No. 24-1021

In the Supreme Court of the United States

CEDRIC GALETTE, PETITIONER

v.

NEW JERSEY TRANSIT CORPORATION,

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF FOR THE STATES OF TEXAS, ALABAMA, ALASKA, ARKANSAS, GEORGIA, IDAHO, INDIANA, IOWA, KANSAS, LOUISIANA, MICHIGAN, MINNESOTA, MISSOURI, MONTANA, NEBRASKA, NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, TENNESSEE, VIRGINIA, AND WYOMING AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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Roman Road System, Encyclopedia Britannica, https://www.britannica.com/technology/Roman-road-system 21

INTEREST OF AMICI CURIAE

Amici curiae are the States of Texas, Alabama, Alaska, Arkansas, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Michigan, Minnesota, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, Pennsylvania, Tennessee, Virginia, and Wyoming.[1] Amici States file this brief because few principles of law are more foundational to constitutional federalism than sovereign immunity. Courts around the country, however, are splintered regarding how to determine whether instrumentalities that States use for important public functions are immune from suit. In fact, the highest courts of two States disagree about whether the same entity is entitled to immunity. Not only does this stark split of authority undermine New Jersey's sovereignty, but it reflects more general confusion about what States must do to protect their instrumentalities from suit in sister States. Such a disagreement about a core feature of federalism calls out for certiorari. *See, e.g.*, *Franchise Tax Bd. of Cal. v. Hyatt*, 587 U.S. 230 (2019).

States also have an interest in avoiding tests that disfavor sovereign immunity or unnecessarily use multifactor balancing tests with respect to it. States can best exercise their police powers when the law is predictable. Many tests used to evaluate immunity, however, essentially guarantee unpredictability. Amici States thus submit this brief in support of New Jersey and urge the Court to accept a State's characterization of its own

[1] No counsel for any party authored this brief, in whole or in part. No person or entity other than amici contributed monetarily to its preparation or submission. On April 11, 2025, counsel of record for all parties received notice of the Amici States' intention to file this brief.

entities. Under that bright-line rule, this would be an easy case because New Jersey has declared that the New Jersey Transit Corporation (NJ Transit) is "an instrumentality of the State." N.J. Stat. § 27:25-4(a).

SUMMARY OF ARGUMENT

"After independence, the States considered themselves fully sovereign nations" protected by sovereign immunity. *Hyatt*, 587 U.S. at 237. And "as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States … retain today." *Alden v. Maine*, 527 U.S. 706, 713 (1999). "The founding generation thus took as given that States could not be haled involuntarily before each other's courts." *Hyatt*, 587 U.S. at 239. "Consistent with this understanding of state sovereign immunity, this Court has held that the Constitution bars suits against nonconsenting States in a wide range of cases." *Id.* at 243–44 (collecting citations). Accordingly, "one State" cannot "hale another into its courts without the latter's consent." *Id.* at 245.

This principle of federalism is foundational. Unfortunately, judicial implementation has created significant confusion across the country—particularly with respect to identifying which State-created entities are entitled to sovereign immunity. As the parties' briefing demonstrates, this question has led to a direct conflict between the highest courts of Pennsylvania and New York with respect to the same entity: NJ Transit. Such a black-and-white split of authority is significant but should not be surprising. Because courts "have identified … an array of multifactor and multistep tests" to assess whether sovereign immunity applies, *Colt v. NJ Transit Corp.*, No.

72, 2024 WL 4874365, at *4 (N.Y. Nov. 25, 2024), disagreement is all but inevitable.

Amici States file this brief because they agree with New Jersey that certiorari is warranted. Amici States also wish to make two additional, related points.

First, multifactor balancing tests are especially inappropriate in cases like this one where a State already has characterized the entity at issue as a State instrumentality. Federalism is a bedrock of American constitutionalism, and sovereign immunity is a bedrock of federalism. Effective federalism, however, requires predictability. States organize themselves in a host of ways and assign similar functions to very different types of entities. States also take different approaches to handling certain activities through government or the private sector. Not only does federalism allow different States to create systems best suited to their own circumstances and voter preferences, but it also allows for policy experimentation regarding such questions. If States cannot know *ex ante* what courts will do, however, the space for policy experimentation necessarily shrinks. Rather than trying to design the best system, lawmakers may focus on mitigating litigation risk. The factors used by both the Pennsylvania and New York courts illustrate the problem.

Second, and relatedly, rather than relying on multifactor balancing tests, the Court should adopt a bright-line rule in favor of immunity where a State itself characterizes the entities it creates as instrumentalities of the State. Such self-characterizations arguably should be dispositive. But at a minimum, they should control unless rebutted by a compelling showing that a State-created entity's functions have no connection to the State's police powers. This test best reflects the reality that States differ and that courts are ill-suited to evaluate how States

choose to distribute and exercise sovereign authority. Because sovereign immunity is a threshold jurisdictional matter, moreover, such a clear rule would reduce burdens on courts and litigants alike.

To be sure, if a State has not characterized an entity as an arm or instrumentality of that State, additional factors may be considered. But even in cases like that—which does not include this one—there should be a strong presumption favoring sovereign immunity. New Jersey is correct, moreover, that a State's disclaimer of liability for the entity should not weigh against that entity's eligibility for sovereign immunity. Contrary decisions are wrong and the Court should not follow them.

Here, applying the correct test, NJ Transit easily should be entitled to immunity because New Jersey created NJ Transit and decreed by statute that it is "an instrumentality of the State," N.J. Stat. § 27:25-4(a). Furthermore, to the extent that NJ Transit's functions are relevant, governments for millennia have built and operated transportation systems.

ARGUMENT

I. Predictable Rules Foster Federalism.

"'An integral component' of the States' sovereignty [is] 'their immunity from private suits.'" *Hyatt*, 587 U.S. at 238 (quoting *Fed. Mar. Comm'n v. S.C. Ports Auth.*, 535 U.S. 743, 751-52 (2002)). Not only does it respect the dignity of States, but sovereign immunity also serves important functions in a federalist system, including giving States more room to experiment with new policy approaches. Multifactor balancing tests that reduce legal certainty undermine those benefits. The analysis used by the highest courts of Pennsylvania and New York exemplify the problems that arise when courts unnecessarily assess sovereign immunity with such tests in cases like

this one where a State has already said how to characterize its own entity that it created.

A. The benefits of federalism.

1. The States were sovereign before the United States was founded, and retained sovereignty following the nation's founding. *See, e.g.*, *Hyatt*, 587 U.S. at 237–41; The Federalist No. 9, at 71 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The proposed Constitution, so far from implying an abolition of the State governments, … leaves in their possession certain exclusive and very important portions of sovereign power."). In fact, the States in many respects are preeminent sovereigns. "In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder," including the "broad authority to enact legislation for the public good—what we have often called a 'police power.'" *Bond v. United States*, 572 U.S. 844, 854 (2014) (quoting *United States v. Lopez*, 514 U.S. 549, 567 (1995)). By contrast, the federal government "has no such authority and 'can exercise only the powers granted to it.'" *Id.* (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819)).

This structural feature means that the States often enjoy primacy with respect to lawmaking. As James Madison explained, "[t]he powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." The Federalist No. 45, at 289 (James Madison) (Clinton Rossiter ed., 1961). By contrast, the federal government can only impose obligations on the People if (i) a policy falls within an enumerated power and (ii) valid federal legislation has been enacted.

Both of those requirements reinforce the primacy of the States. The federal government can only act within its assigned sphere, and legislation must pass both Houses of Congress and survive a veto—a process that effectively requires national consensus. "[T]he Framers were acutely conscious that the bicameral requirement and the Presentment Clauses would serve essential constitutional functions" by "protect[ing] the whole people from improvident laws" and "assur[ing] that the legislative power would be exercised only after opportunity for full study and debate in separate settings." *INS v. Chadha*, 462 U.S. 919, 951 (1983). Through such means, "federal lawmaking procedures … preserve federalism both by making federal law more difficult to adopt, and by assigning lawmaking power solely to actors subject to the political safeguards of federalism." Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 Tex. L. Rev. 1321, 1324 (2001).

2. In operation, the lawmaking diversity created by federalism means that there often is no one single national rule. Because lawmakers in each State are accountable to their own voters, laws within a State can be tailored to the needs of each State's citizens. *See, e.g.*, *Berger v. N.C. State Conf. of the NAACP*, 597 U.S. 179, 192 (2022) (explaining that federalism "permits States to accommodate government to local conditions and circumstances"); Michael W. McConnell, *Federalism: Evaluating The Founders' Design*, 54 U. Chi. L. Rev. 1484, 1493 (1987) ("The first, and most axiomatic, advantage of decentralized government is that local laws can be adapted to local conditions and local tastes ….").

Because of federalism, greater policy experimentation is also possible. *See, e.g.*, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting);

see generally Jeffrey S. Sutton, *Who Decides?: States as Laboratories of Constitutional Experimentation* (2022) (detailing benefits of state-led innovation). Lawmakers in a federalist system can try different approaches and then borrow what works from other jurisdictions. Federalism thus "assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society," "increases opportunity for citizen involvement in democratic processes," "allows for more innovation," and "makes government more responsive by putting the States in competition for a mobile citizenry." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

3. States also often organize themselves differently. Some States vest executive power in a single office, while others spread it around. In some States, the attorney general is independently elected, while in others, it is an appointed position by the governor, the legislature, or even the judiciary. *See, e.g.*, Nat'l Ass'n of Att'ys Gen., *Attorney General Office Characteristics*, https://www.naag.org/news-resources/research-data/attorney-general-office-characteristics (last visited Apr. 22, 2025). Some States also have a single prosecutorial authority, while others have local prosecutors. In Texas, for example, the "Attorney General represents state respondents in federal habeas cases, but not state habeas cases," which are handled by local district attorneys. *Buck v. Davis*, 580 U.S. 100, 110 (2017).

Nor are these the only examples of how States structure themselves differently. *See, e.g.*, Miriam Seifter, *Gubernatorial Administration*, 131 Harv. L. Rev. 483, 491 (2017) ("There are fifty different approaches to each development discussed herein ...."). In fact, not every State even has a bicameral legislature, *e.g.*, Kim Robak, *The Nebraska Unicameral and Its Lasting Benefits*, 76

Neb. L. Rev. 791 (1997), and States differ markedly as to how much "home rule" power localities may exercise, *e.g.*, Maria Ponomarenko, *Some Realism About Criminal Justice Localism*, 173 U. Pa. L. Rev. 789, 841 (2025).

Such diversity—as to policy and even first-order constitutional allocations of power—was a selling point for the U.S. Constitution. *See, e.g.*, Federalist No. 51, at 320 (James Madison) (Clinton Rossiter ed., 1961) (explaining that the Constitution preserves "two distinct governments," each of which has its "distinct and separate departments"). States differ from each other, with their own histories, geography, constitutions, separation-of-powers doctrines, instrumentalities, and priorities. Thus "[h]ow power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself." *Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612 (1937).

B. Sovereign immunity is key to federalism.

Key to federalism is the rule that the Constitution does not "permit[] a State to be sued by a private party without its consent in the courts of a different State." *Hyatt*, 587 U.S. at 233. Indeed, "[t]he 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 245.

After declaring their independence, the States that would become the United States were "fully sovereign," and "[a]n integral component of the States' sovereignty was their immunity from private suits." *Id.* at 237-38 (quotation omitted). As the Court has explained, "[t]he Founders believed that both 'common law sovereign immunity' and 'law-of-nations sovereign immunity' prevented States from being amenable to process in any court without their consent." *Id.* at 238 (citations

omitted). "The Constitution's use of the term 'States' reflects both of these kinds of traditional immunity." *Id.* at 241. "Federalists and Antifederalists alike [consequently] agreed in their preratification debates that States could not be sued in the courts of other States." *Id.* at 240. "The Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239 n. 2 (1985); *accord Edelman v. Jordan*, 415 U.S. 651, 660 (1974).

To be sure, sovereign immunity is not unlimited. The Constitution "abrogated certain aspects of … traditional immunity" by "provid[ing] a neutral federal forum in which the States agreed to be amenable to suits brought by other States." *Hyatt*, 587 U.S. at 241. The Court has also held that the States effectively "consent[ed] to suits brought against them by the United States in federal courts." *Id.* (citing, *inter alia*, *Principality of Monaco v. Mississippi*, 292 U.S. 313, 328 (1934)). The Constitution does not, however, displace immunity for suits brought by private citizens against a State. "The Eleventh Amendment confirmed that the Constitution was not meant to 'rais[e] up' any suits against the States that were 'anomalous and unheard of when the Constitution was adopted.'" *Id.* at 243 (quoting *Hans v. Louisiana*, 134 U.S. 1, 18 (1890)). A State therefore cannot "be sued by a private party without its consent in the courts of a different State." *Id.* at 233.

Robust sovereign immunity is part and parcel of the dignity of the States. Beyond each State's dignity as a sovereign, however, sovereign immunity also enables States to engage in the policy experimentation that is a hallmark of federalism—including whether and under

what circumstances to waive sovereign immunity, as States often do. Absent such immunity, States would be less able to implement public preferences because lawmakers would be forced to speculate about potential liability rather than focusing on innovation.

C. Multifactor balancing tests can undermine federalism.

Despite the importance of sovereign immunity to meaningful federalism, courts are divided regarding how to determine whether State-created entities are immune from suit. Part of the conflict—demonstrated by this very case, in which the same New Jersey entity receives immunity in Pennsylvania but not New York—results from courts' use of multifactor balancing tests for sovereign immunity even where a State itself has already characterized the nature of the entity it created.

Sovereign immunity is a context in which rules are especially valuable. Like other forms of immunity, sovereign immunity is immunity from suit, and the value of that immunity can be "effectively lost" if a State is forced to expend significant resources defending the immunity's applicability. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). By itself, that point counsels in favor of a bright-line rule respecting sovereign immunity where a State has characterized its own creations, so all parties can know in advance whether immunity exists. *See, e.g.*, Dan B. Dobbs et. al, The Law of Torts §252 (2d ed.) (explaining that immunities "tend to be—or at least judges want them to be—bright line rules that can intercept the claim early" and that the "value" of immunity from suit "is to save the defendant from the costs and uncertainties of a trial").

Equally important, the benefits of federalism are threatened by unpredictable sovereign-immunity tests.

Clear rules help States exercise their sovereign powers, while unpredictable tests—applied by out-of-state courts no less—impair State dignity. Clear rules also allow States to focus on creating beneficial laws rather than avoiding litigation risk. This concern has special force where no one disputes that a State *could* craft a law such that those who implement it are protected by sovereign immunity, for instance by vesting execution of the law in the governor's hands directly. Where immunity is permissible, everyone benefits if States know what they must do to safeguard—or knowingly waive—their immunity. The value of "predictable and precise rules" for sovereign immunity is apparent. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 759 (1998).

By their nature, however, multifactor balancing tests reduce predictability. *See, e.g.*, Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 Harv. L. Rev. 22, 65 (1992) (discussing Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989)). This is particularly true when factors may receive different weights in different cases or some factors point in different directions. *Cf. Axon Enter., Inc. v. FTC*, 598 U.S. 175, 207 (2023) (Gorsuch, J., concurring in judgment) ("[W]hat happens when the factors point in different directions, some in favor and others against immediate judicial review? No one knows. You get to *guess*."); *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 59 (1994) (O'Connor, J., dissenting) ("The Court wisely recognizes that [a] six-factor test … ostensibly a balancing scheme, provides meager guidance for lower courts when the factors point in different directions."). When a slew of factors are evaluated and weighed at once, it is more difficult to predict what a court will do. Such unpredictability hinders planning and may require lawmakers to change

or jettison projects altogether or at least spend more time designing them to lessen litigation risk.

Given the importance of federalism, courts evaluating whether sovereign immunity is available should use clear rules rather than multifactor balancing tests whenever possible. Without clear rules, States even in best-case scenarios will be forced to expend more resources in program design, and States and private litigants alike will be forced to expend more resources in litigation. In worst-case scenarios, States will abandon projects altogether, not because they are not worthwhile or because sovereign immunity law could not protect their implementation, but because structuring the program to avoid litigation risk is too difficult. Sovereign immunity should safeguard the "critical flexibility in internal governance that is essential to sovereign authority." *Hess*, 513 U.S. at 62 (O'Connor, J., dissenting).

D. This case shows why courts should avoid multifactor balancing tests in this context.

The unpredictability and inaccuracy of multifactor balancing tests in situations where a State has already characterized its own creation is aptly illustrated by this case. The Court of Appeals of New York and the Supreme Court of Pennsylvania reached opposite conclusions regarding whether NJ Transit is protected by New Jersey's sovereign immunity. *Compare Colt*, 2024 WL 4874365 (rejecting immunity) *with Galette v. NJ Transit*, No. 4 EAP 2024, 2024 WL 5457879 (Pa. Mar. 12, 2025) (upholding it). Both courts, however, answered the question by using different multifactor balancing tests that pose more questions than they answer and do not provide clear guidance for anyone.

For example, the majority of the New York Court of Appeals emphasized three factors: "(1) how the State

defines the entity and its functions, (2) the State's power to direct the entity's conduct, and (3) the effect on the State of a judgment against the entity." *Colt*, 2024 WL 4874365, at *5. The majority, however, also observed that judges "need not give equal weight to each consideration, and the underlying indicia may vary by case and from one party to another." *Id.*

In *Colt*, the court determined that the first factor "leans toward according NJT sovereign immunity," noting among other things that New Jersey law "characterizes NJT as 'an instrumentality of the State exercising public and essential governmental functions.'" *Id.* at *6. The court explained that the second factor "does not weigh heavily in either direction" because "NJT remains beholden to the state in some respects," but "exercises significant independence from New Jersey's control." *Id.* For the third factor, however, the court determined that New Jersey had "clearly disclaimed any legal liability for judgments against NJT, counseling against treating NJT as an arm of New Jersey," *id.* at *7. The court then explained its final "balancing" of these factors:

> Balancing each consideration, we conclude that New Jersey's lack of legal liability or ultimate financial responsibility for a judgment in this case outweighs the relatively weak support provided by the other factors. Put simply, allowing this suit to proceed would not be an affront to New Jersey's dignity because a judgment would not be imposed against the State, and the entity that would bear legal liability has a significant degree of autonomy from the State.

Id.

In *Galette*, by contrast, the Pennsylvania Supreme Court reached the opposite conclusion—but also used a

balancing test. Despite correctly acknowledging the "primacy" of the "expression of the sister State's intention in designing the entity in question," 2024 WL 5457879, at *7, the court nonetheless reviewed six factors[2] and concluded that three "weigh heavily in favor of concluding that NJ Transit is an arm of the state of New Jersey," while three others "to some extent indicate that NJ Transit is a separate entity from the State of New Jersey." *Id.* at *8-9. The court ultimately concluded that "[a]s a coequal sovereign to New Jersey, Pennsylvania must honor this decision and refuse to allow NJ Transit to be haled into Pennsylvania courts to defend against private suits." *Id.* at *9.

Even a glance at *Colt* and *Galette*—as well as the lower court decisions in each—shows that there can be almost as many viewpoints on how to balance the totality of factors as there are judges to do the balancing. Even applying similar tests, jurists reach different results, which is unsurprising given the degree of latitude afforded by multifactor balancing tests. This unpredictability undermines federalism. What is required instead in a case such as this one where the State itself has already characterized its own State-created entity is not a

[2] Specifically, the court considered the six-factor test from *Goldman v. Southeastern Pennsylvania Transportation Authority*, 57 A.3d 1154, 1179 (Pa. 2012): "(1) the legal classification and description of the entity within the governmental structure of the State, both statutorily and under its caselaw; (2) the degree of control the State exercises over the entity; (3) the extent to which the entity may independently raise revenue; (4) the extent to which the State provides funding to the entity; (5) whether the monetary obligations of the entity are binding upon the State; and (6) whether the core function of the entity is normally performed by the State." *Galette*, 2024 WL 5457879, at *2 (quoting *Galette v. NJ Transit*, 293 A.3d 649, 655 (Pa. Super. 2023)).

tweaking of what factors to consider or a reweighing of those factors. Rather, something more substantial is warranted: A bright-line rule that reliably upholds sovereign immunity as an "integral component" of sovereignty. *Hyatt*, 587 U.S. at 238 (quotation omitted).

II. NJ Transit Should Be Immune.

Rather than a multifactor balancing test, the Court should adopt a bright-line rule that entities created by a State are protected by sovereign immunity in situations like this one where that State characterizes them as state instrumentalities. Such a presumption should only be rebuttable, if ever, when an entity's functions are well outside of the State's police powers. Only in situations where a State has not characterized a State-created entity as an arm or instrumentality should additional factors be considered. Even then, however, there should be a strong presumption in favor of immunity and a State's disclaimer of liability for that entity should not weigh against sovereign immunity. Under no circumstances should the Court adopt analyses like New York's.

Applying such a straightforward rule, NJ Transit easily would be immune because New Jersey has already answered the question. New Jersey's own characterization of the entity it created should control.

A. A State's characterization of the entities it creates should control.

Because sovereign immunity "is a fundamental aspect of the sovereignty which the States enjoy[]," *Alden*, 527 U.S. at 713, the Court should adopt a bright-line rule favoring a State's own characterization of the entities it creates. At a minimum, such a characterization should control so long as the entity performs a function within the broad scope of the State's police powers. Because a

State constitutionally could vest such functions in an entity indisputably protected by sovereign immunity—like a governor or attorney general—there is no reason in law or logic why courts should second guess a State's vesting of those same functions in a different State entity. After all, under our Constitution, States decide for themselves how to organize governmental authority subject only to the non-justiciable Guarantee Clause. *See, e.g.*, *Luther v. Borden*, 48 U.S. 1, 42 (1849) (citing U.S. Const., art. IV, § 4)).

As explained above, State diversity in governmental organization and authority allocation is not just theoretical—it happens in the real world. States organize themselves in many ways across many dimensions and have done so since before the founding. *See supra* pp. 7–8. Because States can (and do) decide for themselves how to allocate executive authority, it is a recipe for confusion for out-of-state judges to attempt to define via multifactor balancing tests which entities are instrumentalities entitled to immunity and which are not. States are too different from each other, and it is too easy for judges who are not familiar with the internal structuring of other States to err. *See, e.g.*, N.J.Br.27 (explaining a feature of New Jersey law that "may look odd to a non-New Jerseyan"). Such analysis, moreover, should be unnecessary when the State itself has characterized its own entity. Because States know best what their own law requires and whether State-created entities wield sovereign authority, States are best positioned to say whether State-created entities are protected by the State's immunity. *Cf. Michigan v. Long*, 463 U.S. 1032, 1041 (1983) ("If the state court decision indicates clearly and expressly that [an independent and adequate state ground

exists], we, of course, will not undertake to review the decision.").

Such a bright-line rule in cases like this one where a State has already characterized State-created entities would best vindicate federalism. Governments may exercise sovereign power directly or indirectly. *See, e.g.*, *PennEast Pipeline Co. v. New Jersey*, 594 U.S. 482, 496 (2021) ("Congress 'may, at its discretion, use its sovereign powers, directly or through a corporation created for that object ….'") (quoting *Luxton v. N. River Bridge Co.*, 153 U.S. 525, 530 (1894)). Forcing a State to perform sovereign acts through an entity with a particular structure to maintain immunity is an encroachment on sovereignty and an unnecessary burden on flexibility and creativity. Courts should not elevate form over substance and limit the States' ability to govern.

A bright-line rule in cases such as this one would also comport with this Court's precedent more generally. The Court has "long recognized that a State's sovereign immunity is 'a personal privilege which it may waive at pleasure.'" *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999) (quoting *Clark v. Barnard*, 108 U.S. 436, 447 (1883)). To prevent confusion about whether such a waiver has occurred, the Court's "'test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one.'" *Id.* (quoting *Atascadero*, 473 U.S. at 241). "Generally, [the Court] will find a waiver … if the State makes a 'clear declaration' that it intends to submit itself to our jurisdiction." *Id.* at 675-76 (quoting *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944)). Put differently, States do not waive immunity without "unequivocally" saying so. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984).

Accordingly, a State does not "consent to suit in federal court merely by stating its intention to sue and be sued," *College Savings*, 527 U.S. at 676, and "a waiver of sovereign immunity 'will be strictly construed, in terms of its scope, in favor of the sovereign,'" *Sossamon v. Texas*, 563 U.S. 277, 285 & n.4 (2011) (quoting *Lane v. Peña*, 518 U.S. 187, 192 (1996)). Courts should not conclude that a State instrumentality lacks sovereign immunity in the absence of an equally unequivocal expression from the State.

Especially in cases where a State has already indicated how to treat its own entities, multifactor balancing tests cannot be squared with the principle that a clear statement is required to waive immunity. Contrary to *Colt*, for example, a law that the State will not pay a judgment against a State instrumentality confirms that the State is not waiving sovereign immunity, and should not be interpreted as a factor in *favor* of finding the entity is not immune. *Contra. Colt,* 2024 WL 4874365, at *7. One of the characteristics of sovereign immunity is that no payment will be forthcoming. Such a provision thus would seem to support sovereign immunity—not undermine it. *See, e.g.*, N.J.Br.22 (explaining this point). Regardless, rather than trying to suss out what inference to draw, it is far more consistent with sovereign immunity's constitutional foundation to recognize that such a provision cannot possibly be a clear statement.

Likewise, the mere fact that lawmakers could also allow a private person to engage in the conduct should not matter where a State has already characterized the entity. After all, "the constitutionally grounded principle of state sovereign immunity is [no] less robust" just because "the asserted basis for constructive waiver is conduct that the State realistically could choose to abandon,

that is undertaken for profit, that is traditionally performed by private citizens and corporations, and that otherwise resembles the behavior of 'market participants.'" *College Sav. Bank*, 527 U.S. at 684. Yet the multifactor balancing test many courts use treats this factor as counting against sovereign immunity. *See, e.g.*, *Goldman*, 57 A.3d at 1179 (Pa. 2012) (considering "whether the core function" of the agency "can be categorized as a function which is normally performed by local government or state government"). Again, a bright-line rule respecting a State's own characterization of the entity is better.

Because they are unpredictable, moreover, using multifactor balancing test to assess sovereign immunity would allow courts to infuse their analysis with concerns this Court has rejected. Some judges, including one writing separately in *Colt*, appear to believe that sovereign immunity should be extremely limited. *E.g.*, *Colt*, 2024 WL 4874365, at *15 (Wilson, C.J., concurring) ("Applying sovereign immunity to bar New York's courts from hearing a case concerning injury to one of its own residents that occurred within its own territory would deny an essential element of New York's own sovereignty, while not protecting any core function of New Jersey's"). But *interstate* sovereign immunity recognized in *Hyatt* is not so limited. As *Hyatt* holds, the "States retained immunity from private suits, both in their own courts and in other courts." 587 U.S. at 249.

With a multifactor balancing test, decisions may be driven by a disdain for sovereign immunity generally, despite it being embedded in our constitutional system. This point also counsels in favor of a bright-line rule. *See, e.g.*, Scalia, *The Rule of Law as a Law of Rules*, *supra*, at 1179–80 (explaining how bright-line rules "constrain"

courts, and that "it displays more judicial restraint" to adopt a general rule "than to announce that, 'on balance,' we think the law was violated here—leaving ourselves free to say in the next case that, 'on balance,' it was not").

Finally, sovereign immunity is jurisdictional. *See, e.g., United States v. Mitchell*, 463 U.S. 206, 212 (1983) ("[T]he existence of consent is a prerequisite for jurisdiction."). Because jurisdiction goes to a court's power to act and may determine whether litigation is possible, "administrative simplicity is a major virtue." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). As this case confirms, multifactor balancing tests are not easily administered. By contrast, a bright-line rule focusing on what the State says about the entities it creates is straightforward.

To be sure, a different test is required where a State has not indicated whether an entity is a sovereign instrumentality. Even then, however, the rule should still broadly favor—not disfavor—sovereign immunity and require a clear statement to forego immunity. The analysis from New York is thus wrong for all the reasons New Jersey has identified in its brief to the Court. Additionally, however, in cases like this one, the key point should be that where a State states that the entity is a State instrumentality, a court should respect that statement and uphold sovereign immunity.

B. New Jersey's characterization thus should control.

Applying the correct bright-line rule, NJ Transit is immune. "New Jersey understands NJ Transit to be 'an instrumentality of the State exercising public and essential governmental functions,' and to serve 'an essential public purpose.'" N.J.Br.24-25 (quoting App.17-18, in turn quoting N.J. Stat. §27:25-2(a), -4(a)); *see also id.* at 25 (explaining that "the exercise by the corporation of

the powers conferred" by New Jersey "shall be deemed and held to be an essential governmental function of the State") (quoting App.18, in turn quoting N.J. Stat. §27:25-4(a))"). Such "provisions" of law "leave no doubt that New Jersey considers NJ Transit to be a part of itself—underscoring the affront to New Jersey's dignity from another state contradicting its coequal sovereign on that score." *Id.* Under the correct test, those statements of New Jersey law about the status of an entity created by New Jersey should be sufficient by themselves to resolve the immunity question.

Furthermore, if relevant, building and operating a transportation system is within New Jersey's police powers. Since at least the Roman Empire, sovereigns have been constructing roadways and bridges to facilitate transportation. *See, e.g.*, *Roman Road System*, Encyclopedia Britannica, https://www.britannica.com/technology/Roman-road-system (last accessed Apr. 16, 2025); *accord* U.S. Const. art. I, § 8, cl. 7) (vesting power to create post roads). New Jersey could allow private actors to create such a transportation system, but placing the authority in a State-created entity is also within New Jersey's sovereign authority. Federalism demands respecting New Jersey's expressly stated view that NJ Transit is an instrumentality of New Jersey.

CONCLUSION

The Court should grant the petition, announce a bright-line rule focused on a State's own characterization of the status of State-created entities, and affirm the judgment of the court below.

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