To be argued by: **Michael Rawlinson**
Time Requested for Argument: 15 Minutes

APL-2021-00138

State of New York
Court of Appeals

KATHLEEN HENRY,

Plaintiff-Respondent,

-against-

NEW JERSEY TRANSITCORPORATION;
RENAUD PIERRELOUIS,

Defendants-Appellants,

CHEN NAKAR,

Defendant.

OPENING BRIEF FOR THE DEFENDANTS-APPELLANTS

MCGIVNEY KLUGER CLARK & INTOCCIA, P.C.
Attorneys for Defendants-Appellants
NEW JERSEY TRANSIT & PIERRELOUIS
80 Broad Street, 23rd Floor
New York, New York 10004
(212) 509-3456
mrawlinson@mkcilaw.us.com

Mindy Kallus, Esq.
Michael Rawlinson, Esq.
On the brief

Printed on recycled paper

Appellate Division Docket No. 2020-00380

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

DISCLOSURE STATEMENT vi

QUESTIONS PRESENTED FOR REVIEW 1

PRELIMINARY STATEMENT 2

STATEMENT OF JURISDICTION 4

STATEMENT OF FACTS 5

The Motor Vehicle Collision 5

The Underlying Action 5

The Trial and Subsequent Post-Trial Motion 6

The Appeal to the First Department 6

Appellate Division's Denial of Leave to appeal 7

The Final Judgment 7

Notice of Appeal to the Court of Appeals 7

LEGAL POINTS 8

POINT I
THE APPELLATE DIVISION ERRED IN REFUSING TO DISMISS THE ACTION INASMUCH AS DISMISSAL WAS WARRANTED ON THE GROUND OF CONSTITUTIONALLY MANDATED SOVEREIGN IMMUNITY 8

A. New Jersey Transit is an Arm of State Under Applicable Law and has not Consented to Suit in New York State 8

B. Interstate Sovereign Immunity is a Constitutionally-Protected Right 15

C. The Waiver of Immunity Must Be Express and Unambiguous 16

D. New Jersey Transit Did Not Submit to New York's Jurisdiction 19

E. A Trio of Cases Brought Against New Jersey Transit were Wrongfully Decided 24

POINT II
THE APPELLATE DIVISION ERRED IN FINDING THAT DEFENDANTS' FAILURE TO RAISE THE SOVEREIGN IMMUNITY DEFENSE UNTIL SIX YEARS AFTER SUIT WAS COMMENCED WAS FATAL TO THEIR CHALLENGE 27

POINT III
THE APPELLATE DIVISION'S ORDER CONTRAVENED THE FULL FAITH AND CREDIT CLAUSE AND REVERSAL IS WARRANTED ON THAT BASIS....................29

CONCLUSION....................33

WORD COUNT STATEMENT....................34

TABLE OF AUTHORITIES

Federal Cases **Page**

Alden v. Maine, 527 U.S. 706 (1999) 15, 16

Beaulieu v. Vermont, 807 F. 3d 478 (2d Cir. 2015)....................15

Clark v. Barnard, 108 U.S. 436 (1883) 20

College Saving Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999).................... *passim*

Edelman v. Jordan, 415 U.S. 651 (1974) .... *passim*

Ford Motor Co. v. Dept. of Treasury of Ind., 323 U.S. 459 (1945)....................21

Franchise Tax Bd. of Cal. v. Hyatt, 538 U.S. 488 (2003)....................15

Franchise Tax Bd. of Cal. v. Hyatt, 578 U.S. 171, 136 S. Ct. 1277 .... *passim*

Franchise Tax Bd. of Cal. v. Hyatt, 587 U.S.__,139 S. Ct. 1485 (2019).................... *passim*

Gardner v. New York, 329 U.S. 565 (1947)....................21

Gunter v. Atlantic Coast Line R. Co., 200 U.S. 273 (1906) 20, 21

Hess v. Port Auth. Trans-Hudson Corporation, 513 U.S. 30 (1994) 10

Karns v. Shanahan, 879 F.3d 504 (3d Cir. 2018).................... *passim*

Lapides v. Bd. of Regents, 535 U.S. 613 (2002) .... *passim*

Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) 9

Murray v. Wilson Distilling Co., 213 U.S. 151 (1909)....................14, 17

Nevada v. Hall, 440 U.S. 410 (1979).................... *passim*

Parden v. Terminal Ry. of Alabama State Docks Dep't, 377 U.S. 184 (1964) 18

Pittman v. Rutherford, 2020 U.S. Dist. LEXIS 202837 (E.D.Ky. Oct. 30, 2020)....................31

Raygor v. Regents of the Univ. of Minn., 534 U.S. 533 (2001) 19, 20

Regents of Univ. of California v. Doe, 519 U.S. 425 (1997)....................9

Robinson v. N.J. Transit Rail Operations, Inc., 2019 U.S. App. LEXIS 3386 (3d Cir. January 31, 2019) 8, 13, 14

Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996)....................16

Sossamon v. Texas, 563 U.S. 277 (2011)....................14

Woods v. Rondout Valley Cent. Sch. Dist. Bd. of Educ., 466 F.3d 232 (2d Cir. 2006) 16

State Cases

Belfand v. Petosa, 196 A.D.3d 60 (1st Dep't 2021).................... *passim*

Editorial Photocolor Archives v. Granger Collection, 61 N.Y.2d 517 (1984) 27

Farmer v. Troy University, 276 N.C. App. 53 (2021) 19

Fetahu v. New Jersey Transit, 197 A.D.3d 1065 (1st Dep't 2021) 24, 26

Goffredo v. City of New York, 2007 N.Y. App. Div. LEXIS 5975 (1st Dep't 2007) 27, 29

Heisler v. State, 78 A.D.2d 767 (4th Dep't 1980) 27, 28, 32

Henry v. New Jersey Transit, 195 A.D.3d 444 (1st Dep't 2021)....................7, 24, 25, 26

Lopez v. N.J. Transit, 295 N.J. Super. 196, 684 A.2d 986 (N.J. Super. Ct. App. Div. 1996) 11

Morrison v. Budget Rent A Car Systems, Inc., 230 A.D.2d 253 (2d Dep't 1997)....................22, 27

Muhammad v. N.J. Transit, 176 N.J. 185 (N.J. 2003) 11

Pollard v. State, 173 A.D.2d 906 (3d Dep't 1991) 27, 28, 32

Trepel v. Hodgins, 183 A.D.3d 429 (1st Dep't 2020)....................22, 24, 29

Union Pac. R.R. v. La. Public Service Commission, 662 F.3d 336 (5th Cir. 2011) 22, 23

Weiss v. N.J. Transit, 128 N.J. 376 (N.J. 1992)....................11

New York Statutes

N.Y. Vehicle & Traffic Law § 253 ....13, 18, 19

CPLR § 5601(d)....................4

New Jersey Statutes

N.J. Stat. Ann. § 27:1A-2 11

N.J. Stat. Ann. § 27:25-2 9

N.J. Stat. Ann. § 27:25-2(a) 9

N.J. Stat. Ann. § 27:25-4 .... 9, 11

N.J. Stat. Ann. § 27:25-4(b) 12

N.J. Stat. Ann. § 27:25-4(f) 12

N.J. Stat. Ann. § 27:25-5 11

N.J. Stat. Ann. § 27:25-13(a) 11

N.J. Stat. Ann. § 27:25-13(c)(1) 11

N.J. Stat. Ann. § 27:25-13(h) 12

N.J. Stat. Ann. § 27:25-15.1(a) 11

N.J. Stat. Ann. § 27:25-16 11

N.J. Stat. Ann. § 27:25-20 12

N.J. Stat. Ann. § 27:25-20(a) 12

N.J. Stat. Ann. § 59:1-1 13

Federal Statutes

15 U.S.C. §1125(a) 18

42 U.S.C. § 1983 10

45 U.S.C. § 51 13

U.S. Constitution

U.S. Const. art. IV § 1 29

U.S. Const. amend XI 8

<u>**DISCLOSURE STATEMENT**</u>

Pursuant to 22 NYCRR § 500.1(f), Defendants-Appellants, New Jersey Transit Corporation and Renaud Pierrelouis, submit this Disclosure Statement. New Jersey Transit Corporation 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." New Jersey Transit Corporation has four subsidiary corporations, NJ TRANSIT Bus Operations, Inc., NJ TRANSIT Mercer, Inc., NJ TRANSIT Rail Operations, Inc., NJ TRANSIT Morris, Inc.

QUESTIONS PRESENTED FOR REVIEW

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

   Answer: Yes.

2. Did the Appellate Division err in finding that Defendants-Appellants waived the defense of interstate sovereign immunity, upon erroneously finding waiver of interstate sovereign immunity based upon Defendants-Appellants' affirmative litigation conduct?

   Answer: Yes.

3. Did the Appellate Division err in finding that since the defense of interstate sovereign immunity was ostensibly available to Defendants-Appellants prior to the United States Supreme Court's opinion in *Franchise Tax Board of California v. Hyatt*, 587 U.S.__, 139 S. Ct. 1485 (2019) the defense was waived by them because they did not raise it until six years after the lawsuit was commenced and after a trial was held?

   Answer: Yes.

4. Did the Appellate Division's order contravene the Full Faith and Credit Clause of the United States Constitution, thereby evincing a policy of hostility to a sister state?

Answer: Yes.

PRELIMINARY STATEMENT

The constitutionally-mandated defense of interstate sovereign immunity and the waiver of that defense speak to a court's subject matter jurisdiction. In this appeal as of right from a final judgment of Supreme Court, New York County, entered July 13, 2021, Defendants-Appellants, New Jersey Transit Corp., an arm of state of the State of New Jersey, and Renaud Pierrelouis, a New Jersey Transit bus operator, raise constitutional challenges to the subject matter jurisdiction of the New York courts to adjudicate the underlying personal injury action. Defendants-Appellants first raised the lack of subject matter jurisdiction in the Appellate Division, First Department, after the United States Supreme Court ("the Supreme Court") decided *Franchise Tax Bd. of Cal. v. Hyatt,* 587 U.S.__,139 S. Ct. 1485 (2019) ("*Hyatt III*"). *Hyatt III* involved a tort suit brought in 1998 in Nevada against the Franchise Tax Board of California ("FTB"), an arm of the State of California. Gilbert Hyatt, who had obtained a computer chip patent while a resident of California, left California for Nevada. He sued FTB alleging torts committed in the course of a tax audit by FTB of his tax returns. On the parties' third trip to the United States Supreme Court, Justice Clarence Thomas, writing for the majority, held that the State of California had not consented to suit in Nevada and was, therefore, immune from suit pursuant to the defense of interstate sovereign immunity. The

Supreme Court in *Hyatt III* overturned *Nevada v. Hall*, 440 U.S. 410 (1979), a decision that held that the source for interstate sovereign immunity was comity. In rejecting comity as the source for sovereign immunity, the Supreme Court in *Hyatt III* explained that interstate sovereign immunity was embedded in the Constitution at the time of its framing as part of the Constitution's design and was a fundamental right. The Supreme Court further explained that because of the flawed holding in *Hall*, *stare decisis* did not need to be followed.

Relying upon *Hyatt III*, Defendants-Appellants asked the Appellate Division to dismiss the personal injury action against them based upon interstate sovereign immunity. Although the Appellate Division recognized that New Jersey had not consented to suit in New York, it rejected the challenge to subject matter jurisdiction raised by Defendants-Appellants and did not dismiss the claims against Defendants-Appellants. Instead, the Appellate Division concluded that Defendants-Appellants waived interstate sovereign immunity because of their affirmative litigation conduct. Because *Hyatt III* was decided after trial and after the post-trial motion was briefed by the parties, the challenge to subject matter jurisdiction was necessarily raised in the Appellate Division, First Department. The Appellate Division nevertheless concluded that a sovereign immunity defense was available to Defendants-Appellant at the start of the lawsuit, and their failure to raise the defense sooner precluded them from asserting it in the Appellate Division. This

reasoning has no merit. Prior to *Hyatt III*, courts could grant sovereign immunity as a matter of comity. However, the New York trial court in this case was extremely unlikely to dismiss a suit by a private citizen arising out of a motor vehicle accident in New York State. After *Hyatt III* interstate sovereign immunity is a fundamental constitutional right that must be granted in the absence of consent to suit. Clearly, a defense based upon comity (which was highly unlikely to succeed) is not the same as one based upon a constitutional right. Thus, the Appellate Division reached the wrong result in finding that the sovereign immunity defense pre-dated *Hyatt III*. Defendants-Appellants now appeal to this Court from the final judgment of Supreme Court, New York County, which incorporates the Appellate Division's erroneous ruling denying dismissal.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to CPLR § 5601(d) insofar as CPLR § 5601(d) provides that an appeal may be taken to the Court of Appeals as of right from a final judgment, entered in the court of original instance, where the Appellate Division issued an order on a prior appeal in the same action, which necessarily affects the final judgment and raises substantial constitutional questions. The order of the Appellate Division, First Department, dated June 3, 2021, directly involves substantial constitutional questions, including the following: (1) whether the constitutional defense of interstate sovereign immunity

was available to states sued in New York prior to the United States Supreme Court's opinion in *Franchise Tax Bd. v. Hyatt*, 587 U.S.__,139 S. Ct. 1485 (2019) ("*Hyatt III*"), which overturned *Nevada v. Hall*, 440 U.S. 410 (1979) and found that the defense of interstate sovereign immunity was part of the design of the United States Constitution and a constitutional right; (2) whether the constitutional principles relating to the effective waiver of sovereign immunity, referred to in United States Supreme Court precedent and New York State case law, permitted a waiver by litigation conduct; and (3) whether the Appellate Division order finding subject matter jurisdiction contravened the Full Faith and Credit Clause of the Constitution.

STATEMENT OF FACTS

The Motor Vehicle Collision

On October 5, 2014, Plaintiff-Respondent, Kathleen Henry, was involved in a motor vehicle collision in the Lincoln Tunnel while a passenger on a New Jersey Transit bus operated by Defendant-Appellant Pierrelouis within the scope of his employment (R. 36, R. 481-490).[1]

The Underlying Action

On June 29, 2015, Plaintiff-Respondent commenced suit in Supreme Court, New York County, seeking recovery for injuries that she allegedly sustained in the

[1] Numbers in parentheses preceded by the letter "R." refer to pages in the Appellate Record. Numbers in parentheses preceded by the letter "C." refer to pages in the Compendium filed with this brief.

accident (R. 481-490). At the time the action was commenced, *Nevada v. Hall,* 440 U.S. 410 (1979) was the operative law relating to the defense of interstate sovereign immunity. The Supreme Court held in *Hall* that a state could be immune from a suit commenced in another state's forum if that forum decided that the case should not proceed as a matter of comity.

<u>The Trial and Subsequent Post-Trial Motion</u>

A trial was held over six days and concluded on December 11, 2018 (R. 505-1108). Following the trial, the jury awarded Plaintiff-Respondent damages. Defendants-Appellants filed a post-trial motion to set aside the jury verdict (R. 22-35). As of April 25, 2019, the post-trial motion was fully briefed and submitted. On May 13, 2019, the United States Supreme Court decided *Hyatt III*.

The trial court denied the post-trial motion in its entirety on June 27, 2019 (R. 8-20). The trial court entered judgment, upon the jury verdict, for damages of $800,000.00, $400,000.00 for past pain and suffering and $400,000.00 for future pain and suffering, plus expenses (R. 1189). An appeal ensued from the trial court's order denying the post-trial motion to the Appellate Division, First Department (R. 2).

<u>The Appeal to the First Department</u>

Upon appeal to the First Department, Defendants-Appellants sought reversal of the order upon the jury verdict. Following a change in the law in *Hyatt III*,

Defendants-Appellants also raised the defense of interstate sovereignty and asked that the case be dismissed in its entirety. The First Department rejected Defendants-Appellants' argument in *Henry v. New Jersey Transit*, 195 A.D.3d 444 (1st Dep't 2021), finding that the defense was waived as the result of Defendants-Appellants' affirmative litigation conduct.

<u>Appellate Division's Denial of Leave to Appeal</u>

Defendants-Appellants petitioned the First Department for leave to appeal to this Court (C. 7-37). Plaintiff-Respondent opposed the Petition (C. 44-51). By an order dated September 23, 2021, the First Department denied the Petition (C. 120-121).

<u>The Final Judgment</u>

On July 13, 2021, a final judgment was entered in Supreme Court, New York County (C. 38-42). The final judgment brings up for review in this Court the Appellate Division's denial of dismissal of the complaint on the ground that the defense of interstate sovereign immunity was waived by affirmative litigation conduct.

<u>Notice of Appeal to the Court of Appeals</u>

By Notice of Appeal, dated August 12, 2021, Defendants-Appellants appealed to this Court from the July 13, 2021 final judgment (C. 53-63).

I. THE APPELLATE DIVISION ERRED IN REFUSING TO DISMISS THE ACTION INASMUCH AS DISMISSAL WAS WARRANTED ON THE GROUND OF CONSTITUTIONALLY-MANDATED SOVEREIGN IMMUNITY

A. New Jersey Transit is an Arm-of-State Under Applicable Law and has not Consented to Suit in New York State

Sovereign immunity is a defense available to states, as well as to state agencies and governmental entities that are referred to as arms-of-state. Arms-of-state may only be sued if they have expressly consented to suit. In some cases, an arm-of-state may be deemed by its conduct in a litigation to have waived sovereign immunity.

Based upon New Jersey statutes, New Jersey case law and the case law of the United States Court of Appeals for the Third Circuit, New Jersey Transit is an arm of the State of New Jersey with the right to dismissal of the complaint against it on the basis of interstate sovereign immunity. *See, e.g., Robinson v. N.J. Transit Rail Operations, Inc.*, 2019 U.S. App. LEXIS 3386 (3d Cir. Jan. 31, 2019); *Karns v. Shanahan*, 879 F.3d 504 (3d Cir. 2018).[2] The New Jersey Legislature established New Jersey 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

---

[2] Although *Karns* and progeny involve Eleventh Amendment immunity (which grants states immunity from private suits in federal court), as set forth *infra*, pp. 16-17, the cases interpreting Eleventh Amendment immunity are applicable to appeals such as this one involving the defense of interstate sovereign immunity. U.S. Const. amend XI; s*ee Edelman v. Jordan*, 415 U.S. 651 (1974); *College Saving Bank v. Florida Prepaid Postsecondary Educ. Expense Bd*., 527 U.S. 666, 675-678 (1999).

"establish[ing] and provid[ing] for the operation and improvement of a coherent public transportation system in the most efficient and effective manner." N.J. Stat. Ann. 27:25-2. New Jersey 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. The New Jersey Legislature determined that the establishment of a public transportation system was "an essential public purpose which promotes mobility, serves the needs of the transit dependent, fosters commerce, conserves limited energy resources, protects the environment and promotes sound land use and the revitalization of our urban centers." N.J. Stat. Ann. 27:25-2(a).

In deciding whether an entity is an arm of the state, the Supreme Court considers the relationship between the sovereignty and the entity in question and the "essential nature and effect of the proceeding" in which the entity has been sued. *Regents of Univ. of California v. Doe,* 519 U.S. 425, 429-430 (1997). The Supreme Court also gives weight to the degree of state control over an entity and its classification under state law. *See Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) (where Court considered status of school district under Ohio law). The central aim of sovereign immunity is the protection of the state's

integrity.[3] *Hess v. Port Auth. Trans-Hudson Corporation*, 513 U.S. 30, 47-48 (1994). The likelihood that a judgment entered against an entity will be paid from a state's treasury is a "critical" factor in deciding whether to grant immunity. *See Hess*, 513 U.S. 30, 49 (1994). The inquiry is not "a formalistic question of ultimate financial responsibility." *Regents*, 519 U.S. 425, 431.

Applying the factors identified by the Supreme Court, the United States Court of Appeals for the Third Circuit held in *Karns v. Shanahan*, 879 F.3d 504 (3d Cir. 2018) that New Jersey Transit was an arm of the State of New Jersey. *Karns* was a civil rights action brought by the plaintiff, pursuant to 42 U.S.C. § 1983, against New Jersey Transit and its police officers. In an action stemming from an arrest on a New Jersey Transit train platform, the Third Circuit affirmed the district court's dismissal of the action against New Jersey Transit and its officers on Eleventh Amendment grounds. Because New Jersey Transit is an arm of the State of New Jersey, and because states and arms-of-state are not "persons" within the meaning of 42 U.S.C. § 1983, dismissal of the action against New Jersey Transit and its officers was required. *Karns v. Shanahan*, 879 F.3d 504 (3d Cir. 2018).

For the reasons that follow, New Jersey Transit's status and its limited autonomy qualify it as an arm-of-state. In deciding that New Jersey Transit was as

---

[3] While *Hess* concerned the question of Eleventh Amendment immunity, the rationale in Eleventh Amendment cases applies to cases involving interstate sovereign immunity. See *infra*, pp. 16-17.

an arm-of-state, the *Karns* Court examined New Jersey statutes. It found that under N.J. Stat. Ann. § 27:25-4, New Jersey Transit is within the New Jersey Department of Transportation, which, in turn, is a principal department within New Jersey's executive branch pursuant to N.J. Stat. Ann. § 27:1A-2. Under N.J. Stat. Ann. § 27:25-5, New Jersey Transit is statutorily "constituted as an instrumentality of the State, exercising public and essential governmental functions." *Karns*, 879 F.3d 504, 517. Pursuant to N.J. Stat. Ann. § 27:25-16, New Jersey Transit is exempt from state taxation altogether. Pursuant to N.J. Stat. Ann. § 27:25-13(a), and (c)(1), New Jersey Transit wields the power of eminent domain. Pursuant to N.J. Stat. Ann. § 27:25-15.1(a), New Jersey Transit's police officers exercise jurisdiction throughout the State of New Jersey.

New Jersey Transit's classification and status as an arm-of-state under state law is well-established. New Jersey Transit is both a "public entity within the ambit of the [New Jersey Tort Claims Act]," *see Muhammad v. N.J. Transit*, 176 N.J. 185 (N.J. 2003), and is entitled to immunity. *See Weiss v. N.J. Transit*, 128 N.J. 376 (N.J. 1992). New Jersey's intermediate appellate courts have regularly held that New Jersey Transit is a public entity and entitled to immunity. *Karns*, *supra*, (citing *Lopez v. N.J. Transit*, 295 N.J. Super. 196, 684 A.2d 986 (N.J. Super. Ct. App. Div. 1996)) (referring to New Jersey Transit as a public entity).

The Third Circuit reviewed New Jersey statutes to gauge New Jersey Transit's degree of autonomy. It found that, pursuant to N.J. Stat. Ann. § 27:25-4(b), New Jersey Transit is subject to the control of the New Jersey legislature and the governor who is "responsible for appointing the entire New Jersey Transit board, which is composed of members of the Executive Branch," *Karns*, 879 F.3d at 518. Pursuant to N.J. Stat. Ann. § 27:25-20(a), "The Commissioner of Transportation, an Executive branch official who is chairman of the New Jersey Transit governing board, has the power and duty to review New Jersey Transit's expenditures and budget." *Karns,* 879 F.3d at 518. Pursuant to N.J. Stat. Ann. § 27:25-20, New Jersey 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. Pursuant to N.J. Stat. Ann. § 27:25-4(f), the governor has the authority to veto any and all actions taken by New Jersey Transit's governing board. Pursuant to N.J. Stat. Ann. § 27:25-13(h), the New Jersey Legislature retains the authority to legislatively overrule proposed acquisitions. The Court concluded that, "[a]ll of these facts suggest that NJ Transit is an instrumentality of the state, exercising limited autonomy apart from it." *Karns*, 879 F.3d at 518.

The Third Circuit held that New Jersey Transit was "entitled to the protections of Eleventh Amendment immunity, which in turn functions as an absolute bar to any claims in this case against NJ Transit and the officers in their

official capacities." *Karns*, 879 F.3d 504, 519. Following *Karns*, the Third Circuit reaffirmed New Jersey Transit's status as an arm-of-state in *Robinson v. N.J. Transit Rail Operations, Inc.*, 2019 U.S. App. LEXIS 3386 (3d Cir. January 31, 2019). There, the plaintiff, a New Jersey Transit employee, brought suit in federal court under the Federal Employee Liability Act, 45 U.S.C. § 51, *et seq.*, after he sustained injuries while on the job. After trial, *Karns* was decided. New Jersey Transit moved to vacate the judgment based upon *Karns*. New Jersey Transit argued that vacatur was warranted on Eleventh Amendment grounds. The Third Circuit vacated the district court's judgment and remanded with instructions to dismiss the case. *Karns* and *Robinson* establish that New Jersey Transit is an arm-of-state.

Plaintiff-Respondent argued in the Appellate Division that certain provisions, including Section 253 of the N.Y. Vehicle & Traffic Law, the New Jersey Tort Claims Act, N.J. Stat. Ann. § 59:1-1, *et seq.*, the *respondeat superior* provisions of the New Jersey Public Transportation Act, and the right to interstate travel afforded by the United States Constitution, amount to express or implied consent by New Jersey Transit to suit in the New York courts. None of the above-referenced provisions, however, constitute express consent to suit. None of the provisions state by their terms that New Jersey has consented to suit in a sister state's courts. The New Jersey Tort Claims Act only allows suits against the State of New Jersey in its own courts. The fact that a state's citizens have the right to travel between the states

does not compel the conclusion that any state has waived immunity in the courts of another state. Significantly, under well-settled principles of constitutional law, waivers of sovereign immunity cannot be implied. *See Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (citing *Murray v. Wilson Distilling Co.,* 213 U.S. 151 (1909)) (Court will only find waiver 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 Saving Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675-678 (1999) (constructive or implied waiver has no place in sovereign immunity jurisprudence); *Sossamon v. Texas*, 563 U.S. 277, 284 (2011) (a state's consent to suit requires a "clear declaration"). In addition to Supreme Court precedent, the Appellate Division expressly held that the New Jersey Tort Claims Act which allows citizens of New Jersey to sue the State of New Jersey in New Jersey courts did not constitute express consent by New Jersey Transit to suit in New York. *Belfand v. Petosa*, 196 A.D.3d 60, 69 (1st Dep't 2021).[4]

For the reasons expressed in *Robinson*, *supra*, in light of settled Supreme Court precedent, and the case law of the Appellate Division, absent express consent,

---

[4] Defendant-Appellant argues, *infra* at pp. 24-25, that *Belfand* was wrongly decided with respect to the finding that affirmative litigation conduct amounted to a waiver of sovereign immunity, but expressly agrees with the Court's finding that the New Jersey Tort Claims Act did not constitute express consent by the State of New Jersey to be sued in New York State.

New Jersey Transit is immune from suit in New York's courts under principles of interstate sovereign immunity.

B. Interstate Sovereign Immunity is a Constitutionally-Protected Right

State sovereign immunity is a broad doctrine that bars all claims by private citizens against state governments and their agencies, except where Congress has validly abrogated that immunity or the state has waived its immunity. The state's immunity from suit is a fundamental aspect of the sovereignty which the states enjoyed before the United States Constitution was ratified. *FTB v. Hyatt,* 587 U.S.__, 139 S. Ct. 1485 (2019) (*Hyatt III)*[5]; *Alden v. Maine*, 527 U.S. 406 (1999).

The sovereign immunity defense asserted by Defendants-Appellants on their appeal to the First Department involves broader immunity than the immunity granted by the Eleventh Amendment of the United States Constitution. *See Beaulieu v. Vermont*, 807 F. 3d 478 (2d Cir. 2015). The Eleventh Amendment grants immunity to states from claims for damages brought by private entities in federal

[5] Prior to *Hyatt III*, Gilbert Hyatt brought a suit in Nevada in 1998 against the Franchise Tax Board of California, a California agency, to recover for torts allegedly committed in the course of a tax audit by FTB. By 2019 the suit had already been before the Supreme Court twice. In *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488 (2003) (*Hyatt I*), the Supreme Court held that the Full Faith and Credit Clause did not forbid Nevada from applying its own immunity law, where California law provided immunity for all injuries committed in the tax collection context, while Nevada law provided immunity for negligence but not for intentional torts committed therein. In *Hyatt II*, *Franchise Tax Bd. of Cal. v. Hyatt*, 578 U.S. 171, 136 S. Ct. 1277 (2016), the Supreme Court held that the Full Faith and Credit Clause required Nevada to apply a $50,000 liability cap to the judgment against FTB that would have been applicable to its own agencies. The Supreme Court did not overturn *Hall* in *Hyatt II,* but did overturn *Hall in Hyatt III.*

courts. It limits the federal judiciary's Article III powers to adjudicate cases. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996); *Woods v. Rondout Valley Cent. Sch. Dist. Bd. of Educ.*, 466 F.3d 232, 240 (2d Cir. 2006).

In contrast to Eleventh Amendment immunity, interstate sovereign immunity grants immunity to states in all private suits, whether in state or federal court. *Hyatt III*; *Alden*, 527 U.S. 706, 713. This immunity existed prior to the ratification of the Constitution, and it was later embedded in the Constitution's design at the time of ratification. *Hyatt III; Alden v. Maine*, 527 U.S. 706, 713 (1999). States may elect to waive interstate sovereign immunity and Eleventh Amendment immunity. *Coll. Saving Bank v. Fla. Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675-76 (1999); *see Lapides v. Bd. of Regents*, 535 U.S. 613, 618-620. Further, the cases examining waiver in the Eleventh Amendment context apply by analogy to interstate sovereign immunity and have been applied by courts that have addressed interstate sovereign immunity. Accordingly, the rationale permitting Eleventh Amendment immunity to be raised and granted for the first time on appeal applies to interstate sovereign immunity as well.

C. The Waiver of Immunity Must Be Express and Unambiguous

As Supreme Court precedents make clear, the waiver of sovereign immunity must be express and unambiguous. *Edelman v. Jordan*, 415 U.S. 651 (1974) (the Constitution forbids constructive or implied waivers of sovereign

immunity). In *Edelman*, the petitioner, Director of the Illinois Department of Public Aid, sought review of a judgment of the United States Court of Appeals for the Seventh Circuit that found that he and prior directors had administered federal-state programs in a manner inconsistent with federal regulations and the Fourteenth Amendment. The Seventh Circuit held that, as a matter of federal law, Illinois had "constructively consented" to the suit in federal court by participating in the federal program and agreeing to administer federal and state funds in compliance with federal law. The Supreme Court disagreed. The Supreme Court held that constructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and waiver of a constitutionally protected right will only be found "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." *Edelman v. Jordan*, 415 U.S. 651 (1974) (citing *Murray v. Wilson Distilling Co.,* 213 U.S. 151 (1909)); *see also College Saving Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675-678 (1999) ("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 Saving Bank is instructive. There, the petitioner argued that the respondent, an arm-of-state of the State of Florida, 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 referred to in *Parden v. Terminal Ry. of Alabama State Docks Dept.*, 377 U.S. 184 (1964). In *Parden*, the Supreme Court held that an Alabama railway constructively waived its Eleventh Amendment immunity by operating in interstate commerce at the same time that the Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.,* provided a private right of action to plaintiffs injured while employed by common carriers operating in interstate commerce. The Supreme Court in *College Sav. Bank* rejected the petitioner's arguments, expressly overruled *Parden* and adopted the standard in *Edelman* to the effect that waivers of immunity must be express and unambiguous. *College Sav. Bank*, 527 U.S. 666, 680.

The argument raised by Plaintiff-Respondent in the Appellate Division that New Jersey could impliedly waive its interstate sovereign immunity by operating vehicles in New York in light of Vehicle and Traffic Law ("VTL") § 253 has no merit in view of *Edelman,* subsequent cases, and the terms of § 253. As stated previously, the Appellate Division has spoken on the issue of whether New Jersey

has consented to suit in New York State. As set forth in *Belfand*, the Appellate Division held that New Jersey's consent to suits in its state courts under its Tort Claims Act was not an express consent to suit in the courts of a sister state and, therefore, failed to satisfy *Hyatt's* constitutional demand. *Belfand v. Petosa*, 196 A.D.3d 60, 69 (1st Dep't 2021). VTL § 253, moreover, provides only that a non-resident motorist's use of a motor vehicle is deemed equivalent to an appointment of the Secretary of State for service of process—a matter relating to personal jurisdiction, not subject matter jurisdiction. Applying similar reasoning to *Belfand*, the North Carolina Court of Appeals found that Troy University, an arm of the state of Alabama with a recruitment office in North Carolina, was immune from suit in North Carolina as a matter of fundamental constitutional law that was never waived by the State of Alabama. *See Farmer v. Troy University*, 276 N.C. App 53 (2021), *appeal filed*, Docket No. 457P19-2 (2021).

D. New Jersey Transit Did Not Submit to New York's Jurisdiction

For waiver to be found, the courts also consider voluntary invocation of jurisdiction, voluntary submission to jurisdiction, or litigation conduct. *See Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 547 (2001); *Lapides v. Bd. of Regents*, 535 U.S. 613 (2002). For the reasons that follow, there was no waiver and the Appellate Division erred in denying dismissal.

New Jersey Transit and bus operator, Renaud Pierrelouis, were named as defendants and were compelled to defend the underlying action. They did not enter the New York forum voluntarily. The courts have held, however, that defending an action on the merits does not in itself constitute a waiver by affirmative invocation or by litigation conduct. In *Raygor*, the Supreme Court observed that there was no requirement that sovereign immunity be raised at the outset of a lawsuit. Although the Supreme Court in *Lapides* held that voluntary removal by the State of Georgia of a state court case to federal court constituted a voluntary entrance into the forum, thereby waiving Eleventh Amendment immunity, the Court reviewed the circumstances that qualify as a state's voluntary entry into the forum. The Supreme Court held 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]." *Lapides*, 535 U.S. at 619. *Lapides* considered three older cases in determining whether the State of Georgia had voluntary entered into the forum to submit to jurisdiction. *See, e.g., Clark v. Barnard*, 108 U.S. 436 (1883) (the appearance in federal court by the State of Rhode Island to intervene as a claimant to a fund was a voluntary submission to the court's jurisdiction); *Gunter v. Atlantic Coast Line R. Co.*, 200 U.S. 273, 289 (1906) (state officials were voluntarily appointed by the State of South Carolina to defend its rights and submit to the

court's jurisdiction); *Gardner v. New York*, 329 U.S. 565 (1947) (the New Jersey State Comptroller could file a claim in a reorganization proceeding on the state's behalf). Unlike the circumstances in *Lapides, Clark*, *Gunter* and *Gardner* involved a voluntary entry by the state into the forum. But states are immune from suit where the state is involuntarily made a defendant in an action. The position of the State of Georgia in *Lapides* by effecting removal rendered it unlike the position of the State of Indiana in *Ford Motor Co. v. Dept. of Treasury of Ind.*, 323 U.S. 459 (1945). The State of Indiana was involuntarily made a defendant in federal court, whereas the State of Georgia initiated and effected removal to federal court. *See Lapides, supra,* at 622.

In the case at bar, the State of New Jersey was involuntarily haled into New York's courts and New Jersey Transit and Pierrelouis were defendants from the outset. New Jersey Transit did not act out of gamesmanship but out of necessity when it raised sovereign immunity before the Appellate Division. It did so because *Hyatt III* was decided after the post-trial motion was fully briefed and submitted. In the absence of waiver by the State of New Jersey, New Jersey's sovereign immunity required dismissal. The fact that prior to *Hyatt III* New Jersey could have asserted a different defense based upon comity does not support affirmance of the Appellate Division because the post-*Hyatt III* defense is constitutionally mandated and can be raised at any time.

A number of New York decisions support dismissal of the underlying action. In *Morrison v. Budget Rent A Car Systems, Inc.,* 230 A.D.2d 253 (2d Dep't 1997), a case decided prior to *Hyatt III*, the Appellate Division, Second Department, reviewed the parties' stipulations purportedly waiving subject matter jurisdiction. South Carolina State University and an employee were sued for alleged negligence arising from a two-car accident. The Appellate Division concluded that parties cannot stipulate to waive subject matter jurisdiction where sovereign immunity is in issue. In *Trepel v. Hodgins*, 183 A.D.3d 429 (1st Dep't 2020), a case commenced prior to, but decided after, *Hyatt III*, the plaintiff sued the Arizona Board of Regents and a board employee (the "Arizona Defendants") in Supreme Court, New York County. The Arizona Defendants sought dismissal on a number of grounds in their original motion to dismiss, but subsequently cited *Hyatt III* on the plaintiff's appeal to the Appellate Division, arguing that the Court was required to dismiss the action following *Hyatt III*. The Court accepted the Arizona Defendants' argument and dismissed the complaint against them, citing *Hyatt III*. The result reached by the Appellate Division, First Department, in *Trepel* should also obtain in this case.

The posture of the State of New Jersey is akin to that of the State of Louisiana in *Union Pac. R.R. v. La. Public Service Commission*, 662 F.3d 336 (5th Cir. 2011). There, the Fifth Circuit held that the Louisiana Public Service Commission did not waive its Eleventh Amendment immunity by failing to raise it in the district court.

Union Pac. R.R. v. La. Public Service Commission, 662 F.3d 336 (5th Cir. 2011). Although the Commission had prevailed on a prior motion for summary judgment and first raised the Eleventh Amendment in its responsive brief on appeal, the Court found that "[w]hile the state may have defended on the merits below, it never chose to litigate this suit in the federal forum." *Id.* at 341. Relying upon *Lapides*, the Fifth Circuit 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 Fifth Circuit stated that its holding was in accord with six other circuit courts of appeal, all of which permitted Eleventh Amendment immunity to be asserted for the first time on appeal, and that any fears of gamesmanship had been assuaged. *See id.* at 341-342. Here, Defendants-Appellants' constitutional right to dismissal pursuant to interstate sovereign immunity was not expressed until *Hyatt III* was decided.

The relevant inquiry is whether New Jersey expressly and unambiguously consented to private suits in New York. As evidenced by the New Jersey Tort Claims Act, its provisions, and the case law, New Jersey did not expressly and unambiguously consent to private suit in New York State. Just as Arizona's lack of express consent to private suit in New York required dismissal of the action against

the Arizona Defendants in *Trepel*, New Jersey's lack of express consent requires dismissal of this action pursuant to *Hyatt III*.

The State of New Jersey did not waive its interstate sovereign immunity by an affirmative invocation of New York's jurisdiction or by its litigation conduct. New Jersey Transit and Renaud Pierrelouis were named as defendants. They did not submit to the jurisdiction of the New York courts. The mere fact that years passed from the commencement of the underlying action was not a basis to find that waiver occurred. This case is no different from *Trepel* and compels the same result.

E. A Trio of Cases Brought Against New Jersey Transit were Wrongly Decided

Two recent decisions of the Appellate Division, First Department, as well as the underlying appeal in the case at bar, involved lawsuits brought by individuals against New Jersey Transit. *See Henry v. New Jersey Transit*, 195 A.D.3d 444 (1st Dep't 2021); *Belfand v. Petosa*, 196 A.D.3d 60 (1st Dep't 2021); *Fetahu v. New Jersey Transit*, 197 A.D.3d 1065 (1st Dep't 2021). In each of these cases, New Jersey Transit brought sovereign immunity to the attention of the courts in which New Jersey Transit appeared. The Appellate Division, First Department, rejected the defense of sovereign immunity on the basis of affirmative litigation conduct on the part of New Jersey Transit. For the reasons that follow, these cases were wrongly decided. The First Department in *Henry* determined that New Jersey Transit's litigation conduct amounted to a waiver of New Jersey's defense of

sovereign immunity. The First Department expressly relied in *Henry* upon the reasoning of *Belfand v. Petosa*, an opinion decided on the same day and involving the same defendant as *Henry*. The First Department in *Belfand* held that the New Jersey Tort Claims Act did not provide consent by New Jersey to be sued in a New York State action. The Appellate Division gave lip service to Supreme Court precedents such as *Edelman v. Jordan*, 451 U.S. at 657, *Lapides, supra,* and *College Saving Bank, supra,* that the waiver of sovereign immunity, a fundamental constitutional right, must be express and unambiguous, and then decided erroneously that New Jersey Transit's litigation conduct was an abandonment of a known right. As explained in *Belfand*:

> The classic description of an effective waiver of a constitutional right is the intentional relinquishment or abandonment of a known right or privilege. Courts indulge every reasonable presumption against waiver of fundamental constitutional rights. State sovereign immunity… is constitutionally protected. And in the context of federal sovereign immunity . . . it is well established that waivers are not implied. We see no reason why the rule should be different with respect to state sovereign immunity.

Belfand, *supra*, at 69-70 (quoting *College Sav. Bank*, *supra*, 527 U.S. at 682).

Notwithstanding the requirement that waiver of a fundamental constitutional right must be express and unambiguous, the Court in *Belfand* found that New Jersey Transit waived its immunity by its litigation conduct in Supreme Court, New York County, where the underlying action was commenced. The Appellate Division found that New Jersey Transit's litigation conduct induced substantial reliance by

the plaintiff and it found that the defense of sovereign immunity pre-dated *Hyatt III* and could have been raised earlier. This finding plainly conflicts with the long-standing principle that the sovereign immunity defense can be raised at any time.

In *Fetahu*, New Jersey Transit raised sovereign immunity in its motion to dismiss in the lower court. Supreme Court, New York County found that New Jersey Transit waived its sovereign immunity defense by engaging in litigation conduct that amounted to an "inescapably [] clear declaration to have [New York] courts entertain this action." *Fetahu v. New Jersey Transit*, 197 A.D.3d 1065 (1st Dep't 2021). Relying upon *Henry*, the Appellate Division found it significant that New Jersey Transit did not assert the defense until six years after the action was commenced, and had by then defended against the case on the merits. The First Department further found that to the extent that New Jersey Transit contended that it could not have raised the defense before *Hyatt III,* the First Department had already rejected this contention in *Belfand.* *Fetahu v. New Jersey Transit*, 197 A.D.3d 1065 (1st Dep't 2021). The reasoning in each of these cases is flawed. The defense of interstate sovereign immunity as laid out in *Hyatt III* is not the same defense as that outlined in *Hall*. A defense resting on comity was highly unlikely to be granted by the New York State trial court in *Henry* where the motor vehicle accident occurred in New York State. The sovereign immunity defense after *Hyatt*

III is a fundamental constitutional right that must be granted. This Court should reject the reasoning of the Appellate Division, First Department.

II. THE APPELLATE DIVISION ERRED IN FINDING THAT DEFENDANTS' FAILURE TO RAISE THE SOVEREIGN IMMUNITY DEFENSE UNTIL SIX YEARS AFTER SUIT WAS COMMENCED WAS FATAL TO THEIR CHALLENGE

Because sovereign immunity speaks to the Court's subject matter jurisdiction, it may be raised at any time, including for the first time on appeal. *See*, *e.g.*, *Goffredo v. City of New York*, 2007 N.Y. App. Div. LEXIS 5975 (1st Dep't 2007); *Morrison v. Budget Rent a Car Systems, Inc.*, 230 A.D.2d 253 (2d Dep't 1997).

In *Goffredo*, the petitioner raised a preemption challenge in the Appellate Division in his motion to reargue the Appellate Division's order affirming the lower court. The preemption challenge was not raised at the trial level or even in the parties' appellate briefs. Nevertheless, the Appellate Division granted re-argument, finding that the constitutional challenge spoke to subject matter jurisdiction. As the Court found, "[a] judgment or order issued without subject-matter jurisdiction is void, and that defect may be raised at any time and may not be waived." *Goffredo*, *supra*, at *2 (citing *Editorial Photocolor Archives v. Granger Collection*, 61 N.Y.2d 517, 523 (1984)); *see also Pollard v. State*, 173 A.D.2d 906 (3d Dep't 1991); *Heisler v. State*, 78 A.D.2d 767, 768 (4th Dep't 1980).

The Third Department permitted the State of New York to raise the defense of sovereign immunity for the first time on appeal, after the conclusion of trial. *Pollard v. State*, 173 A.D.2d 906 (3d Dep't 1991) (sovereign immunity did not serve as bar to suit by inmate against New York State for loss of property). The Fourth Department permitted the State of New York to argue for the first time on appeal that it had not waived its sovereign immunity from suits concerning the conduct of elections. *Heisler v. State*, 78 A.D.2d 767, 768 (4th Dep't 1980) (sovereign immunity did not bar negligence claim after plaintiff fell after leaving a polling place). The Fourth Department permitted the defense "[s]ince sovereign immunity brings into question jurisdiction of the subject under the Court of Claims, it may be raised [by the State] at any time." *Heisler* cited *Buckles v. State*, 221 N.Y. 418 (1917), where this Court permitted the State of New York to raise the defense for the first time at trial. Th*e Buckles* Court reasoned, that "[b]eing thus a question of jurisdiction, [sovereign immunity] could be raised at any time and could not be waived…." *Buckles*, 221 N.Y. at 424. These long-standing cases that allow the defense of sovereign immunity be raised at any time warrant reversal of the Appellate Division herein which erred in refusing to grant the defense in this case.

Here, Defendants-Appellants raised a constitutional challenge to the court's subject matter jurisdiction in the Appellate Division. The challenge was precipitated by the change in the law announced in *Hyatt III*. Since the change in the law

occurred after the trial and briefing of the underlying post-trial motion, Defendants-Appellants could only raise it in the Appellate Division. Like the defense of preemption, interstate sovereign immunity and waiver are matters of constitutional law that affect subject matter jurisdiction and they can be raised at any time. *See*, *Trepel*, 183 A.D.3d at 429; *Goffredo v. City of New York*, 2007 N.Y. App. Div. LEXIS 5975 (1st Dep't 2007).

Defendants-Appellants properly raised the lack of subject matter jurisdiction premised upon sovereign immunity when they did. The Appellate Division erred in rejecting Defendants-Appellants' challenge. There were no grounds to reject the constitutionally mandated defense of interstate sovereign immunity.

III. THE APPELLATE DIVISION'S ORDER CONTRAVENED THE FULL FAITH AND CREDIT CLAUSE AND REVERSAL IS WARRANTED ON THAT BASIS

In addition to the arguments raised in Points I and II of this brief regarding the defense of interstate sovereign immunity, a distinct argument based upon the Full Faith and Credit Clause of the United States Constitution also supports dismissal of the underlying complaint. The Full Faith and Credit Clause states that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. Const. art. IV § 1. In *Hyatt II*, the Supreme Court held that while the Full Faith and Credit Clause "does not require a State to substitute for its own statute . . . the statute of another State reflecting a

conflicting and opposed policy," the decision by a state not to apply another state's statute on this ground must not evince a "policy of hostility to the public Acts of that other State." *Hyatt II*, 578 U.S. 171, 136 S. Ct. 1277 (2016). In *Hyatt II* the Supreme Court found a violation of the Full Faith and Credit Clause because Nevada had attempted to impose liability on FTB, the California agency, above the $50,000 statutory cap applicable to Nevada agencies under Nevada law. *Hyatt II*, 578 U.S. 171, 136 S. Ct. 1277, 1280 (2016). As the Court in *Hyatt II* explained, Nevada had applied a "special rule of law applicable only in lawsuits against its sister States, such as California." *Hyatt II*, 578 U.S. 171, 136 S. Ct. 1277, 1282 (2016). Therefore, Nevada's rule "reflect[ed] a constitutionally impermissible policy of hostility to the public Acts of a sister State." *Hyatt*, 578 U.S. 171, 136 S. Ct. 1277, 1282-1283 (2016) (internal quotation marks omitted).

The rationale of the Supreme Court in *Hyatt II* finding that Nevada's rule which was applicable only to a California agency contravened the Full Faith and Credit Clause. Although the United States Supreme Court, after overturning *Hall,* vacated the judgment against FTB (that the Nevada Supreme Court had reduced to the statutory limit), the Supreme Court's reasoning in *Hyatt II* that the Full Faith and Credit Clause was violated supports the conclusion that the Appellate Division's ruling evinced hostility to New Jersey and should be reversed on this ground as well. Although the Full Faith and Credit Clause does not require a state

to apply another state's law "in violat[ion] [of] its own legitimate public policy," it nonetheless requires "a healthy regard for [the] sovereign status [of other states]." *Hyatt II*, 136 S. Ct. 1277, 1283.

The Full Faith and Credit Clause argument expressed in *Hyatt II* has been applied by other courts. *See Pittman v. Rutherford*, 2020 U.S. Dist. LEXIS 202837 (E.D.Ky. Oct. 30, 2020). In *Pittman*, the plaintiffs sought leave to amend their complaint to add Brown County, Ohio as a defendant. Their claims stemmed from alleged misrepresentations by Brown County employees regarding the sexual abuse history of a foster child placed in their home. After the case was removed to federal court in Kentucky, the defendants moved to dismiss the complaint on the ground that Brown County was immune from suit. The District Court held that Brown County was immune from suit because Kentucky courts would defer to Ohio immunity law. The Court also determined that even if Ohio law did not apply, the Full Faith and Credit Clause required Kentucky courts to find immunity because Kentucky failing to grant immunity would amount to an unconstitutional policy of hostility because Kentucky counties would be immune under these circumstances. The District Court adopted the reasoning of the Supreme Court expressed in *Hyatt II*.

The same rationale applies to this case. The New York courts permit the dismissal of actions against the State of New York on sovereign immunity grounds.

See Pollard v. State, 173 A.D.2d 906 (3d Dep't 1991); *Heisler v. State*, 78 A.D.2d 767, 768 (4th Dep't 1980). For the same reasons, the New York courts should dismiss the complaint against New Jersey Transit on sovereign immunity grounds. The Appellate Division's rejection of New Jersey Transit's sovereign immunity defense—even though New York courts would have granted immunity to the State of New York in similar circumstances--necessitates the determination that the Full Faith and Credit Clause was violated in the case at bar.

CONCLUSION

For all of the foregoing reasons, this Court should reverse the Appellate Division's determination denying dismissal of the underlying action against New Jersey Transit and Renaud Pierrelouis on the ground that the defense of interstate sovereign immunity was waived; should set aside the judgment, and dismiss the complaint. As an alternative basis for setting aside the judgment below, this Court should find that the Appellate Division's rejection of Defendants-Appellants' defense contravenes the Full Faith and Credit Clause of the United States Constitution, necessitating dismissal of the complaint.

Dated: New York, NY
April 19, 2022

Respectfully submitted,
McGIVNEY, KLUGER, CLARK & INTOCCIA, P.C.

By: Michael Rawlinson
Attorneys for Defendants-Appellants
80 Broad Street
New York, New York 10004
(212) 509-3456
mrawlinson@mkcilaw.us.com

WORD COUNT STATEMENT
PURSUANT TO 22 NYCRR § 500.13

The foregoing brief was prepared on a computer. A proportionally-spaced typeface was used, as follows:

Name of typeface: Times New Roman

Point size: 14

Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the questions presented for review, table of contents, table of authorities, and word count certification is 7,817 words.

New York State Court of Appeals

APL-2021-00138

KATHLEEN HENRY,

Plaintiff-Respondent,

-against-

NEW JERSEY TRANSITCORPORATION;
RENAUD PIERRELOUIS,

Defendants-Appellants,

CHEN NAKAR,

Defendant.

STATEMENT PURSUANT TO CPLR §5531

1. The index number of this case in the court below is 156496/2015. The Appellate Division, First Department Docket Number is 2020-00380.

2. The full names of the original parties to this action are set forth in the caption above. There has been no change.

3. This action was commenced in the Supreme Court, New York County.

4. This action was initiated by the filing of a Summons and Complaint on or about June 29, 2015. Defendant Nakar filed his answer on or about August 10, 2015. Defendants New Jersey Transit and Pierrelouis filed their answer on or about September 23, 2015.

5. This is an action for personal injuries, automobile accident.

6. This appeal is taken from the Post-Trial Decision and Order of Hon. Lillian Wan, J.S.C., New York County, dated Jun. 27, 2019 and entered Jul. 3, 2019.

7. This appeal is being made on the fully reproduced record on appeal.

8. This is an appeal as of right from an order and judgment of the Supreme Court of New York, County of New York pursuant to CPLR § 5601(d).