Transit is subject to audit by the State of New Jersey at any time. N.J. Stat. Ann. § 27:25-20(e). And, finally, NJ Transit's acquisition of any privately-owned transportation entity is subject to legislative veto. N.J. Stat. Ann. § 27:25-13(g).

Second, Plaintiffs-Respondents' focus on N.J. Stat. Ann. § 27:25-17 (Opp. Br. at 20-24), which provides that a debt or liability of NJ Transit shall not constitute a debt of the State of New Jersey, ignores the effect of any such judgments against NJ Transit on the ability of the State of New Jersey to provide public transportation. When enacting the Public Transportation Act of 1979, New Jersey's Legislature

anticipated that NJ Transit would be dependent on funds from the Legislature for its operating deficits:

The Department of Transportation estimates that if this legislation were enacted, the Public Transit Corporation could operate the public transit system, maintaining the existing level of service, for at least \$5 million less than it would cost under the current system.

Senate Bill 3137, Public Transportation Act of 1979, Fiscal Note, June 8, 1979, at 1.

Consistent with the understanding that NJ Transit would run at an operating deficit and be subsidized by the State of New Jersey, Governor Byrne indicated on signing the Public Transportation Act of 1979 that the “funds appropriated in the fiscal year 1980 budget for bus subsidies will be transferred to the Corporation.” Governor Brendan T. Byrne, *Message on Signing the Public Transportation Act of 1979*, July 17, 1979, at 2. Moreover, the legislative history establishes that the practical consequences of every adverse judgment contributes to NJ Transit’s operating deficit, which in turn impinges on the State’s sovereign immunity, which it “enjoyed before the ratification of the Constitution, and which [it] retain[s] today.” *Alden v. Maine*, 527 U.S. 706 (1999).

Third, Plaintiffs’-Respondents’ contention that NJ Transit is not an arm of the State because it is a sue-and-be-sued entity under the Tort Claims Act (Opp. Br. at 24) runs afoul of various New York and New Jersey rulings. *See, e.g., Karns*, 879

F.3d at 517 (noting the fact that NJ Transit can sue and be sued is not dispositive against it being an arm of the state); *Nizomov*, 220 A.D.3d at 881 (finding that New Jersey’s consent to suits in its state courts under Tort Claims Act is not express consent to suit in sister states); *Lucheko v. City of Hoboken*, 998 A.2d 506, 514 (N.J. Super. Ct. App. Div. 2010) (noting that New Jersey’s Supreme Court has recognized that legislative intent of Tort Claims Act was to re-establish the immunity of *all governmental bodies* in New Jersey except in circumstances specifically enumerated therein).

Plaintiffs-Respondents’ reliance on a recent Pennsylvania court’s application of its own state law to reject NJ Transit’s assertion that it is an arm of the state, *Galette v. NJ Transit*, 293 A.3d 649, 652 (Pa. Super. 2023), is improper. Not only is that case on appeal, (Pa., No. 204 EAL 2023, filed June 28, 2023), but as the Pennsylvania Commonwealth Court, an intermediate appeal court, subsequently held in affirming the dismissal of another case against NJ Transit under *Hyatt III*, “it is inappropriate for [forum] state law to control.” *Marshall v Southeastern Pennsylvania Transportation Auth.*, 300 A.3d 537, 549 (Pa. Commw. Ct. 2023) (citing *Hyatt III*, 139 S. Ct. at 1498-99).

For these reasons and those set forth in Defendants-Appellants’ Opening Brief, Defendants-Appellants respectfully submit that Plaintiffs-Respondents’

arguments that NJ Transit is independent of state control fail and the Appellate Division correctly found that NJ Transit is arm of the state of New Jersey.

**E. NJ Transit Has Not Argued It Is Not An Arm Of The State**

Plaintiffs-Respondents' reliance on *Weaver v New Jersey Tr. Corp.*, 2011 WL 1261099 (N.J. Super Ct. App. Div. 2011) and *Torres v New Jersey Tr.*, 2022 WL 1561077 (N.J. Super Ct. App. Div. 2022) for the proposition that NJ Transit has argued against being an arm of the state in other litigation (Opp. Br. at 56-57) is misplaced. Those cases concern in-state service of process rules for the requisite Notice of Tort Claim under the Tort Claim Act—not whether an entity is an arm of the State for purposes of interstate sovereign immunity.

In New Jersey, a Notice of Tort Claim—a prerequisite to suing a public entity under the Tort Claims Act—must be served in writing on the entity. N.J. Stat. Ann. § 59:8-3. The plaintiffs in *Weaver* and *Torres* served the Department of Treasury rather than NJ Transit. *Weaver*, 2011 WL 1261099 at \*1 (complaint rejected because plaintiff sent notice of tort claim to the Department of Treasury); *Torres*, 2022 WL 1561077 at \*1 (plaintiff served the Department of Treasury). Although most sue and be sued entities in New Jersey, including NJ Transit, are not considered the State for purposes of the Tort Claims Act, this is irrelevant as to whether they should be considered an arm of the state for purposes of interstate sovereign immunity. *See*

*Karns*, 879 F.3d at 515-20 (detailed analysis of Eleventh Amendment immunity). Thus, Defendants-Appellants respectfully submit Plaintiffs-Respondents’ reliance on these cases is misplaced and this Court should find that NJ Transit is an arm of the State of New Jersey.

## POINT II

### **DEFENDANT-RESPONDENT ANA HERNANDEZ IS ENTITLED TO IMMUNITY**

Plaintiffs-Respondents’ contention that Defendant-Respondent Ana Hernandez (“Hernandez”) is not entitled to immunity because she was sued individually rather than in an official capacity (Opp. Br. at 60) is without merit. Courts in New York and elsewhere have explained that—in accord with the United States Supreme Court’ decision in *Hyatt III*—state employees, and employees of arms of the State, are entitled to immunity. *See Trepel v. Hodgins*, 183 A.D.3d 429 (1st Dep’t 2020) (individual employee defendant entitled to immunity under *Hyatt III*); *see also Reale v. State*, 218 A.3d 723, 726-27 and n.6 (Conn. App. 2019) (employees of Rhode Island state entities entitled to state immunity under *Hyatt III*); *Nizomov*, 220 A.D.3d at 881 (dismissing case against NJ Transit employee after *Hyatt III*); *Belfand v. Petosa*, 196 A.D.3d 60, 69 n.2 (1st Dep’t 2021) (bus driver entitled to immunity under *Hyatt III* as NJ Transit’s concession of liability as to

defendant bus driver amounts to an admission that his acts were perpetrated in his “official capacity”). *Cf.* N.J. Stat. Ann. § 59:2-2 (“A public entity is liable for the injury proximately caused by an act or omission of a public employee within the scope of his employment . . .”).

In *Trepel*, a case commenced prior to *Hyatt III*, plaintiff sued the Arizona Board of Regents and a board employee (the “Arizona Defendants”) in New York. The lower court granted the Arizona Defendants’ Motion to Dismiss the complaint. Plaintiff appealed. In response, the Arizona Defendants argued that the lower court was required to dismiss the action in view of *Hyatt III*. The Appellate Division accepted the Arizona Defendants’ argument and dismissed the complaint against them. *Trepel*, 183 A.D.3d at 429. Similarly, in *Reale*, the plaintiff brought a spoliation action in the Connecticut Superior Court against five state defendants, including the State of Rhode Island, the Rhode Island Department of Children, Youth and Families, an investigator, and two attorneys. The Appellate Court of Connecticut, relying on *Hyatt III*, affirmed the dismissal of the claims against all state defendants. *Reale*, 218 A.3d at 726-27. The reasoning in *Reale* and *Trepel* establishes that employees of state entities are entitled to dismissal on sovereign immunity grounds for the same reasons that apply to the state entities themselves. That should be the case here.

Plaintiffs-Respondents' contention that the Eleventh Amendment and, by extension, the doctrine of interstate sovereign immunity does not extend to State employees sued in their individual as opposed to official capacities (Opp. Br. at 58) is flawed. Interstate sovereign immunity "neither derives from, nor is limited by, the Eleventh Amendment." *Id.* at 1496-97.

Plaintiffs-Respondents allege Hernandez operated the bus with NJ Transit permission, consent and knowledge and within the scope of her employment. (R. 21-24). Because NJ Transit may be vicariously liable for Hernandez's negligence, the United States Supreme Court's holding in *Hyatt III* mandates that Hernandez is entitled to immunity. *Hyatt III*, 139 S. Ct. at 1492; *Belfand*, 196 A.D.3d at 63 n. 2. Accepting Plaintiffs-Respondents' argument would mean a party could circumvent the United States Supreme Court's holding simply by suing a state employee. Logic dictates that cannot be the case.

The Section 1983 cases on which Plaintiffs-Respondents rely are inapposite. Under Section 1983, whether an individual defendant is operating in his/her official capacity is relevant because a state government may not be vicariously liable for violations of federal law. *See, e.g., Wright v. Smith*, 21 F.3d 496, 501 (2d Cir. 1994). But that distinction is irrelevant here. Since Plaintiffs-Respondents' claims are based on alleged violations of state tort law, which may impose liability against a state

entity for the employee's acts based on the doctrine of respondeat superior, NJ Transit could be held liable for the conduct of Hernandez. *See Tice v. Cramer*, 627 A.2d 1090, 1095 (N.J. 1993) (“when the public employee is liable for acts within the scope of ... employment, so too is the entity”); N.J. Stat. Ann. § 59:2-2 (“A public entity is liable for the injury proximately caused by an act or omission of a public employee within the scope of his employment . . .”). *see also Stanley v. Gallegos*, 2012 WL 12953737, \*3 (D.N.M. 2012) (“[g]enerally, a plaintiff cannot sue a sovereign due to the sovereign’s immunity from suit and this extends to individual public employees acting within the scope of their duties.”).

Plaintiffs-Respondents incorrectly conflate issues unique to federal law with interstate sovereign immunity for alleged violations of state tort law—which does not differentiate between official and individual capacity—and therefore should be rejected by this Court. *See Stanley*, 2012 WL 12953737, at \*3 (“Plaintiff has conflated the doctrines of qualified immunity for alleged federal constitutional violations, which differentiates between official and individual capacity, and the doctrines in tort law regarding respondeat superior, vicarious liability and an employee acting within the scope of their duties, which do not differentiate between official and individual capacity.”).



For these reasons and those set forth in the Opening Brief, Defendants-Appellants respectfully submit that the Appellate Division correctly found that Defendant-Respondent Hernandez—as a NJ Transit employee acting within scope of her employment—is entitled to immunity the same as NJ Transit.

### **POINT III**

#### **DEFENDANTS-APPELLANTS DID NOT CONSENT TO SUIT IN THE STATE OF NEW YORK**

Plaintiffs-Respondents further argue that NJ Transit consented to jurisdiction in New York because it operates a business in the State. (Opp. Br. at 64-65). This argument also fails.

It is well established that a state's engagement in interstate commerce does not, in and of itself, constitute a waiver of interstate sovereign immunity and/or consent to jurisdiction. *See College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680 (1999). Indeed, the Appellate Division has held on more than one occasion that NJ Transit has not consented to jurisdiction in New York because it conducts business there. *Nizomov*, 220 A.D.3d at 881 (NJ Transit did not consent to suit in New York by virtue of extensive operations within New York); *Colt*, 206 A.D.3d at 128 (NJ Transit did not consent to suit in New York); *Belfand v. Petosa*, 196 A.D.3d at 70 n.7 (same); *Accord Marshall*. 300 A.3d 537,

552 (Pa. Commw. Ct. 2023) (NJ Transit did not consent to jurisdiction by doing business in Pennsylvania).

In support of their argument, Plaintiffs-Respondents misconstrue the decision in *Farmer v Troy Univ.*, 879 S.E.2d 124 (N.C. 2022), *cert. denied*, 143 S. Ct. 2561 (2023). Plaintiffs-Respondents erroneously contend that the *Farmer* Court found that the defendant (an Alabama university) ... had waived sovereign immunity when it engaged in business in North Carolina. (Opp. Br. at 64-65). Indeed, that is not *Farmer's* holding. Instead, the court held that the Alabama university explicitly waived its sovereign immunity by registering as a nonprofit corporation under a North Carolina law that *expressly provided*—unlike here—that such registration included consent to be sued in North Carolina state courts. *Id.* at 128 (emphasis added).

Plaintiffs-Respondents' reliance on the dissent in *Henry v New Jersey Tr. Corp.*, 39 N.Y.3d 361 (2023) (Opp. Br. at 64-65) is similarly misplaced. The dissent in *Henry* took issue with NJ Transit seeking immunity whilst conducting business in New York. *Id.* at 365. But, as noted above, merely conducting business in another state is insufficient to constitute a waiver of sovereign immunity. *See College Sav. Bank*, 527 U.S. at 680. The dissent in *Henry* further maintains that NJ Transit's entitlement to interstate sovereign immunity can be disregarded as "hostile to the

public Acts” of the forum state since affording NJ Transit immunity would, in essence, relieve it of all liability, thereby treating NJ Transit better than both New York treats its own citizens and New Jersey treats NJ Transit (given that it can be sued there). *Henry*, 39 N.Y.3d at 397. But this is simply not the case as residents of other states have filed suit against NJ Transit in New Jersey— even when the accidents occurred outside of the state. *See, e.g., Johnson v. N.J. Transit Corp.*, CAM-L-003139-22 (N.J. Super. Ct. L. Div. Camden Cty. 2022) (Pennsylvania resident injured in bus accident in Philadelphia files suit against NJ Transit in New Jersey); *Zhong v. N.J. Transit Corp.*, ESX-L-3230-20 (N.J. Super. Ct. L. Div. Essex Cty. 2020) (New York resident injured in accident at Port Authority Bus Terminal filed suit against NJ Transit in New Jersey).<sup>3</sup>

And, even if the dissent were correct, that would not vitiate interstate sovereign immunity. As the dissent in *Colt* observed, even if the Appellate Division were correct that the action could not be maintained in New Jersey, that would have no bearing on the court’s duty to honor NJ Transit’s interstate sovereign immunity defense. *Colt*, 206 A.D.3d at 142. Indeed, when reaching its decision in *Hyatt III*,

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<sup>3</sup> *Kinberg v. Kinberg*, 85 A.D.3d 673, 674 (1st Dep’t 2011) (“Appellate courts in this state may take judicial notice of ‘official court record[s]’ in other proceedings”).

the United States Supreme Court was fully cognizant that the action could not have been maintained in the non-forum state. *Id.* at 143.

Plaintiffs-Respondents further demonstrate their misunderstanding of interstate sovereign immunity by insisting that NJ Transit can be sued in New York because it is a “sue and be sued” entity for purposes of New Jersey’s Tort Claims Act (Opp. Br. at 66). But this distinction is irrelevant. As noted above, the United States Supreme Court has distinguished immunity from liability—which the Tort Claims Act reduces—from immunity from suit in a sister court, which the Tort Claims Act does not waive or reduce. *See Hyatt III*, 139 S. Ct. at 1493 (“[a]n integral component” of the States’ sovereignty was “their immunity from private suits” in “each other’s courts”); *Belfand*, 196 A.D.3d. at 69 (“New Jersey’s consent to suits in its state courts under its Tort Claims Act is not an express consent to suit in courts of a sister state and therefore fails to satisfy *Hyatt [III]*’s constitutional demand.”).

Finally, Plaintiffs-Respondents misconstrue New Jersey’s venue rules to support their erroneous theory that a plaintiff cannot sue NJ Transit in New Jersey if the accident did not occur there—thus, in this instance, necessitating suit in New York. (Opp. Br. at 66-69).<sup>4</sup> This claim is wrong. Indeed, as noted above, citizens of

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<sup>4</sup> Because an imposition of the Appellate Division’s misinterpretation of the New Jersey Rules of Court—including that, under New Jersey Court Rule 4:3-2, a suit in New Jersey would be foreclosed (*Colt*, 206 A.D.3d at 130)—would improperly infringe on New Jersey’s sovereignty, it

sister states have filed suit against NJ Transit in New Jersey, even when the suit occurred elsewhere. *See, e.g., Johnson v. N.J. Transit Corp.*, CAM-L-003139-22. As previously emphasized in Defendants-Appellants Opening Brief,<sup>5</sup> this is because New Jersey courts venue rules are not jurisdictional because the New Jersey Superior Court “maintains statewide jurisdiction.”<sup>6</sup> (App. Br. at 23) (citing *N.J. Thoroughbred Horseman’s Assoc. v. N.J.*, 791 A.2d 320, 326 (N.J. Super. Ct. Ch. Div. 2001)). Thus, “while the proper location of venue remains an important aspect of the administration of justice, it does not rise to the level of jurisdictional debate,” and, therefore, the requirement that a lawsuit be venued in the county where the cause of action arose “applies only if . . . the cause of action *arises* in the county where the governmental body is located.” *Id.* (emphasis added).

For these reasons and those set forth in the Opening Brief, Defendants-Appellants respectfully submit that the Appellate Division correctly found that NJ Transit has not consented to suit in New York.

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should be rejected by this Court. *Hyatt III*, 139 S. Ct. at 1497-98 (states may not infringe on a sister state’s rights by prompting hostility between the states).

<sup>5</sup> Defendants-Appellants cite to their Opening Brief as (App. Br. at \_\_\_\_).

<sup>6</sup> Plaintiffs-Respondents’ reliance on *Astoriano v. N.J. Transit Corp.*, 2006 WL 3696710 (Pa. Com. Pl. 2006) and *Flamer v. N.J. Transit Bus Operations, Inc.*, 607 A.2d 260, 261 (Pa. Super. Ct. 1992)—two cases in which Pennsylvania courts dismissed cases for lack of subject matter jurisdiction—is misplaced because those cases involve the issue of whether a suit had to be filed in New Jersey.

## POINT IV

### **DEFENDANTS-APPELLANTS HAVE NOT WAIVED THEIR RIGHT TO ASSERT INTERSTATE SOVEREIGN IMMUNITY**

Plaintiffs-Respondents' arguments regarding waiver (Opp. Br. at 73-74) similarly fail. Because sovereign immunity is a fundamental right embedded in the United States Constitution, there can be no waiver of sovereign immunity unless NJ Transit expressly waived its immunity—which it did not. *See Edelman v. Jordan*, 415 U.S. 651 (1974) (the United States Constitution forbids constructive or implied waivers of sovereign immunity).

Defendants-Appellants pled interstate sovereign immunity at the very outset of this case—in their Answer. (R. 34, 37-38). Accordingly, the Appellate Division rightly found that NJ Transit had not waived the defense. *See Colt*, 206 A.D.3d at 129. The assertion of immunity at the outset of the case distinguishes this one from those—addressed in Defendants-Appellants' Opening Brief—in which New York courts have determined that NJ Transit waived its immunity by not asserting the defense until much later in the case. *Henry v. N.J. Transit Corp.*, 195 A.D.3d 444 (1st Dep't 2021), *app. dismiss'd*, 2023 N.Y. LEXIS 495 (March 21, 2023); *Belfand*, 196 A.D.3d at 60; *Fetahu v. N.J. Transit Corp.*, 197 A.D.3d 1065 (1st Dep't 2021); *Taylor v. N.J. Transit Corp.*, 199 A.D.3d 540 (1st Dep't 2021)).

The argument that NJ Transit waive its right to interstage sovereign immunity because it did not seek dismissal until after filing its Answer (Opp. Br. at 73-74) is without merit. Indeed, New York courts have ruled that interstate sovereign immunity is based on a court's subject matter jurisdiction which may be raised at any time—including for the first time on appeal. *See Buckles v. State*, 221 N.Y. 418, 424 (1917) (“[b]eing thus a question of jurisdiction, [sovereign immunity] could be raised at any time and could not be waived”); *see also Pollard v. State*, 173 A.D.2d 906 (3d Dep’t 1991) (although court did not find immunity, sovereign immunity could be raised at any time); *Heisler v. State*, 78 A.D.2d 767, 768 (4th Dep’t 1980) (although court did not find immunity in the case, sovereign immunity could be raised by the sovereign for the first time on appeal). Federal courts have also held that sovereign immunity may be raised at any time during a proceeding. *Calderon v. Ashmus*, 523 U.S. 740, 745 n.2 (1998); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 n.8 (1984); *Beaulieu v. Vermont*, 807 F.3d 478, 491 (2d Cir. 2015) (citing *McGinty v. New York*, 251 F.3d 84, 94 (2d Cir. 2001)); *Richardson v. N.Y. State Dep’t of Corr. Serv.*, 180 F.3d 426, 449 (2d Cir. 1999), *abrogated on other grounds*, 548 U.S. 53 (2006).

In finding waiver, the courts search for an affirmative invocation of jurisdiction. *Beaulieu*, 807 F.3d at 478. Appearance in New York for purposes of

defending a lawsuit does not waive immunity. *See National Rifle Assoc. of America v. Cuomo*, 525 F. Supp. 3d 382, 407 (N.D.N.Y. 2021) (a State does not waive immunity “by defending the claims against it” as “[s]uch a result is not supported by either case law or logic.”). Plaintiffs-Respondents’ insistence to the contrary (Opp. Br. at 73-74) is incorrectly based on an Eleventh Amendment application rather than interstate sovereign immunity referenced in *Hyatt III* and should be disregarded by this Court.

In addition, the argument that New Jersey’s Tort Claims Act itself provides a “waiver” because it permits suit against the State of New Jersey (Opp. Br. at 24) is incorrect. For waiver to be effective, a state must intentionally relinquish or abandon a known right or privilege. *College Sav. Bank*, 527 U.S. at 682. The courts must indulge every reasonable presumption against the waiver of fundamental constitutional rights. *Id.* (citing *Aetna Ins. Co. v. Kennedy ex rel. Bogash*, 301 U.S. 389, 393 (1937); *Ohio Bell Telephone Co. v. Public Util. Comm’n of Ohio*, 301 U.S. 292, 307 (1937)). Courts cannot presume that a state acquiesced in the loss of fundamental rights because waiver of sovereign immunity “cannot be implied but must be unequivocally expressed.” *Id.*

The Tort Claims Act does not waive any immunity that is not expressly waived. When enacting, New Jersey’s Legislature:



[C]hose to limit State liability through an initial presumption of immunity. N.J.S.A. 59:2-1(a) makes explicit this presumption of immunity, providing that “[e]xcept as otherwise provided by this act, a public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person.” Accordingly, the Supreme Court has recognized that the legislative intent of the [Tort Claims Act] was to *re-establish the immunity of all governmental bodies in New Jersey except in the circumstances enumerated . . . .*

*Luchejko v. City of Hoboken*, 998 A.2d 506, 514 (N.J. Super. Ct. App. Div. 2010) (emphasis added); *accord Alden*, 527 U.S. at (1999) (sovereign immunity from being “su[ed] in the courts of another sovereign” is a “different concept” from immunity from being “su[ed] in the sovereign’s own courts.”) (cited with approval in *Hyatt III*, 139 S. Ct. at 1493 and 1496).

Finally, the contention that interstate sovereign immunity sounds in personal jurisdiction (Opp. Br. at 73-74) is inaccurate. As a matter of law, “for cases in which there are consequences that attach to the distinction between personal jurisdiction and subject matter jurisdiction, it is more appropriate . . . to characterize a sovereign immunity bar as one that entails a lack of subject matter jurisdiction.” *Morrison*, 230 A.D.2d at 261 (citing *Brown v. State of New York*, 89 N.Y.2d 172 (1996)). Thus, even if the Courts of New York have personal jurisdiction over NJ Transit, “the doctrine of sovereign immunity is invoked only *after* the New York court has

acquired personal jurisdiction over the parties” *Id.* at 261. Personal jurisdiction does not preclude sovereign immunity.

For these reasons and those set forth in the Opening Brief, Defendants-Appellants respectfully submit that the Appellate Division correctly found that NJ Transit has not waived its right to assert interstate sovereign immunity in this case.

## POINT V

### **THIS COURT SHOULD ADOPT THE APPELLATE DIVISION’S RECENT DECISION IN *NIZOMOV V. JONES***

The Appellate Division’s decision in *Nizomov v. Jones*—a decision issued after Defendants-Appellants filed their Opening Brief—directly addresses the above issues and its reasoning should be adopted by this Court. 220 A.D.3d at 879.

In *Nizomov*, the Appellate Division held that: (i) NJ Transit is an arm of the State of New Jersey for the purpose of interstate sovereign immunity as set forth in *Hyatt III*; (ii) NJ Transit’s bus operators are entitled to interstate sovereign immunity; (iii) NJ Transit did not consent to suit in the State of New York by virtue of its extensive operations within the State of New York; and (iv) NJ Transit did not waive its right to assert sovereign immunity based on its litigation conduct. 220 A.D.3d at 880-81.

The plaintiffs Nizomov (Husband) and Radjabova (Wife) alleged that defendant NJ Transit Operator, Michael Jones, while driving a NJ Transit Bus and acting within the scope of his employment with NJ Transit, struck a vehicle operated by plaintiff Nizomov, thereby causing personal injuries. Plaintiffs sued both NJ Transit and Jones. Defendants—after the parties engaged in pre-trial litigation but before the end of pre-trial discovery—moved to dismiss the Complaint. The lower court granted the motion to dismiss. The plaintiffs moved for, *inter alia*, leave to reargue. The lower court adhered to its prior determination, and plaintiffs appealed. The Appellate Division—as noted above—affirmed the lower court’s decision.

As the Appellate Division explained, in *Hyatt III* the United States Supreme Court held that “States retain their sovereign immunity for private suits brought in the courts of other States” and a State “can waive sovereign immunity only in limited circumstances, including by the enactment of legislation or by specific conduct during litigation.” *Nizomov*, 220 A.D.3d at 882. After detailing *Hyatt III*, the Appellate Division ruled that: (i) defendants did not consent to suit or waive their sovereign immunity by virtue of their extensive operations in New York (*Id.* at 881); (ii) the fact that NJ Transit is subject to suit in New Jersey pursuant to the New Jersey Tort Claim Act “is not an express consent to suit” in New York (*Ibid.*); (iii) defendants’ conduct during the litigation did not amount to waiver of sovereign

immunity; and (iv) defendants “have not unconstitutionally infringed” on New York’s public policy by “deferring to the sovereignty of New Jersey and its courts” in accordance with *Hyatt III* as the United States Constitution embeds interstate sovereign immunity within the constitutional design. *Ibid.* Applying these standards, the Appellate Division properly found that defendants were entitled to dismissal. *Id.* at 882.

For these reasons and those set forth in the Opening Brief, Defendants-Appellants respectfully submit that the Appellate Division’s Order in the instant case was error and should be reversed.

## POINT VI

### **PLAINTIFFS-RESPONDENTS DO NOT ADDRESS AND THEREFORE CONCEDE THE FULL FAITH AND CREDIT ARGUMENT**

As noted in Defendants-Appellants’ Opening Brief, the Appellate Division’s Order contravenes the Full Faith and Credit Clause of the United States Constitution. (App. Br. at 26-29). Plaintiffs-Respondents—other than a brief mention in the Preliminary Statement—do not respond to this argument. Thus, Defendants-Appellants respectfully submit that this Court should find that the Appellate Division’s rejection of NJ Transit’s interstate sovereign immunity defense was error because it runs afoul of the Full Faith and Credit Clause of the United States

Constitution. *Cf. Nizomov*, 220 A.D.3d at 881 (the NJ Transit Defendants “as proxy for the state of New Jersey” did not “adopt [] a policy of hostility to the public acts of New York in derogation of the Full Faith and Credit Clause of the United States Constitution.”).

### **CONCLUSION**

For these reasons and those set forth in the Opening Brief, Defendants-Appellants respectfully request that this Court enter an Order reversing the Appellate Division’s Order dated May 24, 2022, and dismissing Plaintiffs-Respondents’ Complaint as against Defendants-Appellants.

Dated: January 4, 2024

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**NEW YORK STATE COURT OF APPEALS**  
**CERTIFICATE OF COMPLIANCE**

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

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The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the corporate disclosure statement, questions presented for review, table of contents, table of authorities, and word count certification is 7,961 words. Permission to file an oversized Brief was granted pursuant to the December 4, 2023 letter of the court.