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September 7, 2021

Via. Digital Filing and First-Class Mail
Hon. John P. Asiello
Chief Clerk and Legal Counsel
Court of Appeals, State of New York
20 Eagle Street
Albany, New York 12207

Re: *Henry (Kathleen) v. NJ Transit Corp.* (APL 2021-00138) – Defendants-Appellants' Jurisdictional Response

Dear Mr. Asiello:

This office represents Defendants-Appellants New Jersey Transit Corp. ("Transit") and Renaud Pierrelouis in the above-referenced appeal.

Please accept this letter in response to your August 26, 2021, letter addressed to the undersigned.

As set forth at length below, because the Appellate Division's June 03, 2021, Decision and Order directly and necessarily involves substantial constitutional questions of statewide importance and necessarily affects the subject July 13, 2021, Judgment, the Court's retention of subject-matter jurisdiction is justified pursuant to CPLR 5601(b)(1) and (d).

Background History

From 1979 through 2019, *Nevada v. Hall*, 440 U.S. 410 (1979), relegated interstate sovereign immunity to a matter of comity. *Hall*'s majority rejected Nevada's argument that interstate sovereign immunity existed as a constitutional mandate vis-à-vis the Constitution's structure, which, Nevada had argued, fundamentally altered the nature of interstate relations. The Court reasoned that, while states were free to recognize sister states' sovereign immunity as a matter of comity, nothing about the Constitution otherwise required them to. As such, the Court

affirmed a California judgment entered against Nevada despite the fact that Nevada, like New York and New Jersey, had consented to suits solely in its own courts.

In 2019, the Supreme Court reversed *Hall* in *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485 (2019) (hereinafter "*Hyatt III*"), holding that "The Constitution does not merely allow States to afford each other immunity as a matter of comity; it embeds interstate sovereign immunity within the constitutional design." *Id.* at 1497.

In so holding, the Court reasoned that "the Constitution affirmatively altered the relationships between the States so that they no longer relate to each other solely as foreign sovereigns," *id.* at 1497, as was the case under the Articles of Confederation. The Court pointed to numerous provisions in the Constitution, such as Article III, the Eleventh Amendment, the Full Faith and Credit Clause (hereinafter "the FF&CC"), the Privileges and Immunities Clause, the Extradition Clause, the Compact Clause, and Art. I, Sec. 10, Cl. 3's additional provisions as reflecting this reality. In shedding the Articles of Confederation to form a more perfect union, "[t]he Constitution implicitly strip[ped] the states of any power they once had to refuse each other sovereign immunity, just as it denie[d] them the power to resolve border disputes by political means." *Id.* at 1497. The Court thus reversed the judgment of the Nevada Supreme Court, holding that, absent its consent, California could not be subjected to private suits in Nevada.

With respect to *stare decisis*, the Court reasoned that, although the plaintiff had relied on *Hall* in good faith for over two decades in prosecuting his action in Nevada, "such case-specific costs are not among the reliance interests that would persuade us to adhere to an incorrect resolution of an important constitutional question." *Id.* at 1499.

Procedural History

Like the plaintiff in *Hyatt III*, Plaintiff-Respondent commenced suit against one state in the courts of another during *Hall*'s erroneous reign.[1]

From the time of commencement, in 2015, through May 13, 2019, when *Hyatt III* was decided, *Hall* deprived New Jersey of any right to dismissal, since comity, unlike the Eleventh Amendment or FF&CC, "is not a rule of law, but one of practice, convenience, and expediency" that "does not of its own force compel a particular course of action" but, rather, "is an expression of one State's entirely voluntary decision to defer to the policy of another." *Ehrlich-Bober & Co. v. University of Houston*, 49 N.Y.2d 574, 580 (1980).

By the time *Hyatt III* was decided, trial in the underlying action had concluded, and Appellants' post-trial motion was fully briefed.

The trial court's June 27, 2019, Decision and Order denied Appellants' post-trial motion in its entirety.

[1] As set forth in Appellants' briefs, Transit is an arm of the State of New Jersey and part of its executive branch of government. *See, e.g., Karns v. Shanahan*, 879 F.3d 504 (3d Cir. 2018) (finding same and dismissing action via the Eleventh Amendment).

In light of *Hyatt III*'s intervening change in the law, Appellants expeditiously sought dismissal of the action for lack of subject-matter jurisdiction in their briefs on appeal from the trial court's June 27, 2019, Decision and Order.[2]

Appellants argued that, because New Jersey has not expressly and unequivocally waived its interstate sovereign immunity from suits in New York, either by its laws or an affirmative invocation of New York's jurisdiction,[3] *Hyatt III* deprives New York's courts of subject-matter jurisdiction. With respect to the latter, Appellants' argument was threefold: (1) Given *Hall*'s erroneous reign, a true interstate-sovereign-immunity defense, as distinct from a comity defense, was unavailable to Appellants prior to *Hyatt III*, precluding any waiver; (2) under New York precedents, interstate sovereign immunity speaks to subject-matter jurisdiction, which may be raised at any time;[4] and (3) as a matter of constitutional law, no waiver was possible in any event, since *Lapides v. Bd. of Regents*, 535 U.S. 613 (2002) (removal of action from state to federal court waived Eleventh Amendment immunity), does not sanction a waiver by defense on the merits alone but, rather, requires that a state's litigation conduct be on par with a voluntary entrance into the forum.

By its June 03, 2021, Decision and Order, the Appellate Division rejected Appellants' contention that the defense of interstate sovereign immunity was unavailable prior to *Hyatt III* in light of *Hall*.[5] As such, relying upon *Lapides*, the court held that Appellants' litigation conduct amounted to an affirmative invocation of New York's jurisdiction and thus a waiver of New Jersey's interstate sovereign immunity under the circumstances.

Judgment was entered and served with Notice of Entry on July 13, 2021. Appellants timely filed their Notice of Appeal to this Court on August 12, 2021, seeking review of the June 03, 2021, Decision and Order pursuant to CPLR 5601(d).

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[2] In doing so, Appellants relied upon precedents holding that states' sovereign immunity speaks to subject-matter jurisdiction, a "defect [that] may be raised at any time and may not be waived." *Morrison v. Budget Rent a Car Sys.*, 230 A.D.2d 253 (2d Dep't 1997) (holding South Carolina's immunity under the South Carolina Tort Claims Act speaks to subject-matter jurisdiction); *Trepel v. Hodgins*, 183 A.D.3d 429 (1st Dep't 2020) (dismissing action via *Hyatt III* for lack of subject-matter jurisdiction); *Goffredo v. City of New York*, 2007 N.Y. App. Div. LEXIS 5975 (1st Dep't 2007) (permitting subject-matter jurisdiction to be raised for first time in motion to reargue appeal); *Buckles v. State*, 221 N.Y. 418, 424 (1917) (State's sovereign immunity "could be raised at any time and could not be waived"); and *Roma v. Ruffo*, 92 N.Y.2d 489 (1998) (considering subject-matter jurisdiction in appeal of right although first raised in Appellate Division), *infra*. *Cf. In re Estate of Rougeron*, 17 N.Y.2d 264 (1966) (judgment not subject to collateral attack for lack of subject-matter jurisdiction where contingent upon the status of a party).

[3] *See College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (abrogating doctrine of constructive waiver); and *Lapides v. Bd. of Regents*, 535 U.S. 613 (2002) (waiver by affirmative invocation/litigation conduct), *infra.*

[4] *See* fn. 2, *supra.*

[5] The Appellate Division's decision in *Belfand v. Petosa*, 2021 NY Slip Op 03522, 196 A.D.3d 60 (1st Dep't 2021), decided along with the subject June 03, 2021, Decision and Order, held that the New Jersey Tort Claims Act (N.J. Stat. Ann. §§59:1-1, *et seq.*), contains no express, unequivocal waiver of New Jersey's interstate sovereign immunity that can thwart *Hyatt III*'s command. However, as here, the court found that *Lapides*, *supra*, permitted a waiver by affirmative invocation/litigation conduct under the circumstances.

Substantial Constitutional Questions of Statewide Importance

The June 03, 2021, Decision and Order raises substantial constitutional questions of statewide importance that extend far beyond the case at hand and affect interstate relations.

The nature of interstate sovereign immunity pre-*Hyatt III* is a substantial constitutional question of statewide importance. In this regard, *Boudreaux v. State of La., Dept. of Transp.*, 11 N.Y.3d 321 (2008), is dispositive. There, the Appellate Division had held that neither the FF&CC nor principles of comity required New York's enforcement of a judgment against Louisiana. This Court sustained the plaintiffs' appeal of right pursuant to CPLR 5601(b) and clearly distinguished states' rights under the FF&CC from the doctrine of comity, which is "not a rule of law" but merely "a voluntary decision by one state to defer to the policy of another." *Id.* at 326. Likewise, in *Crair v. Brookdale Hosp. Med Ctr.*, 94 N.Y.2d 524 (2000), this Court granted the plaintiffs leave to appeal from the Appellate Division's Decision and Order which had held that dismissal as against Maryland and Virginia was appropriate as a matter of comity. Citing to *Hall*, the Court emphasized that "the Constitution does not imply that one State's immunity from suit in the courts of another state is anything other than a matter of comity." *Id.* at 528. Further, in *Deutsche Bank Sec., Inc. v. Montana Bd. of Invs.*, 7 N.Y.3d 65, 72 (2006),[6] the Court characterized *Hall* as providing that "states do not have immunity from suit in the courts of other states" and distinguished interstate sovereign immunity from comity. In light of these pre-*Hyatt III* descriptions of interstate sovereign immunity, the Appellate Division's characterization of the defense as preceding *Hyatt III* raises significant concerns as to the continued viability of *Boudreaux*, *Crair*, and *Deutsche Bank*, as well as the extent to which, as a matter of constitutional law, the doctrine of comity and states' FF&CC rights are distinguishable from a true interstate-sovereign-immunity bar called for by *Hyatt III*.

Waiver by litigation conduct is a substantial constitutional question of statewide importance. The question of waiver is a matter of federal constitutional law, not state law: "[W]hether a particular set of state … activities amounts to a waiver of the State's [forum] immunity is a question of *federal law*." *Lapides*, 535 U.S. at 623 (emphasis added). The Supreme Court made this clear in *Lapides* in reversing *Ford Motor Co. v. Department of Treasury of Ind.*, 323 U.S. 459 (1945), to the extent it required that counsel for the state be statutorily authorized to effect a waiver by litigation conduct. In doing so, the Court, in the interest of uniformity, announced a "rule of federal law that finds waiver through a state['s] … general invocation of … jurisdiction." *Id.* at 624. Thus, the Appellate Division's finding of a waiver by affirmative invocation, or an "inescapably [] clear declaration," here, in direct reliance upon *Lapides*, is indisputably a direct adjudication of federal constitutional law. Yet, because *Lapides* provides no coherent definition of a "voluntary invocation" beyond a voluntary appearance in the action,[7] the subject Decision and Order risks uncertainty as to *Lapides*' boundaries. Indeed, the federal Courts of Appeals are divided on the question. *Compare Union Pac. R.R. v. La. PSC*, 662 F.3d

[6] *Deutsche Bank* reached this Court via certified question pursuant to CPLR 5602(b).

[7] *See Lapides*, 535 U.S. at 619 (*citing Clark v. Barnard*, 108 U.S. 436 (1883) (waiver by intervenor status); *Gardner v. New Jersey*, 329 U.S. 565 (1947) (petitioner status); and *Gunter v. Atlantic Coast Line R. Co.*, 200 U.S. 273 (1906) (declining to permit vacatur of final judgment via the Eleventh Amendment)).

336, 342 (5th Cir. 2011) (permitting Eleventh Amendment immunity to be raised for first time on appeal), *with Ku. v. Tennessee*, 322 F.3d 431 (6th Cir. 2003) (waiver by defense on the merits). Pursuant to *Lapides*, the extent to which sister states' litigation conduct in New York's courts can be deemed a waiver of their interstate-sovereign-immunity rights is a substantial constitutional question that is properly resolved by this Court.

As the foregoing questions are yet to be addressed by this Court or the Supreme Court subsequent to *Hyatt III*'s sea change in the law, it cannot be the case that they are "so clearly not debatable and utterly lacking in merit as to require dismissal for want of substance." Arthur Karger, *The Powers of the New York Court of Appeals*, §7:5 (3d ed. rev. 2005) (hereinafter "*Powers*") (*citing Hamilton v. Regents of the Univ. of Calif.*, 293 U.S. 245 (1934), *et seq.*). Rather, they constitute significant constitutional questions of statewide importance that are properly resolved by this Court at this juncture.

Direct and Necessary Involvement

The foregoing questions are directly and necessarily involved in the underlying Decision and Order as antecedents to subject-matter jurisdiction.

Appellants' objections were properly raised for the first time in the Appellate Division. *Hyatt III* clearly provides that, in the absence of a waiver, New York's courts lack subject-matter jurisdiction over the instant action. For "[e]ach State's equal dignity and sovereignty under the Constitution implies certain constitutional limitations on the sovereignty of all of its siter States," and "[o]ne such limitation is the *inability* of one State to hale another into its courts without the latter's consent." *Hyatt III*, 139 S. Ct. at 1497 (emphasis added). The foregoing questions are accordingly antecedent to, and thus inextricably intertwined with, subject-matter jurisdiction, which "may be raised at any time." *Editorial Photocolor Archives, Inc. v. Granger Collection*, 61 N.Y.2d 517, 523 (1984). Accordingly, in *Roma v. Ruffo*, 92 N.Y.2d 489 (1998), this Court permitted the appellant's appeal of right although its challenge to the trial court's subject-matter jurisdiction was raised for the first time in the Appellate Division. As *Roma* illustrates, because subject-matter jurisdiction is the substratum upon which the authority to adjudicate depends, it is always directly involved in the action and appropriately raised at any time. Thus, Appellants' challenges to New York's subject-matter jurisdiction were properly asserted and necessarily adjudicated for the first time in the Appellate Division, given *Hyatt III*'s intervening change in the law.

Jongebloed v. Erie E. Co., 296 N.Y. 912 (1947), lends support. There, this Court sustained the appellant's appeal of right on constitutional grounds because, although the substantial constitutional question was not raised in the trial court, it "was properly presented to the Appellate Division and necessarily involved in its decision." *Id.* at 912. This is exactly the case here. While *Powers* suggests that *Jongebloed* is no longer dispositive in this regard,[8] decisions indicating as much involved constitutional challenges that are markedly distinguishable from an interstate-sovereign-immunity challenge. In *Mingo v. Pirnie*, 55 N.Y.2d 1019, 1020 (1982), for example, this Court declined to consider the appellant's contention that he was entitled to a hearing because, although the question was raised and reviewed in the Appellate

[8] *See Powers* at §7:4.

Division, it was not raised at *nisi prius*. *Citing Mingo*, this Court held similarly in *Shurgin v. Ambach*, 56 N.Y.2d 700 (1982), with respect to the petitioner's due process challenge. In *In re Barbara C.*, 64 N.Y.2d 866 (1985), this Court dismissed the appellant's appeal as moot because her challenges under the Equal Protection Clause "were not raised or preserved in the trial court." *Id.* at 866. In doing so, the Court emphasized that, "Unlike the Appellate Division which may reach and decide issues which are not properly preserved, this court is limited to reviewing questions of law." *Id.* at 868. *In re Shannon B.*, 70 N.Y.2d 458 (1987), similarly held that the appellant's appeal did not lie of right because her Fourth Amendment challenge was first raised in the Appellate Division and thus not properly preserved. The right to a hearing and due process, Equal Protection, and Fourth Amendment questions, are not inextricably intertwined with subject-matter jurisdiction; unlike with interstate sovereign immunity, such challenges, even if successful, have no impact upon a court's authority to adjudicate. Accordingly, as *Roma*, *supra*, illustrates, rules of preservation are inapplicable here, and Appellants' objections were properly raised as pure questions of law affecting New York's subject-matter jurisdiction.

The foregoing questions were necessarily reached in the underlying Decision and Order. It is well-settled that, for an appeal to lie of right on constitutional grounds, the constitutional question must be "not only directly but necessarily involved in the decision in the case." *Haydorn v. Carroll*, 225 N.Y. 84, 88 (1918). Similarly, an appeal will not lie of right where the Appellate Division's "constitutional discussion [i]s only incidental." *Powers*, §7:9 (*citing Board of Education v. Wieder*, 72 N.Y.2d 174, 182-83 (1988)). Here, the Appellate Division's finding of a waiver of New Jersey's interstate sovereign immunity was essential to its Decision and Order, since, absent a waiver, *Hyatt III* deprives New York's courts of subject-matter jurisdiction. *See, e.g.*, *Trepel v. Hodgins*, 183 A.D.3d 429, 429 (1st Dep't 2020) (dismissing via *Hyatt III* for lack of subject-matter jurisdiction absent waiver); *see also In re Grand Jury Subpoenas for Locals 17, 135, 257 & 608 of United Brotherhood of Carpenters & Joiners*, 72 N.Y.2d 307, 311 (1988) (even where not raised by the parties, subject-matter jurisdiction must be considered by the court *sua sponte*). Far from being "only incidental" to its Decision and Order, the foregoing questions were necessarily reached as jurisdictional antecedents; absent a waiver, the Decision and Order cannot stand.

The Necessarily-Affects Requirement

Because reversal of the Decision and Order would require reversal of the Judgment and dismissal of the action for lack of subject-matter jurisdiction pursuant to *Hyatt III*, the necessarily-affects requirement is readily satisfied. *Powers* provides that a non-final order necessarily affects a judgment "if the result of reversing that order would necessarily be to require a reversal and modification of the final determination" and leave "no further opportunity during the litigation to raise again the questions decided by the non-final order." *Powers*, §9:5, 304-305, 311. As *Hyatt III* provides that, absent a waiver, New York is "strip[ped] … of any power [it] once had to refuse [New Jersey] sovereign immunity," *Hyatt III*, 139 S. Ct. at 1497, such is exactly the case here.

Conclusion

As the nature of interstate sovereign-immunity pre-*Hyatt III* and questions of waiver by litigation conduct are substantial constitutional questions of statewide importance directly and necessarily involved in the underlying Decision and Order, and the Decision and Order necessarily affects the July 13, 2021, Judgment, the retention of subject-matter jurisdiction herein is justified pursuant to CPLR 5601(b)(1) and (d), and Appellants' appeal of right should be sustained.

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AFFIRMATION OF SERVICE

DEAN L. PILLARELLA, ESQ., an attorney duly admitted and licensed to practice law before the courts of the State of New York, affirms the following under penalty of perjury pursuant to CPLR 2106:

That I am not a party to this action, which bears Index No. 156496/15; am over 18 years of age; and am associate attorney at the law firm of McGIVNEY, KLUGER, CLARK & INTOCCIA, P.C., 80 Broad Street, New York, NY 10004, attorneys for Defendants-Appellants NEW JERSEY TRANSIT CORPORATION and RENAUD PIERRELOUIS.

That, on September 07, 2021, I caused to be served a true copy of Defendants-Appellants' annexed September 07, 2021, Jurisdictional Response by *e-mailing and mailing* the papers enclosed in a sealed envelope, with postage prepaid thereon, in a post office or official depository under the exclusive care and custody of the U.S. Postal Service within the State of New York as follows:

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That, all counsel having consented to e-filing in this matter, said e-mail addresses are the

e-mail addresses listed for counsel on NYSCEF.

Dated: New York, NY
September 07, 2021

Dean L. Pillarella

Dean L. Pillarella, Esq.