To be argued by: **Dean L. Pillarella**
Time Requested for Argument: 15 Minutes

Appellate Division Docket No.: 2020-00380

New York Supreme Court
APPELLATE DIVISION – FIRST DEPARTMENT

KATHLEEN HENRY,

Plaintiff-Respondent,

-against-

NEW JERSEY TRANSITCORPORATION;
RENAUD PIERRELOUIS,

Defendants-Appellants,

CHEN NAKAR,

Defendant.

APPELLANTS' REPLY BRIEF

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New York County Clerk's Index No. 156496/2015

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

New York Statutes

New Jersey Statutes

Federal Statutes

Treatises

ARGUMENT IN REPLY

Respondent cannot avoid the inescapable grasp of *Trepel v. Hodgins*, 183 A.D.3d 429 (1st Dep't 2020), and *Franchise Tax Board of California v. Hyatt*, 139 S. Ct. 1485 (2019) (*Hyatt III*). As the New Jersey Transit Corporation ("Transit") is an arm of the State of New Jersey, and New Jersey has not expressly and unequivocally consented to private suits in New York's courts, the action must be dismissed, with prejudice, for lack of subject-matter jurisdiction pursuant to the doctrine of interstate sovereign immunity.

I. APPELLANTS' CHALLENGES TO THE COURT'S SUBJECT-MATTER JURISDICTION ARE PROPER AS A LEGAL MATTER.

Respondent admits that interstate sovereign immunity speaks to the Court's subject-matter jurisdiction and may thus be raised for the first time on appeal. Despite this, she contends that the record and briefs are insufficient to permit adjudication of the defense's applicability at this juncture and that the Court should instead follow the general rule that a party may not argue on appeal a theory never presented to the trial court. Her brief tacitly acknowledges the rule's inapplicability in relying solely upon an alleged absence of legal considerations—namely, the constitutional right of interstate travel, N.Y. Vehicle and Traffic Law ("VTL") §253 and notions of "implied waiver," Transit's arm-of-state status, the N.J. Public Transportation Act of 1979 (N.J. Stat. Ann. §27:25-1 through 24.2) ("NJPTA")'s "sue and be sued" provision, and the N.J. Tort Claims Act (N.J. Stat. Ann. §§59:1-

1, *et. seq.*) ("NJTCA")'s general *respondent superior* provision—rather than any allegedly novel factual assertions or theories, to support her position. This is self-defeating.

Appellants' challenges to the Court's subject-matter jurisdiction present solely legal questions. Transit's arm-of-state status is "a question of federal law … answered only after considering the provisions of state law that define the agency's charter." *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 n. 5 (1997). Whether the NJTCA, which governs suits against Transit, *see Muhammad v. New Jersey Transit*, 176 N.J. 185 (N.J. 2003), provides New Jersey's consent to suits in foreign courts is resolved by analysis of its history, provisions, and interpretative case law. In addition to being discussed at length in Appellants' brief and herein, sister courts have already resolved both questions in Appellants' favor. *See Karns v. Shanahan*, 879 F.3d 504 (3d Cir. 2018) (finding Transit an arm-of-state and dismissing action on Eleventh Amendment grounds); and *Hyatt v. County of Passaic*, 340 Fed. Appx. 833, (3d Cir. 2009) (holding NJTCA cannot provide a waiver of Eleventh Amendment immunity). Appellants' challenges are properly before this Court as a legal matter and ripe for consideration.

Goffredo v. City of New York, 2007 N.Y. App. Div. LEXIS 5975 (1st Dep't 2007), guides here. There, the petitioner first raised a preemption challenge in his motion to reargue this Court's order affirming the trial court. Although the

challenge was not raised at the trial level, or even in the parties' appellate briefs, because it spoke to subject-matter jurisdiction, this Court granted re-argument, reasoning that "[a] judgment or order issued without subject-matter jurisdiction is void, and that defect may be raised at any time and may not be waived." *Id.* at 2 (*citing Editorial Photocolor Archives v. Granger Collection*, 61 N.Y.2d 517, 523 (1984)). Here, Appellants raise a constitutional challenge to the Court's subject-matter jurisdiction precipitated by a change in the law rendered after trial and briefing of the underlying Motion had concluded. Like preemption, interstate sovereign immunity and waiver are matters of constitutional law that control the Court's subject-matter jurisdiction. *See, e.g., Trepel*, 183 A.D.3d at 429. Per *Goffredo*, Appellants' challenges are appropriate.

Respondent's reliance upon *Sean M. v. City of New York*, 20 A.D.3d 146 (1st Dep't 2005), is misplaced. There, the trial court denied the defendant's motion seeking dismissal on the basis of statutory immunity or, alternatively, the plaintiff's discovery abuse. On appeal, the defendant raised the novel theory that reversal and dismissal were warranted because, given the case's age and delay, its continued defense was prejudicial. This Court rejected the theory because, while the defendant had argued that delay warranted dismissal vis-à-vis the plaintiff's discovery abuse, its novel theory of delay was never presented to the trial court and thus unpreserved. Appellants do not raise novel factual assertions or theories. They

raise legal arguments challenging the Court's subject-matter jurisdiction in light of an intervening Supreme Court precedent.

Neither does *Recovery Consultants, Inc. v. Shih-Hsieh*, 141 A.D.2d 272 (1st Dep't 1988), assist Respondent. There, the defendants appealed form the trial court's denial of summary judgment which rejected their theory that the contract at issue concerned an unenforceable gambling debt under Nevada law which rendered it unenforceable in New York. On appeal, the plaintiff, the contract's assignee, argued for the first time that, while the contract's assignor held a gambling license, it did not, which, it argued, rendered the contract enforceable with respect to it. As this theory was never presented to the trial court, this Court declined to consider it, reasoning that "[f]actual assertions not properly contained in the record may not be considered by an appellate court" and "a party [may not] argue on appeal a theory never presented to the court of original jurisdiction." *Id.* at. 276. As with *Sean M.*, this is not the case here. Unlike motions for summary judgment, Appellants' challenges raise only legal questions and do not require factual inquiry.

Matter of Halpern v. White, 2020 NY Slip Op 07133 (1st Dep't 2020), and *Chateau D'if Corp. v. City of New York*, 219 A.D.2d 205 (1st Dep't 1996), illustrate this. Per *Matter of Halpern*'s briefs, there, the respondent argued for the first time on appeal that the trial court lacked subject-matter jurisdiction because

the proceeding's petition was not accompanied by competent evidence that an abstract of judgment had been filed with the county clerk per N.Y. Civil Practice Law and Rules ("CPLR") 5018. In response, this Court held that, although the respondent's challenge spoke to subject-matter jurisdiction and thus could be raised at any time, the lack of a fully developed factual record in this regard rendered the defense's consideration inappropriate. In so holding, this Court distinguished the matter from *Chateau D'if Corp. v. City of New York*, 219 A.D.2d 205, 209 (1st Dep't 1996), which holds that a determinative "legal argument which appear[s] upon the face of the record and which could not have been avoided … if brought to the opposing party's attention at the proper juncture[,]" may be raised for the first time on appeal, provided a sufficient record exists. Unlike the question of whether an abstract of judgment has, in fact, been filed, Appellants' challenges are a legal matter and constitute determinative, unavoidable legal arguments that are apparent from the face of the record in light of *Hyatt III*.

The final-judgment rule is inapplicable. Respondent wrongly suggests Appellants' jurisdictional challenges are improperly taken from an interlocutory order, rather than a judgment. This contorts the final-judgment rule, which provides only that "Any right of intermediate appeal terminates with the entry of a final judgment." *In re Aho*, 39 N.Y.2d 241, 248 (1976). Here, no final judgment has entered, rendering the underlying Decision and Order the only appealable

paper at this juncture. Inasmuch as Respondent intends to argue that Appellants must challenge the Court's subject-matter jurisdiction on appeal from a final judgment, rather than the subject Decision and Order, she cites no supporting precedent and overlooks that a defect in subject-matter jurisdiction affects the validity of all underlying proceedings. For "[s]ubject-matter jurisdiction is a concept that is absolute—it either exists in its entirety or it does not exist at all." *Caffrey v. North Arrow Abstract & Settlement Servs., Inc.*, 160 A.D.3d 121, 133 (2d Dep't 2018). Accordingly, this Court considers the defense even when raised for the first time on a motion to reargue an appeal. *See Goffredo, supra*; and *Murray v. State Liquor Authority*, 139 A.D.2d 46 (1st Dep't 1988). This appeal is a proper vehicle for Appellants' jurisdictional challenges.

Respondent presents no reason to upset blackletter law that a challenge to the Court's subject-matter jurisdiction "may be raised at any time and may not be waived[,]" *Editorial Photocolor Archives*, 61 N.Y.2d at 523, or that "the defense of sovereign immunity brings into question jurisdiction of the subject … and may be raised at any time." *Pollard v. State*, 173 A.D.2d 906, 907 (3d Dep't 1991). In any event, Appellants' challenges are appropriately considered as determinative, unavoidable legal arguments that are apparent from the face of the record in light of *Hyatt III*.

II. THE LEGAL CONSIDERATIONS RAISED BY RESPONDENT FAIL TO WARRANT REJECTION OF APPELLANTS' JURISDICTIONAL CHALLENGES OR PROVIDE A WAIVER OF NEW JERSEY'S INTERSTATE SOVEREIGN IMMUNITY.

Respondent's reliance upon *Fitchik v. New Jersey Transit Rail Operations, Inc.*, 873 F.2d 655 (3d Cir. 1989), the constitutional right of interstate travel, VTL §253 and notions of "implied waiver," the NJPTA's "sue and be sued" provision, and the NJTCA's general *respondent superior* provision fail.

A) *Fitchik* and Transit's Arm-of-State Status

Transit's arm-of-state status is undisputed and resolved in its favor. As detailed at length in Appellants' brief, in *Karns v. Shanahan*, *supra*, the Third Circuit recently affirmed Transit's arm-of-state status and dismissed the action on Eleventh Amendment grounds. In adjudicating the question, the court applied a three-factor balancing test, looking to (1) Transit's funding and whether any judgment against it would be paid by the state ("the funding factor"), (2) its status under New Jersey law, and (3) its degree of autonomy under New Jersey law. In finding factors (2) and (3) satisfied, the court relied exclusively upon New Jersey statutory and case law as clear indicators of Transit's arm-of-state status.

Respondent's attempt to discredit *Karns* fails. Notably, Respondent does not directly dispute Transit's arm-of-state status. Instead, she passingly cites to *Fitchik*, *supra*, to suggest that Appellants' record and brief are insufficient for this Court to

adjudicate the question. This is false. As already noted, Transit's arm-of-state status is not a factual inquiry but, rather, "a question of federal law … answered only after considering the provisions of state law that define the agency's charter." *Regents of the Univ. of Cal.*, 519 U.S. at 429 n. 5. *Karns* extensively analyzed such provisions, as does Appellants' brief. *See Karns*, 879 F.3d at 516-518; and App. Br., 11-14.

Respondent misconstrues *Karns*'s abrogation of *Fitchik*. While it is true that, in *Fitchik*, decided twenty years before *Karns*, the Third Circuit initially denied Transit arm-of-state status, it did so under a flawed analytical framework, wherein the funding factor was considered the "most important factor" and afforded dispositive weight. *Fitchik*, 519 F.2d at 659. Because the court found that the funding factor weighed strongly against Transit, while the others weighed only slightly in its favor, the court concluded that Transit was not an arm-of-state. Foreshadowing *Karns*, *Fitchik*'s dissent rejected the court's affording the funding factor dispositive weight, writing "Payment is only meaningful in light of the entity's other attributes." *Id.* at 664. The Third Circuit has since abandoned *Fitchik*'s framework and aligned itself with the case's dissent in light of *Regents*.

Regents invalidated *Fitchik*'s analysis. In *Regents*, the Supreme Court held that the Ninth Circuit erred in denying the petitioner arm-of-state status because it was indemnified by the federal government. Like the Third Circuit in *Fitchik*, the

Ninth Circuit considered the petitioner's funding "the single most important factor" and gave it dispositive weight. In reversing the Ninth Circuit, the Court held that "it is the entity's potential legal liability, rather than its ability or inability to require a third party to reimburse it, or to discharge the liability in the first instance, that is relevant." *Regents*, 519 U.S. at 431. The Court cautioned that the Ninth Circuit's approach had incorrectly "convert[ed] the inquiry into a formalistic question of ultimate financial ability." *Id.* at 431. *Fitchik* did just that.

Karns corrected *Fitchik*'s untenability in light of *Regents*. Subsequent to *Regents*, the Third Circuit recalibrated its arm-of-state analysis to weigh each *Fitchik* factor equally. *See Maliandi v. Montclair State Univ.*, 845 F.3d 77 (3d Cir. 2016). Under this new framework, in *Karns*, the court found that Transit's status as an integral part of New Jersey's government had since become apparent in light of a gamut of New Jersey precedents. It also found that Transit's limited degree of autonomy under New Jersey law weighed in its favor. Accordingly, the court held that Transit is an arm-of-state and dismissed the action on Eleventh Amendment grounds. *Karns*'s abrogation of *Fitchik* in light of *Regents* does not cast doubt upon Transit's arm-of-state status; it strengthens it.

New York precedents align with *Karns*. In the related tribal-immunity context, the Court of Appeals held in *Ransom v. St. Regis Mohawk Educ. & Community Fund*, 86 N.Y.2d 553, 560 (1995), that the petitioner-fund was an arm-

of-the-tribe after holistically analyzing, among others, (1) whether it was engaged in a traditional governmental function, (2) the source and extent of tribal control of its funding, and, critically, (3) whether its governing board was composed of tribal officials. *See id.* at 560. *Karns* and the NJPTA reveal that factors (1) and (3) are readily satisfied. Further, though NJPTA §27:25-17 precludes Transit's debts from directly accruing to the state—a fact that cannot be dispositive in light of *Regents*—element (2) is nonetheless at least partially satisfied in that, as found in *Karns*, Transit is statutorily obligated to report its budget to New Jersey's governor and legislature, and either may unilaterally audit or veto the decisions of its governing board. *See* NJPTA §27:25-4(f), 27:25-13(h), 27:25-20. Likewise, Transit's chairman is an executive branch official who is statutorily obligated to review Transit's expenditures and budget. *See id.* at 27:25-20(a). By *Karns* and *Ransom*'s analyses, Transit is squarely an arm-of-state.

Turner v. State, 49 A.D.2d 269 (3d Dep't 1975), and *Ehrlich-Bober & Co. v. Univ. of Houston*, 69 A.D.2d 75 (1st Dep't 1979),[1] are consistent with *Karns*. In *Turner*, the Third Department held that the SUNY Research Foundation was an arm-of-state because it was created within the State Department of Education to serve governmental functions related to higher education and thus an integral part of government. In *Ehrlich-Bober & Co.*, this Court held that the University of

[1] *Rev'd on other grounds, Ehrlich-Bober & Co. v. Univ. of Houston*, 49 N.Y.2d 574 (1980) (accepting arm-of-state finding but reversing on comity grounds).

Houston was an arm of Texas by looking solely to its status and function under Texas law. Likewise, here, it is undisputed that the New Jersey Legislature created Transit within the state's executive branch of government to fulfill the "essential public purpose" of "establish[ing] and provid[ing] for the operation and improvement of a coherent public transportation system." NJPTA §25:25-1. *Karns* also correctly recognized as much.

New Jersey law establishes Transit's arm-of-state status, while the analyses contained in *Karns* and New York precedents reinforce it. As such, the action requires New Jersey's express, unambiguous consent to suit in New York.

B) The Constitutional Right of Interstate Travel

The constitutional right of interstate travel is irrelevant because it merely guarantees "free ingress and regress to and from neighboring states." *Saenz v. Roe*, 526 U.S. 489, 501 (1999). It has no impact upon states' constitutional rights to interstate sovereign immunity. *Edwards v. California*, 314 U.S. 160 (1941), and *Crandall v. Nevada*, 73 U.S. 35 (1868), provide two paradigmatic examples of violations of the right of free ingress and regress. In *Edwards*, the Supreme Court invalidated a California law criminalizing knowingly bringing indigents into the state as an unconstitutional bar on interstate passage; in *Crandall*, a Nevada law taxing individuals leaving the state as an unconstitutional tax on traveling from or passing through a state. There are plainly no such infringements here.

New Jersey's right to interstate sovereign immunity has nothing to do with one's ability to enter or leave New Jersey or New York. The fundamental right of interstate travel exists alongside New Jersey's fundamental right to interstate sovereign immunity. While the Constitution guarantees the right of free ingress and regress, it also guarantees states' rights to freedom from private suits in foreign courts absent express consent. Respondent's ability to seek recovery against Appellants is accordingly confined by the contours of the NJTCA. Her attempts to relegate interstate sovereign immunity to a second-class right existing beneath, rather than alongside, other constitutional rights, succumbs to the same fallacy as *Nevada v. Hall*, 440 U.S. 410 (1978), and must be rejected in light of *Hyatt III*.

Respondent's appeals to fairness and public policy fail. *Hyatt III*'s rejection of *Nevada*'s policy-laden comity approach to interstate sovereign immunity renders policy considerations irrelevant. *Hyatt III*'s majority squarely rejected the dissent's contention that "When a citizen brings suit against one State in the courts of another, both States have strong sovereignty-based interests." *Hyatt III*, 139 S. Ct. at 1504. By the majority's holding, the sole question here is whether New Jersey has expressly and unambiguously consented to private suits in New York's courts. Respondent's repeated contentions that *Hyatt III*'s paradigm renders New York unable to protect its citizens from Transit's negligence except by impermissibly restricting the right of interstate travel misreads *Hyatt III*. *Hyatt III*,

like the Eleventh Amendment, merely concerns private individuals' abilities to seek redress. It has no impact upon New York's Article III, Sec. 2, rights to bring federal suits *parens patriae* against sister states.[2] Nor does it impact New York's ability under the Compact Clause to create compacts with sister states concerning interstate travel. It simply provides that, absent express consent, New York may not subject sister states to private suits in its courts as a constitutional alternative.

The right of interstate travel has no bearing on New Jersey's right to freedom from private suits beyond its borders.

C) VTL §253 and "Implied Waivers" of Sovereign Immunity

Vehicle and Traffic Law §253 is irrelevant because it concerns personal jurisdiction, not subject-matter jurisdiction. VTL §253 "is at root just a 'longarm statute' whose underlying theory is the same as CPLR 302." David D. Siegel and Patrick M. Connors, *New York Practice*, §97, p. 208 (6th ed., Practitioner Treatise Series, 2018). The statute, "on the books years before outright extraterritorial service was allowed under 'longarm jurisdiction,' was a lip server to the restrictive demands of the now abandoned [*Pennoyer v. Neff*, 95 U.S. 714 (1878)]." *Id.* at §97, p. 209. On the other hand, interstate sovereign immunity concerns subject-

[2] As *Hyatt III* held, the states' amenability to suits under Article III, Sec. 2, of the Constitution "affirmatively altered the relationships between states, so that they no longer relate[d] to each other solely as sovereigns[,]" *Hyatt III*, 139 S. Ct. at 1495, as was the case under the Articles of Confederation. The states' consent to a neutral federal forum for disputes arising with sister states or the Union "implicitly strip[ped] States of any power they once had to refuse each other sovereign immunity, just as it denies them the power to resolver border disputes by political means." *Id.* at 1498.

matter jurisdiction. This Court re-affirmed this in *Trepel*, *supra*, reasoning that, in light of *Hyatt III*, it lacked subject-matter jurisdiction over the Arizona Board of Regents because Arizona had not consented to suits in New York's courts. *See id.* at 429. Similarly, in *Morrison v. Budget Rent a Car Sys.*, 230 A.D.2d 253 (2d Dep't 1996), the Second Department held that the parties' stipulation to "waive the affirmative defense of lack of jurisdiction" could not waive defendants' sovereign immunity defenses because they concerned subject-matter jurisdiction, which is never waived. Respondent's appeal to VTL §253 incorrectly resorts to concepts of personal jurisdiction in an attempt to expand the Court's subject-matter jurisdiction.

Reale v. State, 192 Conn. App. 759, 219 A.3d 723 (Con. Ct. App. 2019), lends support. There, the Appellate Court of Connecticut *sua sponte* dismissed the action against Rhode Island and its Department of Children, Youth, and Families ("RIDCYF"), in light of *Hyatt III* upon the plaintiff's appeal from the state's successful motion to dismiss for lack of personal jurisdiction. While the plaintiff's appeal was pending, the Supreme Court decided *Hyatt III*, which rendered personal jurisdiction irrelevant. Accordingly, the court declined to address the underlying motion and dismissed the action against the state on its own accord because "[s]overeign immunity implicates subject-matter jurisdiction and because subject-matter jurisdiction concerns a 'basic competency of the court, [it] can be raised . . .

by the court *sua sponte*, at any time.'" *Id.* at 763-4. While Respondent attempts to distinguish *Reale* as being a spoliation action, rather than one concerning "implied consent" by operation of a motor vehicle, she again fails to realize that the question here is not one of personal jurisdiction. She also ignores that constructive or implied waivers of sovereign immunity are precluded by the Supreme Court's waiver jurisprudence.

The Constitution forbids constructive or implied waivers of sovereign immunity. As the Supreme Court has repeatedly held, "there is no place for the doctrine of constructive waiver in our sovereign-immunity jurisprudence, and we … find waiver only where stated by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." *College Sav. Bank*, 527 U.S. at 678 (*citing Edelman v. Jordan*, 415 U.S. 651, 673 (1974)). While *College Sav. Bank* and *Edelman* are cited at length in Appellants brief, Respondent makes no attempt to distinguish either. Both are fatal to Respondent.

College Sav. Bank is instructive. There, the petitioner argued that the respondent, a Florida arm-of-state, constructively waived its Eleventh Amendment immunity by misrepresenting its products in interstate commerce while the Lanham Act (15 U.S.C. §1125(a), *et seq.*) subjected states to federal suits for damages arising from misleading interstate advertising. The petitioner relied in part

upon the constructive-waiver doctrine of *Parden v. Terminal Ry. of Alabama State Docks Dep't*, 377 U.S. 184 (1964), where the Court held that an Alabama railway constructively waived its Eleventh Amendment immunity by operating in interstate commerce while the Federal Employers' Liability Act ("FELA") (45 U.S.C. §51, *et seq.*) provided a private right of action to plaintiffs injured while employed by common carriers operating interstate. In addition to rejecting the petitioner's arguments, the Court expressly overruled *Parden* and adopted in lieu *Edelman*'s standard that waivers of sovereign immunity must be express and unambiguous. *Parden*'s reversal precludes constructive or implied waivers of sovereign immunity and renders *Edelman*'s command controlling here.

Respondent overlooks the effect of *College Sav. Bank*'s abrogation of *Parden*. Respondent's logic improperly relies upon *Parden* in reasoning that New Jersey could impliedly waive its interstate sovereign immunity by operating vehicles in New York in light of VTL §253. This is conceptually identical to the Supreme Court's reasoning in *Parden* that, by operating a railway in interstate commerce in light of the FELA, Alabama impliedly waived its Eleventh Amendment immunity. Similarly, her logic parallels College Savings Bank's failed argument that the Florida Prepaid Postsecondary Education Expense Board impliedly waived its Eleventh Amendment immunity by misrepresenting its own products in interstate commerce in light of the Lanham Act's provisions.

Respondent's reliance upon VTL §253 and notions of "implied waiver" must be rejected per *College Sav. Bank.*

Just as New Jersey's non-resident motorist statute is powerless to compel New York to defend suits in New Jersey courts, New York's is powerless with respect to New Jersey. Per *Edelman*, the sole relevant inquiry is whether there is an express, unambiguous waiver to suits in the forum.

D) The NJPTA's "Sue and be Sued" Provision/§27:25-5(a)

Respondent's repeated reliance upon the NJPTA's "sue and be sued" provision/§27:25-5(a) is futile. It is already settled that a state's mere consent to sue and be sued cannot provide a waiver to suits in foreign courts. Accordingly, in *Karns*, the Third Circuit dismissed the action against Transit notwithstanding its consent to sue and be sued. Similarly, in *Breen v. Mortgage Com. of New York*, 285 N.Y. 425 (1941), the Court of Appeals held that the Mortgage Commission of New York could not be subjected to suits outside the Court of Claims merely because it consented to sue and be sued. In *Florida Dep't of Health & Rehabilitative Servs. v. Florida Nursing Home Ass'n*, 450 U.S. 147 (1981), the Supreme Court held that Florida's Department of Health and Rehabilitative Services' constituting "a body corporate with the capacity to sue and be sued" was insufficient to provide a waiver of Eleventh Amendment immunity. Rather, it provided a mere a "general waiver" that could not satisfy *Edelman*'s command that

a waiver of sovereign immunity be explicit and unambiguous. Tellingly, in *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573 (1946), the Supreme Court held that even Utah's consent to suit in "*any court* of competent jurisdiction" was purely a general waiver and insufficient to provide consent to suits beyond Utah. The NJPTA's sue-and-be sued provision is irrelevant.

Respondent misapplies *Petty v. Tennessee-Missouri Bridge Comm'n*, 259 U.S. 275 (1959). Respondent erroneously cites to *Petty* in support for her contention that NJPTA §25:25-5(a) provides Transit's consent to suits in foreign courts. There, an administratrix filed suit against the Tennessee-Missouri Bridge Commission ("the Commission") pursuant to the Jones Act (46 U.S.C.S. §688), which permits seamen to bring federal suits against their employers for on-the-job injuries, after her husband died while operating a Commission ferryboat. The Commission was a bistate compact created between Tennessee and Missouri under the Compact Clause. The Commission's charter provided that it could not be construed to diminish federal courts' powers or interstate commerce and that the Commission could sue and be sued. Because the Commission, by virtue of its nature as a bistate compact, was created with Congressional approval, the Court reasoned that it was "called on to interpret not unilateral state action but the terms of a consensual agreement." *Id.* at 279. Accordingly, it held that the sue-and-be-sued provision of the Commission's charter provided consent to federal suits.

Unlike the Commission, Transit is not a bistate compact created by an agreement between states with Congressional approval. It is unilaterally the product of New Jersey's actions, part of its executive branch of government, and created by the state's legislature. *Petty* is irrelevant.

Respondent's reliance upon *Interstate Wrecking Co. v. Palisades Interstate Park Com.*, 57 N.J. 342 (N.J. 1971), commits the same fallacy. *Interstate Wrecking Co.* concerned the Palisades Interstate Park Commission ("the Park Commission"), a bistate compact between New York and New Jersey. When the Park Commission breached its contract with the appellee, a New Jersey company, for work performed in New York, the company sued the Park Commission in New Jersey. The Park Commission sought dismissal on sovereign-immunity grounds, arguing that, because the contract solely concerned work performed in New York, suit against the Park Commission was only appropriate in New York's Court of Claims per *Breen*, *supra*. Citing to *Petty*, *supra*, the New Jersey Supreme Court rejected this argument, reasoning that, as a bistate compact, the Park Commission's consent to sue and be sued, as contained in its charter, permitted suits in both states. As Transit is not the product of a bistate compact between New York and New Jersey, NJPTA §25:25-5(a) cannot speak to New York's courts.

Lieberman v. Port Auth. of N.Y. & N.J., 132 N.J. 76 (N.J. 1993), is irrelevant. *Lieberman* concerned the Port Authority of New York and New Jersey

("the Authority"), another bistate compact between New York and New Jersey. The plaintiff brought suit against the Authority in New Jersey for inadequate police protection after she was assaulted in the Port Authority Bus Terminal in New York. At issue was not whether New Jersey's courts were a proper forum but whether the Authority's charter, which provided for liability "to the same extent as though it were a private corporation," not a general ability to sue and be sued, permitted such suits. In analyzing the tort law of both states, the New Jersey Supreme Court reasoned that, while neither allowed recovery for inadequate police protection, the complaint, as liberally construed, permissibly sought recovery against the Authority for failure to provide reasonably safe premises in its capacity as a landlord. *Lieberman* is readily distinguishable: In addition to involving a bistate compact, *Lieberman* was a matter of substance, not forum. The inquiry here is where Transit may be sued, not for what it may be sued.

That Transit may sue and be sued is undisputed. The question here, however, is *where* it may be sued. Because neither the NJPTA nor the NJTCA expressly provides consent to suits in New York's courts, *Trepel* and *Hyatt III* require dismissal.

E) The NJTCA's *Respondent Superior* Provision/NJTCA §59:2-2 and Legislative History

Respondent mistakes NJTCA §59:2-2 for a forum provision. It well-settled that §59:2-2 is properly understood as a mere general waiver of substantive tort liability for suits sounding in *respondeat superior*. Its plain text speaks solely to substance, not forum. Accordingly, the New Jersey Supreme Court holds that §59:2-2 simply provides that "The primary liability imposed upon public entities is that of *respondeat superior*: when the public employee is liable for acts within the scope of that employee's employment, so too is the entity. N.J.S.A. 59:2-2." *Tice v. Cramer*, 133 N.J. 347, 355 (N.J. 1993) (citation in original). Thus, given the broad scope of §59:2-2, where a more specific liability provision of the NJTCA applies, the Court requires that "the vicarious liability provisions of N.J.S.A. §59:2-2 must give way to the more exacting standards of [the NJTCA]." *Ogborne v. Mercer Cemetery Corp.*, 197 N.J. 448, 460 (N.J. 2009) (holding §59:4-2, concerning dangerous conditions on public property, rather than §59:2-2, applied where the plaintiff was injured scaling a wall on state property). Section 59:2-2 is not a forum provision.

For this reason, federal courts have settled that §59:2-2 provides no waiver of Eleventh Amendment immunity. In *Ritchie v. Cahall*, 386 F. Supp. 1207, 1974 U.S. Dist. LEXIS 12933 (D.N.J. 1974), the plaintiff argued that §59:2-2 waived

New Jersey's Eleventh Amendment immunity. In rejecting this argument, the court reasoned that, to construe §59:2-2 as such would "contradict[] the general intent of the Act, which provides for immunity with exceptions, rather than liability with exceptions." *Id.* at 1209. For "§59:2-2 must be read in the overall context of the act…." *Id.* at 1209. Building on *Ritchie*, in *Hyatt v. County of Passaic*, *supra*, the Third Circuit affirmed the district court's dismissal of the action against county prosecutors and officials. The court reasoned that, as the state was the real party in interest, the action was properly dismissed per the Eleventh Amendment, since the NJTCA provides no consent to federal suits. In rejecting the plaintiff's arguments, the court reasoned, "The [NJ]TCA, which allows suits against public entities and their employees in state courts does not expressly consent to suit in federal courts and thus is not an Eleventh Amendment waiver. *See* N.J. Stat. Ann. §59:2-2(a)." *Id.* at 837 (citation in original). Just as the NJTCA does not expressly consent to suits in federal courts, neither does it expressly consent to suits in sister states' courts.

Respondent's attempts to derive a waiver from any provision of the NJTCA ignore the historical realities of its adoption. In addition to being adopted seven years prior to *Nevada*, a time at which waivers of interstate sovereign immunity were practically unheard of, the NJTCA was adopted to reclaim and strengthen New Jersey's sovereign immunity from an activist judiciary, not further weaken it.

As such, the New Jersey Supreme Court requires that the NJTCA be interpreted to provide that "immunity for public entities is the rule and liability is the exception." *Fleuhr v. City of Cape May*, 159 N.J. 532, 539 (N.J. 1999). Respondent argues just the opposite, ignoring the NJTCA's text and history, along with *Edelman*'s command.

III. APPELLANTS' DEFENSE ON THE MERITS PRIOR TO *HYATT III* CANNOT PROVIDE A WAIVER BY AFFIRMATIVE INVOCATION/LITIGATION CONDUCT.

Respondent's contentions that Appellants waived their rights to assert the defense of interstate sovereign immunity by defending on the merits prior to *Hyatt III* fail on multiple fronts.

Respondent overlooks the effect of *Hyatt III*'s reversal of *Nevada*. Prior to *Hyatt III*, appeals to interstate sovereign immunity spoke to comity and policy, as *Nevada* remained the law. *Nevada*'s erroneous holding denied the states their rights of interstate sovereign immunity by relegating the defense to a matter of the forum's discretion, rather than a Constitutional mandate. For this reason, in reversing *Nevada*, Justice Thomas wrote, "The Constitution does not merely allow states to afford each other immunity as a matter of comity; it embeds interstate sovereign immunity within the constitutional design." *Hyatt III*, 139 S. Ct. at 1497. *Boudreaux v. State of La., Dept. of Transp.*, 11 N.Y.3d 321 (2008), illustrates this, holding that, unlike the Full Faith and Credit Clause, for example, which imposes a

constitutional mandate upon New York's courts, "comity is not a rule of law, but a *voluntary decision* by one state to defer to the policy of another." *Id.* at 326 (emphasis added). Thus, appellants had no right to dismissal until *Hyatt III*, which was decided after trial and briefing of the underlying Motion had concluded. *Hyatt III*'s intervening change in the law and fundamental altering of the nature of the defense of interstate sovereign immunity preclude any waiver.

Even if the defense had been available, New York law further precludes a waiver. As already demonstrated, under New York law, a state's entitlement to interstate sovereign immunity is a matter of subject-matter jurisdiction. *See*, *e.g.*, *Trepel*, 183 A.D.3d 429, *supra*. This was so even under *Nevada*'s paradigm. *See Morrison*, 230 A.D.2d 253, *supra*. Because "when a court lacks subject-matter jurisdiction it may not acquire it by waiver," *id.* at 260, and a defect in subject-matter jurisdiction "may be raised at any time and may not be waived," *Goffredo*, 2007 N.Y. App. Div. LEXIS 5975 at 1, there can be no waiver here.

The Supreme Court's waiver jurisprudence similarly precludes a waiver. The Supreme Court has never held that, absent a voluntary entrance into the forum, merely defending an action on the merits can constitute a waiver by affirmative invocation/litigation conduct. In *Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 547 (2001), the Court observed that it had never required that sovereign immunity be raised at the onset. The appropriate inquiry is therefore contained in

Laipedes v. Bd. of Regents, 535 U.S. 613 (2002), which Respondent fails to distinguish. There, the Court held that Georgia's voluntary removal of the case to federal court constituted a voluntary entrance into the forum and thus a waiver of its Eleventh Amendment immunity. In so holding, the Court relied upon *Clark v. Barnard*, 108 U.S. 436 (1883), *Gunter v. Atlantic Coast Line R. Co.*, 200 U.S. 273 (1906), and *Gardner v. New York*, 329 U.S. 565 (1947). None apply here.

Unlike this action, *Clark*, *Gunter*, and *Gardner* each involved a voluntary entrance into the forum. In *Clark* and *Gunter*, Rhode Island and South Carolina, respectively, voluntarily intervened in the actions. In *Gardner*, New Jersey voluntarily filed the action in federal court. Accordingly, in *Laipedes*, the Court reasoned that "where a state voluntarily becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of [sovereign immunity]." *Laipedes*, 535 U.S. at 619. Because Georgia's position rendered it unlike Indiana's in *Ford Motor Co. v. Dept. of Treasury of Ind.*, 323 U.S. 459 (1945), which "involved a State that a private plaintiff had *involuntarily* made a defendant in federal court,"[3] *id.* at 622 (emphasis in original), the Court held that

[3] *Laipedes* partially overruled *Ford* to the extent of abrogating its requirement that a state's counsel be specifically authorized to waive sovereign immunity, rather than to generally defend the action, to bring about a waiver by litigation conduct. The Court partially adopted the approach proposed by Justice Kennedy's concurrence in *Wis. Dep't of Corr. v. Schacht*, 525 U.S. 381 (1998), with respect to removal: "[O]nce the States know or have reason to expect that removal will constitute a waiver, then it is easy enough to presume that an attorney authorized to

Georgia's voluntary removal of the action to federal court waived its Eleventh Amendment immunity. The opposite is the case here. Like the defendants in *Ford* and *Edelman*, because Appellants are hailed before New York's courts involuntarily and have remained in a defensive posture from the action's inception, per *Laipedes*, there could be no waiver by affirmative invocation/litigation conduct even absent *Hyatt III*.

Union Pac. R.R. v. La. PSC, 662 F.3d 336 (5th Cir. 2011), illustrates this. There, the Fifth Circuit held that the Louisiana Public Service Commission (LPSC), did not waive its Eleventh Amendment immunity by declining to raise the defense in the district court. Although the LPSC had prevailed on a prior motion for summary judgment and raised an Eleventh Amendment defense for the first time in response to the plaintiff's appeal, the court found that "While the state may have defended on the merits below, it never chose to litigate this suit in the federal forum." *Id.* at 341. Citing *Laipedes*, the court dismissed the action, holding that "where the State of Louisiana was involuntarily haled into federal court as a defendant—we conclude that there was never a voluntary invocation of or unequivocal submission to federal jurisdiction." *Id.* at 341. The court observed that its holding accorded with at least six sister Courts of Appeals, all of which permit

represent the State can bind it to the jurisdiction of the court (for Eleventh Amendment purposes) by consenting to removal." *Laipedes*, 535 U.S. at 624 (*citing Wis. Dep't of Corr*, 525 U.S. at 397). Accordingly, Appellants' withdraw their appeal to their being represented by private counsel, rather than a specific statutory authority. *See* App. Br. 26.

Eleventh Amendment immunity to be asserted for the first time on appeal, and that any fears of gamesmanship were assuaged. *See id.* at 341-342. So, too, here.

New Jersey's posture is akin to Louisiana's in *Union Pac. R.R.* Like Louisiana, here, New Jersey was involuntarily haled into New York's courts and has remained in a defensive posture from the action's inception. Moreover, Appellants' assertion of interstate sovereign immunity at this juncture is not a matter of gamesmanship but, rather, necessity, since *Hyatt III*, which afforded New Jersey the right of dismissal, was not decided until years after this action was commenced.[4] In this regard, New Jersey's position is even stronger than Louisiana's had been. While the Eleventh Amendment afforded Louisiana the right of dismissal from inception, here Appellants' right of dismissal via the doctrine of interstate sovereign immunity did not exist until *Hyatt III*, which was decided years after commencement. Prior to this, Appellants were at the mercy of New York's courts because *Nevada* incorrectly rendered the matter one of New York's discretion, rather than New Jersey's rights.

[4] While the Fifth Circuit observed that a minority of jurisdictions have interpreted *Laipedes* more broadly to permit a litigation waiver wherever a state may fairly be said to have engaged in unfair gamesmanship, *Union Pac. R.R.*, 662 F.3d at 342, *Hyatt III*'s intervening change in the law assuages any such fears. For, unlike in the Eleventh Amendment context, where states' rights to dismissal exist from inception, here, Appellants' right to dismissal did not exist until *Hyatt III*'s reversal of *Nevada*, which occurred after trial and briefing of the underlying Motion had concluded. In any event, New York's treatment of sovereign immunity as concerning subject-matter jurisdiction is inconsistent with the minority view, as the defense of subject-matter jurisdiction, by its nature, cannot be waived.

Respondent misreads *Hyatt III*'s *dicta*. While it is true that, in *Hyatt III*, the Court observed in a footnote that the petitioner "has raised an immunity-based argument from this suit's inception, though it initially was based on the Full Faith and Credit Clause," 139 S. Ct. 1491, fn. 1, Respondent takes this out of context. As revealed by *Hyatt III*'s briefs, the Court's observation addressed the respondent's contention that, by declining to ask the Court to overrule *Nevada* in its initial petition for *certiorari* in *Hyatt I* (*Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488 (2003)), the Franchise Tax Board of California ("the Board") waived its right to do so at that juncture, where the case was before the Court a third time. The respondent based its argument on the Court's operating procedures providing that an argument not raised in a petition for *certiorari* is waived. *See, e.g., Caterpillar Inc. v. Lewis*, 519 U.S. 61, 75, n. 13 (1996). The Court rejected this argument because the Board's request that *Nevada* be overruled constituted a jurisdictional objection on par with its jurisdictional objections raised under the Full Faith and Credit Clause in *Hyatt I* and *Hyatt II* (*Franchise Tax Bd. v. Hyatt*, 136 S. Ct. 1277 (2016)). Inasmuch as Respondent relies upon *Hyatt III*'s *dicta* as requiring that the defense of interstate sovereign immunity be raised at the onset, she overlooks its narrow context and ignores the Court's and New York's aforementioned waiver precedents entirely.

New Jersey has not waived its interstate sovereign immunity by an affirmative invocation of New York's jurisdiction or its litigation conduct.

CONCLUSION

This case is no different from *Trepel*. While Respondent contends that Transit's operation of vehicles within New York presents a significant distinction, this is false. For the Constitution forbids constructive or implied waivers of sovereign immunity. As Transit is an arm of the State of New Jersey, the relevant inquiry, rather, is whether New Jersey has expressly and unambiguously consented to private suits in New York. As revealed by the NJTCA's history, provisions, and interpretative case law, it has not. Just as Arizona's lack of express consent to private suits in New York required dismissal of the action as against it in *Trepel*, New Jersey's lack of express consent requires dismissal here per *Hyatt III*.

Dated: New York, NY
January 15, 2021

Respectfully submitted,

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Dated: New York, NY
January 15, 2021