

**APL-2021-00138**

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

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KATHLEEN HENRY,

*Plaintiff-Respondent,*

-against-

NEW JERSEY TRANSIT CORPORATION;  
RENAUD PIERRELOUIS,

*Defendants-Appellants,*

CHEN NAKAR,

*Defendant.*

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**DEFENDANTS-APPELLANTS' RESPONSE TO AMICUS BRIEFS**

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## PRELIMINARY STATEMENT

Defendants-Appellants, New Jersey Transit Corporation and Renaud Pierrelouis, submit the instant supplemental brief to address the arguments raised by the two amici curiae herein that were not fully addressed in the opening and reply briefs. (Unless otherwise specified, Defendants-Appellants are referred to collectively as “New Jersey Transit”). The two amici curiae are: (1) Valbona Fetahu (“Fetahu”), a plaintiff in another personal injury action brought in New York Supreme Court against New Jersey Transit stemming from a motor vehicle accident; and (2) the New York State Trial Lawyers Association (“NYSTLA”). The arguments that they raise have no merit. Fetahu argues that New Jersey Transit expressly waived sovereign immunity and/or consented to the jurisdiction of the New York State courts in her suit and the underlying suit in *Henry*. She further argues that New Jersey Transit’s affirmative litigation actions in *Henry* and *Fetahu* constituted an express waiver of sovereign immunity in both actions and, thus, this Court should affirm the Appellate Division order in *Henry* denying dismissal. *See Henry v. New Jersey Transit*, 195 A.D.3d 444 (1st Dep’t 2021); *Fetahu v. New Jersey Transit*, 197 A.D.3d 1065 (1st Dep’t 2021). The instant appeal to this Court from *Henry* is fully briefed. Following the Appellate Division order, the *Fetahu* case is again before

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Supreme Court, New York County awaiting a trial date. The Appellate Division in *Fetahu* and *Henry* relied upon *Belfand v. Petosa*, 196 A.D. 60 (1st Dep’t 2021) for the proposition that New Jersey Transit waived sovereign immunity by affirmative litigation conduct. (The latest trial in *Belfand* resulted in a hung jury but no new trial date has been set). NYSTLA does not address the issues of consent or waiver in its amicus brief. NYSTLA argues that New Jersey Transit is not an arm of the state and describes arm-of-state tests applied by United States District Courts and Circuit Courts of Appeals interpreting the Eleventh Amendment of the United States Constitution which limits the jurisdiction of the federal courts.<sup>1</sup> But it does not ask this Court to apply any particular test.<sup>2</sup> To the extent that the United States Court of Appeals for the Third Circuit held in *Karns v. Shanahan*, 879 F.3d 504 (3d Cir. 2018)

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<sup>1</sup> NYSTLA’s argument that Pierrelouis is not immune from suit for his individual conduct is addressed in Defendants-Appellants’ COA Reply Brief, pp. 11-12.

<sup>2</sup> As explained in this appeal, New Jersey Transit asks this Court to find that there was no express waiver of interstate sovereign immunity. The doctrine of waiver has evolved in Eleventh Amendment jurisprudence but has been applied in cases involving interstate sovereign immunity. Cf. *Belfand v. Petosa*, 196 A.D. 60. This doctrine provides that a state or state entity must waive immunity expressly. At the same time, New Jersey Transit argues that the factors finding an arm-of-state under the Eleventh Amendment may be different from factors determining an arm-of-state in cases involving interstate sovereign immunity. Defendants-Appellants’ COA Reply Brief, pp. 8-21.

that New Jersey Transit was an arm of the state, NYSTLA asks that the *Karns* test be rejected. As set forth herein, none of the arguments raised by the amici curiae support affirmance of the Appellate Division in this action.

**I. NEW JERSEY TRANSIT DID NOT WAIVE SOVEREIGN IMMUNITY; NOR DID IT CONSENT TO SUIT IN NY**

**A. There was no waiver of immunity.**

In *Hyatt III*, the Franchise Tax Board of California (“FTB”), an agency of the State of California, argued that interstate sovereign immunity barred suit in Nevada by a Nevada resident for the recovery of damages stemming from an audit by FTB. The Supreme Court held that interstate sovereign immunity is a Constitutionally mandated right embedded in the design of the Constitution. *Franchise Tax Board of California v. Hyatt*, 587 U.S. \_\_\_, 139 S. Ct. 1485 (2019). Since *Hyatt III* was decided, the Appellate Division, First Department, has recognized that interstate sovereign immunity is a fundamental right. See *Belfand v. Petosa*, 196 A.D.3d 60; *Henry v. New Jersey Transit*, 195 A.D.3d 444; *Fetahu v. New Jersey Transit*, 197 A.D.3d 1065.

Despite the fundamental nature of the right to assert interstate sovereign immunity, the Appellate Division erroneously held below and in *Fetahu* that

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affirmative litigation conduct overrode sovereign immunity. However, the holdings of the Appellate Division that litigation conduct can be deemed a voluntary waiver of immunity are inconsistent with precedent finding that the waiver of a Constitutional right must be express and cannot be implied. *See Edelman v. Jordan*, 415 U.S. 651, 673 (1974); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675-678 (1999); *Sossamon v. Texas*, 563 U.S. 277, 284 (2011). Although these three cases were decided in connection with federal jurisdiction, the principles described therein may apply in cases addressing interstate sovereign immunity. In fact, the First Department has held that New Jersey Transit is an arm-of-state in state actions brought against New Jersey Transit, although it allowed the cases to proceed because of affirmative litigation conduct. *Belfand*, *supra*, 196 A.D.3d 60, 73.

New Jersey Transit argues herein that affirmative litigation actions taken by a state entity do not constitute express waiver. In order to establish express waiver, the state or state entity must affirmatively invoke the jurisdiction of the court. *Beaulieu v. Vermont*, 807 F.3d 478 (2d Cir. 2015). Courts reviewing whether a defendant waived immunity consider waiver in view of the express language used in a statute. In *Edelman*, the Supreme Court found that the actions of the state in

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participating in a federal program did not establish the state's waiver under the Eleventh Amendment because waiver must be stated by the most express language that will leave no room for any other reasonable construction. *Edelman*, 415 U.S. 651, 673.

The Supreme Court in *College Sav. Bank* explicitly addressed what constitutes the effective waiver of sovereign immunity. *College Sav. Bank*, 527 U.S. 666, 682 (1999). In *College Sav. Bank*, the petitioner, a New Jersey chartered bank located in Princeton, New Jersey, sued Florida Prepaid Postsecondary Education Expense Board for violations of the Lanham Act, alleging false advertising on the part of Florida Prepaid. The Supreme Court found that Florida Prepaid had not waived sovereign immunity because waiver must be stated by the most express language and cannot be implied. For waiver to be effective, the state must intentionally relinquish or abandon a known right or privilege. *College Sav. Bank*, 527 U.S. 666, 682 (1999). The courts must indulge every reasonable presumption against the waiver of fundamental constitutional rights. *Id.* (citing *Aetna Ins. Co. v. Kennedy ex rel. Bogash*, 301 U.S. 389, 393 (1937); *Ohio Bell Telephone Co. v. Public Util. Comm'n of Ohio*, 301 U.S. 292, 307 (1937)). The courts cannot presume that a state

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acquiesced in the loss of fundamental rights because waiver of sovereign immunity “cannot be implied but must be unequivocally expressed.” *Id.* at 682.

In *Sossamon*, the Supreme Court held that the State of Texas did not consent to waive sovereign immunity because the state’s receipt of federal funds was not an unequivocal expression of an intent to waive its sovereign immunity to an inmate’s suit for damages arising under the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C.S. § 2000cc *et seq.* (“RLUIPA”). The fact that RLUIPA authorized “appropriate relief against a government” was not the unequivocal expression of state consent to private suits for damages under the statute. The Court upheld the longstanding rule that a waiver of sovereign immunity must be expressly and unequivocally stated in the text of the relevant statute. *Sossamon v. Texas*, 563 U.S. 277, 284 (2011).

Interpreting *Hyatt III*, the Appellate Division recognized in *Belfand* that interstate sovereign immunity was a fundamental right, but, nevertheless, it erroneously found that the defendants’ affirmative conduct in the state lawsuit constituted an express waiver of that right. Subsequently, the Appellate Division cited *Belfand* in finding that New Jersey Transit waived immunity by affirmative litigation conduct in *Henry* and *Fetahu*. However, the Appellate Division

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misinterpreted the case law relating to the waiver of Constitutional rights, failed to apply the presumption against waiver, and erroneously found that affirmative litigation conduct amounted to an express waiver of Constitutional rights. These holdings by the Appellate Division cannot be reconciled with United States Supreme Court precedent in *Edelman*, *College Sav. Bank*, and *Sossamon*.

Fetahu's argument that New Jersey Transit's actions taken in defending the claims against it in *Henry*, *Fetahu* and *Belfand* established express waiver of sovereign immunity misreads the case law. The fact that the defendants in *Henry*, *Belfand* and *Fetahu* did not assert immunity in their Answers and litigated the claims against them did not establish waiver as the doctrine has developed in the cases.

In finding waiver, the courts search for an affirmative invocation of jurisdiction. *Beaulieu v. Vermont*, 807 F.3d 478 (2d Cir. 2015). The reasoning of the Second Circuit in *Beaulieu* on the issue of waiver is instructive. There, employees of the State of Vermont initially sued Vermont in state court for violations of the Fair Labor Standards Act. *Beaulieu v. Vermont*, 807 F.3d 478 (2d Cir. 2015). The defendants removed the state court action to federal court where the District Court dismissed the action on sovereign immunity grounds. The Second Circuit concluded that the District Court properly dismissed the action on the basis of Vermont's

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sovereign immunity which had not been waived. *Beaulieu v. Vermont*, 807 F.3d 478, 491 (2d Cir. 2015). The Second Circuit found that Vermont did not waive sovereign immunity when it removed the state case against it to federal court (although it also found that Vermont waived Eleventh Amendment immunity because the defendants invoked federal jurisdiction on removing the state case to federal court). *Beaulieu v. Vermont*, 807 F.3d 478.

Significantly, the Second Circuit also stated that a state may renounce sovereign immunity at an early phase of a litigation but may later change its strategy regarding the assertion of sovereign immunity. *Beaulieu v. Vermont*, 807 F.3d 478, 490. The Second Circuit also considered whether a state defendant's prejudicial conduct can override the rule that the waiver of a constitutional right must be express. The Second Circuit found that even assuming that prejudicial conduct by a state entity can override the state's sovereign immunity, no such prejudicial conduct occurred. *Beaulieu v. Vermont*, 807 F.3d 478, 491. Although the defendants did not invoke immunity sooner which could have resulted in an earlier dismissal of the suit (and fewer costs for the plaintiff), the conduct by the defendants was not duplicitous, and the "tardy" invocation of immunity did not amount to serious unfairness. *Beaulieu v. Vermont*, 807 F.3d 478, 491. The same rationale applies here. New

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Jersey Transit moved to dismiss the action in *Henry* based upon interstate sovereign immunity after the Supreme Court held in *Hyatt III* that the assertion of interstate sovereign immunity was a constitutional right. Any delays in moving to dismiss were obviously not the result of duplicitous conduct but resulted from a change in the law. *Beaulieu* and the cases describing express waiver make clear that affirmative steps taken in a litigation such as the defense of an action and/or the failure to include immunity as a defense do not establish express waiver.

Fetahu also argues that the rule that sovereign immunity may be raised at any time should not apply to this case. This argument has no merit. The rule has long been relied upon by the courts of this state. *See Buckles v. State*, 221 N.Y. 418, 424 (1917) (“[b]eing thus a question of jurisdiction, [sovereign immunity] could be raised at any time and could not be waived”); *Pollard v. State*, 173 A.D.2d 906 (3d Dep’t 1991) (although court did not find immunity, sovereign immunity could be raised at any time); *Heisler v. State*, 78 A.D.2d 767, 768 (4th Dep’t 1980) (although court did not find immunity in the case, sovereign immunity could be raised by the sovereign for the first time on appeal). The federal cases decided under the Eleventh Amendment have also found that sovereign immunity may be raised at any time

during a proceeding.<sup>3</sup> *Beaulieu, supra*, 807 F.3d 478, 491 (citing *McGinty v. New York*, 251 F.3d 84, 94 (2d Cir. 2001); *Calderon v. Ashmus*, 523 U.S. 740, 745 n.2 (1998); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 n.8 (1984); *Richardson v. N.Y. State Dep't of Corr. Serv.*, 180 F.3d 426, 449 (2d Cir. 1999), *abrogated on other grounds*, 548 U.S. 53 (2006); *Leonhard v. United States*, 633 F.2d 599, 618 n.27 (2d Cir. 1980), *cert. denied*, 451 U.S. 908 (1981)). There is no reason to disregard this long-held rule. Neither Plaintiff nor Fetahu explain why this principle—that sovereign immunity may be raised at any time—should not apply to this case.

**B. New Jersey Transit Did Not Consent to Suit.**

In addition to the argument that New Jersey Transit waived sovereign immunity by its affirmative litigation conduct, Fetahu cites the New York Vehicle & Traffic Law (“VTL”) and argues that New Jersey Transit expressly consented to jurisdiction in New York by driving into New York and thereby subjecting itself to

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<sup>3</sup> As set forth *infra*, NYSTLA’s argument that this case presents an arm-of-state question under the Eleventh Amendment has no merit. Although the arm-of-state cases decided under the Eleventh Amendment may apply by analogy, those cases do not control the outcome of this appeal, particularly where the Supreme Court has instructed the courts to consider the aims of the Eleventh Amendment if factors point in two directions. *See Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 34 (1994).

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jurisdiction. Section 253 of the VTL, however, provides that non-New York State drivers may be deemed to be served with process by service upon the New York Secretary of State. The statute does not address principles of sovereign immunity.

**C. Fetahu’s Reliance Upon Footnote 1 in *Hyatt III* is Inapposite**

In an early part of its decision, the Supreme Court stated that the sole issue before it was whether to overrule *Nevada v. Hall*, 440 U.S. 410 (1979). *Franchise Tax Board v. Hyatt*, 587 U.S. \_\_\_, 139 S.Ct. 1485, 1491 fn 1 (“*Hyatt III*”). In its footnote to this statement, the Court stated: “We also reject Hyatt’s argument that the [Franchise Tax] Board waived its immunity. The Board has raised an immunity-based argument from this suit’s inception, though it was initially based on the Full Faith and Credit Clause.” Fetahu now purports to rely upon this footnote as support for affirmance of the Appellate Division order denying New Jersey Transit’s motion to dismiss on sovereign immunity grounds. Such reliance is inapposite. The Court in *Hyatt III* rejected the argument that the FTB waived immunity from suit, stating that the Franchise Tax Board had raised an immunity defense at the outset of the action. The Supreme Court in *Hyatt III* did not address whether a party waives sovereign immunity if it is not raised in an answer. In sum, footnote 1 in *Hyatt III* has no bearing on this appeal. *Hyatt III* simply does not address those cases where

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an immunity defense was not raised at the outset of an action. *Hyatt III* also does not address the issue of waiver by affirmative litigation conduct.

## **II. THE ARM-OF-STATE TESTS UNDER THE ELEVENTH AMENDMENT DO NOT APPLY TO THE CASE AT BAR**

### **A. Eleventh Amendment cases are only applicable by analogy.**

In its amicus brief, NYSTLA argues that New Jersey Transit is not an arm of the state under the Eleventh Amendment and, therefore, the Appellate Division below correctly denied New Jersey Transit's motion to dismiss on sovereign immunity grounds. Although Plaintiff-Respondent raised a similar argument in this Court, it did not raise in the Appellate Division the argument that New Jersey Transit was not an arm-of-state.

In referring to numerous arm-of-state tests in its brief, NYSTLA evidently seeks to cast doubt upon the Third Circuit's holding that New Jersey Transit was an arm-of state in *Karns v. Shanahan* and the Appellate Division holding in *Belfand* that relied upon the *Karns* holding. But it bears repeating that all of the Eleventh Amendment arm-of-state cases are applicable only by analogy to this case. None of these arm-of-state cases compel a particular outcome here.

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Of all the arm-of-state cases cited by NYSTLA in its brief, *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 34, is the case that New Jersey Transit argues makes clear that finding an arm-of-state under the Eleventh Amendment is not the same as an arm-of-state for sovereign immunity purposes. The Supreme Court held in *Hess* that “when indicators of immunity point in different directions, the Eleventh Amendment’s twin reasons for being remain [the Supreme Court’s] prime guide.”—protecting the state treasury and protecting state dignity. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 34 (1994). Obviously, a court deciding whether an entity is an arm-of-state that can properly assert interstate sovereign immunity does not have to consider the aims of the Eleventh Amendment which bars suits against states in federal courts (unless Congress abrogated immunity). While the protection of state dignity referred to in *Hess* may be an aim of interstate sovereign immunity (preventing suits against states in the courts of other states) and an aim of the Eleventh Amendment, the protection of the state treasury is not an aim of interstate sovereign immunity. Interstate sovereign immunity prohibits suits against states in the courts of other states and may prevent litigiousness and forum shopping. It does not bar suits in the state’s own courts if the state has consented to suit in its own courts. A court considering whether an entity waived interstate sovereign immunity

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is more likely to consider the entity's status under state law and its autonomy from the state in concluding that an entity is an arm-of-state.

**B. Assuming it is applicable, there is no reason to set aside the Third Circuit's test**

Assuming that the analysis in *Karns* applies where interstate sovereignty is raised by a party, there is no reason to set aside *Karns* and the test it lays out. Of all the arm-of-state cases cited by NYSTLA, *Karns* is the most analogous. The Court of Appeals explicitly reviewed the statutory provisions relating to New Jersey Transit and evaluated its autonomy. In *Fitchik*, the Court of Appeals laid out three factors to determine whether a subsidiary of New Jersey Transit was an arm-of-state under the Eleventh Amendment, and it held that N.J. Transit Rail Operations was not an arm-of-state because the first of the three factors was primary and supported finding that New Jersey Transit was not an arm-of-state. *Fitchik v. N.J. Transit Rail Operations, Inc.*, 873 F.2d 655, 659 (3d Cir. 1989). The three factors are whether payment of the judgment comes from the state (also referred to as the state treasury factor); the status the entity has under state law; and the entity's autonomy. *Karns v. Shanahan*, 879 F.3d 504, 513. Applying intervening Supreme Court precedent, the Third Circuit found that the state treasury factor was no longer the most important

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of the three factors and that the second and third factors supported finding New Jersey Transit an arm-of-state. The Third Circuit considered the status of New Jersey Transit under state law—how New Jersey law treats the entity, whether the entity is separately incorporated, whether the entity can sue or be sued in its own right, and whether it is immune from state taxation. *Karns*, 879 F.3d 504, 516-517. The Third Circuit also considered whether the state entity has authority to exercise the power of eminent domain, the application of state administrative procedure and civil service laws to the entity, the ability to enter into contracts and make purchases on its own behalf, and whether the entity can own real estate. *Karns*, 879 F.3d 504, 516-517. The Third Circuit carefully considered state law and concluded:

There is considerable indication that New Jersey law considers NJ Transit an arm of the state. First, consistent with the New Jersey Constitution, NJ Transit is “allocated within the Department of Transportation,” N.J. Stat. Ann. § 27:25-4, which is a principal department within the Executive Branch of the State of New Jersey, N.J. Stat. Ann. § 27:1A-2. NJ Transit, moreover, is statutorily “constituted as an instrumentality of the State exercising public and essential governmental functions.” N.J. Stat. Ann. § 27:25-4. Although NJ Transit can sue and be sued, N.J. Stat. Ann. § 27:25-5, this is not dispositive. Cf. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676, 119 S. Ct. 2219, 144 L. Ed. 2d 605 (1999) (observing that a state does not “consent to suit in federal court merely by stating its intention to ‘sue and be sued’”). NJ Transit is also considered state property for tax purposes and is exempt from state taxation. N.J. Stat. Ann. § 27:25-16. These factors favor immunity. See,

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e.g., *Christy v. Pa. Tpk. Comm'n*, 54 F.3d 1140, 1148 (3d Cir. 1995) (noting that exemption from state property taxation is an attribute associated with sovereignty); *Skehan v. State Sys. of Higher Educ.*, 815 F.2d 244, 249 (3d Cir. 1987) (concluding that immunity from local taxation of real property favors immunity). NJ Transit also has the power of eminent domain, N.J. Stat. § 27:25-13(a), (c)(1), which likewise favors immunity. See, e.g., *Christy*, 54 F.3d at 1148 (recognizing that the power of eminent domain is associated with sovereignty).<sup>4</sup>

The Third Circuit also relied upon New Jersey cases that regard New Jersey Transit as an agency of the state.<sup>5</sup> *Muhammad v. New Jersey Transit*, 176 N.J. 185, 821 A.2d 1148, 1153 (N.J. Sup. Ct. 2003) (New Jersey Transit is a public entity within the New Jersey Tort Claims Act); *Cavuoti v. N.J. Transit Corp.*, 161 N.J. 107, 735 A.2d 548, 563 (N.J. Sup. Ct. 1999) (New Jersey discrimination statute allows the award of punitive damages against public entities); *Weiss v. N.J. Transit Corp.*, 128 N.J. 376, 608 A.2d 254, 258 (N.J. Sup. Ct. 1992) (As public entity, New Jersey Transit is entitled to legislative immunity). Although Plaintiff-Respondent argues in her brief that New Jersey Transit may be a public entity but that it is not a state-wide

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<sup>4</sup> The Third Circuit also found that the New Jersey Transit and its officers may exercise police powers. *Karns*, 879 F.3d 504, 517.

<sup>5</sup> The cases cited in this paragraph and the paragraph that follows are addressed in *Karns*. *Karns*, 879 F.3d 504, 516-518.

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entity, this argument is belied by the statute establishing New Jersey Transit as an entity performing essential government functions. New Jersey Transit is not a local government; it is not a municipality or any kind of local entity.

The Third Circuit also relied upon cases that have found New Jersey Transit a surrogate of the state or a state agency responsible for performing essential governmental functions. *Karns*, 879 F.3d 504, 517-518 (citing *Davis v. N.J. Transit*, 2012 N.J. Super. Unpub. LEXIS 1915 (N.J. Super. Ct. App. Div. Aug. 8, 2012) (New Jersey Transit is a surrogate of the state); *Geod Corp. v. N.J. Transit Corp.*, 678 F. Supp. 2d 276, 288 (D.N.J. 2009 (New Jersey Transit has no autonomy from the state); *N.J. Transit PBA Local 304 v. N.J. Transit Corp.*, 290 N.J. Super. 406, 675 A.2d 1180, 1181 (N.J. Super. Ct. App. Div. 1996) (Pursuant to N.J.S.A. 27:25-2a, 2b, New Jersey Transit is a state agency responsible for operating and improving public transportation in New Jersey), *aff'd*, 151 N.J. 531, 701 A.2d 1243 (N.J. 1997); *N.J. Transit Corp. v. Mori*, 435 N.J. Super. 425, 89 A.3d 237, 239-40 (N.J. Super. Ct. App. Div. 2014) (New Jersey Transit, as a public entity, was entitled in a condemnation action to a discounted 2.3 to 1 ratio of filled wetlands to mitigation credits)).

Finally, the Third Circuit in *Karns* considered whether New Jersey Transit

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was autonomous and found that the state’s fairly “substantial control” over New Jersey Transit counseled in favor of according it Eleventh Amendment immunity. *Karns*, 879 F.3d 504, 518. The Court in *Karns* described certain statutory provisions as bases for according New Jersey Transit Eleventh Amendment immunity. The New Jersey legislature and the Governor placed operational constraints upon New Jersey Transit. The Governor is responsible for appointing the entire governing board of New Jersey Transit, which is composed of several members of the Executive Branch. N.J. Stat. Ann. § 27:25-4(b). The Governor can veto or approve any action taken by New Jersey Transit’s governing board. N.J. Stat. Ann. § 27:25-4(f). The Commissioner of Transportation, an Executive Branch official who is the chairman of the governing board, has the power and duty to review New Jersey Transit’s expenditures and budget. N.J. Stat. Ann. § 27:25-20(a). New Jersey Transit must annually report on its condition and its budget to the Governor and Legislature and is subject to audit. N.J. Stat. Ann. § 27:25-20. Certain acquisitions by New Jersey Transit are subject to legislative veto. *See* N.J. Stat. Ann. § 27:25-13(h).

The Court in *Karns* discounted the state treasury factor as it was applied in *Fitchik* because after *Regents of the University of California v. Doe*, 519 U.S. 425

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(1997), the inquiry into immunity is not a “formalistic question of ultimate financial liability.” *Karns*, 879 F.3d 504, 513 (quoting *Regents, supra*). Although the Court in *Fitchik* found that New Jersey Transit was not an arm-of-state because New Jersey was not financially responsible for judgments against New Jersey Transit, the Court also concluded that the state had fairly substantial control over New Jersey Transit. Upon recalibrating the three-factor test, the *Karns* Court found that New Jersey Transit was an arm-of-state in view of New Jersey Transit’s status under state law and the control exerted by the executive branch over New Jersey Transit—the second and third factors. *Karns*, 879 F.3d 504, 518. In contrast, a significant number of the arm-of-state cases cited by NYSTLA hold that an entity is an arm of the state if judgments against the entity are required to be paid by the state. *E.g., Grajales v. Puerto Rico Ports Authority*, 831 F.3d 11 (1st Cir. 2016) (At the second step of the arm-of-state test, where indicators point in different directions, the court must resolve whether the state is legally obligated to pay for the entity’s indebtedness in the action); *Ram Ditta v. Maryland Nat. Capital Park and Planning Comm’n*, 822 F.2d 456, 457 (4th Cir. 1987) (“the most important consideration is whether the state treasury will be responsible for paying any judgment that might be awarded”); *Guertin v. Michigan*, 912 F.3d 907, 936-937 (6th Cir. 2019) (the “foremost” and

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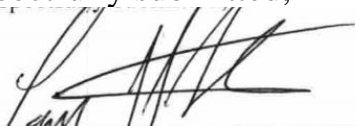
“most salient factor” is whether the state is potentially liable for a judgment against the entity). The rationale expressed in such cases obviously conflicts with the Supreme Court in *Regents* and the Third Circuit in *Karns* which focus on weighing the co-equal factors with respect to immunity. In sum, assuming that the arm-of-state test expressed in *Karns* applies where an entity raises interstate sovereign immunity, then *Karns* supports the finding that New Jersey Transit is an arm-of-state and dismissal in Defendants-Appellants’ favor is warranted on this basis.

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## **CONCLUSION**

For the reasons set forth herein and in the opening brief and the reply brief of Defendants-Appellants, this Court should reverse the Lower Court order denying Defendants-Appellants' motion to dismiss which was premised on interstate sovereign immunity grounds and should grant dismissal.

Respectfully submitted,



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## **WORD COUNT STATEMENT**

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