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COURT OF APPEALS  
STATE OF NEW YORK

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COLT,

Respondent,

-against-

NO. 72

NEW JERSEY TRANSIT,

Appellant.

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20 Eagle Street  
Albany, New York  
September 10, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE SHIRLEY TROUTMAN  
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

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Raven Wood  
Official Court Transcriber

1 CHIEF JUDGE WILSON: Good afternoon. The first  
2 case on today's calendar is Colt v. New Jersey Transit.  
3 Counsel?

4 MS. PRINGLE: Thank you, Your Honor. Good  
5 afternoon. Katherine Pringle, together with my colleague  
6 Scott Henney of the firm Friedman Kaplan Seiler Adelman &  
7 Robbins, for the appellants New Jersey Transit and Anna  
8 Hernandez. And I would like to reserve five minutes of my  
9 time for rebuttal.

10 CHIEF JUDGE WILSON: Yes.

11 MS. PRINGLE: The jurisprudence of sovereign  
12 immunity was significantly altered by the Supreme Court's  
13 recent decision in Franchise Tax Board v. Hyatt. Applying  
14 the substance of this case for the first time, the  
15 Appellate Division made a clear error in its application.  
16 The Appellate Division found, correctly in our view, two  
17 things: That New Jersey Transit is an arm of the state  
18 entitled to sovereign immunity - - -

19 JUDGE SINGAS: Well, was the arm of the state  
20 fully litigated below?

21 MS. PRINGLE: Yes, Your Honor, I do believe the  
22 arm of the state was fully litigated below.

23 JUDGE SINGAS: How?

24 MS. PRINGLE: Pardon me?

25 JUDGE SINGAS: How?



1 MS. PRINGLE: In the motion to dismiss the case  
2 under sovereign immunity, the matter was briefed and  
3 addressed by the Appellate Division.

4 JUDGE SINGAS: In your moving papers you had one  
5 paragraph that cited to Karns. Do you think that's enough  
6 of a record for us to make a determination about arm of the  
7 state?

8 MS. PRINGLE: In addition to citing to Karns, we  
9 cited to a whole series of issues in New Jersey which lay  
10 out all of the indicia of why New Jersey is - - - why New  
11 Jersey Transit is an arm of the state. And if you'd like  
12 me to turn to that now, I will.

13 JUDGE GARCIA: Oh, I'm sorry. Before you do,  
14 where is that in the record that you did that in the  
15 Supreme Court? Where did you lay all this out?

16 MS. PRINGLE: It's in the brief here. And the  
17 court can take public notice of the record of New Jersey's  
18 statutes and prior holdings which control on this issue.

19 JUDGE GARCIA: So Karns is what, 2020?

20 MS. PRINGLE: I believe so Your Honor.

21 JUDGE GARCIA: Around.

22 JUDGE SINGAS: It's 2018.

23 JUDGE GARCIA: Or 2018? Has anything changed  
24 since then?

25 MS. PRINGLE: Well, let me back up for just a

1 moment in terms of the - -

2 JUDGE GARCIA: I guess my follow up is, how would  
3 we know, since you didn't address it at all in your papers  
4 in the Supreme Court?

5 MS. PRINGLE: Okay. What has changed since Karns  
6 is the Hyatt opinion.

7 JUDGE GARCIA: No, I understand that Hyatt  
8 changed the law. I'm just talking about the facts  
9 surrounding whether or not the entity is an arm of the  
10 state. So that was a 2018 decision, or 2018 to 2020 range.  
11 None of that was briefed. You cite Karns, but you don't  
12 say whether or not those factors remain the same. Right?  
13 The statutes to the regs, the way we interpret them, change  
14 over time. Why is that argument never made below?

15 MS. PRINGLE: The decision that controls in this  
16 case is not Karns but is Muhammad v. New Jersey Transit and  
17 the Public Transportation Act of 1979. New Jersey itself  
18 defines the New Jersey Transit as an arm of the state.

19 CHIEF JUDGE WILSON: Can I stop you there for a  
20 second?

21 MS. PRINGLE: Yes, Your Honor.

22 CHIEF JUDGE WILSON: So where does the - - - does  
23 the sovereign immunity, is that controlled by federal law?

24 MS. PRINGLE: After Hyatt III - - -

25 CHIEF JUDGE WILSON: Right, after Hyatt.

1 MS. PRINGLE: - - - it is not a matter of federal  
2 law under the series of decisions that arise under the 11th  
3 immunity.

4 CHIEF JUDGE WILSON: Correct. But is it  
5 nevertheless a matter that is ultimately a question of  
6 federal law?

7 MS. PRINGLE: It is ultimately a question of the  
8 full faith and credit clause of the Constitution. That  
9 provides that this court, sitting in New York, must give  
10 full faith and credit to the decisions and judicial acts of  
11 the New Jersey court and of legislature.

12 CHIEF JUDGE WILSON: Wait, I'm sorry. So your  
13 view is that the sovereign immunity of states comes from  
14 the full faith and credit clause?

15 MS. PRINGLE: No, Your Honor.

16 CHIEF JUDGE WILSON: So that's what I'm trying to  
17 get at. Where does that come from?

18 MS. PRINGLE: Sure. The - - - New Jersey's right  
19 to sovereign immunity arises as a basic right that it had  
20 prior to the Constitution and was preserved in the  
21 Constitution. That's what's recognized.

22 CHIEF JUDGE WILSON: And so that's then a federal  
23 question?

24 MS. PRINGLE: Is it a - - pardon me, Your Honor?

25 CHIEF JUDGE WILSON: That's determined by federal

1 law?

2 MS. PRINGLE: It is determined by federal - -

3 CHIEF JUDGE WILSON: Constitutional law.

4 MS. PRINGLE: It is determined by federal  
5 constitution law. But as applied in this court, sitting in  
6 New York, the role of New York is to give full faith and  
7 credit to the decisions of New Jersey, both through its  
8 legislature and through its highest court in proclaiming  
9 that New Jersey Transit is an arm of the state.

10 JUDGE HALLIGAN: Can I ask you to back up a  
11 little bit?

12 MS. PRINGLE: Certainly.

13 JUDGE HALLIGAN: It seems to me that your  
14 analysis assumes that arm of the state is the proper test.  
15 Is that your position?

16 MS. PRINGLE: Yes, Your Honor.

17 JUDGE HALLIGAN: Okay.

18 MS. PRINGLE: I believe that arm of the state is  
19 the proper test for the sovereign immunity of New Jersey  
20 Transit.

21 JUDGE HALLIGAN: And I want to understand why,  
22 because it seems to me that clearly, under the Eleventh  
23 Amendment precedent that has been articulated and applied,  
24 but perhaps there's an argument that the scope of interests  
25 that are protected by state sovereign immunity are broader

1 than the specific fiscal interests that were at play with  
2 respect to the Eleventh Amendment. And so why is it that  
3 we should assume that the correct test for whether New  
4 Jersey Transit can invoke sovereign immunity is the arm-of-  
5 the-state test, as opposed to going back and looking at  
6 what Hyatt tells us about what interests state sovereign  
7 immunity is intended to protect?

8 MS. PRINGLE: I think that's a very good point,  
9 Your Honor. This case does not arise under the Eleventh  
10 Amendment. It arises under that fundamental sense of  
11 sovereign immunity that was preserved by the Constitution.  
12 And so there is this body of law that talks about when a  
13 state agency can invoke that sovereign immunity. But here  
14 we're not bound by that series of Eleventh Amendment cases.

15 And so to your point, I would point the court's  
16 attention to the Federal Maritime Commission v. South  
17 Carolina State Ports Authority case. In that case, decided  
18 in 2002, there was no financial issue. The Maritime  
19 Authority has no ability to impose financial consequences  
20 on the state. And nevertheless, Justice Thomas, in that  
21 opinion said that what is fundamental is that the state  
22 sovereign immunity is at issue and therefore whether or not  
23 there's a financial impact on the - - -

24 JUDGE HALLIGAN: But does that - - - I don't mean  
25 to interrupt you.

1 MS. PRINGLE: It's all right.

2 JUDGE HALLIGAN: But does that tell us what the  
3 correct test for ascertaining whether an entity that is not  
4 the state qua state is covered? I mean, perhaps one might  
5 take the position, for example, that to the extent that the  
6 Eleventh Amendment is more specifically concerned with the  
7 impact on the state fisc, that the emphasis on funding that  
8 we see, whether you look at the Second Circuit or the Third  
9 Circuit, whatever test you use under the Eleventh  
10 Amendment, might be a little off base. So I'm just trying  
11 to understand what the right test is.

12 MS. PRINGLE: I think you're - - I think that is  
13 a very perceptive question. The Supreme Court in Hyatt  
14 does not tell us what the right test is, but what they do  
15 is to emphasize the importance of sovereign immunity to the  
16 states and the way in which the states came into the  
17 constitutional compact with their sovereign immunity  
18 intact, and continue to have that sovereign immunity.

19 CHIEF JUDGE WILSON: Would you agree, though,  
20 that the Constitution in some ways erodes the sovereign  
21 immunity of the states?

22 MS. PRINGLE: Yes, Your Honor, it does in the  
23 sense that in entering into the constitutional pact, New  
24 York, as held in the Hyatt III case, gave up its right to  
25 deny sovereign immunity to its sister states, as did New



1 Jersey with respect to New York. So it both preserved the  
2 ability of the states to assert their sovereign immunity,  
3 and also limited the ability of the states to deny  
4 sovereign immunity to their brothers and sisters.

5 CHIEF JUDGE WILSON: Let me ask you then a much  
6 less theoretical question. Supposing New Jersey instructed  
7 New Jersey Transit drivers to enter New York and  
8 deliberately run over pedestrians.

9 MS. PRINGLE: Correct.

10 CHIEF JUDGE WILSON: Immune?

11 MS. PRINGLE: I'm sorry.

12 CHIEF JUDGE WILSON: Immune?

13 MS. PRINGLE: First, let me just be clear that  
14 there's no record in this case of - -

15 CHIEF JUDGE WILSON: I understand. It's a  
16 hypothetical. Who would do that?

17 MS. PRINGLE: But recognizing that - -

18 CHIEF JUDGE WILSON: But there's a difference  
19 between intentional torts and negligent torts. And I'm  
20 asking whether you have a view as to whether sovereign  
21 immunity cuts differently as to one of those things.

22 MS. PRINGLE: In a case where New Jersey  
23 intentionally sought to murder the citizens of New York,  
24 for example - -

25 CHIEF JUDGE WILSON: By bus driving.

1 MS. PRINGLE: Pardon me?

2 CHIEF JUDGE WILSON: By driving busses.

3 MS. PRINGLE: By driving busses. There would  
4 certainly be an action by New York against New Jersey, for  
5 which the Supreme Court would have original jurisdiction.  
6 That is one clear way - -

7 CHIEF JUDGE WILSON: Suppose they did it one  
8 time. Suppose they just did it one time; they instructed a  
9 particular bus driver to run over a particular pedestrian.

10 MS. PRINGLE: I think there would be a question  
11 of whether that particular bus driver has liability under  
12 the argument that they were not acting as in their official  
13 capacity.

14 CHIEF JUDGE WILSON: Well, there's an instruction  
15 from the director of New Jersey Transit to seek out an  
16 undesirable New York movie director and run him over.

17 MS. PRINGLE: There, again, I think this would be  
18 a case that New York could bring against New Jersey in the  
19 original jurisdiction of the supreme court. I do not have  
20 an answer, and I do not think that the particular  
21 decedent's family would have the right to sue New Jersey in  
22 the New York case.

23 CHIEF JUDGE WILSON: In New York? Because of  
24 sovereign immunity?

25 MS. PRINGLE: Because of sovereign immunity.

1 Certainly, they could sue New Jersey in the New Jersey  
2 courts.

3 CHIEF JUDGE WILSON: Only to the extent New  
4 Jersey chose to allow that.

5 MS. PRINGLE: Correct. But here, New Jersey has,  
6 as a general matter through its Tort Claims Act, waived its  
7 sovereign immunity to allow such suits.

8 JUDGE GARCIA: Sorry, to go back to Judge  
9 Halligan's point, the difference, potential difference  
10 between an Eleventh Amendment analysis, and an inter-state  
11 analysis, immunity analysis would - - and I think you're  
12 pointing to the fiscal issue. And perhaps that would have  
13 less weight in an interstate. And I think that's the  
14 suggestion of that case, South Carolina. What else? Would  
15 there be any other factors that would weigh differently in  
16 an interstate analysis as opposed to an Eleventh Amendment  
17 analysis?

18 MS. PRINGLE: I don't think we have got enough  
19 guidance to answer that question specifically. So let me  
20 draw your attention to two points.

21 JUDGE GARCIA: Um-hum.

22 MS. PRINGLE: First, if you look at each of the  
23 different tests that the appellee spends a lot of time in  
24 their brief talking about, they really come down to the  
25 same thing. Does the agency at issue appear by external

1           indicia to be acting in the same manner as the state? So  
2 we can talk about all of the indicia that are at issue  
3 here, but I think the test is less relevant because those  
4 tests all come down to essentially the same thing.

5           JUDGE GARCIA: And those would be the same under  
6 either analysis, under Eleventh Amendment, under interstate  
7 analysis?

8           MS. PRINGLE: My first point is that those would  
9 be instructive to the correct test, but my second point is  
10 that you need to come back to first principles of what is  
11 the point of sovereign immunity. And the point of  
12 sovereign immunity comes back to this question of whether  
13 the state should be haled into a different state in order  
14 to answer for its official acts. And here that's  
15 inappropriate.

16           JUDGE GARCIA: But does that generally make the  
17 bar higher on an interstate analysis, or does it cause us  
18 to weigh the factors differently?

19           MS. PRINGLE: I think what it does is it causes  
20 this court to focus first and foremost on the dignity of  
21 the state. Here - - -

22           JUDGE GARCIA: These are so abstract, though. So  
23 if we're looking at that, I agree as an abstract matter,  
24 the dignity of the state may have a different perception in  
25 an interstate. I'm being hauled into court in Newark, New

1 Jersey, or I'm being hauled - - I'm in a state court next  
2 door versus I'm in New York State court in a different  
3 jurisdiction with different rules. How does that  
4 practically play out when we apply whatever test we think  
5 is appropriate to these facts?

6 MS. PRINGLE: Sure. Here, New Jersey has made a  
7 substantial investment in the transportation of its people,  
8 both within New Jersey, primarily within New Jersey, but  
9 also in order to deliver its workers to the important  
10 cities of New York and Philadelphia. It subsidizes that.  
11 It makes it part of its judicial, I'm sorry, legislative  
12 body, executive branch - - -

13 JUDGE HALLIGAN: On that point, if I can, my  
14 understanding, but correct me if I'm wrong, is that the New  
15 Jersey statute allows for funding of NJT from various  
16 entities, including the state. But I'm not sure I saw in  
17 the record any specific evidence that New Jersey Transit  
18 is, in fact, funded by the state. Is there something in  
19 there that you can - - and if so what amount, what  
20 proportion of the budget. Is there anything in the record  
21 that establishes that?

22 MS. PRINGLE: I would point Your Honor's  
23 attention to New Jersey legislature Senate Bill 3137, the  
24 Public Transportation Act of 1979.

25 JUDGE HALLIGAN: Is that an authorizing statute

1 or an appropriating statute?

2 MS. PRINGLE: That, I believe it's an authorizing  
3 statute.

4 JUDGE HALLIGAN: Right, so - - -

5 MS. PRINGLE: But what it makes clear is that the  
6 New Jersey legislature always contemplated that New Jersey  
7 Transit would be dependent on state funds, and it has,  
8 since that time, always provided funding to New Jersey  
9 Transit.

10 JUDGE HALLIGAN: But that latter point, I take  
11 it, is not specifically established in the record, what the  
12 amount of the funding is.

13 MS. PRINGLE: It does not specifically - - I  
14 don't believe we have the specific amount of the funding in  
15 the record. I would point your attention to the district  
16 court decision in Worrell v. New Jersey Bus Operations,  
17 holding that New Jersey Transit is financially dependent on  
18 the state, and that a judgment against New Jersey Transit  
19 will have a significant financial impact on the State of  
20 New Jersey.

21 JUDGE HALLIGAN: And just one last, if I can  
22 follow up, I think that the federal circuits have pretty  
23 uniformly held that the burden to prove that an entity is  
24 the arm of the state lies with the entity seeking to invoke  
25 sovereign immunity. If we were to follow that, then what

1 do we make of the absence of a specific piece of evidence  
2 in the record? I take it your argument then is that the  
3 determinations in the district court decision you pointed  
4 me to would be sufficient; is that right?

5 MS. PRINGLE: I think it's sufficient, given the  
6 diminished role of the impact on the fisc, to the overall  
7 question of whether New Jersey Transit should be considered  
8 an arm of the state. There's plenty of evidence that, as a  
9 practical matter, New Jersey Transit, which is prohibited  
10 from issuing bonds or incurring debt, must seek to recover  
11 from the New Jersey legislature the amount of money that it  
12 needs to fund its operations and its deficits. So if for  
13 example, New Jersey Transit were hit with a large number of  
14 personal injury suits, it would have to turn to, and as a  
15 practical matter does turn to, the people of New Jersey to  
16 fund that.

17 JUDGE RIVERA: I'm sorry, I thought the statutory  
18 framework did not allow for the state to be liable.

19 MS. PRINGLE: It does not allow for the - -

20 JUDGE RIVERA: It's a discretionary determination  
21 upon a request to refill the coffers of New Jersey Transit?

22 MS. PRINGLE: Yeah, the law is clear that New  
23 Jersey Transit is not - - excuse me, sorry. The State of  
24 New Jersey is not directly liable. That is correct.  
25 However, New Jersey is indirectly liable because New Jersey

1 Transit is not permitted under state law to run a deficit  
2 or to issue bonds. Therefore, if it's in a position of  
3 having to pay out a substantial judgment or judgments, that  
4 money ultimately comes from the subsidy that is regularly  
5 provided by New Jersey.

6 JUDGE RIVERA: Red light is on. Could you just  
7 for 30 seconds address the waiver issue?

8 MS. PRINGLE: Certainly. The Appellate Division  
9 correctly held that the New Jersey Transit did not waive  
10 either by its actions in this case, or by its actions in  
11 the state, its right to sovereign immunity. So first, its  
12 actions in this case, New Jersey Transit raised in its  
13 answer the defense of sovereign immunity.

14 JUDGE RIVERA: Well, it's an immunity; it wasn't  
15 specific. So if you really believed you had sovereign  
16 immunity, why sit on your hands for a couple of years?

17 MS. PRINGLE: Your Honor - - -

18 JUDGE RIVERA: Why make discovery demands on the  
19 other side? Why comply with discovery? I'm confused as to  
20 why an entity that is trying to protect the coffers of the  
21 state would incur so much cost if it really has a sovereign  
22 immunity defense that it believes it can assert and succeed  
23 on.

24 MS. PRINGLE: Yeah, I understand what you're  
25 saying, Your Honor. Here, the case originally arose before



1 the Hall decision and - - or sorry, pardon me before the  
2 Hyatt decision. And so here, New Jersey Transit did move  
3 after the Hyatt decision - -

4 JUDGE GARCIA: But more than a year after, right?

5 MS. PRINGLE: It was close to a year. Yes, Your  
6 Honor.

7 JUDGE GARCIA: I think it's May, and you move in  
8 July.

9 JUDGE RIVERA: Were there other motions made  
10 during that period of time?

11 MS. PRINGLE: No, there were not other motions  
12 made during that time.

13 JUDGE RIVERA: The discovery proceeding during  
14 that time?

15 MS. PRINGLE: I'm sorry?

16 JUDGE RIVERA: Was discovery proceeding during  
17 that time?

18 MS. PRINGLE: Yes. There was some limited  
19 discovery. But at the time that the motion was made to  
20 dismiss, discovery was still open. There had not been a  
21 pre-trial conference and there not had not been a trial.  
22 So that's in clear contrast to a case like the Henry case  
23 that this court heard.

24 JUDGE RIVERA: But I'm sorry, as I understood  
25 your argument, it's a legal issue that you could have

1 raised without discovery being completed, correct?

2 MS. PRINGLE: Yes, Your Honor. I'm not denying  
3 that this could have been brought earlier. What I am  
4 saying is that in the posture of this case, the time that  
5 they brought it would not meet the Supreme Court test of an  
6 explicit and unequivocal waiver of the New Jersey's right  
7 of sovereign immunity.

8 JUDGE RIVERA: Is that counting from the answer  
9 or when Hyatt is decided?

10 MS. PRINGLE: I think you need to - - you need to  
11 count from both to some degree.

12 JUDGE RIVERA: So what are you referring to in  
13 the answer?

14 MS. PRINGLE: I'm sorry?

15 JUDGE RIVERA: The sovereign immunity, that's  
16 what you claim? Not using the word sovereign nevertheless  
17 refers to sovereign immunity in the answer?

18 MS. PRINGLE: In the answer, the question of  
19 immunity was immediately raised, which, whether or not the  
20 word sovereign is, I think, the understanding is that  
21 sovereign immunity - -

22 JUDGE RIVERA: So then let's assume that - -  
23 let's assume that's - - I think there are other  
24 understandings, but let's assume that that's what - - how  
25 you wanted to proceed. It makes it a harder case for you.

1 I don't understand why you're sitting and waiting even  
2 longer.

3 MS. PRINGLE: To answer your question, Your Honor  
4 - -

5 JUDGE RIVERA: Yes.

6 MS. PRINGLE: - - it is true that a motion could  
7 have been made earlier, and I'm not going to deny that.  
8 However, what the Supreme Court requires for a waiver is an  
9 express and intentional and clear waiver with every  
10 potential ambiguity being construed against waiver. It's  
11 one thing in something - -

12 JUDGE RIVERA: But if you - - if you're claiming  
13 immunity and the answer and then you're not making the  
14 motion until after the statute of limitations applies, I  
15 believe that's the chronology, it does begin to look a  
16 little bit more problematic, let me put it that way, from  
17 your side to have waited so long.

18 MS. PRINGLE: It's different, for example, from  
19 the Henry case where the question was raised in the dissent  
20 in that matter of whether there had been some kind of  
21 improper maneuvering by waiting until after the actual  
22 trial and resolution. That wasn't the case here. And so I  
23 understand the point in if someone waits until after the  
24 trial. I don't know how that comes out. But in this case,  
25 it was the motion to dismiss and the waiver issue was fully

1           briefed - - - or excuse me, the sovereign immunity issue  
2           was fully briefed before there was a pre-trial conference  
3           and before there was a trial. In light of the high  
4           standard for waiver, no waiver should be found.

5                        JUDGE RIVERA: I may get the last question while  
6           on the red light is on. I don't want the Chief Judge to  
7           pass me a note or to otherwise interrupt me. Let's say it  
8           takes ten years to get to trial. Does that make a  
9           difference?

10                      MS. PRINGLE: Well, I would look at the - -

11                      JUDGE RIVERA: It seems a long time to sit and  
12           wait.

13                      MS. PRINGLE: I understand what you're saying,  
14           Your Honor, but look at, for example, at the Hyatt case.  
15           So first of all, this is not ten years. But look for  
16           example, at the Hyatt case. In that case, poor Mr. Hyatt  
17           litigated for almost twenty years. Nineteen years, with  
18           three trips to the Supreme Court. He recovered a judgment  
19           of \$500 million against the State of California. So  
20           clearly he had been abused by California in Nevada.  
21           Nevertheless, the Supreme Court found that the sovereign  
22           immunity issue was much more important than those specific  
23           costs to Mr. Hyatt. And so our case is nothing like Mr.  
24           Hyatt. This is a much more condensed time frame, and the  
25           constitutional principle is what really matters, and needs

1 to be enforced by this court.

2 Furthermore, if you're looking for a clear rule,  
3 it's difficult to say that you know you have to move within  
4 a month or you have to move within three months. I think  
5 it is a much clearer rule if you if you suggest that  
6 there's potential for manipulation if it's done after  
7 trial. But before trial, there's no such indication of  
8 manipulation. And one further point, there's no indication  
9 that Mr. Colt could not refile his case in New Jersey,  
10 given New Jersey's rule of equitable tolling.

11 CHIEF JUDGE WILSON: Thank you.

12 MS. PRINGLE: Thank you, Your Honor.

13 MR. SHOOT: May it please the court. I'd like to  
14 pose a hypothetical, if I may. A New Jersey Transit bus  
15 drives into Manhattan, one of hundreds that do so each  
16 year. Along the way, it strikes a pedestrian, causes  
17 property damage, and violates some traffic regulations,  
18 maybe a VTL provision. And the position here is the  
19 injured pedestrian or dead pedestrian can't bring suit in  
20 New York. The landowner can't bring suit in New York. And  
21 the traffic regulation can't be charged in New York.

22 JUDGE WILSON: Let's say in your hypothetical it  
23 is New Jersey. There's no question it's an arm of the  
24 state. New Jersey decides they're not waiving sovereign  
25 immunity at all, ever. Not anywhere. Not in New Jersey,



1 not anywhere else. You would still say they could be sued  
2 in New York?

3 MR. SHOOT: No, Your Honor. I'm saying they can  
4 be sued in New York because they are not New Jersey and  
5 because New Jersey waived whatever sovereign immunity this  
6 entity would have had. Let me start with the arm of the  
7 state. Judge Singas asked, well, there's hardly any record  
8 here in terms of this entity's activity.

9 JUDGE SINGAS: I would say the same to you. The  
10 flip side of the coin, your opposition papers don't talk  
11 about - - in fact, the arm of the state is nowhere in the  
12 papers.

13 MR. SHOOT: The - - -

14 JUDGE SINGAS: So I'm troubled by the thinness of  
15 this record, frankly.

16 MR. SHOOT: This was pages 19 - - - 29 to 30 of  
17 our brief. Every circuit that has addressed the issue says  
18 that the burden of establishing that the entity is an arm  
19 of the state is on the entity that claims to be an arm of  
20 the state. The fact that it's produced zero evidence is -  
21 - - doesn't make it harder.

22 JUDGE GARCIA: Do you make the argument, even  
23 that they failed to meet their burden, that they weren't an  
24 arm of - - that they were an arm of the state? Like, I  
25 don't see that in your answer.

1 MR. SHOOT: Well, they're not an arm of the  
2 state.

3 JUDGE GARCIA: You make several specific  
4 arguments in answering the motion tied to the act and tied  
5 to some other things. Waiver, I think. But you never even  
6 put in an answer to the motion saying they failed to meet  
7 their burden to show that they're an arm of the state.

8 MR. SHOOT: Your Honor, we briefed this at length  
9 in the Appellate Division.

10 JUDGE GARCIA: No, no, I'm not talking about the  
11 Appellate Division. I'm talking about the motion court.

12 MR. SHOOT: Yeah. The only showing that they  
13 have is an arm of the state is they, as you mentioned,  
14 Judge Singas, as they cite a case. And we're suggesting,  
15 Your Honor, that simply they are not. They're not an arm  
16 of the state. And what they - - and the proof that they  
17 could have produced or didn't produce is secondary.  
18 Doesn't matter. And the reason why it doesn't matter is  
19 they are simply not legally an arm of the state. I'd like  
20 to tell you why.

21 JUDGE HALLIGAN: So you're saying that they could  
22 not establish with whatever proof that they're an arm of  
23 the state?

24 MR. SHOOT: Because the New Jersey statutes,  
25 which they failed to cite, foreclose it. And let me

1 explain why. As you are aware, in our brief, the United  
2 States Supreme Court has five times, five different cases,  
3 addressed what is and what is not an arm of the state. The  
4 last couple were Hess v. Port Authority and Regents of  
5 California v. Doe. However, in all that time they've not  
6 articulated a clear standard, a clear test. They've stated  
7 principles with the result that every single circuit now  
8 has its own arm-of-the-state test. The Second Circuit has  
9 one, the Third Circuit has one, the Ninth Circuit has one.  
10 They're all different.

11 CHIEF JUDGE WILSON: Those are in the Eleventh  
12 Amendment context, correct?

13 MR. SHOOT: I'm sorry, Your Honor?

14 CHIEF JUDGE WILSON: Those are in the Eleventh  
15 Amendment context?

16 MR. SHOOT: Yes, they are. And in fact, this is  
17 a Whack-A-Mole. In the Appellate Division, the claim was  
18 that they are an arm of the state under the Eleventh  
19 Amendment. But then when we come up with case law and  
20 statutes showing that they just are not, then it's no  
21 longer under the Eleventh Amendment.

22 JUDGE HALLIGAN: But if we need to determine or  
23 we might want to consider determining what the right test  
24 is to figure out if there is sovereign immunity following  
25 Hyatt, why is it that the Eleventh Amendment arm-of-the-



1 state test is the one that we should use? Because I think  
2 even following Hyatt, it's probably the case that the  
3 Eleventh Amendment protects a somewhat narrower set of  
4 interests than state sovereign immunity generally does. So  
5 why is it - - - why is the Eleventh Amendment test the  
6 right test here?

7 MR. SHOOT: Two points with respect to that. The  
8 one issue that Hyatt doesn't address at all, it just  
9 doesn't address it because it wasn't at issue there, is  
10 this entity the state, or an arm of the state? It was  
11 clear it was.

12 JUDGE HALLIGAN: I agree, it doesn't tell us what  
13 the test is.

14 MR. SHOOT: There has, to my knowledge, been not  
15 a case, nor has one been cited where a court has said the  
16 test is different from the, for interstate immunity - -

17 JUDGE HALLIGAN: Has this come up, though, post  
18 Hyatt? The question of what test a court should apply to  
19 determine whether an entity that wants to invoke sovereign  
20 immunity, but is not the state qua state is able to do so  
21 and whether the Eleventh Amendment jurisprudence applies?

22 MR. SHOOT: Every court that has addressed it  
23 post-Hyatt and pre-Hyatt has used Eleventh Amendment case  
24 law, including Gillette. The Gillette decision.

25 JUDGE HALLIGAN: It seems to me maybe Hyatt

1 changes the landscape a bit. So that's why I'm asking if  
2 their case is post-Hyatt you can point us to.

3 MR. SHOOT: Not really, because Hess - - the  
4 Supreme Court decision in Hess states quite clearly that  
5 there are twin reasons for being on the Eleventh Amendment,  
6 fiscal, and the state's dignity. There's never been a  
7 suggestion that it's different for interstate immunity.

8 JUDGE RIVERA: So that is your understanding, let  
9 me put it that way, of Hyatt III, that it sweeps more  
10 broadly than the prior jurisprudence under the Eleventh  
11 Amendment? That is to say that the state, as the state of  
12 course, New Jersey as New Jersey, and in addition, perhaps  
13 other entities fall within this rubric of Hyatt III that  
14 would not fall under the Eleventh Amendment or is it in  
15 reverse?

16 MR. SHOOT: Your Honor, Hyatt doesn't address the  
17 issue at all. I mean, it's just - -

18 JUDGE RIVERA: No, I'm asking you, what's your  
19 understanding. If you were going to interpret that and say  
20 yes, under Hyatt - - let me put it perhaps more crassly.  
21 There's more potential defendants than there would be under  
22 the Eleventh Amendment jurisprudence. Or do you view it in  
23 reverse?

24 MR. SHOOT: I suppose so, but I think the  
25 interests in not appearing in a sister state's courts are

1 the same. Whether it's - - -

2 JUDGE RIVERA: Well, then are we bound by New  
3 Jersey's judiciary's own interpretation of whether or not  
4 New Jersey Transit is an arm of the state or otherwise  
5 functions as the state for purposes of the services that it  
6 is rendering?

7 MR. SHOOT: Statutorily, Your Honor, they are not  
8 an arm of the state.

9 JUDGE RIVERA: I didn't ask that. That's not  
10 what I asked. I'm asking you about whether or not this  
11 full faith and credit argument, or some version of it,  
12 binds us so that we are locked into an outcome on this  
13 question.

14 MR. SHOOT: Your Honor, if I - -

15 JUDGE RIVERA: Whether or not they can even  
16 invoke this question at the - - - at its core, as I  
17 understand it, is whether or not they can even invoke and  
18 draw the benefit of sovereign immunity.

19 MR. SHOOT: I find the full faith and credit  
20 argument positively Orwellian - - -

21 JUDGE RIVERA: Okay.

22 MR. SHOOT: - - - in the sense, you can search  
23 for a statute from New Jersey or a supreme court holding  
24 from New Jersey, stating that this entity has interstate  
25 immunity. You can search for a statute that says that they

1 haven't waived their immunity. You won't find it, but what  
2 you will find is in the very law under which this suit is  
3 brought, the New Jersey Tort Claims Act, not some other  
4 area of the law, the term state is defined. In this law,  
5 59:1-3, state is defined. It shall mean the state and any  
6 other and any office, department, division, bureau, board,  
7 commission or agency of the state, but shall not include  
8 any such entity which is statutorily authorized to sue and  
9 be sued. They've by definition ruled it out.

10 Now, there's one exception here. The exception  
11 is the Palisades Interstate Park Commission. And with  
12 respect to that exception, there's an exception. That's  
13 accepted, but only with respect to employees, property, and  
14 activities within the State of New Jersey.

15 JUDGE HALLIGAN: Can I ask you about that? Is it  
16 your position then, that given that what you just shared  
17 with us, that if the record established that the State of  
18 New Jersey funded New Jersey Transit to some meaningful  
19 amount, and also perhaps was liable for judgments that  
20 there still would not be - - - there wouldn't be an arm of  
21 the state. Is this the - - - is the statute the only  
22 factor in your view?

23 MR. SHOOT: Well, that's what I was talking  
24 about, Your Honor, full faith and credit. The only way you  
25 could find they're not an arm of the state is by not giving



1 full faith and credit to the definition - - -

2 JUDGE HALLIGAN: So your view is that the statute  
3 then, that you just shared with us, is the only factor  
4 that's relevant, notwithstanding funding or anything else?

5 MR. SHOOT: No, there are other statutes too.

6 JUDGE GARCIA: But let's say the Jersey Supreme  
7 Court interpreted those statutes differently. Let's say  
8 the Jersey Supreme Court looked at that statutory  
9 landscape, heard all these arguments, and this is just  
10 hypothetical, and said they're an arm of the state. Could  
11 we then look at the statutes ourselves and say, no, that  
12 statute doesn't mean that?

13 MR. SHOOT: In the nature of - -

14 JUDGE GARCIA: And this hypothetical question.

15 MR. SHOOT: The New Jersey Supreme Court would  
16 never look at it, could never look at it because it arises  
17 - -

18 JUDGE GARCIA: I'm asking you a hypothetical  
19 question.

20 MR. SHOOT: No, no.

21 JUDGE GARCIA: Let's say they did.

22 MR. SHOOT: There would be no occasion. The  
23 reason being, the issue arises only when they're sued in  
24 the courts of another state. So when would the New Jersey  
25 Supreme Court - -

1 CHIEF JUDGE WILSON: Well, right. But we can  
2 change - - we can change the hypothetical a little bit to  
3 get at what Judge Rivera, I think, was trying to ask you.  
4 Suppose the New Jersey legislature amended the statute you  
5 just read to say New Jersey Transit is an arm of the state.  
6 Then do we have to give full faith and credit to that  
7 statute?

8 MR. SHOOT: That would be a factor to consider.

9 CHIEF JUDGE WILSON: But not dispositive?

10 MR. SHOOT: No, because under the test of any  
11 circuit you choose, one of the factors is how does the  
12 state itself denominate this entity? Another factor is - -  
13 and it would change the analysis under the federal law.  
14 Another factor is would a judgment against this entity  
15 affect the fisc of the alleged arm of the state?

16 CHIEF JUDGE WILSON: These are again - - you're  
17 back to Eleventh Amendment tests, I think. Right? And  
18 let's let me ask you if you agree or disagree with this.  
19 Hyatt, I think, identifies two sources of the of the  
20 interstate sovereign immunity. One is common law, and the  
21 other is law of nations. With me so far?

22 MR. SHOOT: Yes.

23 CHIEF JUDGE WILSON: Okay. That is perhaps  
24 different from the source of Eleventh Amendment immunity,  
25 which was a reaction to Chisholm, just after the Union had

1           been formed, the United States had been formed, where the  
2           question really was, did the States intend to create a  
3           federal judiciary that would be able to hear cases with  
4           states as a defendant? Those seem to me two very different  
5           sources that might have two very different purposes. Maybe  
6           not. But if they are, then I'm not sure why you would  
7           resort to the Eleventh Amendment cases or factors at all.

8                   MR. SHOOT: The reason I'm resorting to the  
9           Eleventh Amendment cases is, essentially, that is all we  
10          have to distinguish what is a state or an arm of the state  
11          for the purpose of a sovereign immunity from what is not.  
12          And if it's possible - -

13                   CHIEF JUDGE WILSON: But if there are two  
14          different types of sovereign immunity that really - -  
15          Eleventh Amendment sovereign immunity is it's often phrased  
16          that way, but it really is a disability of the federal  
17          courts to hear a certain type of case, right? That's  
18          actually the way the amendment is worded.

19                   MR. SHOOT: Yes. But the purposes - - the twin  
20          purposes of its being, according to Hess, are to save the  
21          state's fisc, which would arise only if the state is going  
22          to be responsible for the judgment against the so-called  
23          arm, or to preserve the state's dignity. And I don't think  
24          there are any other purposes that could be served by  
25          interstate immunity other than financial and dignity.

1                   JUDGE HALLIGAN: But to that point, as I think  
2                   that the chief was suggesting, the reaction to Chisholm, I  
3                   believe, was focused on concerns about debts that the  
4                   states had. And so the focus on the state fisc, I think,  
5                   was paramount. And that is, I think, why you see such a  
6                   focus on questions about funding and liability in the  
7                   Eleventh Amendment jurisprudence. But the sovereign  
8                   immunity that is laid out in Hyatt seems to me to perhaps  
9                   be focused more broadly. And to be focused, for example,  
10                  on questions about, setting aside any monetary impact, what  
11                  is the consequence? Is it indignity of hailing one state  
12                  into another state's courts? So that the test might be  
13                  different because the underlying concerns and objectives of  
14                  the immunity might be different, no?

15                 MR. SHOOT: But when you go down that road, I  
16                 think you ultimately ended the destination that you're  
17                 going to have a different test for a New Jersey entity  
18                 depending upon whether they're brought into the Southern  
19                 District, New York, or New York Supreme. And the test  
20                 would be different in each if you go down that road. But I  
21                 don't know if that can be true.

22                 JUDGE GARCIA: I don't know if that would be  
23                 true.

24                 JUDGE RIVERA: Well, it's the difference of the  
25                 Eleventh Amendment or sovereignty, that's the point. Yes,



1           you're right. It might depend on the court what decision  
2           they make as to which one they want to assert. But I'm  
3           just circling back. If indeed, New Jersey has announced to  
4           the world that New Jersey Transit is us, right, is New  
5           Jersey. We believe we're in a symbiotic relationship here.  
6           And they are appropriately able to invoke sovereign  
7           immunity, can this court hold otherwise?

8                     MR. SHOOT: Your Honor, but the - - - New Jersey  
9           has done the exact opposite. They've defined in the law  
10          that we're suing under - - -

11                    JUDGE RIVERA: Okay. Let's say we don't agree  
12          with you on that. Go to the question I've asked. I mean -  
13          - -

14                    MR. SHOOT: I'm sorry.

15                    JUDGE RIVERA: - - - maybe you answered it and I  
16          missed it, so I'm just asking it again.

17                    MR. SHOOT: Okay.

18                    JUDGE RIVERA: Can we hold to the contrary?

19                    MR. SHOOT: New Jersey has never held that this  
20          is an arm of the state. In the case that was cited by my  
21          adversary, Mullen v. New Jersey Transit, they said the  
22          opposite. When you look at the definitions there are  
23          public entities and there are - - and there's the state.  
24          Those two things, they're both defined in the Tort Claims  
25          Act. A public entity is basically any governmental entity,

1 every water authority, every town, and every village, et  
2 cetera, they're a public entity. That they're a public  
3 entity doesn't mean that they're the state. And in fact,  
4 that's what the Mohammed court said, that they're a public  
5 entity, which they are, doesn't mean that they're the  
6 state.

7 And if you look - - if you look nationally at the  
8 entities that have been deemed arms of the state, if we're  
9 looking at transportation authorities and common carriers,  
10 this isn't the only one in the United States. There are  
11 two others that were deemed arm of the state. The Alaska  
12 Railroad Company, and the Washington Metro Authority. In  
13 each instance, the Hess court observed, there was a reason  
14 for that, that these were thinly capitalized ventures where  
15 a judgment against one of these entities would be funded by  
16 the state because they were thinly capitalized.

17 If you look on the other side, the great, great  
18 majority of these entities have been deemed not arm of the  
19 state, not subject to sovereign immunity. New York State  
20 Thruway Authority, not an arm of the state, Second Circuit;  
21 Puerto Rican Port Authority, not an arm of the state, First  
22 Circuit; Golden Gate Bridge Highway and Transportation  
23 District, not an arm of the state, Northern District,  
24 California.

25 JUDGE SINGAS: In those cases, is it the fiscal

1           considerations that are paramount?

2                   MR. SHOOT: Well, each of them applied their own  
3           circuits test. But as was said, those tests are similar in  
4           that they look at—they're framed differently, but they all  
5           look at the fisc, they all look at the amount of control  
6           over the entity.

7                   JUDGE SINGAS: Which test would you advocate for?

8                   MR. SHOOT: Your Honor, the Second Circuit - - -  
9           but actually, it doesn't matter, because if even if you  
10          apply the Third Circuit's test and you consider the  
11          statutes which were not cited to the Karns court in which  
12          it did not find, you end up at the same result. This is  
13          not an arm of the state. Dallas Area Rapid Transit,  
14          Southeastern Pennsylvania Transportation Authority,  
15          Metropolitan Bus Authority.

16                  JUDGE RIVERA: Well, let me ask you. Let's say  
17          our ruling allows you to move forward in New York and you  
18          win, who's paying?

19                  MR. SHOOT: The New Jersey Transit Authority, as  
20          a matter of statute; they will not be reimbursed. They  
21          will not be reimbursed because one of the statutes - - -

22                  JUDGE RIVERA: Where are they getting the money  
23          from?

24                  MR. SHOOT: They get the money from their own - -  
25          - their own coffers.

1 JUDGE RIVERA: You mean from what they charge,  
2 the ridership?

3 MR. SHOOT: Yes. My adversary just cited as  
4 evidence - -

5 JUDGE RIVERA: If that's not enough for them to  
6 continue in business, does New Jersey have to pay for the  
7 rest of it?

8 MR. SHOOT: No. As a matter of statute, they're  
9 not going to pay anything. As a matter of statute 25-17,  
10 they are not liable. The state is not liable.

11 JUDGE RIVERA: I understand that. But my  
12 question is a different one about the shell game of money.  
13 So if under - - in response to me, you're saying, well,  
14 New Jersey Transit has to pay it out of whatever their  
15 coffer is, that's separate from money that came directly  
16 from the state, that's going to leave them with a deficit  
17 somewhere, right, because they're paying you. Doesn't New  
18 Jersey have to make that up?

19 MR. SHOOT: Let me give you the Third Circuit's  
20 answer to that very question.

21 JUDGE RIVERA: Yes, please.

22 MR. SHOOT: You were just cited the case of  
23 Worrell as evidence that they're subsidized by the state.  
24 Worrell is a 1980s trial level case. Subsequent to  
25 Worrell, the Third Circuit twice addressed the issue that

1           you're talking about where does the money come from? And  
2           in the first case, *Fitchik v. New Jersey Transit Authority*,  
3           the court concluded what was remarkable about the finances  
4           of the New Jersey Transit is how little money came from the  
5           state. And then in *Karns*, where the Third Circuit looked  
6           again, what the court said is back in *Fitchik*, we said that  
7           this is not subsidized by the state, and no one's provided  
8           any evidence to cause us to believe otherwise. The reason  
9           that the Third Circuit nonetheless deemed them to be an arm  
10          of the state was they weren't aware, as it wasn't cited to  
11          them, or at least didn't cite in their decision, this  
12          entity is by law, independent. The statute uses that word,  
13          independent of any executive branch control.

14                   JUDGE RIVERA: I'm sorry, your red light is on.  
15          Could you just take a moment to address waiver?

16                   MR. SHOOT: Certainly, Your Honor. We claim  
17          waiver in three different respects. One, by operation of a  
18          multi-million dollar business, transportation business that  
19          is likely to cause injury in the State of New York. There  
20          was one cited authority as to - - - for the proposition  
21          that operating a business doesn't waive the jurisdictional  
22          impediment. It isn't a consent to jurisdiction. That case  
23          didn't deal with this at all. The savings bank case,  
24          *versus Florida Prepaid*. That case dealt with the issue of  
25          whether Congress can force a waiver when an entity enters

1 into a particular field, in that case, making loans, and  
2 did that render them subject to the Lanham Act? But this  
3 is a case where the state has waived its immunity. The  
4 question isn't whether they can be forced to waive their  
5 immunity. They waived it in the Tort Claims Act at Section  
6 2.2(a). The question is when it has waived its immunity,  
7 can it still assert interstate immunity as to the very  
8 actions for which they waived immunity?

9 The second way in which we say they waived  
10 immunity is by New Jersey itself. When New Jersey passes a  
11 statute that says this is not the state, anything that can  
12 be sued, any entity that can sue and be sued, with the  
13 partial exception of the Palisades Interstate Authority.  
14 Any state that can sue, any entity that can sue and be  
15 sued, is not the state, that - - - ,how more clearly can it  
16 be a waiver of interstate immunity? This legislature is  
17 telling us it's not a state, at least for the purposes of  
18 the Tort Claims Act, and they're waiving immunity for the  
19 purposes of the Tort Claims Act.

20 And the third is by their actions in this case.  
21 This court, last year, in Henry, decided that this  
22 interstate immunity defense isn't like - - it's not a  
23 matter of subject matter jurisdiction. It's more akin to  
24 in personam jurisdiction. Of course, in personam  
25 jurisdiction is easily waived. The commentary deferred to

1 - - -

2 JUDGE RIVERA: If they argue there had not yet  
3 been a trial, and in part, that's the dividing line, why  
4 aren't they right about that?

5 MR. SHOOT: Well, you know, the question was what  
6 happened between these two appoints? This suit was  
7 commenced in September of 2017. The motion was made in  
8 July of 2020, just a bit shy of three years. The limited  
9 discovery, so called, was nine so ordered stipulations from  
10 nine discovery conferences during that almost three year  
11 span. During all that period of time, they could have  
12 moved for dismissal at any point. They did not. And even  
13 when you look at their so-called pleading - - -

14 JUDGE RIVERA: Did they gain an advantage by not  
15 doing so?

16 MR. SHOOT: Well, certainly we gained a detriment  
17 by not doing so in that the statute of limitations has run  
18 in New Jersey. And what's happening consistently in all  
19 these transit cases in New York is they resist not only the  
20 jurisdiction here, but any finding that they've waived it,  
21 the statute of limitations, back in New Jersey.

22 CHIEF JUDGE WILSON: Well, counsel said it's  
23 equitably tolled, or maybe equitably tolled. Do you  
24 disagree?

25 MR. SHOOT: Actually, that's the first time that



1 was mentioned, and I'm not familiar with it, Your Honor.  
2 In all the cases that I've seen, the New Jersey Transit  
3 cases, that's not been mentioned, it wasn't mentioned in  
4 the briefs here, and I'm just not familiar with it, Your  
5 Honor. The - - - when you look at the pleadings, they  
6 claimed - - - they pleaded lack of jurisdiction over NJT,  
7 not interstate immunity, not 11th Amendment immunity. They  
8 claim this court lacks jurisdiction, which speaks to, I  
9 think, to subject matter jurisdiction, and that they're  
10 immune from suit. There was no indication anywhere in  
11 their pleading by what immune to suit what they meant was  
12 they're not immune to suit. But they're immune to suit  
13 here in New York. Nothing to convey the notion that the  
14 problem isn't that they're immune, but the problem is  
15 they're immune in New York, supposedly. That wasn't  
16 pleaded. So - - -

17 CHIEF JUDGE WILSON: Thank you, Counsel.

18 MR. SHOOT: Thank you, Your Honors.

19 JUDGE HALLIGAN: Counsel, can I ask you two  
20 questions about Hess? One is, what's your view about  
21 whether the test in Karns and - - - or Mancuso, if you  
22 think the distinction matters, best furthers the goals set  
23 forth in Hess? And what do we do about the fact that Hess  
24 is a compact clause case? Does it affect the way we think  
25 about the arm of the state test?



1 MS. PRINGLE: Sure. Hess goes to the question of  
2 dignity of the state because it is a compact case. So  
3 there they said that it's not a single state; it's two  
4 states. And the fact that the two states had entered into  
5 a compact approved by Congress lessens the dignity of the  
6 state issue, and therefore, you know, made it easier to  
7 find a waiver of sovereign immunity. So Hess did not in  
8 any way turn on the fact that it's a common carrier or that  
9 it's The Port Authority. It was really turning on the fact  
10 that this was a compact case.

11 In terms of the test that should be applied - - -

12 JUDGE HALLIGAN: Just so on that, so we should  
13 not take away from Hess anything relevant to the factors  
14 for the arm of the state test if it's not a compact clause?  
15 That's what I was trying to get at.

16 MS. PRINGLE: Sure. I think what Hess makes  
17 clear is that the two issues it turned on were, first, that  
18 the compact matter and second, with respect to finances,  
19 that you need to look at the practical impact of the impact  
20 on the fisc. There, the Port Authority is set up as a  
21 completely independent, both in terms of control and in  
22 terms of finances. So by negative implication, that's  
23 relevant to our case, where New Jersey Transit is not set  
24 up independently, either financially or in control. New  
25 Jersey Transit remains subject to appointment by - -

1 JUDGE HALLIGAN: Sorry, just I don't want to run  
2 up against your red light.

3 MS. PRINGLE: Of course.

4 JUDGE HALLIGAN: Carnes and Mancuso, does the  
5 difference matter, do you think?

6 MS. PRINGLE: I think since Carnes is the Third  
7 Circuit and is directly on point, it's the federal court  
8 that has jurisdiction over them.

9 JUDGE HALLIGAN: Okay. And if we don't - - if we  
10 don't view ourselves as bound by the difference, does it  
11 matter in terms of the goals of what the Eleventh Amendment  
12 is looking to protect?

13 MS. PRINGLE: I think those cases are pretty much  
14 reaching the same - - approaching it the same way, using  
15 two different tests under the Eleventh Circuit. And as  
16 applied directly to this party in Carnes, the Third Circuit  
17 reached the decision that that the New Jersey Transit is  
18 the arm of the state. And so to get back to the to the  
19 broader point - - -

20 JUDGE RIVERA: Is it your view that the analysis  
21 under Hyatt III expands, let me put it that way, the actors  
22 who might fit within the state for purposes of sovereign  
23 immunity? As compared to the Eleventh Amendment.

24 MS. PRINGLE: Yes, potentially because the  
25 Eleventh Amendment is limited to federal court, whereas the

1 sovereign immunity recognized in Hyatt goes beyond that.  
2 And also because the court in - -

3 JUDGE RIVERA: Well, that doesn't mean the actors  
4 expand. That doesn't mean the venue - - - a different - -  
5 -

6 MS. PRINGLE: But to continue, I think because  
7 Hyatt so strongly stressed the fact that this is  
8 fundamental to the constitutional compact, and is an  
9 explicit limit on the state's ability to deny sovereign  
10 immunity, I think it does potentially expand the universe  
11 of plaintiffs.

12 JUDGE RIVERA: Of course, the type of  
13 administrative framework we now have was not envisioned at  
14 the time of the Constitution, or predating the  
15 Constitution. So perhaps not. Perhaps it really is just  
16 the state.

17 MS. PRINGLE: Well, to get to - - to look at, I  
18 think the - - another portion of the Constitution, which is  
19 the full faith and credit clause, here the issue is not  
20 just hypothetical, as Judge Guerrero suggested. It has  
21 explicitly been decided by the State of New Jersey. It was  
22 decided in the Public Transportation Act 27:25, and it was  
23 decided explicitly by the highest court of New Jersey in  
24 the Mohammed v. New Jersey Transit case, which - -

25 JUDGE RIVERA: Let's put aside for one moment the

1 judicial decisions. Let me ask you a different kind of  
2 question. Can a state itself declare what entities fall  
3 within this Hyatt III sovereign immunity analysis because  
4 it expands its own protections? Let me put it that way.

5 MS. PRINGLE: I would say yes with a caveat. The  
6 state's legislative act of declaring that New Jersey  
7 Transit is a part of the state, and the Tort Claims Act is  
8 a bit of a red herring. I can come back to that if you  
9 like, but the state has explicitly said that this is a part  
10 of the state. Once it does that, that's entitled to full  
11 faith and credit. You can imagine a scenario where a state  
12 says, okay, we're just going to immunize everything that  
13 anyone does in New Jersey. And there I think you would  
14 have a separate kind of a case where full faith and credit  
15 might not be warranted.

16 CHIEF JUDGE WILSON: It's a little different  
17 question. It's whether New Jersey could immunize whatever  
18 New Jersey does in New York. So New Jersey opens up a  
19 shooting gallery with live ammunition in Times Square and  
20 says, that's an arm of the state. Does that work?

21 MS. PRINGLE: I think there you might have a very  
22 difficult case, and I would not want to be arguing that  
23 case for the State of New Jersey.

24 JUDGE RIVERA: But why is that? The questions  
25 we're turning on whether or not the state itself can define

1 the contours of that sovereign immunity and who can rely on  
2 it, who can invoke it or what can invoke it.

3 MS. PRINGLE: The reason I would have more  
4 trouble in Judge Guerrero's hypothetical - - -

5 CHIEF JUDGE WILSON: It's actually - - -

6 JUDGE GARCIA: Are you talking to me when you say  
7 Judge Guerrero?

8 MS. PRINGLE: Sorry, am I getting the names  
9 wrong? I apologize, but the reason I have - - -

10 JUDGE GARCIA: Well, I think they're on your  
11 sheet if you look down.

12 JUDGE RIVERA: In front of you if you don't see  
13 them.

14 JUDGE GARCIA: It might be helpful.

15 MS. PRINGLE: The reason I was having trouble  
16 with Judge Wilson's hypothetical is that, if you look at  
17 the arm of the - - - the instructive cases under the  
18 Eleventh Amendment on arm of the state, they talk about  
19 questions of control, questions of traditional use of  
20 executive power, things that look and act like the state.  
21 A shooting gallery does not look and act like the state.  
22 So I think there would be a much more difficult decision to  
23 be made there. Here, however, New Jersey Transit has the  
24 police authority. It has eminent domain authority. It is  
25 subject to - - -

1                   JUDGE HALLIGAN: So is the rule that that the  
2 state's statutory designation has to be given complete  
3 deference in if it's what? I'm what exactly is the  
4 cabining principle you are articulating there? If it is  
5 something that quacks like a state? I'm not trying to be  
6 flippant, but if it's something that - -

7                   MS. PRINGLE: No, of course. Of course.

8                   JUDGE HALLIGAN: - - we would generally recognize  
9 as an essential state function, is that what you're  
10 suggesting?

11                  MS. PRINGLE: The full faith and credit clause  
12 requires that states defer to the legitimate legislative  
13 and judicial acts of their sister states? I think if there  
14 were, as in your hypothetical, reason to question, whether  
15 that was a legitimate act of the state, then there might be  
16 an argument that the full faith and credit act does not - -  
17 - clause does not apply. Here, all of the indicia and  
18 they're cited in our case, they're cited in the Mohammed  
19 matter. They're cited in the Karns matter. All of the  
20 indicia are that New Jersey legitimately has named the New  
21 Jersey Transit Authority as an arm of the state because it  
22 is subject to the control of New Jersey, because it is  
23 performing a traditional New Jersey, a state function,  
24 because under all of the indicia, as recognized under state  
25 law, that is a legitimate act of - -

1 JUDGE RIVERA: Public transportation is public.  
2 Can you just quickly say whatever your comment was  
3 regarding the Tort Claims Act being a red herring?

4 MS. PRINGLE: Oh, yes. The Tort Claims Act, the  
5 appellant or appellees cites the one provision which says  
6 that the state shall not be included in such entity under  
7 the Tort Claims Act, but that's been explicitly addressed  
8 in Mohammed and other places. There's another portion of  
9 the New Jersey Tort Claims Act that refers to public  
10 entities more broadly, including the State and other public  
11 authorities. And the point is that New Jersey Transit is a  
12 sue and be sued state - - - authority under New Jersey law.  
13 So it's outside of the particular provision that is being  
14 cited by my opponent in this matter, but it has been  
15 explicitly recognized to be an arm of the state for the  
16 purposes of the Tort Claims Act.

17 CHIEF JUDGE WILSON: Thank you.

18 MS. PRINGLE: Thank you, Your Honors.

19 MR. SHOOT: You want to make - - - a point of  
20 information - -

21 CHIEF JUDGE WILSON: No.

22 MR. SHOOT: - - not relating to the merits. This  
23 is going to be argued tomorrow in the Supreme Court of  
24 Pennsylvania.

25 CHIEF JUDGE WILSON: You can send us a letter



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afterwards, if you like.

(Court is adjourned)





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C E R T I F I C A T I O N

I, Raven Wood, certify that the foregoing transcript of proceedings in the Court of Appeals of Colt v. New Jersey Transit, No. 72 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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