APL-2021-00138

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

Appellate Division, First Department Case No. 2020-00380

Court of Appeals

STATE OF NEW YORK

KATHLEEN HENRY,

Plaintiff-Respondent,

against

NEW JERSEY TRANSIT CORPORATION,
RENAUD PIERRELOUIS,

Defendants-Appellants,

and

CHEN NAKAR,

Defendant.

BRIEF FOR *AMICUS CURIAE* NEW YORK STATE TRIAL LAWYERS' ASSOCIATION IN SUPPORT OF PLAINTIFF-RESPONDENT

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Date Completed: July 13, 2022

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Preliminary Statement

The New York State Trial Lawyers Association ("NYSTLA") does not address whether defendants New Jersey Transit Corporation ("NJT") and Renaud Peirrelouis waived their alleged right to be sued only in their home state. NYSTLA demonstrates that defendants had no such right in the first place.

POINT I

NJT IS NOT "THE STATE" OR AN "ARM OF THE STATE" UNDER THE GOVERNING SUPREME COURT PRECEDENTS.

Defendants argue that NJT is "an arm of the State" within the meaning of the Eleventh Amendment because, a) it is a "public entity" within the meaning of New Jersey law (App. Br. at 10-11), and, b) the Third Circuit held that NJT is "an arm of the State" in *Karns v Shanahan*, 879 F3d 504 [3d Cir 2018] (*id.* at 8, 10-15).

NYSTLA below demonstrates that NJT is not an "arm of the State," especially in the present context.

> 1) Per the controlling United States Supreme Court rulings, the fact that NJT is a "public entity" does not make it an "arm of the State" (Point IA, *infra*),
>
> 2) New Jersey statutes *specifically provide* that NJT is "independent" of the State (NJ Stat Ann 27:25-4[a]), that the State is *not* responsible for any of NJT's debts or liabilities (NJ Stat Ann 27:25-17), and that the term "State" shall *not* include any entity "which is statutorily authorized to sue and be sued" (NJ Stat Ann 59:1-3) (Point IB, *infra*),
>
> 3) While every federal circuit has its own multi-prong test to determine whether a "public entity" is an "arm of the State" (Point IC, *infra*), NJT should not qualify under any (Points ID and IE, *infra*).

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

Per the Eleventh Amendment to the U.S. Constitution:

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

Emphasis added.

In consequence of the Amendment's plain language, "a governmental entity is entitled to Eleventh Amendment immunity only if it is more like an arm of the State, such as a state agency, than like a municipal corporation or other political subdivision [quotation marks omitted]." *Woods v Rondout Val. Cent. School Dist. Bd of Educ.*, 466 F3d 232, 236 [2d Cir 2006].

When appellants argue that they are entitled to the Eleventh Amendment's protection because NJT is a "public entity" (App. Br. at 10-11), such is a false dichotomy. The Southeastern Pennsylvania Transportation Authority, the New York State Thruway Authority, and the Port Authority Trans-Hudson Corporation (*i.e.*, PATH) are all public entities. Yet, all were held *not* to be "arms of the State" for the purposes of the Eleventh Amendment, the latter by virtue of the Supreme Court's correction of an erroneous Third Circuit ruling. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 US 30, 44-54 [1994]; *Mancuso v New York State Thruway Auth.*, 86 F3d 289, 292-296

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

Indeed, in almost every case the issue has arisen, publicly operated bus and rail lines have been deemed *not* to be arms of the State, even when the suit arose from conduct far more "governmental" (*e.g.*, police protection) than allegedly negligent operation of a bus.

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

Appellants repeatedly note that NJT is part of the Executive Branch. It is nonetheless a matter of statutory law that NJT is "independent" of the "supervision or control" of the Executive Branch. NJ Stat Ann 27:25-4[a] states:

> … the corporation [NJT] is hereby allocated within the Department of Transportation, but, notwithstanding that allocation, <u>the corporation shall be independent of any supervision or control by the department or by any body or officer thereof</u>. The corporation is hereby constituted as an instrumentality of the State exercising public and essential governmental functions, and the exercise by the corporation of the powers conferred by this act shall be deemed and held to be an essential governmental function of the State.

Emphasis added.

It is also indisputable that New Jersey is *not* liable for any judgment entered against NJT. NJ Stat Ann 27:25-17 expressly provides:

> … No debt or liability of the corporation shall be deemed or construed to create or constitute a debt, liability, or a loan or pledge of the credit of the State.

Finally, the New Jersey Tort Claims Act, the statute that governs NJT's tort liability, states that essentially every governmental entity is a "public entity" but the term "State" *shall not* include any state entity which can sue and be sued. NJSA 59:1-3 states in part:

> "Public entity" includes the State, and any county, municipality, district, public authority, public agency, and any other political subdivision or public body in the State.
>
> "State" shall mean the State and any office, department, division, bureau, board, commission or agency of the State, but shall not include any such entity which is statutorily authorized to sue and be sued. "State" also means the Palisades Interstate Park Commission, but only with respect to employees, property and activities within the State of New Jersey.

Emphasis added.

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

Whether a given entity is entitled to the protections of the Eleventh Amendment is a question of federal law. *E.g.*, *Woods*, 466 F3d at 236-237; *Fresenius Med. Care*

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

New York courts are "bound by the United States Supreme Court's interpretations of Federal statutes and the Federal Constitution." *People v Kin Kan*, 78 NY2d 54, 59 [1991]. However, when "there is neither a decision of the Supreme Court nor uniformity in the decisions of the lower Federal courts, a State court required to interpret a Federal statute is not bound to follow the decision of the Federal courts or precluded from exercising its own judgment." *423 S. Salina St., Inc. v City of Syracuse*, 68 NY2d 474, 489 [1986].

Here, the Supreme Court has on several occasions addressed whether a particular entity was an "arm of the State" for purposes of the Eleventh Amendment. However, "[t]he Supreme Court has not articulated a clear standard for determining whether a state entity is an 'arm of the state' entitled to sovereign immunity." *Leitner v Westchester Community Coll.*, 779 F3d 130, 134 [2d Cir 2015]. The Circuits have developed their own tests. Those tests differ substantially.

1. The Pertinent Supreme Court Rulings

The Supreme Court has addressed the question of whether a particular entity was an "arm of the State" for purposes of the Eleventh Amendment.

In *Ford Motor Co. v Dept. of Treasury of State of Indiana*, 323 US 459 [1945], the Court unsurprisingly held that Indiana's Treasury Department, which collected income taxes

on the State's behalf, was a "State" within the meaning of the Eleventh Amendment. The Court stated that "when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest … even though individual officials are nominal defendants" (*id.* at 464).

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

Thereafter, in *Lake Country Estates, Inc. v Tahoe Regional Planning Agency*, 440 US 391 [1979], the Supreme Court ruled that the TRPA, "created by Compact between California and Nevada" (440 US at 393), was, at least in that case, *not* an "arm of the State" (*id.* at 400-402). The Court observed, *inter alia*, that "regulation of land use," the function that "gave rise to the specific controversy at issue in this litigation," is "traditionally a function performed by local government" (*id.* at 402). The Court also stressed that the Compact "expressly provide[d]" that the TRPA's obligations "shall *not* be binding on either State" (*id.*, emphasis by the Court).

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

The two cases paired in *Hess* each involved personal injury claims asserted against PATH, a wholly owned subsidiary of the Port Authority. In rejecting the Third Circuit's conclusion that PATH was "an arm of the State," the Supreme Court noted that the facts pointed in different directions. On the one hand, the Port Authority's commissioners were state appointees (*id.* at 44) and the two States had each agreed to appropriate sums to cover PATH's expenses (*id.* at 37). On the other hand, the dollar amounts of those contributions were "notably modest" (513 US at 37-38).

The *Hess* Court ultimately concluded that where the "indicators of immunity point in different directions," "the Eleventh Amendment's twin reasons for being" should be "our prime guide" (513 US at 47-48). Those reasons are, 1) to safeguard the State's purse (*id.* at 48), and, 2) to preserve the State's "dignity" (*id.*). Those factors dictated that PATH *not* be afforded Eleventh Amendment protection. First, PATH mostly paid its own way and the "Eleventh Amendment's core concern" was therefore "not implicated" (*id.* at 51). Second, it could not be deemed an affront to PATH's dignity to appear in federal court.

The Supreme Court's next and last "arm of the State" ruling came in *Regents of the Univ. of California v Doe*, 519 US 425 [1997]. A New York plaintiff brought suit

against the University of California Regents and several individual defendants (519 US at 426). The Court was "concerned only with respondent's breach-of-contract claim against the University," wherein the plaintiff alleged that "the University agreed to employ him as a mathematical physicist …" (*id.*). Concluding that the University was an "arm of the State," the *Regents* Court stressed that it was "undisputed" that the State would stand liable for any judgment (*id.*).

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

The Circuits have developed their own "arm of the State" tests. However, all have agreed that the public entity claiming to be an arm of the State has the burden of proving its claim. *Leitner*, 779 F3d at 134; *United States ex rel. Fields v Bi–State Dev. Agency of the Missouri–Illinois Metro. Dist.*, 829 F3d 598, 600 [8th Cir 2016].

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

The "first step" "'pays deference to the state's dignitary interest in extending or withholding Eleventh Amendment immunity from an entity'" by examining 'how the state has structured the entity.'" *Grajales*, 831 F3d at 17, *quoting Fresenius*, 322 F3d at 65. This entails a "broad range of structural indicators" that include "how state law characterizes the entity, the nature of the functions performed by the entity, the entity's

overall fiscal relationship to the [State] (as opposed to whether the [State] is liable for any judgment in the particular case at hand), and how much control the state exercises over the operations of the entity" (*id.* at 17-18).

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

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

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

to show that it is an arm of the Commonwealth entitled to immunity from this suit" (*id.*).

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

<u>The Fourth Circuit</u> delineated its "arm of the State" test in *Ram Ditta v Maryland Nat. Capital Park and Planning Com'n*, 822 F2d 456 [4th Cir 1987].[1] Under the Fourth Circuit test, "the most important consideration is whether the state treasury will be responsible for paying any judgment that might be awarded" (*Ram Ditta*, 822 F2d at 457). "Other important inquiries … include, but are not necessarily limited to, whether the entity exercises a significant degree of autonomy from the state, whether it is involved with local versus statewide concerns, and how it is treated as a matter of state law" (*id.* at 457-458).

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[1] The Second and Third Circuit tests are discussed below in greater detail. *See* pages 19 to 27, *infra*.

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

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

Williams, 242 F3d at 319.

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

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

> (1) the State's potential liability for a judgment against the entity;
> (2) the language by which state statutes, and state courts refer to the entity and the degree of state control and veto power over the

> entity's actions; (3) whether state or local officials appoint the board members of the entity; and (4) whether the entity's functions fall within the traditional purview of state or local government.

Guertin, 912 F3d at 937.

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

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

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

If those factors "'point in different directions'" (*Fields*, 872 F3d at 882, *quoting Hess*, 513 US at 47), the Court then "turn[s] to the "Eleventh Amendment's twin reasons for being" as the "prime guide" in determining whether the subject entity "is more like an arm of the state or a local governmental entity" (*id.*).

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

<u>The Ninth Circuit</u> has a five-factor test:

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

Crowe v Oregon State Bar, 989 F3d 714, 731 [9th Cir 2021]. Whether the judgment would be paid from state funds is "the first and most important" factor. *Id.* at 733.

The Ninth Circuit ruled in *Alaska Cargo Transp., Inc. v Alaska* R.R. *Corp.*, 5 F3d 378 [9th Cir 1993] that the defendant railroad was an "arm of the State." However, it did so because federal law required Alaska to provide rail service (otherwise real property conveyed to Alaska would revert back to the United States) and because the railroad's "fisc" was "in substantial respects … dependent upon and controlled by the will of the governor and the legislature" (5 F3d at 381). The Supreme Court would later distinguish the Ninth Circuit's ruling in *Alaska Cargo* and the DC Circuit's ruling as to WMATA (discussed below) from its own ruling concerning PATH on the ground the Circuit Court rulings concerned "thinly capitalized" ventures that were dependent on a steady influx of state funding. *Hess*, 513 US at 49-50.

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

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

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

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

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

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

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

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

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

The Eleventh Circuit test has a special wrinkle. The factors “‘must be assessed in light of the particular function in which the defendant was engaged when taking the actions out of which liability is asserted to arise.’” *McAdams*, 931 F3d at 1135, *quoting Manders*, 338 F3d at 1308. It is thus entirely possible for an entity to be “an arm of the

State" when liability arises from one function (perhaps alleged police misconduct) but not "an arm of the State" when liability arises from another function (perhaps negligent operation of a bus).

The DC Circuit has a three-prong test: "(1) the State's intent as to the status of the entity, including the functions performed by the entity; (2) the State's control over the entity; and (3) the entity's overall effects on the state treasury." *Kaul v Fedn. of State Med. Boards*, 19-CV-3050 (TSC), 2021 WL 1209211 [DDC Mar. 31, 2021], *quoting Puerto Rico Ports Auth. v Fed. Mar. Com'n*, 531 F3d 868, 873 [DC Cir 2008].

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

Overall, each Circuit has its own distinct test. This Court developed its own nine-prong test, based partly on "federal precedent on the Eleventh Amendment immunity of States," in assessing whether a given entity qualifies as "an 'arm' of an Indian tribe" for purposes of tribal immunity. *Sue/Perior Concrete & Paving, Inc. v Lewiston Golf Course Corp.*, 24 NY3d 538, 550 [2014]. The Court said that "the most significant factor is the effect on tribal treasuries, just as 'the vulnerability of the state's purse' is

considered 'the most salient factor' in determinations of a State's Eleventh Amendment immunity." *Id.* at 550, *quoting Hess*, 513 US at 48.

The Circuits also differ as to whether the test is specific to "the particular function in which the defendant was engaged when taking the actions out of which liability is asserted to arise." *McAdams*, 931 F3d at 1135.

As noted, the Eleventh Circuit holds that the calculus varies with the act or omission from which liability arises. *McAdams*, 931 F3d at 1135; *Manders*, 338 F3d at 1308. The Fourth Circuit has reached the same conclusion. *Foremost Guar. Corp.*, 826 F2d at 1388.

The Supreme Court has also considered the particular function involved resolving the "arm of the State" issue, albeit without stating that such must be done in all cases. *Lake Country Estates*, 440 US at 402; *Hess*, 513 US at 41-42.

This is consistent with the laws of both New York and New Jersey. Both States determine immunity from liability based upon the specific act or omission from which the claim arises. *Connolly v Long Is. Power Auth.*, 30 NY3d 719, 728 [2018]; *Lieberman v Port Auth. of New York and New Jersey*, 132 NJ 76, 86, 92-93, 622 A2d 1295, 1300, 1303-1304 [1993]. New Jersey's high court has specifically said "[a] public body may be considered an agency of the State for some purposes but not for others." *Bunk v Port Auth. of New York and New Jersey*, 144 NJ 176, 187, 676 A2d 118, 123 [1996].

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

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

Yet, as NYSTLA demonstrates, NJT's quest for Eleventh Amendment immunity should here fail under any Circuit's test.

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

The Second Circuit has its own two-stage, "arm of the State" test. It is a test NJT cannot possibly pass.

In the first stage, the Court considers the following six factors:

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

Mancuso, 86 F3d at 293.

The inquiry ends there only if "these factors all point in one direction." *Woods*, 466 F3d at 240; *Leitner*, 779 F3d at 135. The court otherwise proceeds to the second

stage, where it "must focus on the two main aims of the Eleventh Amendment, as identified by the Supreme Court: preserving the state's treasury and protecting the integrity of the state." *Leitner*, 779 F3d at 137.

In *Mancuso*, 86 F3d 289, the Second Circuit ruled that the New York State Thruway Authority, which surely comes closer to the concept "arm of the State" than does NJT, was *not* an "arm of the State" within the meaning of the Eleventh Amendment. At the first stage, the factors pointed in both directions. On one hand, the defendant provided "a function that a state would normally provide." *Id.* On the other, there was no indication that the State currently funded the Authority's operations (*id.* at 295) and the Authority "provided no evidence" "it would have any difficulty in satisfying a judgment in this case" (*id.* at 296).

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

It cannot be reasonably doubted that NJT is not an "arm of the State" under the Second Circuit's test. The bare fact that NJT's obligations are "not binding on the State" (NJ Stat Ann 27:25-17), the sixth *Mancuso* factor, means that NJT could at best

claim the *Mancuso* factors go in "both directions," which means that NJT could at best survive to reach the second stage of the inquiry. But it could not possibly win that stage.

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

Here, the first second-stage variable cannot be disputed. NJ Stat Ann 27:25-17 specifically states that "[n]o debt or liability of the corporation shall be deemed or construed to create or constitute a debt, liability, or a loan or pledge of the credit of the State."

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

Even if the Court were to somehow conclude that it *would* offend New Jersey's dignity for the independent-by-law NJT to be compelled to defend in the State where it caused injury, the question would then be whether the dignity factor *outweighed* the preservation-of-the-State's fisc determinant. And the Second Circuit's rule holds that

"[i]f the outcome still remains in doubt [after the second stage]," "then whether a judgment against the governmental entity would be paid out of the state treasury generally determines the application of Eleventh Amendment immunity." *Woods*, 466 F3d at 241.

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

As is demonstrated below, the Third Circuit's test is inconsistent with governing Supreme Court precedent. Yet, NJT should lose even under the Third Circuit's test. It prevailed in *Karns*, 879 F3d 504 only because the Third Circuit superimposed flawed logic on its already flawed test.

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

The Third Circuit set forth its three-prong "arm of the State" test in *Fitchik v New Jersey Tr. Rail Operations, Inc.*, 873 F2d 655 [3d Cir 1989]:

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

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

The Supreme Court afterwards ruled, in *Hess*, 513 US 30, that the Third Circuit erred in ruling that PATH was an "arm of the State."

Did the Supreme Court's rejection of its conclusions concerning PATH convince the Third Circuit that its unique-to-itself test might warrant modification? It did not. The Third Circuit retained the test. Worse still, it recalibrated the test so as to *de-emphasize* the very factor the Supreme Court deemed one of the Eleventh Amendment's "twin reasons for being" (*Hess*, 513 US at 47), preservation of the State's fisc.

The Third Circuit acknowledged in *Maliandi v Montclair State Univ*, 845 F3d 77, 84 n.3 [3d Cir 2016] that its test was inconsistent with *Hess*, but determined it was bound by its own rulings.

That brings us to *Karns*, 879 F3d 504, wherein the Third Circuit did an about-face and ruled (over a dissent) that the same entity it previously determined not to be an arm of the State actually was, at least in the context of that case. The stated excuse for the flip was the perception that Supreme Court's decision in *Regents of the University*

of California, 519 US 425 changed the calculus and required the *Karns* Court to de-emphasize the risk, if any, to the State's fisc. *Karns*, 879 F3d at 513-514.

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

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

Karns, 879 F3d 504 was a civil rights action against NJT and two NJT police officers. The Third Circuit returned to its *Fitchik* factors, but now reached a different conclusion than in *Fitchik*. It did so by, a) disregarding statutory realities, and, b) crediting flawed defense claims.

Regarding the first *Fitchik* factor, whether "any judgment would be paid from the State treasury" (*Fitchik*, 873 F2d at 659), the *Karns* Court noted that it had previously "concluded that NJ Transit is financially independent" and that the parties had not offered any proof "to undermine this assessment." *Karns*, 879 F3d at 515-516).

Regarding the second *Fitchik* factor, "whether state law treats an agency as independent, or as a surrogate for the state" (*Fitchik*, 873 F2d at 662), whereas the *Fitchik* Court deemed the answer equivocal (*id.* at 662), the *Karns* Court now ruled that it had since "become much more apparent that New Jersey law regards NJ Transit as

an arm of the state" and that the second factor "therefore weighs strongly in favor of immunity." *Karns*, 879 F3d at 517. The *Karns* Court particularly observed that New Jersey's Supreme Court had in the interim declared "that NJ Transit 'is a public entity within the ambit of the [New Jersey Tort Claims Act].'" *Karns*, 879 F3d at 517, *quoting* NJ Stat Ann 27:25-4 and *Muhammad v New Jersey Tr.*, 176 NJ 185, 194, 821 A2d 1148, 1153 [2003].

In essence, the Third Circuit credited NJT's flawed argument that a "public entity" was thereby "an arm of the State" — even though New Jersey's high court actually rejected that premise in *the very decision* the *Karns* Court cited in support of its ruling. *Muhammad*, 176 NJ at 193 ("As defined by the TCA, however, the State is only one category of public entity …").

Strikingly, the *Karns* Court somehow failed to note or consider that the TCA *specifically says* that the term "State" "*shall not include* any such [public] entity which is statutorily authorized to sue and be sued [emphasis added]." NJ Stat Ann 59:1-3.

Regarding the third *Fitchik* factor, the *Karns* Court concluded that the State exercised substantial control over NJT (879 F3d at 518) — utterly ignoring, a) that NJT's enabling act specifically said "the corporation shall be independent of any supervision or control by the department or by any body or officer thereof [emphasis added]" (NJ Stat Ann 27:25-4[a]), and, b) that all of the facts it cited as support for its

finding of "substantial control" had been equally present in *Hess*, 513 US at 44, 49, wherein the Supreme Court ruled that PATH was *not* an "arm of the State."

NYSTLA submits that NJT should not be deemed an "arm of the State" even under the *Fitchik* test because each of the three *Fitchik* elements is flat-out negated by New Jersey statutes, two of which were not cited or considered in *Karns*.

Regarding the first, "whether any judgment would be paid from the state treasury" (*Fitchik*, 873 F2d at 659), NJ Stat Ann 27:25-17 specifically says, "No debt or liability of the corporation shall be deemed or construed to create or constitute a debt, liability, or a loan or pledge of the credit of the State."

Regarding the second factor, "whether state law treats an agency as independent, or as a surrogate for the state" (*Fitchik*, 873 F2d at 662), the statute that defines "State" for purposes of the Tort Claim Act flat-out says that the term "State" "shall not include any such entity which is statutorily authorized to sue and be sued." NJ Stat Ann 59:1-3.

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

In conclusion, NJT is indeed a "public entity" but it is no more "an arm of the State" than is New York State Thruway Authority, the Port Authority, or Oneida County.

POINT II

AS AN INDIVIDUAL SUED IN HIS INDIVIDUAL CAPACITY FOR HIS INDIVIDUAL CONDUCT, DEFENDANT PIERRELOUIS PLAINLY HAS NO ELEVENTH AMENDMENT IMMUNITY FROM SUIT.

Given that NJT is itself not a "State" within the meaning of the Eleventh Amendment, it logically follows that its bus driver, Renaud Pierrelouis, is also not a State. Even if NJT were a State, Mr. Pierrelouis *still* would not be entitled to the protections of the Eleventh Amendment.

First, the Eleventh Amendment does not extend to State employees sued in their individual (as opposed to official) capacity. *Hafer v Melo*, 502 US 21, 23, 29, 31 [1991]; *Ying Jing Gan v City of New York*, 996 F2d 522, 529 [2d Cir 1993]; *Guillemard-Ginorio v Contreras-Gomez*, 585 F3d 508, 530-531 [1st Cir 2009].

The proof of the pudding is defendants' star case: *Karns*, 879 F3d 504. There, the fact that NJT was deemed an "arm of the State" did not bar suit against the NJT police officers who were sued in their individual capacity for their individual actions. The defendant officers prevailed, but on the merits. *Id.* at 519-522.

Second, while NJT has elsewhere tried to muddy the waters by equating "official capacity" with "scope of employment" — theorizing that any individual sued for conduct that occurred in the scope of employment is being sued in the individual's "official capacity" — the argument lacks merit.

The distinction between "official" and "individual" capacity depends on "the capacity in which the state officer is sued, not the capacity in which the officer inflicts the alleged injury." *Hafer*, 502 U.S. at 26. As the Supreme Court recently noted while explaining why a tribal employee could be sued individually notwithstanding that the tribe was immune, "[i]n an official-capacity claim, the relief sought is only nominally against the official and in fact is against the official's office and thus the sovereign itself." *Lewis v Clarke*, 137 S Ct 1285, 1291, 197 L Ed 2d 631 [2017]. "This is why," the *Lewis* Court said, "when officials sued in their official capacities leave office, their successors automatically assume their role in the litigation." *Id.*

Here, Mr. Pierrelouis was not sued as a personification of all NJT bus drivers. He was sued because he negligently operated the subject bus. Indeed, as a bus driver, Mr. Pierrelouis had no "official capacity" in which he could be sued. *Pavelka v Carter*, 996 F2d 645, 649-650 [4th Cir 1993].

Finally, while NJT has elsewhere argued that its alleged Eleventh Amendment immunity should extend to its individually sued employees because it stands vicariously liable for their negligence, the courts, including the Supreme Court, have consistently rejected that argument.

In *Hafer*, 502 U.S. at 31, the defendants argued that failure to extend the State's Eleventh Amendment immunity to the individually sued officers would undermine the State's immunity. The Supreme Court rejected that view, stating: "[i]nsofar as

respondents seek damages against Hafer personally, the Eleventh Amendment does not restrict their ability to sue in federal court."

The Supreme Court made essentially the same point in *Lewis*, 137 S.Ct. 1285. There, Connecticut's Supreme Court had reasoned that failure to extend the Mohegan Tribe's immunity to the individual employee would "'eviscerate' the protections of tribal immunity" (137 S.Ct. at 1290). A unanimous US Supreme Court instead ruled that "sovereign immunity 'does not erect a barrier against suits to impose individual and personal liability'" (*id.* at 1291, *quoting Hafer*, 502 US at 30-31).

The Circuits have consistently ruled the same way. The fact that the State is required to reimburse its individually sued employee does not transform the employee into "one of the United States." *State Emp. Bargaining Agent Coalition v Rowland*, 718 F3d 126, 137 [2d Cir 2013]; *Farid v Smith*, 850 F2d 917, 923 [2d Cir 1988]; *Wilson v Beebe*, 770 F2d 578, 588 [6th Cir 1985]; *Benning v Bd. of Regents of Regency Universities*, 928 F2d 775, 778-779 [7th Cir 1991]; *Duckworth v Franzen*, 780 F2d 645, 650 [7th Cir 1985].

Conclusion

The order below should be affirmed.

Dated: New York, New York
July 13, 2022

Respectfully submitted,

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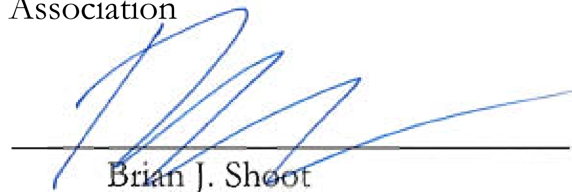

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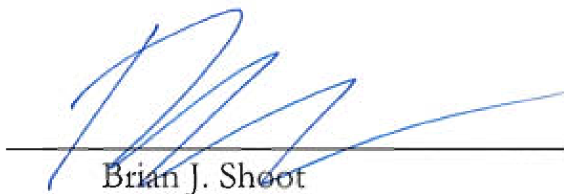
By: 
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