No. _____

In the Supreme Court of the United States

TROY UNIVERSITY, ET AL.,
Petitioners,

v.

SHARELL FARMER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Franchise Tax Board of California v. Hyatt*, 139 S. Ct. 1485 (2019), this Court held that, under the Constitution, "States retain their sovereign immunity from private suits brought in the courts of other States." *Id.* at 1492. Although States may voluntarily "consent" to suit, *id.* at 1490, this Court has consistently stressed that only "a 'clear declaration' *by the State* . . . expressing unequivocally that it waives its immunity" will suffice—"waivers are not implied." *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680-82 (1999) (emphasis in original).

In this case, the North Carolina Supreme Court held—in a divided decision—that this Court's precedents compelled the conclusion that Troy University, an arm of the State of Alabama, waived its sovereign immunity from private suit in North Carolina courts. App. 1a-2a. In so holding, the majority did not identify any declaration by Alabama expressly waiving its sovereign immunity. Instead, the majority deemed that immunity waived simply because Troy University operated in North Carolina after registering under a North Carolina statutory scheme generally providing that foreign nonprofit corporations may "sue and be sued" in that State. *Id.* at 9a. The question presented is:

Whether a State waives its sovereign immunity from private suit in the courts of another State by operating in the State under a corporate registration statute with a sue-and-be-sued clause.

PARTIES TO THE PROCEEDING

Petitioners (defendant-appellees below) are Troy University, Pamela Gainey, and Karen Tillery.

Respondent (plaintiff-appellant below) is Sharell Farmer.

RELATED PROCEEDINGS

North Carolina Supreme Court:

Farmer v. Troy University, No. 457PA19-2 (Nov. 4, 2022)

North Carolina Court of Appeals:

Farmer v. Troy University, No. COA19-1015 (Mar. 2, 2021)

North Carolina Superior Court, Cumberland County:

Farmer v. Troy University, No. 18CVS5146 (July 1, 2019)

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OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioners Troy University, Pamela Gainey, and Karen Tillery respectfully petition this Court for a writ of certiorari to review the judgment of the North Carolina Supreme Court in this case.

OPINIONS BELOW

The opinion of the North Carolina Supreme Court (App. 1a-33a) is reported at 382 N.C. 366 and 879 S.E.2d 124. The opinion of the North Carolina Court of Appeals (App. 35a-55a) is reported at 276 N.C. App. 53 and 855 S.E.2d 801. The order of the North Carolina Superior Court, Cumberland County (App. 56a-57a) is available at 2019 WL 6999625.

JURISDICTION

The North Carolina Supreme Court entered its judgment on November 4, 2022. On January 23, 2023, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 16, 2023. This Court has jurisdiction under 28 U.S.C. § 1257(a). The "federal issue" of petitioners' sovereign immunity "has been finally decided" by the North Carolina Supreme Court, "reversal of [that] court on the federal issue would be preclusive of any further litigation," later "review of the federal issue by this Court" may be thwarted if petitioners ultimately "prevail on the merits," and "a refusal immediately to review" the decision below would "seriously erode [the] federal policy" underlying sovereign immunity. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975); *see Mitchell v. Forsyth*, 472 U.S. 511, 525 n.8 (1985) ("[S]tate-court decisions rejecting a party's federal-law claim that he is not subject to suit before a

particular tribunal are 'final' for purposes of our certiorari jurisdiction under 28 U.S.C. § 1257.").

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reproduced at App. 62a-75a.

INTRODUCTION

This case presents an exceptionally important question concerning a "fundamental aspect of the States' 'inviolable sovereignty'" preserved and protected by the Constitution. *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1493 (2019) (citation omitted). In *Hyatt*, this Court overruled its prior decision in *Nevada v. Hall*, 440 U.S. 410 (1979), and held that "States retain their sovereign immunity from private suits brought in the courts of other States," so "a State [cannot] be sued by a private party without its consent in the courts of a different State." 139 S. Ct. at 1490, 1492. The question presented is whether a State waives that constitutionally protected aspect of its sovereignty by operating in another State under a corporate registration statute that contains a sue-and-be-sued clause.

Petitioner Troy University is a public university in the State of Alabama. As an arm of the State, Troy University is entitled to Alabama's sovereign immunity. Under *Hyatt*, Alabama—including Troy and its officers—retain that immunity from private suit in the courts of other States. Yet, in the decision below, a divided North Carolina Supreme Court declared that Alabama waived that immunity, and is subject to suit in North Carolina's courts, because Troy University recruited potential students in North

Carolina from a nearby military base as a registered foreign nonprofit corporation.

That ruling directly contravenes this Court's precedent. This Court has repeatedly held that a waiver of sovereign immunity must be "express" and "unequivocal"—reflected in a "'clear declaration' *by the State*" demonstrating with "certain[ty] that the State in fact consents to suit." *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680 (1999); *see Sossamon v. Texas*, 563 U.S. 277, 284 (2011). But the North Carolina Supreme Court did not identify any "clear declaration" by Alabama waiving its immunity from suit. Instead, the court held that Alabama waived its immunity because Troy University "engaged in business" in North Carolina after registering under a North Carolina statute generally providing that nonprofit corporations may "sue and be sued" in that State. App. 9a. *College Savings* roundly rejects the kind of constructive-waiver analysis deployed by the court below. 527 U.S. at 680-81. The clear conflict with this Court's precedent, and with decisions of other courts applying that precedent, on a matter of constitutional importance warrants certiorari.

Heightening the need for this Court's review, the North Carolina Supreme Court believed that this surprising result was compelled by this Court's decisions in *Thacker v. Tennessee Valley Authority*, 139 S. Ct. 1435 (2019), and *Georgia v. City of Chattanooga*, 264 U.S. 472 (1924). App. 1a-2a, 10a-14a. As the dissent below explained, those decisions do not justify the North Carolina Supreme Court's abrogation of Alabama's state sovereign immunity here. *Thacker* involved a federal statute in which Congress explicitly waived the immunity of a federal

agency, while *Chattanooga* involved a dispute over the condemnation of real property. App. 31a-32a (Barringer, J., joined by Newby, C.J., dissenting). Neither of those cases supports, much less compels, the theory of waiver adopted by the North Carolina Supreme Court below in the different circumstances here. Because only this Court can settle the meaning of its own precedents, the Court's review is necessary.

The practical consequences of the decision below underscore the need for this Court's intervention. "Interstate sovereign immunity" reflects "'an essential component of federalism'"—a right guaranteed to each State that is "integral to the structure of the Constitution." *Hyatt*, 139 S. Ct. at 1498 (citation omitted). The North Carolina Supreme Court's ruling in this case drives a stake through the interstate sovereign immunity recognized in *Hyatt* for any State entity that does business in North Carolina, including the numerous other public schools that have already registered to conduct business there. And virtually every State in the Union has a corporate-registration regime that, like North Carolina's, includes a sue-and-be-sued clause. The North Carolina Supreme Court's decision thus paves the way for other States to eliminate the state sovereign immunity preserved by the founders and recognized by *Hyatt*. The petition should be granted.

STATEMENT OF THE CASE

A. Legal Background

"Upon ratification of the Constitution, the States entered the Union 'with their sovereignty intact.'" *Sossamon*, 563 U.S. at 283 (citation omitted). An "'integral component' of the States' sovereignty [is] their 'immunity from private suits.'" *Hyatt*, 139 S. Ct.

at 1493 (citation omitted). A State therefore "cannot be sued in its own courts, or in any other, without its consent and permission." *Alden v. Maine*, 527 U.S. 706, 745 (1999) (quoting *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1858)).

In *Hall*, the Court considered interstate sovereign immunity—that is, whether a State retains its sovereign immunity from private suits brought in another State's courts. 440 U.S. at 414. *Hall* involved a tort suit in California state court against the University of Nevada and the State of Nevada, which arose from a car crash in California in which a University employee struck another vehicle while conducting University business. This Court rejected Nevada's argument that the State was constitutionally immune from suit, holding that interstate sovereign immunity is not a "constitutional command" but is instead a "matter of comity" that could be disregarded by the forum State. *Id.* at 416, 425-26.

But this Court overruled *Hall* in *Hyatt*, holding that "States retain their sovereign immunity from private suits brought in the courts of other States." 139 S. Ct. at 1492. *Hall*'s contrary conclusion, the Court explained, was "irreconcilable with our constitutional structure and with the historical evidence showing a widespread preratification understanding that States retained immunity from private suits, both in their own courts and in other courts." *Id.* at 1499. Thus, under the Constitution, "a State [cannot] be sued by a private party without its consent in the courts of a different State." *Id.* at 1490.

Because state sovereign immunity is a "constitutionally protected privilege," a State's decision whether to waive that immunity and consent

to suit "'is altogether voluntary on the part of the [State].'" *College Savings*, 527 U.S. at 675 (quoting *Beers*, 61 U.S. at 529); *see Alden*, 527 U.S. at 758 ("[Waiver is] a privilege of sovereignty concomitant to [the] constitutional immunity from suit."). Accordingly, a waiver of sovereign immunity "may not be implied." *Sossamon*, 563 U.S. at 284 (citing *College Savings*, 527 U.S. at 682). Rather, a waiver "requir[es] a 'clear declaration' *by the State* . . . expressing unequivocally that it waives its immunity" and "intends to submit itself to [the court's] jurisdiction." *College Savings*, 527 U.S. at 676, 680. This requirement ensures that sovereign immunity remains intact unless it is "certain that the State in fact consents to suit." *Id.* at 680.

B. Factual Background

Troy University is a public university located among the rolling hills of Troy, Alabama. App. 2a, 35a. It was created by the Alabama Legislature in 1887 as an "arm of the State of Alabama." App. 15a, 61a; *see* Ala. Code § 16-56-1. By law, Troy University must submit its budget to, and receive appropriations from, the Alabama Legislature, and its Board of Trustees must report to the Alabama Legislature each year. *See* Ala. Code § 16-56-10. As an "arm[] of the State," Troy University is entitled to the State's sovereign immunity from private suit—an immunity Alabama has enshrined in its own State Constitution. App. 7a-8a; *see* Ala. Const. art. I, § 14 ("[T]he State of Alabama shall never be made a defendant in any court of law or equity."). This immunity extends to the University as well as its employees. App. 7a (citing *Alabama State Univ. v. Danley*, 212 So. 3d 112, 122 (Ala. 2016)).

For decades, Troy University has enjoyed a proud relationship with the United States military. Dating back to the end of World War II, when the University expanded its course offerings to enroll returning veterans, the University has fostered innovative educational opportunities for members of the military, including through online courses, satellite teaching locations near military bases across the country, and tailored degree programs. The University counts some 60 flag officers among the ranks of its alumni, has a presence on or near military installations worldwide, and participates in online learning programs with all service branches.

As part of that effort, Troy University recruits students from prominent military installations across the country. That includes servicemen and women from U.S. Army Fort Bragg, one of the largest military installations in the world, located near Fayetteville, North Carolina. *See* App. 2a. In 2006, Troy University registered with the North Carolina Secretary of State for a certificate of authority to operate as a foreign nonprofit corporation in the State, and leased an office building near Fayetteville. *See* N.C. Gen. Stat. § 55A-15-01(a); App. 2a.[1]

From May 2014 until September 2015, respondent Sharell Farmer was employed by Troy University in its Fayetteville office, where he recruited students to enroll in online educational courses originating from the University's main campus in Alabama. App. 2a. In May 2015, Farmer filed a complaint with Troy

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[1] To complete the registration, the University filled out an "application for a certificate of authority," which requested basic information such as the applicant's name, addresses, and contact information for officers and agents. App. 58a-61a.

University's Human Resources Department, alleging sexual harassment by two other University employees at the Fayetteville office, petitioners Pamela Gainey and Karen Tillery. *Id.* at 2a-3a. Farmer's employment with the University ended four months later. *Id.* at 3a.

C. Proceedings Below

1. In July 2018, Farmer filed this lawsuit in North Carolina state court against Troy University as well as Gainey and Tillery in their official capacities as Troy University employees. App. 3a, 54a. In his complaint, Farmer asserted various tort and wrongful termination claims arising under North Carolina law based on allegations that he was subjected to sexual harassment during his employment and that the University ultimately retaliated against him for reporting the harassment. *Id.* at 3a-4a.

Petitioners moved to dismiss Farmer's complaint on the ground that, under this Court's decision in *Hyatt*, this action is barred by Alabama's sovereign immunity. *Id.* at 4a-5a. In response, Farmer asserted that Alabama waived its sovereign immunity because Troy University registered to do business in North Carolina as a foreign nonprofit corporation under the North Carolina Nonprofit Corporation Act, which provides that a North Carolina nonprofit corporation has the "power . . . [t]o sue and be sued, complain and defend in its corporate name." N.C. Gen. Stat. § 55A-

3-02(a)(1).[2] Pointing to this Court's decision in *Hyatt*, the trial court rejected Farmer's argument and granted petitioners' motion to dismiss. App. 56a-57a.

2. The North Carolina Court of Appeals affirmed. *Id.* at 35a-55a. Applying *Hyatt*, the court explained that, as an "arm[] of the State of Alabama," Troy University is "entitled to the sovereign immunity enjoyed by the State," and this immunity applies in North Carolina courts. *Id.* at 40a-43a. The court then rejected Farmer's argument that Troy University had "waived its sovereign immunity by registering with the North Carolina Secretary of State as a nonprofit corporation, thus enabling it to sue and be sued in its corporate name" based on the North Carolina Nonprofit Corporation Act. *Id.* at 44a-47a.

As the court explained, under this Court's precedents, a waiver of state sovereign immunity must be "explicitly expressed" by the State, *id.* at 45a (citing *Sossamon*, 563 U.S. at 284), and "'[c]ourts indulge every reasonable presumption against waiver,'" *id.* (quoting *College Savings*, 527 U.S. at 682). In this case, the court concluded, Farmer failed to identify any "explicit waiver of state sovereign immunity" by Alabama. *Id.* at 46a. To the contrary, the court observed that "Alabama has explicitly *not* consented to be sued" in the sovereign immunity provision of the Alabama Constitution, which "'may not be waived.'" *Id.* at 45a (quoting *Patterson v.*

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[2] Under the Act, "a foreign corporation with a valid certificate of authority" is treated like "a domestic corporation of like character" in terms of its "rights," "privileges," "duties, restrictions, penalties, and liabilities," and thus is subject to the sue-and-be-sued clause in the same way as a domestic corporation. N.C. Gen. Stat. § 55A-15-05(b); *see* App. 13a.

Gladwin Corp., 835 So. 2d 137, 142 (Ala. 2002)). Particularly in light of *Hyatt*'s recognition that "interstate sovereign immunity is a fundamental right 'embed[ded] . . . within the constitutional design,'" the court declined to "read into the Nonprofit Corporation Act a blanket waiver of interstate sovereign immunity for an arm of another [S]tate that registers as a nonprofit corporation in the State of North Carolina." *Id.* at 46a-47a (alterations in original) (quoting *Hyatt*, 139 S. Ct. at 1497).

3. The North Carolina Supreme Court granted Farmer's petition for discretionary review and reversed in a divided opinion. *Id.* at 1a-33a.[3]

In an opinion by Justice Earls, the majority acknowledged that, as an arm of the State of Alabama, Troy University is constitutionally "entitled to sovereign immunity from suit without its consent in the state courts of every state in the country," and that "any waiver of sovereign immunity must be explicit." *Id.* at 8a-9a (citing *Sossamon*, 563 U.S. at 284; *College Savings*, 527 U.S. at 682). But—based on its reading of this Court's precedent—the majority concluded that, when Troy University "conducted business in North Carolina, while knowing it was subject to the North Carolina Nonprofit Corporation Act and its sue and be sued clause, it explicitly waived its sovereign immunity." *Id.* at 1a-2a, 9a-16a.

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[3] The court focused its review on "whether suit in North Carolina against Troy University is barred by sovereign immunity." App. 6a & n.2. But the court's holding that the University waived its immunity from suit applied to both the individual defendants and the University itself. *See id.* at 53a-54a (recognizing that the individual defendants are entitled to the University's immunity).

The majority pointed to *Thacker*, a 2019 case interpreting the federal government's waiver of sovereign immunity for the Tennessee Valley Authority—a federal entity that, pursuant to its enabling legislation, "[m]ay sue or be sued in its corporate name." *Id.* at 10a-11a (alteration in original) (quoting *Thacker*, 139 S. Ct. at 1438). Although *Thacker* involved a federal entity, the majority believed that "*Thacker* recognizes that a sue and be sued clause can act as a waiver of sovereign immunity when a *state* entity's nongovernmental activity is being challenged." *Id.* at 11a (emphasis added). Based on that understanding, the majority held that North Carolina's sue-and-be-sued clause operated as a waiver of Alabama's sovereign immunity. *Id.* at 12a-13a.

The majority also invoked *Chattanooga*—a 1924 case upholding Tennessee's power to condemn in-state land owned by Georgia—to bolster that conclusion. *Id.* at 13a-14a (citing *Chattanooga*, 264 U.S. at 478-80). The majority understood *Chattanooga* as "holding" that "when Tennessee granted Georgia permission to acquire and use the land, and Georgia accepted the terms of the agreement, the State of Georgia consented to be made a party to the condemnation proceedings." *Id.* at 13a-14a. The majority held that the "same is true in this case," reasoning that when Troy University "obtained a certificate of authority to operate in North Carolina" as a "foreign corporation" and then operated as such using a leased facility in Fayetteville, it "consented . . . to be sued in North Carolina" under the sue-and-be-sued clause. *Id.* at 13a-14a.

Justice Barringer, joined by Chief Justice Newby, dissented. *Id.* at 23a-33a. In her view, the majority's

decision "misunderstands the extent of the holding in [*Hyatt*]" and reflects "a misguided departure from the United States Constitution." *Id.* at 23a. Under *Hyatt*, she observed, "Alabama carries its sovereign immunity into the courts of North Carolina." *Id.* at 28a. And "[*Hyatt*] controls the outcome in this case" because "there is no clear indication that Alabama has consented to be haled into North Carolina's courts." *Id.* at 28a, 30a. Justice Barringer also explained that *Thacker* and *Chattanooga* are inapposite and do not support what the majority accomplished here—a decision that "unilaterally impose[s] a waiver of sovereign immunity on Alabama" without its consent. *Id.* at 30a-33a. This result, she stressed, squarely "violates the Constitution of the United States." *Id.* at 30a.

REASONS FOR GRANTING THE PETITION

The North Carolina Supreme Court's divided decision in this case drives a hole through the constitutionally protected doctrine of interstate sovereign immunity. Its decision sharply conflicts with the decisions of this Court, as well as with how other courts have treated analogous immunity issues. Yet the majority believed this startling result was compelled by this Court's precedents. Only this Court can correct a misunderstanding of its own precedents. And the extraordinary importance of the question presented underscores the need for this Court's intervention here. Interstate sovereign immunity is a core right guaranteed to the States by the Constitution. Virtually every State has a corporate registration regime like North Carolina's, with a general sue-and-be-sued clause. If allowed to stand, the North Carolina Supreme Court's decision below

will be a blueprint for eliminating an essential aspect of state sovereignty guaranteed by the Constitution itself. The petition should be granted.

A. The North Carolina Supreme Court's Decision Conflicts With Decisions Of This Court And Other Courts

The North Carolina Supreme Court held that, by operating in North Carolina as a registered foreign corporation subject to a general sue-and-be-sued clause, Troy University "waived its sovereign immunity from suit in [North Carolina]." App. 9a; *see id.* at 16a. That holding sharply conflicts with this Court's precedent as well as the decisions of other state courts of last resort that have refused to find a waiver of immunity in analogous circumstances based on a sue-and-be-sued clause. These conflicts warrant this Court's review. *See* Sup. Ct. R. 10(b)-(c).

1. The decision below directly conflicts with this Court's decision in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999). In *College Savings*, the Court held that "a 'clear declaration' *by the State* . . . expressing unequivocally that it waives its immunity" is required to show "that the State in fact consents to suit." *Id.* at 680. The Court explained that this requirement protects the "constitutionally grounded principle of state sovereign immunity" by ensuring that "*the State* has made [the] 'altogether voluntary' decision to waive its immunity." *Id.* at 681, 684 (quoting *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1858)).

Applying that rule, the Court rejected the argument that the State entity in that case had "waived its immunity from suit by engaging in the voluntary and nonessential activity of selling and

advertising a for-profit educational investment vehicle in interstate commerce after being put on notice" by a federal statute "that the State will be subject to suit if it engages in [that] conduct." *Id.* at 679-80. As the Court explained, a State does not "express[ly]" and "unequivocally" waive its sovereign immunity by merely engaging in conduct, even if a statute (there, a federal statute) put the State "on notice" that "it would be subject to [suit] for doing so." *Id.* at 680-81. Such a theory would amount to an "'implied[]' or 'constructive[]' waive[r]" of immunity, *id.* at 676, and "there is 'no place' for the doctrine of constructive waiver in [the Court's] sovereign-immunity jurisprudence," *id.* at 678 (quoting *Edelman v. Jordan*, 415 U.S. 651, 673 (1974)).

In reaching that conclusion, the Court overruled what remained of its decision in *Parden v. Terminal Railway of the Alabama State Docks Department*, 377 U.S. 184 (1964), which held that a federal statute authorizing suits against interstate railroads operated to waive the sovereign immunity of a railroad owned by Alabama. Although the statute did not "specifically refer[] to the States," *Parden* reasoned that the statute "'conditioned the right to operate a railroad in interstate commerce upon amenability to suit,'" and that by "'operating a railroad in interstate commerce, Alabama must be taken to have accepted that condition and thus to have consented to suit.'" *College Savings*, 527 U.S. at 676-77 (quoting *Parden*, 377 U.S. at 192). As the Court emphasized in *College Savings*, this "constructive-waiver" reasoning was "ill conceived" from the start—a departure from "the jurisprudence of sovereign immunity, and indeed [from] the jurisprudence of constitutional law." *Id.* at 680.

The North Carolina Supreme Court in this case resurrected the same constructive-waiver rule this Court rejected in *College Savings*. In language almost identical to the language from *Parden* quoted above, the court declared that, by "engag[ing] in business in North Carolina" as a registered nonprofit corporation, "[Alabama] accepted the sue and be sued clause in the North Carolina Nonprofit Corporation Act and thereby . . . waived its sovereign immunity from suit." App. 9a; *see also id.* at 16a (Alabama "waived its sovereign immunity" by "enter[ing] North Carolina and conduct[ing] business in North Carolina, while knowing it was subject to the North Carolina Nonprofit Corporation Act and its sue and be sued clause"). *College Savings* leaves no doubt that this constructive-waiver analysis is "fundamentally incompatible" with this Court's "cases requiring that a State's express waiver of sovereign immunity be unequivocal." 527 U.S. at 680.

The North Carolina Supreme Court repeatedly characterized Alabama's conduct as an "explicit" waiver of immunity. App. 1a; *see id.* at 8a-9a, 12a, 15a-16a. But merely tacking an "explicit" label on its finding of waiver does not change how it got there: The North Carolina Supreme Court based its waiver finding on Troy University's "conduct[]"—namely, "engaging in business as a nonprofit corporation registered to do business in [North Carolina]" with the general power to sue and be sued. *Id.* at 15a-16a. The court did not, because it could not, identify any "'clear declaration' *by* [*Alabama*] . . . expressing unequivocally that it waives its immunity." *College*

Savings, 527 U.S. at 680.[4] Accordingly, the court clearly engaged in a constructive-waiver analysis.

The stark conflict between the North Carolina Supreme Court's waiver ruling and this Court's decision in *College Savings* alone warrants review.

2. The North Carolina Supreme Court's decision also is sharply at odds with this Court's decisions in *Franchise Tax Board of California v. Hyatt*, 139 S. Ct. 1485 (2019), and *Sossamon v. Texas*, 563 U.S. 277 (2011).

By basing its waiver ruling on a North Carolina statute, the decision below circumvents this Court's admonition in *Hyatt* that the Constitution "forbids" States from "apply[ing] their *own law*" to "refuse each other sovereign immunity." 139 S. Ct. at 1498 (emphasis added). That is exactly what happened here: The North Carolina Supreme Court deemed Alabama's sovereign immunity waived based on "the North Carolina Nonprofit Corporation Act." App. 9a. In other words, the majority applied North Carolina law to "unilaterally impose a waiver of sovereign immunity on Alabama." *Id.* at 32a (Barringer, J., dissenting). *Hyatt* forbids that result.

Moreover, even if a State's sovereign immunity could be dictated by the application of another State's law, the decision below "cannot be squared with [this Court's] longstanding rule," reaffirmed in *Sossamon*,

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[4] The only clear declaration from Alabama regarding its sovereign immunity is in the Alabama Constitution, which unequivocally states that "Alabama shall *never* be made a defendant in *any* court of law or equity." Ala. Const. art. I, § 14 (emphasis added); *see Alabama v. Pugh*, 438 U.S. 781, 782 (1978) (per curiam) (recognizing that the Alabama Constitution forbids a waiver of sovereign immunity).

"that a waiver of sovereign immunity must be expressly and unequivocally stated *in the text of the relevant statute*." 563 U.S. at 290 (emphasis added). That requirement repudiates yet another problematic aspect of *Parden*, which found a waiver of immunity "[d]espite the absence of any provision in the statute specifically referring to the States." *College Savings*, 527 U.S. at 676. The statutory provisions in this case also say nothing about States or sovereign immunity. Rather, they are generally directed at "nonprofit corporations in North Carolina." App. 9a; *see* N.C. Gen. Stat. §§ 55A-3-02(a), 55A-15-05(b) (generally referencing "corporation[s]"). Thus, even if (contrary to *College Savings* and *Hyatt*) a State could be deemed to have waived its immunity merely by operating under another State's law, the general sue-and-be-sued clause here could not accomplish that result.

In this respect, this case is easier than *College Savings*: There, the federal statute specifically and "unambiguously" referred to state sovereign immunity, providing that state entities taking certain action "'shall not be immune,'" under "'any . . . doctrine of sovereign immunity, from suit in Federal court by any person.'" 527 U.S. at 670, 679 (citation omitted). This language at least "put [States] on notice" that, "if [a] State takes certain action," "Congress intend[ed] to subject it to suits brought by individuals." *Id.* at 680-81. Yet the Court in *College Savings* still concluded that merely taking the specified action did not amount to an express and unequivocal waiver of immunity by the State. But here, the North Carolina Supreme Court found waiver based on the operation of a state statute generally governing nonprofit corporations that does not refer to sovereign immunity at all. *Cf. Sossamon*,

563 U.S. at 289 n.6 ("Liability against nonsovereigns could not put the States on notice that they would be liable in the same manner, absent an unequivocal textual waiver.").[5]

3. The North Carolina Supreme Court's decision also contravenes decisions of other courts addressing analogous waiver issues in the context of tribal sovereign immunity. This Court has held that, as a "matter of federal law," Indian tribes enjoy "immunity from suit traditionally enjoyed by sovereign powers." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788-89 (2014) (citations omitted). And as with state sovereign immunity, "a waiver of [tribal] sovereign immunity 'cannot be implied but must be unequivocally expressed.'" *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (citation omitted).

Applying that rule in a case involving a tribal entity incorporated under state law, the New York Court of Appeals has held that "the mere fact that a tribal corporation . . . is empowered to 'sue and be sued'" under a State's "nonprofit corporation laws" does not satisfy "the requirement of an express and unequivocal waiver of tribal sovereign immunity." *Ransom v. St. Regis Mohawk Educ. & Cmty. Fund,*

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[5] Worse still, the North Carolina Supreme Court agreed that mere sue-and-be-sued language does not necessarily waive sovereign immunity. App. 12a-13a. As this Court has explained, "a State [is not deemed] to have waived its sovereign immunity" when "a statute is susceptible to multiple plausible interpretations, including one preserving immunity." *Sossamon*, 563 U.S. at 287. Here, the court below specifically acknowledged that "a sue and be sued clause 'is not always construed as an express waiver of sovereign immunity.'" App. 12a (citation omitted). That should have been the end of the inquiry as to whether there was any conceivable waiver here.

Inc., 658 N.E.2d 989, 995 (N.Y. 1995). The Minnesota Supreme Court has similarly held that a tribal entity's "registration with the Secretary of State as a foreign corporation" is not "the kind of 'express and unequivocal' waiver of sovereign immunity . . . mandated by the Supreme Court." *Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 297 (Minn. 1996).

The reasoning of these state courts of last resort squarely conflicts with the rule adopted by the North Carolina Supreme Court below. And the fact that these cases arise in the context of tribal immunity only makes the conflict *more* untenable: Unlike tribal sovereign immunity—which is a creature of federal common law—state sovereign immunity is "embedded in the text and structure of the Constitution" itself. *Hyatt*, 139 S. Ct. at 1499; *see Bay Mills*, 572 U.S. at 816 n.1 (Thomas, J., dissenting) ("Unlike the States, Indian tribes 'are not part of this constitutional order,' and their immunity is not guaranteed by it." (citation omitted)). Thus, if anything, a *stricter* standard should apply to waivers of state sovereign immunity. Yet, these state high courts refused to find a waiver of tribal immunity in analogous circumstances on the basis of a sue-and-be-sued clause. These decisions thus demonstrate a clear division among state high courts on the important and recurring question whether, under this Court's precedents, a sovereign entity unequivocally waives its immunity merely by operating under another sovereign's general corporations law.

The multiple conflicts generated by the decision below on a matter of the utmost constitutional importance warrant this Court's review.

B. The North Carolina Supreme Court's Reliance On *Thacker* And *Chattanooga* In Finding Waiver Underscores The Need For Review

The need for this Court's review is heightened by the fact that the North Carolina Supreme Court believed its ruling was compelled by two of this Court's other decisions: *Thacker v. Tennessee Valley Authority*, 139 S. Ct. 1435 (2019), and *Georgia v. City of Chattanooga*, 264 U.S. 472 (1924). *See* App. 1a-2a, 10a-14a. The court's analysis reflects a fundamental misunderstanding of those decisions, neither of which has any bearing on this case. Because those decisions come from this Court, and therefore can be authoritatively addressed only by this Court, it is imperative for this Court to grant review and "dispel the misunderstanding." *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1652 (2018); *see, e.g.*, Stephen M. Shapiro et al., *Supreme Court Practice* § 4.25, at 4-73 to -74 (11th ed. 2019) (collecting cases granting certiorari "to determine whether [a] state court has properly interpreted . . . or extended a prior Supreme Court decision").

1. In *Thacker*, this Court interpreted a federal statute creating a federal agency—the Tennessee Valley Authority (TVA)—which, among other things, provides that "the TVA '[m]ay sue and be sued.'" 139 S. Ct. at 1438-40 (alteration in original) (quoting 16 U.S.C. § 831c(b)). Heeding existing precedent, the Court held that when Congress includes a sue-and-be-sued clause in a federal agency's "organic statute," the clause "serves to waive [the agency's] sovereign immunity" from suit, except when the agency is engaged in certain "governmental" (rather than "commercial") activity. *Id.* at 1440-43.

The North Carolina Supreme Court read *Thacker* broadly to establish the rule that "a sue and be sued clause can act as a waiver of sovereign immunity when a state entity's nongovernmental activity is being challenged." App. 11a. But *Thacker* concerned a federal statute waiving the immunity of a federal entity; thus, the sovereign possessing the immunity (the federal government) was the same sovereign that waived the immunity (also the federal government). The Court repeatedly stressed this point, emphasizing that the "scope of immunity that federal corporations enjoy is up to Congress," which "'has full power to endow such an entity with the [federal] government's immunity from suit'" and "equally" the "power to 'waive that immunity.'" *Thacker*, 139 S. Ct. at 1442 (citations and internal alterations omitted). Thus, a federally enacted "sue-and-be-sued clause serves to waive sovereign immunity *otherwise belonging to an agency of the Federal Government*." *Id.* at 1440 (emphasis added).

This case is fundamentally different. Unlike the statute in *Thacker*, the sue-and-be-sued statute relied on by the court below was not enacted by the sovereign possessing the immunity at issue (Alabama)—it was enacted by a different sovereign (North Carolina). It thus cannot serve as a waiver of Alabama's immunity. And that fact is cemented by the Court's holding in *Hyatt*—decided just a few weeks after *Thacker*—that States cannot simply "apply their own law" to "refuse each other sovereign immunity." 139 S. Ct. at 1498. The Court's review is needed to clarify that *Thacker* does not authorize the North Carolina Supreme Court's sweeping exception to the constitutionally grounded principle of state sovereign immunity.

Nor, contrary to the North Carolina Supreme Court's belief (App. 11a-12a), does *Thacker*'s distinction between "commercial" and "governmental" activity map onto the waiver issue here. *College Savings* rejected any "distinction between commercial and noncommercial state activities" for purposes of the "constitutionally grounded principle of state sovereign immunity." 527 U.S. at 684-86 & n.4. *Thacker* is not to the contrary. It simply noted that, because of the particular statute at issue there (the TVA Act), it was pertinent, as a matter of statutory interpretation, whether the underlying activity was commercial or governmental. 139 S. Ct. at 1443-44. *College Savings* answers the relevant immunity question here—and held that States do not "waive[]" their constitutionally protected immunity by engaging in conduct, even if it "resembles the behavior of 'market participants.'" 527 U.S. at 684.[6]

2. The Court's century-old decision in *Chattanooga* is also inapposite. In that case, Georgia purchased land in Chattanooga, Tennessee for a railroad yard. When Chattanooga sought to condemn Georgia's land to extend one of its streets, Georgia attempted to enjoin the proceedings by invoking its sovereign immunity from suit. 264 U.S. at 478-79.

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[6] *Hyatt*'s overruling of *Nevada v. Hall*, 440 U.S. 410 (1979), supports this point. *Hall* held that Nevada lacked sovereign immunity from suit by California residents who brought a tort claim in California for injuries they allegedly suffered when they were struck by a vehicle driven by a University of Nevada employee while conducting University business in California. *Id.* at 411. In overruling *Hall*, the Court in *Hyatt* in no way suggested that the existence of immunity in that situation might have turned on whether the University employee was operating the vehicle in a "commercial" or "governmental" capacity.

This Court rejected that argument, explaining that Tennessee's "power of eminent domain" "cannot be surrendered" and "is not impaired by the fact that a sister State owns the land." *Id.* at 479-80. Instead, "[l]and acquired by one State in another State is held subject to the laws of the latter and to all the incidents of private ownership"; so, "as to that property," Georgia could "claim no sovereign immunity or privilege in respect to its expropriation." *Id.* at 479-81. The Court made clear that its decision was limited to "the matter of the condemnation of land"—and that it was *not* "decid[ing] the broad question whether Georgia ha[d] consented generally to be sued in the courts of Tennessee in respect of all matters arising out of the ownership and operation of its railroad property in that State." *Id.* at 482.

As several members of this Court recently explained, *Chattanooga* simply reflects a narrow "limitation on the sovereign immunity of States claiming an interest in land located within other States"—a limitation derived from the well-settled "exception to sovereign immunity for actions to determine rights in immovable property." *Upper Skagit*, 138 S. Ct. at 1655 (Roberts, C.J., concurring) (citing *Chattanooga*, 264 U.S. at 480-82); *see id.* at 1660 (Thomas, J., dissenting) (same). The Solicitor General has similarly described *Chattanooga* as a case holding that "when a State purchases real property in another State, it does not have immunity from suit with respect to rights to that real property." U.S. Amicus Br. 28, *Upper Skagit*, *supra* (No. 17-387).

This case, of course, does not present a dispute about the condemnation of land (or even real property more generally), so the exception applied in *Chattanooga* is inapplicable. Yet the North Carolina

Supreme Court reasoned that, under the "holding in [*Chattanooga*]," Alabama "consented to be . . . sued in North Carolina" by "requesting and receiving a certificate of authority to do business in North Carolina, renting a building [in North Carolina], and hiring local staff." App. 13a-15a. That reading of *Chattanooga*—which unmoors its holding from anything having to do with real property or the eminent domain power—is untenable, particularly in light of the Court's explicit refusal in *Chattanooga* to decide any matters "broad[er]" than the "matter of the condemnation of land." 264 U.S. at 482.[7]

3. The North Carolina Supreme Court's expansive reading of *Chattanooga* not only is impossible to square with the Court's decision, but conflicts with decisions of other courts, which have firmly rejected the argument that "[*Chattanooga*] is authority for the proposition that a state, by engaging in a private business within another state, subjects itself to the laws of the latter to the extent that it can no longer claim immunity from suit to enforce the obligations arising therefrom." *Paulus v. South Dakota*, 227 N.W. 52, 55 (N.D. 1929). As these courts explain, *Chattanooga* is confined to the context of "eminent domain" disputes concerning real property.

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[7] The North Carolina Supreme Court's expansive reading of *Chattanooga* also conflicts with *Hyatt*'s overruling of *Hall*. Courts in the *Hall* litigation had also given *Chattanooga* a broad reading, citing it as "reflect[ing] that state sovereignty ends at the state boundary." *Hall v. University of Nevada*, 503 P.2d 1363, 1365 (Cal. 1972) (citing *Chattanooga*, 264 U.S. at 479); *see also Hall*, 440 U.S. at 426 n.29 (citing *Chattanooga*, 264 U.S. at 480). As *Hyatt* makes clear, however, that restrictive understanding of state sovereignty is "contrary to our constitutional design." 139 S. Ct. at 1492.

Id.; *accord, e.g.*, *Cayuga Indian Nation of N.Y. v. Seneca County*, 978 F.3d 829, 836-37 & n.6 (2d Cir. 2020) (explaining that the "exception" "recognized" in *Chattanooga* is limited to "claims to a right or interest in real property"), *cert. denied*, 141 S. Ct. 2722 (2021). The decision below thus not only stretches *Chattanooga* beyond its terms, but does so in a way that directly conflicts with decisions of other courts.

Only this Court can definitively address the meaning of its own precedents. Certiorari is warranted to dispel the notion that *Thacker* and *Chattanooga* actually dictate the expansive waiver rule adopted by the decision below.

C. The Question Presented Is Exceptionally Important And Warrants Review In This Case

1. The square conflicts with this Court's precedent and the decisions of other courts are reason enough to grant review. But certiorari is especially warranted given the extraordinary importance of the question presented—not only to the State of Alabama, but to every State in the Union.

a. "The question whether sovereign immunity has been waived is one of critical importance to any functioning government," and that is "especially true when it comes to suits for money damages." *Robinson v. Department of Educ.*, 140 S. Ct. 1440, 1441 (2020) (Thomas, J., joined by Kavanaugh, J., dissenting from denial of certiorari). Indeed, for States, immunity from private suits not only reflects a "central" component of their "sovereign dignity," but also protects their ability to decide for themselves how to allocate their resources "in accordance with the will of their citizens," rather than the will of their "judgment

creditor[s]" or courts. *Alden v. Maine*, 527 U.S. 706, 715, 750-51 (1999). Each and every "surrender" of that immunity "carries with it substantial costs to the autonomy, the decisionmaking ability, and the sovereign capacity of the States." *Id.* at 750.

Given these "substantial costs," it is not surprising that this Court has frequently granted review in a "wide range of cases" to reinforce the boundaries of state sovereign immunity. *Hyatt*, 139 S. Ct. at 1496 (collecting cases). Indeed, the Court has repeatedly granted certiorari in state sovereign immunity cases even without a lower-court conflict—including in *Hyatt* itself. *See also, e.g.*, *Torres v. Texas Dep't of Pub. Safety*, 142 S. Ct. 2455 (2022); *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244 (2021); *Coleman v. Ct. of Appeals of Md.*, 566 U.S. 30 (2012). And the Court has not hesitated to intervene when, as here, the lower court "misapplied the prevailing standard for finding a waiver of the State's immunity." *Florida Dep't of Health & Rehab. Servs. v. Florida Nursing Home Ass'n*, 450 U.S. 147, 147 (1981) (per curiam); *see also Alabama v. Pugh*, 438 U.S. 781, 782 (1978) (per curiam) (reversing decision against Alabama state entity in light of Alabama's sovereign immunity from suit).

The context in which this immunity dispute arises—one State's courts disregarding another State's immunity—only amplifies the need for this Court's review. The principle of "interstate sovereign immunity" is "'an essential component of federalism'" that recognizes and preserves "[e]ach State's equal dignity and sovereignty under the Constitution." *Hyatt*, 139 S. Ct. at 1497-98 (citation omitted). The decision below reflects a stunning disregard for Alabama's sovereignty by interpreting a North

Carolina statute to "unilaterally impose a waiver of sovereign immunity on Alabama." App. 33a (Barringer, J., dissenting). Indeed, that interpretation overrides an express provision in Alabama's Constitution—the document most closely associated with its state sovereignty—declaring that "Alabama shall *never* be made a defendant in *any* court of law or equity." Ala. Const. art. I, § 14 (emphasis added). That refusal to respect Alabama's state sovereignty warrants this Court's review.

b. The implications of the North Carolina Supreme Court's ruling extend well beyond this case. The decision below effectively eliminates the sovereign immunity of *any* State entity that registers to do business in North Carolina. According to the North Carolina Secretary of State's online database, at least a dozen other public universities from at least eight other States have active registrations as foreign nonprofit corporations in North Carolina.[8] Based on the decision below, every one of those States is deemed to have waived its sovereign immunity from suits against the universities in North Carolina courts.

The decision below, moreover, creates a blueprint for eliminating the constitutional immunity

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[8] *See Business Registration: Search*, N.C. Secretary of State, https://www.sosnc.gov/online_services/search (last visited Feb. 15, 2023). Those registered public universities include the Board of Trustees of the University of Alabama, University of Arizona, Central Michigan University, University of Louisville, University of Maryland, University of Missouri, Missouri University of Science and Technology, University System of New Hampshire, University of South Carolina, Winthrop University, East Tennessee State University, and Western Kentucky University.

recognized in *Hyatt* across the nation. The sue-and-be-sued provision cited by the North Carolina Supreme Court reflects a basic component of nonprofit corporations law. *See, e.g.*, Revised Model Nonprofit Corporation Act § 3.02(1) (1987) (nonprofit corporations may "sue and be sued"); *see also id.* § 15.01(a) (certificate of authority required for foreign nonprofit corporation to "transact business in this state"); *id.* § 15.05(b) (foreign nonprofit corporations with certificate of authority are treated like "a domestic corporation of like character"). Indeed, virtually every State in the Union requires foreign nonprofit corporations to register in the State under statutory schemes that include sue-and-be-sued clauses.[9] The decision below thus lays the

[9] *See* Ala. Code §§ 10-3A-20(2), 10-3A-170, 10-3A-171; Alaska Stat. §§ 10-20-011(2), 10-20-455, 10-20-465; Ariz. Rev. Stat. Ann. §§ 10-3302(1), 10-11501(A), 10-11505(B); Ark. Code Ann. §§ 4-28-209(2), 4-28-221(c); Colo. Rev. Stat. §§ 7-90-801, 7-90-805(2), 7-123-102(1)(a); Conn. Gen. Stat. §§ 33-1036(1), 33-1210(a), 33-1214(b); D.C. Code §§ 29-105.03(1), 29-403.02(1); Del. Code Ann. tit. 8, §§ 122(2), 371(b); Fla. Stat. §§ 617.0302(2), 617.1501(1), 617.1505(2); Ga. Code Ann. §§ 14-3-302(1), 14-3-1501(a), 14-3-1505(b); Haw. Rev. Stat. §§ 414D-52(1), 414D-271(a), 414D-275(b); Idaho Code §§ 30-30-302(1), 30-21-501(c), 30-21-502(a); 805 Ill. Comp. Stat. 105/103.10(b), 105/113.05, 105/113.10; Ind. Code §§ 23-17-1-2, 23-17-4-2(1); Iowa Code §§ 504.302(1), 504.1501(1), 504.1505(2); Kan. Stat. Ann. §§ 17-6102(b), 17-7931; Ky. Rev. Stat. Ann. §§ 14A.9-010(1), 14A.9-050(2), 273.171(2); La. Stat. Ann. §§ 12:207(B)(3), 12:301, 12:306(2); Me. Stat. tit. 13-B, §§ 202(1)(B), 1201(1), 1204; Md. Code Ann., Corps. & Ass'ns §§ 2-103(2), 5-201, 7-202(a); Mass. Gen. Laws ch. 155, § 6, ch. 156D, §§ 15.01(a), 15.05(b); Mich. Comp. Laws §§ 450.2261(1)(b), 450.3011; Minn. Stat. §§ 303.03, 303.09, 317A.161 subd. 3; Miss. Code Ann. §§ 79-11-151(b), 79-11-363(1), 79-11-371(2); Mo. Rev. Stat. §§ 355.131(1), 355.751(1), 355.771(2); Mont. Code Ann. §§ 35-2-118(a), 35-2-820(1), 35-2-824; Neb. Rev. Stat. §§ 21-1928(1), 21-19,146(a), 21-19,150(b);

groundwork for negating the immunity recognized in *Hyatt* throughout the country.

These concerns are real. Even a quick search of various States' Secretary of State websites reveals that dozens of public universities have registered in States across the country—for example, the University of California in the District of Columbia, the University of Florida in Colorado, the University of Michigan in Florida, Maine, New Jersey, and Pennsylvania—all under regimes functionally identical to North Carolina's. Indeed, North Carolina itself has registered its own state entities in other States: UNC Chapel Hill has registered in South Carolina and Colorado; UNC Raleigh has done so in the District of Columbia; and North Carolina State University has done so in Oklahoma. For these

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Nev. Rev. Stat. § 82.121(2)(b); N.H. Rev. Stat. Ann. §§ 293-A:3.02(1), 293-A:15.01(a), 293-A:15.05(b); N.J. Stat. Ann. §§ 15A:3-1(2), 15A:13-3(a); N.M. Stat. Ann. §§ 53-8-5(B), 53-8-64(A), 53-8-65; N.Y. Not-for-Profit Corp. Law §§ 202(a)(2), 1301(a), 1306; N.C. Gen. Stat. §§ 55A-3-02(a)(1), 55A-15-01(a), 55A-15-05(b); N.D. Cent. Code §§ 10-33-21(3), 10-33-127(1); Ohio Rev. Code Ann. §§ 1702.12(A), 1703.27; Okla. Stat. tit. 18, §§ 438.33(A), 1016(2), 1130(B), 1130(D); Or. Rev. Stat. §§ 65.077(1), 65.701(1), 65.714(1); 15 Pa. Cons. Stat. §§ 411(a), 5502(a)(2); 7 R.I. Gen. Laws §§ 7-6-5(2), 7-6-70(a), 7-6-71; S.C. Code Ann. §§ 33-31-302(1), 33-31-1501(a), 33-31-1505(b); S.D. Codified Laws §§ 47-22-53, 47-27-1, 47-27-6; Tenn. Code Ann. §§ 48-53-102(a)(1), 48-25-101(a), 48-25-105(b); Tex. Bus. Orgs. Code Ann. §§ 2.101(1), 9.001, 9.202; Utah Code Ann. §§ 16-6a-302(2)(a), 16-6a-1501(1)(a), 16-6a-1505(2); Vt. Stat. Ann. tit. 11B, §§ 3.02(1), 15.01(1), 15.05(b); Va. Code Ann. §§ 13.1-826(1), 13.1-919(A), 13.1-923(B); Wash. Rev. Code §§ 24.03A.140(1), 24.03A.260, 24.03A.265(1); W. Va. Code Ann. §§ 31E-3-302(1), 31E-14-1401(a), 31E-14-1405(b); Wis. Stat. §§ 181.0302(1), 181.1501(1), 181.1505(2); Wyo. Stat. Ann. §§ 17-19-302(a)(i), 17-19-1501(a), 17-19-1505(b).

entities and many others, the uncertainty created by the decision below will have immediate and serious consequences for all their interstate operations.

c. The public-university context of this case raises especially acute risks of "plac[ing] unwarranted strain" on "the public fisc"—a core concern of state sovereign immunity. *Alden*, 527 U.S. at 750-51. Between 2008 and 2018, State funding for higher education dropped by 16% per student across the board, and by more than 30% in several States (including Alabama). *See* Michael Mitchell et al., Center on Budget & Policy Priorities, *Unkept Promises: State Cuts to Higher Education Threaten Access and Equity* 2-4 (2018).[10] The costs of these cuts are borne not just by the universities, but by their students. To compensate, schools usually first turn to tuition hikes: During the same ten-year period above, tuition rose 36% overall—including by nearly 70% in Alabama, and by much more in some States where spending cuts were greater. *See id.* at 6-8. When tuition hikes fail to bridge the gap, schools must often take more drastic steps, eliminating "faculty positions," "course offerings," and "student services"—and sometimes even shuttering entire campuses. *Id.* at 3.

The decision below will only sharpen the difficult tradeoffs public universities like Troy face every day. It will divert public funds meant for education, research, and community engagement to the defense of private lawsuits. Every dollar spent on litigation is a dollar *not* spent on Troy's educational mission. Even if States would prefer to continue offering such

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[10] https://www.cbpp.org/sites/default/files/atoms/files/10-4-18sfp.pdf.

services, litigation risks that exist solely in other States may force schools like Troy to curtail or abandon out-of-state efforts, to the detriment of students in Alabama and elsewhere, including veterans who would benefit from Troy's offerings.

2. Finally, this case is an ideal vehicle for considering the question presented. Sovereign immunity was the "sole issue" decided by the North Carolina Supreme Court. App. 6a. That issue was fully ventilated by both the divided decision of the North Carolina Supreme Court and the decision of North Carolina Court of Appeals, each of which specifically addressed the question of waiver and reached different conclusions. And that issue is outcome-determinative; reversing the North Carolina Supreme Court's decision will reinstate the court of appeals' judgment affirming the dismissal of this action. Given the clear conflict with this Court's precedents as well as with the decisions of other courts, and the enormous practical significance of those conflicts, this Court's intervention is needed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 16, 2023

APPENDIX

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IN THE SUPREME COURT
OF NORTH CAROLINA

2022-NCSC-107

No. 457PA19-2

Filed 4 November 2022

SHARELL FARMER

v.

TROY UNIVERSITY,
PAMELA GAINEY, and KAREN TILLERY

[879 S.E.2d 124]

EARLS, Justice.

¶ 1 Troy University is an accredited, four-year state university with multiple physical campuses in Alabama that opened an office in Fayetteville, North Carolina, specifically to recruit military students for its on-line programs. When a former North Carolina employee filed suit against Troy University alleging various state tort claims arising out of his employment in Fayetteville and his termination, the University asserted that sovereign immunity barred his claims. Reading two 2019 United States Supreme Court decisions together and consistent with earlier analogous precedent, we conclude that Troy University's actions in registering as a non-profit corporation in North Carolina and engaging in business here subject to the sue and be sued clause of the North Carolina Nonprofit Corporation Act, N.C.G.S. § 55A-3-02(a)(1) (2021), constituted an explicit waiver of its sovereign immunity. *See Franchise Tax Bd. of California v. Hyatt*, 139 S. Ct.

1485 (2019); *Thacker v. Tenn. Valley Auth.*, 139 S. Ct 1435 (2019); *see also Georgia v. City of Chattanooga*, 264 U.S. 472 (1924).

I. Background

¶ 2 Troy University, a state institution, has its primary campus in Troy, Alabama. Although Troy University does not have a campus in North Carolina, it registered with the North Carolina Secretary of State as a nonprofit corporation on 25 September 2006 and leased an office building in Fayetteville, North Carolina, near Fort Bragg, where it conducted its business. Mr. Farmer was hired by Troy University in May 2014 as a recruiter and worked there until 9 September 2015. As part of his employment, Mr. Farmer recruited military personnel from Fort Bragg to take online educational courses that originated from Troy University's main campus in Troy, Alabama. Throughout his employment, he was the top recruiter in the southeastern region of the United States.

¶ 3 Mr. Farmer claims that while employed at Troy University, he was subjected to frequent and ongoing sexual harassment by Pamela Gainey and Karen Tillery, both of whom also worked at the Troy University office in Fayetteville, North Carolina. This harassment included unwanted touching, and making false statements to third parties about Mr. Farmer's sexual relationships with married women and female students. Mr. Farmer further alleges he witnessed students being subjected to sexual harassment, such as one student who was "challenged" by Mses. Gainey and Tillery "to pull his pants down and show them his penis" and another male student whom they called a "faggot."

¶ 4 Around May 2015, Mr. Farmer filed a complaint with both Troy University's Human Resources Department and Troy University's District Director about the sexual harassment he and other males had experienced. Although Mr. Farmer had given Troy University the names of several witnesses, Troy University did not interview any witnesses before deciding that Mr. Farmer's complaint lacked merit.

¶ 5 Mr. Farmer further alleges that, following his May 2015 complaint, Ms. Gainey retaliated against him by increasing his work hours and making his working conditions unreasonably onerous. On 9 September 2015, Mr. Farmer was terminated from his job at Troy University. He was escorted from the building by two police officers, one with a hand on their gun, and the other with a hand on Mr. Farmer's shoulder pushing him forward. He was also threatened with arrest if he ever set foot on the property again. As a result of this treatment, and his termination from Troy University, Mr. Farmer became homeless, could not obtain another job, and suffered serious mental health consequences.

¶ 6 On 24 July 2018, Mr. Farmer filed this suit against Troy University and the individual defendants, Ms. Gainey, and Ms. Tillery. Mr. Farmer asserted claims against Troy University for (1) wrongful discharge from employment in violation of public policy, and (2) negligent retention or supervision of an employee, or both. He also asserted claims against all defendants for intentional infliction of mental and emotional distress and tortious interference with contractual rights. In the alternative, Mr. Farmer also advanced a claim against all defendants alleging a violation of his

rights under the North Carolina Constitution, in the event that the trial court found his other claims were barred by sovereign immunity.

¶ 7 On 3 October 2018, all defendants (Troy University, Ms. Gainey, and Ms. Tillery) filed a motion to dismiss pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted, which the trial court denied. On 6 December 2018, all defendants filed an answer to Mr. Farmer's complaint, generally denying the claims and asserting numerous defenses, including sovereign immunity. On 13 May 2019, the Supreme Court of the United States issued its opinion in *Franchise Tax Board of California v. Hyatt* (*Hyatt III*), a five-to-four decision, and held that "States retain their sovereign immunity from private suits brought in the courts of other States." *Hyatt III*, 139 S. Ct. 1485 (2019). Before *Hyatt III*, the rule was that States were allowed, but not constitutionally required, to extend sovereign immunity to sister States as a matter of comity. *See Nevada v. Hall*, 440 U.S. 410, 425 (1979). Under that rule, Alabama could be sued in North Carolina by a private party if North Carolina chose not to acknowledge Alabama's sovereign immunity. *See id.* at 426–27; *see, e.g. Atl. Coast Conference v. Univ. of Md.*, 230 N.C. App. 429, 440 (2013) (declining to extend sovereign immunity as a matter of comity in a contract action, stating "it does not follow that because we decided to extend comity to the University of Virginia in *Cox* we must, ipso facto, extend sovereign immunity to all the educational institutions of our sister states irrespective of the attendant circumstances.") (citing *Cox v. Roach*, 218 N.C. App. 311, 318 (2012)). *Hyatt III* established that in general, states are required to recognize the sovereign

immunity of other states as a matter of Federal Constitutional law.

¶ 8 Two days after the decision in *Hyatt III*, Troy University filed another motion to dismiss on 15 May 2019 based on sovereign immunity, pursuant to Rules 12(b)(2) and 12(b)(6) of the North Carolina Rules of Civil Procedure, while individual defendants Gainey and Tillery simultaneously sought dismissal of all claims against them based on mootness in light of a stipulation filed on 25 April 2019 in which Mr. Farmer agreed not to seek damages against the individual defendants. On 24 May 2019, defendants filed an amended motion to dismiss, or in the alternative, for judgment on the pleadings on the same grounds. On 3 June 2019, Mr. Farmer filed his response. On 1 July 2019, the trial court entered an order granting the motion to dismiss as to all defendants, citing *Hyatt III.* Mr. Farmer appealed, but the Court of Appeals rejected Mr. Farmer's arguments and affirmed the trial court's order. *Farmer v. Troy Univ.*, 276 N.C. App. 53, 2021-NCCOA-36, ¶52. Mr. Farmer filed a petition for discretionary review pursuant to N.C.G.S. § 7A-31 and this Court granted review.

II. Sovereign Immunity

¶ 9 This Court reviews de novo a motion to dismiss made under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. *E.g. Krawiec v. Manly*, 370 N.C. 602, 606 (2018) (stating standard of review for a 12(b)(6) motion). "[Q]uestions of law regarding the applicability of sovereign or governmental immunity" are also reviewed de novo. *Est. of Long by and through Long v. Fowler*, 378 N.C. 138, 2021-NCSC-81, ¶ 12 (quoting *Wray v. City of*

Greensboro, 370 N.C. 41, 47 (2017)). Furthermore, sovereign immunity may be a defense under Rule 12(b)(2) of the North Carolina Rules of Civil Procedure.[1] In this case, as noted above, the motion and the trial court's order were made pursuant to both Rule 12(b)(2) and Rule 12(b)(6); however the questions of whether there is personal jurisdiction over defendants and whether plaintiff has stated a claim for relief in this particular case both turn on the sole issue of sovereign immunity, and the standard of review is the same for both.[2]

¶ 10 The initial issue in this appeal is whether Mr. Farmer's state tort claims against defendants are barred in North Carolina under the doctrine of sovereign immunity by virtue of Troy University's status in Alabama as a public university. The Court of Appeals concluded that under *Hyatt III*, no suit may be maintained because "States retain their

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[1] "As was the case in *Teachy v. Coble Dairies*, *Inc.* we need not decide whether a motion to dismiss on the basis of sovereign immunity is properly designated as a Rule 12(b)(1) motion or a 12(b)(2) motion." *Est. of Long*, ¶ 12 n.1; *see Teachy v. Coble Dairies, Inc.* 306 N.C. 324, 328 (1982) (explaining this designation is crucial in North Carolina because denial of a Rule 12(b)(2) motion is immediately appealable by statute but the denial of a 12(b)(1) motion is not.) In this case, the motion to dismiss was granted and neither Mr. Farmer's appeal to the Court of Appeals nor this Court was an interlocutory appeal. *Est. of Long*, ¶12 n.1.

[2] The trial court's order does not distinguish any separate ground for dismissal of the individual defendants. Mr. Farmer's appeal only raises the question of whether suit in North Carolina against Troy University is barred by sovereign immunity. Therefore, we have no occasion here to consider the extent to which another state's sovereign immunity bars individual defendants' liability for their intentional torts in North Carolina.

sovereign immunity from private suits brought in the courts of other States." *Farmer*, ¶ 14 (quoting *Hyatt III*, 139 S. Ct. at 1492).

¶ 11 The doctrine of sovereign immunity, establishing that a sovereign cannot be sued without its consent, *see Alden v. Maine,* 527 U.S. 706, 715–16, (1999), was widely accepted in the states at the time the Constitution was drafted. *Hyatt III*, 139 S. Ct. at 1493–1495. As Alexander Hamilton explained in The Federalist No. 81, "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. . . and the exemption is. . . now enjoyed by the government of every State in the Union." The Federalist No. 81, at 487 (Alexander Hamilton) (J. & A. McLean ed., 1788).

¶ 12 Sovereign immunity is enshrined in Alabama's Constitution, which declares that "the State of Alabama shall never be made a defendant in any court of law or equity." *Ex parte Davis*, 930 So.2d 497, 500 (Ala. 2005) (quoting Ala. Const. art I, § 14). "This immunity extends to [the State of Alabama's] institutions of higher learning. *Ala. State Univ. v. Danley*, 212 So.3d 112, 122 (Ala. 2016) (quoting *Taylor v. Troy State University*, 437 So.2d 472, 474 (Ala. 1983)). Moreover, Alabama "State officers and employees, in their official capacities and individually, [also are] absolutely immune from suit when the action is, in effect, one against the State." *Id.* (quoting *Phillips v. Thomas*, 555 So. 2d 81, 83 (Ala. 1989)). This principle is familiar to North Carolina where our state institutions of higher learning are also deemed to be arms of the State protected by sovereign immunity except in certain circumstances. *See Corum v. Univ. of N.C.*, 330 N.C. 761, 786 (1992) (finding that although the University of North

Carolina could typically claim sovereign immunity, the plaintiff had a direct cause of action under the state constitution); *Smith v. State*, 289 N.C. 303, 320 (1976) (holding that the State of North Carolina, including its agencies, consents to be sued for damages for breach of contract whenever it enters into a valid contract).

¶ 13 Before 2019, controlling United States Supreme Court precedent in *Nevada v. Hall* provided that States maintained their sovereign immunity from suit in other state courts as a matter of comity. 440 U.S. 410, 425 (1979). But in 2019, the United States Supreme Court explicitly overturned its holding in *Hall*. *See Hyatt III*, 139 S. Ct. at 1490, 1492 (concluding that *Nevada v. Hall* is "contrary to our constitutional design"). In *Hyatt III*, the Court determined that States retained their sovereign immunity from private suits brought in the courts of other states regardless of comity. *Id.* at 1492. Put another way, the *Hyatt III* decision holds that the United States Constitution does not simply permit a State to grant its sister States immunity from suit but requires it. *See id.* at 1499 (Breyer, J., dissenting). Under *Hyatt III* and the United States Constitution, as a general matter, Troy University is entitled to sovereign immunity from suit without its consent in the state courts of every state in the country. *See Hyatt III*, 139 S. Ct. at 1490 (majority opinion).

III. Waiver of Sovereign Immunity

¶ 14 Next, this Court must determine whether Troy University has explicitly waived its sovereign immunity from suit in North Carolina. As the Court of Appeals noted, any waiver of sovereign immunity must be explicit. *See Sossamon v. Texas*, 563 U.S.

277, 284 (2011); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999). Nonetheless, United States Supreme Court precedent does not support the Court of Appeals' conclusion that a sue and be sued clause cannot constitute an explicit waiver of sovereign immunity. Specifically, we find that when Troy University registered as a nonprofit corporation here and engaged in business in North Carolina, it accepted the sue and be sued clause in the North Carolina Nonprofit Corporation Act and thereby explicitly waived its sovereign immunity from suit in this state.

¶ 15 The North Carolina Nonprofit Corporation Act covers all nonprofit corporations in North Carolina. This act contains a sue and be sued clause. Specifically, the Act provides:

> (a) Unless its articles of incorporation or this Chapter provides otherwise, every corporation has perpetual duration and succession in its corporate name and has the same powers as an individual to do all things necessary or convenient to carry out its affairs, including without limitation, power:
>
> > (1) *To sue and be sued*, complain and defend in its corporate name. . . .

N.C.G.S. § 55A-3-02(a)(1) (emphasis added). It is crucial to our analysis that *Hyatt III* did not involve a sue and be sued clause. *See generally Hyatt III*, 139 S. Ct. 1485. Instead, *Hyatt III* involved an individual who misrepresented his residency as Nevada to avoid paying California more than ten million dollars in taxes. *Id.* at 1490–91. Suspecting Mr. Hyatt's move to Nevada was a sham, the Franchise Tax Board of California conducted an audit, which involved

sharing personal information with business contacts and interviews with Hyatt's estranged family members. *Id.* Mr. Hyatt subsequently sued the Franchise Tax Board of California in Nevada state court for torts he alleged were committed during the audit. *Id.* at 1491. On these facts, the Court overruled *Nevada v. Hall*, 440 U.S. 410 (1979), and held that "States retain their sovereign immunity from private suits brought in the courts of other States." 139 S. Ct. at 1492.

¶ 16 In contrast, in *Thacker v. Tennessee Valley Authority*, 139 S. Ct. 1435 (2019), the Supreme Court addressed a sue and be sued clause and its effect on sovereign immunity. In *Thacker* the sue and be sued clause at issue was embedded in the Tennessee Valley Authority Act of 1933, which states that, "the Tennessee Valley Authority . . . [m]ay sue or be sued in its corporate name." 139 S. Ct. at 1438. There the Court determined the sue and be sued clause "serv[ed] to waive sovereign immunity otherwise belonging to an agency of the Federal Government." *Id.* at 1440 (citing *Loeffler v. Frank*, 486 U.S. 549, 554 (1988)). The Court further explained that "[s]ue and-be- sued- clauses . . . 'should be liberally construed' " and opined that those words "'in their usual and ordinary sense'. . . 'embrace all civil process incident to the commencement or continuance of legal proceedings.'" *Id.* at 1441 (citing *Fed. Hous. Admin. v. Burr*, 309 U.S. 242, 245–246 (1940)). But a sue and be sued clause is not without limits, and the Court explained that although a sue and be sued clause allows suits to proceed against a public corporation's commercial activity, just as these actions would proceed against a private company, suits challenging an entity's governmental activity may be limited. *Id.*

at 1443. In cases involving governmental activities in which a sue and be sued clause is present, immunity will only apply "if it is clearly shown that prohibiting the type of suit at issue is necessary to avoid grave interference with a governmental function's performance." *Id.* (cleaned up). Thus, while *Hyatt III*, 139 S. Ct. at 1492, requires a State to acknowledge a sister State's sovereign immunity, *Thacker* recognizes that a sue and be sued clause can act as a waiver of sovereign immunity when a state entity's nongovernmental activity is being challenged. 139 S. Ct. at 1443.

¶ 17 The parties in this case disagree about how to characterize Troy University's activities. While Troy University asserts its purpose in North Carolina was to continue the governmental function of higher education, Mr. Farmer argues Troy University's activities were commercial in nature because they involved marketing and selling on-line educational programs.[3] While providing students with an education may be a governmental activity for the Alabama Government in Alabama, here Troy University was engaged in the business of recruiting students for on-line education—recruitment that

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[3] It is difficult to posit how, absent a cooperation agreement, memorandum of understanding, or joint venture with a North Carolina State agency, another State legitimately could engage in governmental functions within North Carolina. Likewise, if the conduct at issue is not in some fashion controlled by the citizens of North Carolina, the entity cannot rightly be engaged in a governmental activity because in this State, "all government of right originates from the people." N.C. Const. art. I, § 2. Nevertheless, we do not need to resolve this issue because, for purposes of the motion to dismiss, Troy University's activities are alleged to be business activities.

occurred in North Carolina for students who remained in North Carolina. The complaint clearly alleges that while in North Carolina, Troy University engaged in marketing and recruitment. Mr. Farmer's job was to help Troy University carry out its commercial activities by recruiting military personnel in North Carolina to enroll in and pay for educational courses. Because Troy University engaged in commercial rather than governmental activity, the sue and be sued clause is to be liberally construed. *See Thacker,* 139 S. Ct. at 1441.

¶ 18 In doing so, this Court concludes that when Troy University chose to do business in North Carolina, while knowing it was subject to the North Carolina Nonprofit Corporation Act and able to take advantage of the Act's sue and be sued clause, *see* N.C.G.S. § 55A-3-02, it explicitly waived its sovereign immunity. *Sossamon,* 563 U.S. at 284 (a waiver of sovereign immunity cannot be "implied" and must be "unequivocally expressed").

¶ 19 Troy University argues that under this Court's precedent in *Guthrie v. North Carolina State Ports Authority*, 307 N.C. 522 (1983), a sue and be sued clause "is not always construed as an express waiver of sovereign immunity and is not dispositive of the immunity defense when suit is brought against an agency of the State." *Id.* at 538. But this Court's holding in *Guthrie* is not inconsistent with our ruling today. Simply because something is not "always . . . an express waiver of sovereign immunity" *id.*, does not mean it can never be a waiver of the same. Furthermore, *Guthrie* is distinguishable from the case at bar because *Guthrie* involved the application of the North Carolina Tort Claims Act to a North Carolina agency, the North Carolina State Ports

Authority, while the present case involves a sister state's entity registered as a nonprofit corporation in North Carolina to conduct business. *See id.* at 524.

¶ 20 We also find additional support for Troy University's waiver of sovereign immunity in chapter 55A, article 15 of the North Carolina Nonprofit Corporation Act. Under this portion of the Act any foreign corporation operating in North Carolina must obtain a certificate of authority. N.C.G.S. § 55A-15-01 (2021). "A certificate of authority authorizes the foreign corporation to which it is issued to conduct affairs in [North Carolina] . . ." *Id.* § 55A-15-05(a) (2021). Foreign corporations operating in North Carolina with a valid certificate of authority have "the same but no greater rights and [have] the same but no greater privileges as, and [are] subject to the same duties, restrictions, penalties, and liabilities now or later imposed on, a domestic corporation of like character." *Id.* § 55A-15-05(b) (2021). Taking this provision together with the United States Supreme Court's holding in *Georgia v. City of Chattanooga*, we find that when Troy University obtained a certificate of authority to operate in North Carolina, it waived any sovereign immunity it had and agreed to be treated like "a domestic corporation of like character."[4] *Id.*; *see Georgia v. City of Chattanooga*, 264 U.S. 472 (1924).

¶ 21 In *City of Chattanooga*, the State of Georgia undertook construction of a railroad which ran from

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[4] Here a "domestic corporation of like character" is a private university established through the Secretary of State's office, as a nonprofit corporation, which does not enjoy sovereign immunity. State universities are incorporated by state statute. *See e.g.*, N.C.G.S. § 116-3 (2021).

Atlanta to Chattanooga, Tennessee. 264 U.S. at 478. In furtherance of the project, Georgia purchased approximately eleven acres, which at the time were located in the outskirts of Chattanooga, to use as a railroad yard. *Id.* As the city grew, there was a demand for extending one of the principal city streets through Georgia's railroad yard. *Id.* at 479. The City began legal proceedings to condemn the land and named the State of Georgia as a defendant. Georgia contended that it had never consented to be sued in Tennessee courts and that sovereign immunity applied. *Id.* The Court determined that by "acquir[ing] land in another State for the purpose of using it in a private capacity, Georgia [could] claim no sovereign immunity." *Id.* at 479–480. Specifically, when Tennessee granted Georgia permission to acquire and use the land, and Georgia accepted the terms of the agreement, the State of Georgia consented to be made a party to condemnation proceedings. *Id.* at 480, 44 S.Ct. 369.

¶ 22 The same is true in this case. By requesting and receiving a certificate of authority to do business in North Carolina, renting a building here, and hiring local staff, Troy University, as an arm of the State of Alabama, consented to be treated like "a domestic corporation of like character," and to be sued in North Carolina. *Id.* § 55A-3-02(a)(1). N.C.G.S. § 55A-15-05.

¶ 23 The Court of Appeals also relied on this Court's precedent in *Evans ex. rel. Horton v. Housing Authority of Raleigh,* 359 N.C. 50 (2004), to support its conclusion that governmental immunity bars Mr. Farmer's suit against Troy University, however, that case does not apply here because it involved a different immunity question. In *Evans* this Court examined whether a municipal corporation could be

sued in state court and explained that "[t]he State's sovereign immunity applies to both its governmental and proprietary functions, while the more limited governmental immunity covers only the acts of a municipality or a municipal corporation committed pursuant to its governmental functions." 359 N.C. at 53 (citing *Guthrie*, 307 N.C. at 533). But here the question is to what degree does sovereign immunity apply to another State engaged in business in North Carolina. This case involves actions by a State other than North Carolina, while *Evans* involved the actions of a North Carolina municipal entity, the Housing Authority of the City of Raleigh. 359 N.C. at 51 (addressing the Housing Authority's failure to repair a property). Therefore, *Evans* does not apply and does not foreclose the conclusion we reach here, namely, that Troy University has explicitly waived sovereign immunity by engaging in business as a nonprofit corporation registered to do business in this state.

¶ 24 Lastly, Mr. Farmer argued in the alternative that, when no other remedy exists, under the Tenth Amendment to the United States Constitution and article I, section 2 of the North Carolina Constitution, the State has the sovereign right to protect its citizens from sexual harassment and the other torts alleged in his complaint. Because we hold that Troy University waived its sovereign immunity and Mr. Farmer can pursue his claims against defendants, there is no need for this Court to address plaintiff's asserted violation under the North Carolina Constitution.

IV. Conclusion

¶ 25 While the United States Constitution requires States to afford one another sovereign immunity from private suits brought in other states, this privilege can be explicitly waived through a sue and be sued clause. *See Hyatt III*, 139 S. Ct. at 1492 (2019); *Thacker*, 139 S. Ct. at 1440 (2019). When Troy University entered North Carolina and conducted business in North Carolina, while knowing it was subject to the North Carolina Nonprofit Corporation Act and its sue and be sued clause, it explicitly waived its sovereign immunity. *See* N.C.G.S. § 55A-3-02. Additionally, by requesting and receiving a certificate of authority to do business in North Carolina, Troy University consented to be treated like "a domestic corporation of like character" and therefore to be sued in North Carolina. *Id.* § 55A-15-05; *see City of Chattanooga*, 264 U.S. at 480. Accordingly, concluding that the doctrine of sovereign immunity does not bar Mr. Farmer's suit against these defendants, we reverse the Court of Appeals decision and remand this case to that court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Justice BERGER concurring.

¶ 26 The founding fathers understood that state sovereign immunity was not absolute. In Federalist 81, Alexander Hamilton stated that "[i]t is inherent in the nature of sovereignty, not to be amendable to the suit of an individual *without its consent.*" The Federalist No. 81 at 422 (Alexander Hamilton) (Gideon ed. 2001). The distinction between a governmental function and a commercial function plays an important role in clarifying the extent of Troy University's consent to be sued in North Carolina. I concur in the result reached by the majority but write separately because I would have decided the case with greater emphasis on the proprietary actions by Troy University. *See Georgia v. City of Chattanooga* 264 U.S. 472, 44 S. Ct. 369, 68 L. Ed. 796 (1924), and *Thacker v. Tennessee Valley Authority,* 139 S. Ct. 1435, 203 L. Ed. 2d 668 (2019).

¶ 27 At the founding, "both Federalists and Antifederalists saw the lack of state suability in the courts of sister states as the beginning point of their arguments," thus it was assumed that a state could not be haled into the court of another state without consent. Ann Woolhandler, *Interstate Sovereign Immunity*, 2006 Sup. Ct. Rev. 249, 259; *see also Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1494, 203 L. Ed. 2d 768, 776 (2019). The adoption of the Eleventh Amendment displayed that the "the Constitution was understood, in light of its history and structure, to preserve the States' traditional immunity from private suits." *Hyatt*, 139 S. Ct. at 1496, 203 L. Ed. 2d at 778 (quoting *Alden v. Maine*, 527 U.S. 706, 724, 119 S. Ct. 2240, 2252, 144 L. Ed. 2d 636 (1999)). However, state sovereign immunity

may be waived by consent. *Principality of Monaco v. Mississippi*, 292 U.S. 313, 321, 54 S. Ct. 745, 747 (1934).

¶ 28 The U.S. Supreme Court held in *Hyatt* that "States retain their sovereign immunity from private suits brought in the courts of other States." 139 S. Ct. at 1492, 203 L. Ed. 2d at 774. Further, the Court concluded that "the Constitution assumes that the States retain their sovereign immunity except as otherwise provided[;] it also fundamentally adjusts the States' relationship with each other and curtails their ability, as sovereigns, to decline to recognize each other's immunity." *Id. at* 1493, 203 L. Ed. 2d at 775. In short, a nonconsenting state cannot be sued by a private party in the courts of a different state. *See id.* at 1490, 203 L. Ed. 2d at 772. Thus, for a suit against a state to be maintained in the forum of a sister state, there must be consent to be sued.

¶ 29 In *Thacker*, the United States Supreme Court addressed how far a waiver of sovereign immunity extends when that waiver is premised upon consent via a sue-and-be-sued clause in a statute. 139 S. Ct. at 1438–39, 203 L. Ed. 2d at 672–73. *Thacker* involved the Tennessee Valley Authority (TVA). *Id.* at 1438–39, 203 L. Ed. 2d at 672–73. When Congress created the TVA by federal statute, it "decided . . . that the TVA could 'sue and be sued in its corporate name.'" *Id.* at 1439, 203 L. Ed. 2d at 673 (citing 16 U.S.C. § 831c(b)). To determine the extent of the sovereign immunity waiver, the Court looked to the distinctions between commercial and governmental functions, reasoning that "a suit challenging a commercial act will not 'gravel[y]'—or, indeed, at all—interfere with the 'governmental functions.'" *Id.* at 1442–44, 203 L. Ed. 2d at 677 (quoting *Federal*

Housing Administration v. Burr, 309 U.S. 242, 245, 60 S. Ct. 488, 84 L. Ed. 724 (1940)).

¶ 30 The Court concluded that "suits based on a public corporation's *commercial* activity may proceed as they would against a private company; only suits challenging the entity's governmental activity may run into an implied limit on its sue-and-be-sued clause." *Id.* at 1443, 203 L. Ed. 2d at 677. In short, the Court decided that the statute subjected the TVA to suit challenging its commercial activities, putting the TVA "in the same position as a private corporation." *Id.* at 1439, 203 L. Ed. 2d at 672–73. The Court did not decide whether the TVA might still have immunity from suits involving its engagement in governmental activities. *Id.* at 1439, 203 L. Ed. 2d at 673. Thus, the role of commercial versus governmental functions defines the scope of the waiver of sovereign immunity.

¶ 31 Similarly, *Georgia v. City of Chattanooga* describes the State of Georgia's engagement in commercial functions, and as such, *City of Chattanooga* is helpful in analyzing the case before us. In that case, the State of Georgia was engaged in proprietary activities related to construction of a railroad. 264 U.S. at 478, 44 S. Ct. at 369. In doing so, Georgia acquired land in the outskirts of the City of Chattanooga to locate a railroad yard. *Id.* at 478, 44 S. Ct. at 369. Tennessee sought to use its eminent domain power to condemn the land, and Georgia asserted that Tennessee could not interfere with its possession in the land because "Georgia ha[d] never consented to be sued in the courts of Tennessee." *Id.* at 479, 44 S. Ct. at 370.

¶ 32 The U.S. Supreme Court determined that "[t]he sovereignty of Georgia was not extended into

Tennessee. Its enterprise in Tennessee is a *private undertaking*. It occupies the same position there as does a *private corporation* authorized to own and operate a railroad, and, as to that property, it cannot claim sovereign privilege or immunity." *Id.* at 481, 44 S. Ct. 369, 370 (emphases added). The Court stated that "[h]aving acquired land in another state *for the purpose of using it in a private capacity*, Georgia can claim no sovereign immunity or privilege in respect of its expropriation." *Id.* at 479–80, 44 S. Ct. at 370 (emphasis added).

¶ 33 The Court also concluded that "[t]he terms on which Tennessee gave Georgia permission to acquire and use the land and Georgia's acceptance amounted to consent that Georgia may be made a party to condemnation proceedings." *Id.* at 480, 44 S. Ct. at 370. A Tennessee state statute provided that the State of Georgia would receive all the same "rights, privileges and immunities with the same restrictions" which are given to the Nashville & Chattanooga Company. *Id.* at 481, 44 S. Ct. at 370. In addition, a decision of the Court of Chancery Appeals of Tennessee determined that included "among the rights and restrictions [is] the right to sue and be sued," and state sovereignty was not offended because the relief only applied to Georgia's "contracts as to the operation of the union depot situated in the city of Chattanooga." *Id.* at 482, 44 S. Ct. at 371 (quoting *E. Tenn., Va. & Ga. Ry. V. Nashville, Chattanooga & St. Louis Ry.*, 51 S.W. 202 (Tenn. Ct. Ch. App. 1897)). The U.S. Supreme Court found that the decision of the Tennessee appeals court bolstered the claim that Georgia consented to sue and be sued in Tennessee with respect to its railroad property. *Id.* at 482, 44 S. Ct. at 371.

¶ 34 The Court focused on the "private" and "proprietary" rights of Georgia when it entered Tennessee to do business and rejected Georgia's contention that it was entitled to sovereign immunity in its commercial activities. *Id.* at 480–81, 44 S. Ct. at 370.

¶ 35 Both *Thacker* and *City of Chattanooga* support the conclusion that when a state engages in a proprietary function in another state and consents by agreement to the sister state's terms of doing business, it consents to suit and waives its sovereign immunity for those commercial activities. It follows that a state which engages in private enterprise activity and consents to the sister state's terms of doing business, should be treated like a similarly situated private corporation for its commercial activities while retaining immunity for its governmental functions.

¶ 36 Here, Alabama did not and has not waived all sovereign immunity in North Carolina. But as to its business activities in North Carolina related to the operation of Troy University for marketing and recruiting, Alabama has waived sovereign immunity.

¶ 37 Troy University sought and obtained a certificate of authority under the North Carolina Nonprofit Corporation Act, rented a building, and hired staff in order to conduct business in North Carolina. Troy University subsequently engaged in marketing and recruiting activities in North Carolina to encourage potential students to pay fees and attend online courses. Troy University chose to engage in a "private undertaking" in a sister state.

¶ 38 To operate in the State of North Carolina, Troy University had to apply for and be granted a

certificate of authority to conduct its business activities. The North Carolina Nonprofit Corporation Act provides that a foreign corporation operating with a valid certificate of authority to conduct affairs in North Carolina "has the same but no greater rights and the same but no greater privileges as, and is subject to the same duties, restrictions, penalties, and liabilities now or later imposed on, a domestic corporation of like character." N.C.G.S. § 55A-15-05(b) (2021). Similar in effect to the statute in *City of Chattanooga*, this statute declares that Troy University, as a foreign, nonprofit corporation within North Carolina, will receive the same rights, privileges, duties, restrictions, penalties, and liabilities as a similarly situated private corporation. Among the general powers afforded to nonprofit corporations within North Carolina is the power "[t]o sue and be sued." N.C.G.S. § 55A-3-02(a).

¶ 39 Having affirmatively acted to obtain the benefit of conducting business in North Carolina, and operating pursuant to the North Carolina Nonprofit Corporation Act, Troy University has consented to suit in this state for its commercial activities. Alabama has thus waived sovereign immunity related to the commercial activities of Troy University.

Justice BARRINGER dissenting.

¶ 40 At issue in this case is whether a private party can sue a public university of the State of Alabama in the courts of this State without Alabama's consent. The pivotal question before us is what does our Federal Constitution say about the sovereign immunity of a state when sued in a sister state. The United States Supreme Court has spoken. Nonetheless, this Court misunderstands the extent of the holding in *Franchise Tax Board of California v. Hyatt* (*Hyatt III*), 139 S. Ct. 1485 (2019), thus rendering a misguided departure from the United States Constitution, as well as our own precedent. Alabama's constitution explicitly states that Alabama cannot be sued. Ala. Const. art. I, § 14. And further, Alabama has not consented to be haled into court in this State. I respectfully dissent.

I. Background

¶ 41 Troy University is a public university in the State of Alabama with its main campus located in Troy, Alabama. Troy University is organized and exists under the laws of the State of Alabama. Ala. Code § 16-56-1 (2022). Plaintiff was employed by Troy University, although his office was in Cumberland County, North Carolina. Troy University hired plaintiff to travel "throughout the southeastern United States to recruit students."

¶ 42 Plaintiff was allegedly harassed by other employees of Troy University at its Cumberland County office. After plaintiff reported the harassment "to the appropriate officials at Troy University," he was allegedly suspended and then fired in retaliation. Plaintiff sued Troy University solely seeking

monetary damages in Superior Court, Cumberland County, alleging (1) wrongful discharge from employment in violation of public policy, (2) intentional infliction of mental and emotional distress, (3) tortious interference with contractual rights, (4) negligent retention and/or supervision of an employee, and (5) a state constitutional claim under Article I, Section 19.

¶ 43 Troy University filed a motion to dismiss under Rules 12(b)(2) and 12(b)(6) arguing that, under the recent Supreme Court of the United States decision in *Franchise Tax Board of California v. Hyatt* (*Hyatt III*), 139 S. Ct. 1485 (2019), Troy University, as a public education institution of the State of Alabama, was immune from suit based on sovereign immunity. The trial court agreed and allowed the motion. After plaintiff appealed, the Court of Appeals affirmed the trial court's dismissal of plaintiff's claims. *Farmer v. Troy Univ.*, 276 N.C. App. 53, 2021-NCCOA-36, ¶ 1.

II. Standard of Review

¶ 44 "Our review of the grant of a motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure is de novo." *Bridges v. Parrish*, 366 N.C. 539, 541 (2013). In reviewing a motion to dismiss, this Court considers "whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Id.* (quoting *Coley v. State*, 360 N.C. 493, 494 (2006)). "Questions of statutory interpretation are questions of law and are reviewed de novo." *In re D.S.*, 364 N.C. 184, 187 (2010). "We review constitutional issues de novo." *State v. Whittington*, 367 N.C. 186, 190 (2014) (italics omitted).

III. Analysis

¶ 45 The Constitution of Alabama states "[t]hat the State of Alabama shall never be made a defendant in any court of law or equity." Ala. Const. art. I, § 14. Unlike other states which establish sovereign immunity by statute or common law, Alabama's sovereign immunity is enshrined in its constitution. Ala. Const. art. I, § 14. "This immunity extends to [Alabama's] institutions of higher learning." *Taylor v. Troy State Univ.*, 437 So. 2d 472, 474 (Ala. 1983) (citations omitted). In this case, Troy University is a public education institution of the State of Alabama. Ala. Code § 16-56-1. Yet plaintiff argues that either *Hyatt III* does not apply to Alabama in this instance or that Alabama consented to be sued in North Carolina. Neither contention is persuasive.

A. *Hyatt III* controls the outcome of this case.

¶ 46 In *Hyatt III*, the Supreme Court of the United States held that a State may not "be sued by a private party without its consent in the courts of a different State." 139 S. Ct. at 1490. Similar to this case, Hyatt sued the Franchise Tax Board of California in Nevada state court for intentional torts he alleges the agency committed during an audit. *Id.* at 1490–91; *see also Franchise Tax Bd. of California v. Hyatt* (*Hyatt I*), 538 U.S. 488, 491 (2003). The trial court initially entered a judgment awarding Hyatt over $490 million. *Hyatt III*, 139 S. Ct. at 1491. However, this judgment was eventually overturned based on California's sovereign immunity. *Id.* at 1499.

¶ 47 The facts of *Hyatt III* are clearly analogous to the present case. Both defendants, Franchise Tax Board of California and Troy University, claimed

sovereign immunity in causes of actions arising from alleged intentional torts. *Id.* at 1491. Hyatt moved from California to Nevada in 1991, thereafter claiming Nevada as his primary residence on his 1991 and 1992 tax returns. *Id.* at 1490. In 1993, the Franchise Tax Board of California "launched an audit to determine whether Hyatt underpaid his 1991 and 1992 state income taxes by misrepresenting his residency." *Id.* at 1490–91. This investigation led to Hyatt's intentional tort claims. *Id.*

¶ 48 Also significant, *Hyatt III* explicitly overruled *Nevada v. Hall*. *Id.* at 1490 ("We . . . overrule our decision . . . in *Nevada v. Hall*.") (citation omitted). The facts in *Hall* are similar to those presented by this case. The respondents in *Hall* were California residents who brought a tort claim in California after they suffered severe injuries in an automobile collision in that state. The other driver was a University of Nevada employee. *Hall*, 440 U.S. 410, 411 (1979). Before the California state courts and ultimately the Supreme Court of the United States, Nevada argued that the Full Faith and Credit Clause of the United States Constitution mandated that California recognize the Nevada statute governing Nevada's sovereign immunity in tort actions. *Id.* at 412–14. Nevada's statute governing sovereign immunity limited "any award in a tort action against the State pursuant to its statutory waiver of sovereign immunity" to a maximum of $25,000. *Id.* at 412. The Supreme Court rejected Nevada's argument, holding that when sovereign immunity or statutory limitations on waivers of sovereign immunity are "obnoxious to [ ] statutorily based policies of jurisdiction," a State is not required

to recognize another State's sovereign immunity or limitations on waiver. *Id.* at 424.

¶ 49 The Supreme Court overruled "this erroneous precedent" in *Hyatt III*, 139 S. Ct. at 1492. *Hyatt III* reasoned that "*Hall* is contrary to our constitutional design and the understanding of sovereign immunity shared by the States that ratified the Constitution." *Id.* In reaching its conclusion, the Supreme Court performed an historical analysis of sovereign immunity and determined that "[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 1497. In other words, whether to apply sovereign immunity is not a choice based on public policy. It is a constitutional mandate.

¶ 50 Just as "*Hall* is irreconcilable with our constitutional structure," *id.* at 1499, so too is this Court's application of sovereign immunity. In the instant case, we have claims similar to those in *Hall*. The plaintiffs in *Hall* sued the University of Nevada after one of its employees tortiously "drove across the dividing strip and collided head-on with the plaintiffs' vehicle." Brief for Respondents, *Hall*, 440 U.S. 410 (No. 77-1337), 1978 WL 206995 (U.S.), at *4. The employee was conducting business in California, "pick[ing] up some television parts." *Id.* Similarly, plaintiff here is suing Alabama for the tortious actions of employees of a public university allegedly conducting business in North Carolina.

¶ 51 The Court here is making the same analytical mistake made in *Hall* that the Supreme Court rejected. Rather than being based on the weight of public policy, *see Hall*, 440 U.S. at 425–27, sovereign immunity applies because of "our

constitutional structure and . . . the historical evidence showing a widespread preratification understanding that States retained immunity from private suits, both in their own courts and in other courts," *Hyatt III*, 139 S. Ct. at 1499.

¶ 52 *Hyatt III* controls the outcome of this case. *Id.* at 1492 ("States retain their sovereign immunity from private suits brought in the courts of other States."). Alabama's sovereign immunity is enshrined in its constitution. Ala. Const. art. I, § 14 ("[T]he State of Alabama shall never be made a defendant in any court of law or equity."). Accordingly, Alabama carries its sovereign immunity into the courts of North Carolina.

¶ 53 *Hyatt III* grounded its reasoning in the "historical understanding of state immunity." *Id.* at 1498. According to *Hyatt III*, "at the time of the founding, it was well settled that States were immune under both the common law and the law of nations." *Id.* at 1494; *see also id.* at 1499 ("[T]he historical evidence show[s] a widespread preratification understanding that States retained immunity from private suits, both in their own courts and in other courts.").

¶ 54 A review of the founders' understanding of sovereign immunity anchors it not in interstate commerce, but rather in the ability of private citizens to recover money from a State's treasury. As Hamilton wrote in Federalist 81:

> The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will. To what

> purpose would it be to authorize suits against states for the debts they owe? How could recoveries be enforced? It is evident that it could not be done without waging war against the contracting state; and to ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the state governments, a power which would involve such a consequence, would be altogether forced and unwarrantable.

The Federalist No. 81, at 318–19 (Alexander Hamilton) (J. & A. McLean ed., 1788). Similarly, in his now favorably cited[1] dissent in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), Justice Iredell reviewed the status of sovereign immunity under the common law at the time of the founding and wrote "there is no doubt that neither in the State now in question, nor in any other in the *Union*, any particular Legislative mode, authorizing a compulsory suit for the recovery of money against a State, was in being either when the Constitution was adopted, or at the time the judicial act was passed." *Id.* at 434–35 (Iredell, J., dissenting). Although the Court here properly acknowledges that Alabama cannot be haled into a North Carolina court without its consent, they do so without fully understanding the extent of the holding in *Hyatt III*. Additionally,

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[1] *See, e.g.*, *Alden v. Maine*, 527 U.S. 706, 715–16, 720, 727 (1999); *Hans v. Louisiana*, 134 U.S. 1, 14 (1890) ("[L]ooking at the subject as Hamilton did, and as Mr. Justice Iredell did, in the light of history and experience and the established order of things, the views of [Hamilton and Iredell] were clearly right,—as the people of the United States in their sovereign capacity subsequently decided.").

this Court improperly held that Alabama waived its sovereign immunity.

B. Alabama did not waive its sovereign immunity.

1. Alabama's Constitution prohibits waiver.

¶ 55 As an initial matter, the mere fact that Alabama was doing business in North Carolina does not cause waiver of its immunity under *Hyatt III*. As noted above, *Hyatt III* overruled *Nevada v. Hall*, 440 U.S. 410 (1979). *See Hyatt III*, 139 S. Ct. at 1490, 1492 ("States retain their sovereign immunity from private suits brought in the courts of other States."). Alabama's Constitution expressly provides "[t]hat the State of Alabama shall never be made a defendant in any court of law or equity." Ala. Const. art. I, § 14. Since there is no clear indication that Alabama has consented to be haled into North Carolina's courts, this Court violates the Constitution of the United States by subjecting Alabama to its jurisdiction.

2. North Carolina law strictly construes waiver.

¶ 56 Furthermore, under North Carolina law, when a statute grants a State entity the power to "sue and be sued" that power "standing alone, does not necessarily act as a waiver of immunity." *Evans ex. rel. Horton v. Hous. Auth. of Raleigh*, 359 N.C. 50, 56 (2004); *accord College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676 (1999) ("[A] state does not . . . consent to suit in federal court merely by stating its intention to 'sue and be sued.'"). This interpretation is predicated on the principle that "[w]aiver of sovereign immunity may not be lightly inferred and State statutes waiving this immunity, being in derogation of the sovereign

right to immunity, must be strictly construed." *Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 537–38 (1983); *see also Orange County v. Heath*, 282 N.C. 292, 296 (1972) ("The concept of sovereign immunity is so firmly established that it should not and cannot be waived by indirection or by procedural rule. Any such change should be by plain, unmistakable mandate of the lawmaking body."); *accord Petty v. Tenn.-Mo. Bridge Comm'n*, 359 U.S. 275, 276 (1959) ("The conclusion that there has been a waiver of immunity will not be lightly inferred."). Accordingly, by "strictly construing" statutes passed by the General Assembly enabling a sovereign entity to "sue and be sued" and refusing to "lightly infer" a waiver of immunity, North Carolina courts have repeatedly held that such language alone does not waive a sovereign entity's immunity. *Evans ex rel. Horton*, 359 N.C. at 56–57; *Guthrie*, 307 N.C. at 537–38; *Jones v. Pitt Cnty. Mem'l Hosp., Inc.*, 104 N.C. App. 613, 616–17 (1991); *Truesdale v. Univ. of N.C.*, 91 N.C. App. 186, 192 (1988), *overruled in part on other grounds by Corum v. Univ. of N.C.*, 330 N.C. 761, 771 n.2 (1992). Plaintiff points to no North Carolina cases holding otherwise.

¶ 57 Plaintiff argues that *Georgia v. City of Chattanooga*, an eminent domain case, should control the sovereign immunity analysis in this case. 264 U.S. 472 (1924). However, *City of Chattanooga*, decided long before *Hyatt III*, addresses property issues, not an intentional tort action seeking money from a state's treasury, as in the present case. *See id.* at 478–80. Also, by my reading of *Hyatt III*, the Supreme Court did not address the distinction between commercial and governmental activity.

However, this door may have been left open by the Supreme Court.

¶ 58 Likewise, *Thacker v. Tennessee Valley Authority* is also distinguishable. 139 S. Ct. 1435 (2019). *Thacker* interpreted the *United States Code* to determine whether Congress, by statute, waived sovereign immunity when it established the Tennessee Valley Authority. *Id.* at 1438. In *Thacker*, the Court analyzed how federal law, not state law, views a statutory sue and be sued clause. *Id.* at 1438–39. Additionally, the Tennessee Valley Authority is a federally created agency, not a sovereign state. *Id.* at 1438; 16 U.S.C. § 831.

¶ 59 It is fundamental to our federal system that "[i]n the interpretation of the Constitution of the United States, the Supreme Court of the United States is the final arbiter," and "any provision of the Constitution or statutes of North Carolina in conflict therewith must be deemed invalid." *Constantian v. Anson County*, 244 N.C. 221, 229 (1956); *see also* U.S. Const. arts. III, VI. Alabama's immunity from suit is predicated on the United States Constitution. *Hyatt III*, 139 S. Ct. at 1498. ("Interstate sovereign immunity is . . . integral to the structure of the Constitution.").

¶ 60 As a result, this Court cannot unilaterally impose a waiver of sovereign immunity on Alabama. Rather, Alabama must consent to be haled into North Carolina courts. While North Carolina's sovereign immunity from suits in this State may be judge-made law, *Corum*, 330 N.C. at 786, according to *Hyatt III*, Alabama's immunity from suit in this State is based on the United States Constitution itself.

IV. Conclusion

¶ 61 The United States Supreme Court has held that the United States Constitution renders Alabama immune from suits by private parties in this State unless Alabama consents to waive its immunity. *Hyatt III*, 139 S. Ct. at 1490. Plaintiff has presented no persuasive arguments that this case somehow escapes that rule. Moreover, there is no clear indication that Alabama has waived its immunity. Therefore, to hold that Alabama has waived its immunity, through reasoning that is attenuated at best and certainly does not constitute a "plain, unmistakable mandate of the lawmaking body," *Heath*, 282 N.C. at 296, violates both the United States Constitution and North Carolina's own standard for waiver of sovereign immunity. Accordingly, I respectfully dissent.

Chief Justice NEWBY joins in this dissenting opinion.

IN THE SUPREME COURT
OF NORTH CAROLINA

No. 457PA19-2

SHARELL FARMER

v.

TROY UNIVERSITY,
PAMELA GAINEY, and KAREN TILLERY

[863 S.E.2d 775]

ORDER

Plaintiffs petition for discretionary review is decided as follows: Allowed as to Issue Nos. 1 and 2; denied as to Issue Nos. 3 and 4.

By order of the Court in conference, this the 27th day of October 2021.

IN THE COURT OF APPEALS
OF NORTH CAROLINA

2021-NCCOA-36

No. COA19-1015

Filed 2 March 2021

Cumberland County, No. 18 CVS 5146

SHARELL FARMER, Plaintiff

v.

TROY UNIVERSITY, PAMELA GAINEY, AND KAREN TILLERY, Defendants.

[855 S.E.2d 801]

ZACHARY, Judge.

¶ 1 Plaintiff Sharell Farmer appeals from an order granting Defendants' motion to dismiss pursuant to Rules 12(b)(2) and (6) of the North Carolina Rules of Civil Procedure, on the grounds of interstate sovereign immunity. After careful review, we affirm the trial court's order.

Background

¶ 2 From May 2014 until 9 September 2015, Plaintiff was employed as a college recruiter for Defendant Troy University. Troy University is a public university, incorporated and primarily located in the State of Alabama. However, Troy University has a recruiting office in Fayetteville, North Carolina, out of which Plaintiff was based, and where Plaintiff worked with Defendants Pamela Gainey and Karen Tillery (the "individual Defendants").

¶ 3 Plaintiff alleges that, while he was employed by Troy University, the individual Defendants committed several acts of "sexual harassment and fraudulent conduct" against him, and that such conduct began "his first day on the job" and continued "throughout his employment," with the individual Defendants making "frequent sexually suggestive remarks to" him. Plaintiff reported the individual Defendants' actions to "the appropriate officials" at Troy University, but following his complaint, Defendant Gainey "immediately retaliated" and suspended him from work for two days for poor performance. On 9 September 2015, Defendant Gainey terminated Plaintiff's employment with Troy University.

¶ 4 On 24 July 2018, Plaintiff filed suit against Troy University and the individual Defendants. Plaintiff asserted claims against Troy University for (1) wrongful discharge from employment, in violation of public policy; and (2) negligent retention and/or supervision of an employee. Plaintiff asserted claims against all Defendants for (1) intentional infliction of mental and emotional distress; and (2) tortious interference with contractual rights. In the event that the trial court determined that his claims were barred by the doctrine of sovereign immunity, Plaintiff also asserted an alternative claim against all Defendants, alleging a violation of his rights under the North Carolina Constitution.

¶ 5 On 3 October 2018, Defendants filed a motion to dismiss pursuant to Rule 12(b)(6) for failure to state a claim, which the trial court denied by order entered on 9 November 2018. On 6 December 2018, Defendants filed their answer to Plaintiff's complaint, generally denying Plaintiff's claims and asserting

several defenses, including the defense of sovereign immunity.

¶ 6 On 13 May 2019, the Supreme Court of the United States filed its opinion in *Franchise Tax Board of California v. Hyatt* ("*Hyatt III*"), holding that "States retain their sovereign immunity from private suits brought in the courts of other States." ___ U.S. ___,___, 203 L. Ed. 2d 768, 774 (2019). On 15 May 2019, citing *Hyatt III*, Defendants filed another motion to dismiss on the grounds of interstate sovereign immunity, pursuant to Rules 12(b)(2) (lack of personal jurisdiction) and (6) (failure to state a claim). In the alternative, Defendants moved for judgment on the pleadings, pursuant to Rule 12(c). On 24 May 2019, Defendants filed an amended motion to dismiss, or in the alternative, for judgment on the pleadings. On 3 June 2019, Plaintiff filed his response.

¶ 7 On 1 July 2019, the trial court entered its order granting Defendants' motion to dismiss pursuant to Rules 12(b)(2) and (6), citing *Hyatt III* in support of its ruling. Plaintiff timely filed his notice of appeal.

Discussion

¶ 8 Plaintiff asserts that the trial court erred in granting Defendants' motion to dismiss. Specifically, Plaintiff argues that (1) the doctrine of interstate sovereign immunity does not apply in this case; (2) Defendants waived sovereign immunity when Troy University registered in North Carolina as a nonprofit corporation; (3) *Hyatt III* must be construed prospectively, not retroactively; (4) Plaintiff's claim under the North Carolina Constitution survives, regardless of whether Defendants' sovereign

immunity defense succeeds; and (5) the trial court committed reversible error in dismissing the individual Defendants from the lawsuit. After careful review, we affirm the trial court's order.

I. Standard of Review

¶ 9 When a trial court grants a motion to dismiss for lack of personal jurisdiction under Rule 12(b)(2), we must review the record to determine whether there is evidence that would support the trial court's determination that exercising its jurisdiction would be inappropriate. *See Martinez v. Univ. of N.C.*, 223 N.C. App. 428, 430, 741 S.E.2d 330, 332 (2012).

¶ 10 On appeal from a trial court's order on a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), this Court conducts de novo review to determine "whether, as a matter of law, the allegations of the complaint . . . are sufficient to state a claim upon which relief may be granted." *Green v. Kearney*, 203 N.C. App. 260, 266, 690 S.E.2d 755, 761 (2010) (citation and internal quotation marks omitted).

II. Sovereign Immunity

¶ 11 Plaintiff first argues that Defendants cannot avail themselves of the doctrine of interstate sovereign immunity, in that the Supreme Court's holding in *Hyatt III* is inapplicable to the present case. We begin with a brief overview of *Hyatt III*.

A. Hyatt III

¶ 12 Hyatt claimed to have moved from California to Nevada, a state that "collects no personal income tax," after obtaining a patent that Hyatt anticipated would yield him millions of dollars

in royalties. *Hyatt III*, ___ U.S. ___, 203 L. Ed. 2d at 772. However, the "Franchise Tax Board of California (Board), the state agency responsible for assessing personal income tax, suspected that Hyatt's move was a sham," and it accused Hyatt of misrepresenting his residency in order to avoid paying income taxes in California. *Id.* The Board audited Hyatt, who later "sued the Board in Nevada state court for torts he alleged the agency committed during the audit." *Id.* at ___, 203 L. Ed. 2d at 773. The Board invoked the State of California's sovereign immunity as a defense. *Id.*

¶ 13 Applying Nevada immunity law, "[t]he Nevada Supreme Court rejected [the Board's sovereign immunity] argument and held that, under general principles of comity, the Board was entitled to the same immunity that Nevada law afforded Nevada agencies[.]" *Id.* And pursuant to then-existing Supreme Court precedent, "each State [was permitted] to decide whether to grant or deny its sister States sovereign immunity" as a matter of comity. *Id.* at ___, 203 L. Ed. 2d at 783 (Breyer, J., dissenting) (citing *Nevada v. Hall*, 440 U.S. 410, 59 L. Ed. 2d 416 (1979)).

¶ 14 In *Hyatt III*, however, the United States Supreme Court explicitly overruled *Hall*, holding that "States retain their sovereign immunity from private suits brought in the courts of other States." *Id.* at ___, 203 L. Ed. 2d at 774 (majority opinion). "The Constitution does not merely allow States to afford each other immunity as a matter of comity; it embeds interstate sovereign immunity within the constitutional design." *Id.* at ___, 203 L. Ed. 2d at 780.

B. Application

¶ 15 Plaintiff first attempts to distinguish the facts of the instant case from the facts of *Hyatt III*, in the hopes of defeating the application of interstate sovereign immunity. Plaintiff argues that in *Hyatt III*, "the legal dispute had its genesis in the State of California. The state taxes owed to California were based on business activities that occurred within the [S]tate of California. The [S]tate of California was involved solely in governmental activity, i.e., collecting state taxes." By contrast, Plaintiff asserts that here, "all the tortious conduct occurred within the sovereign boundaries of North Carolina. The individual tort feasors [sic] were residents in North Carolina." This argument is without merit.

¶ 16 It is evident that for purposes of interstate sovereign immunity, the state in which the allegedly tortious conduct was committed is not a distinguishing fact of any relevance; the dispositive issue is whether one state has been "haled involuntarily" into the courts of another state. *Id.* at ___, 203 L. Ed. 2d at 776. The approach to interstate sovereign immunity laid out in *Hyatt III* is "absolute." *Id.* at ___, 203 L. Ed. 2d at 783 (Breyer, J., dissenting). Regardless, in both the present case and in *Hyatt III*, the tortious conduct occurred in the state in which the plaintiff filed suit. Here, Plaintiff alleges that he was injured by Defendants in North Carolina, where he filed suit; in *Hyatt III*, "[t]he Franchise Tax Board sent its California employees into the state of Nevada[,]" where the employees allegedly committed the torts for which Hyatt sought compensation in the Nevada courts. *Id.* at ___, 203 L. Ed. 2d at 772–73 (majority opinion). Thus, Plaintiff's first argument is inapt.

¶ 17 Plaintiff further contends that allowing the doctrine of sovereign immunity to bar his suit against Defendants erroneously extends the scope of the Alabama Constitution to embrace illegal conduct by North Carolina residents in North Carolina, rather than properly limiting the Alabama Constitution's application to "conduct within the sovereign boundaries of Alabama." Plaintiff then proclaims that

> [t]he sovereignty of North Carolina controls conduct within this state. . . . The sovereignty of North Carolina is sacrosanct. It is absolute. For this Court to apply Alabama sovereign immunity under Article I, § 14 of the Alabama Constitution to conduct which occurred exclusively within the sovereign boundaries of North Carolina would constitute an intrusion on the sovereignty of this State.

¶ 18 However, the United States Supreme Court succinctly foreclosed this argument in *Hyatt III*:

> The problem with [Plaintiff's] argument is that the Constitution affirmatively altered the relationships between the States, so that they no longer relate to each other solely as foreign sovereigns. Each State's equal dignity and sovereignty under the Constitution implies certain constitutional limitations on the sovereignty of all of its sister States. One such limitation is the inability of one State to hale another into its courts without the latter's consent.

Id. at ___, 203 L. Ed. 2d at 779–80 (citation and internal quotation marks omitted). Under *Hyatt III*, it is clear that the "intrusion"—if any—upon the

sovereignty of North Carolina occurred upon the ratification of the United States Constitution, and not upon the trial court's dismissal of Plaintiff's claims on the grounds of interstate sovereign immunity.

¶ 19 Plaintiff next argues that the doctrine of interstate sovereign immunity does not apply in this instance because Troy University was not exercising a governmental function, but rather "came into North Carolina and leased office space in Fayetteville *for a business and commercial venture*." (Emphasis added). This argument is similarly unavailing.

¶ 20 To begin, Alabama courts consider the State's universities, including Troy University, to be arms of the State of Alabama entitled to the sovereign immunity enjoyed by the State. *See, e.g.*, *Ex parte Troy Univ.*, 961 So. 2d 105, 109–10 (Ala. 2006); *Stark v. Troy State Univ.*, 514 So. 2d 46, 50 (Ala. 1987). Like North Carolina, Alabama does not recognize a "business and commercial ventures" exception to its sovereign immunity. *Ex parte Troy Univ.*, 961 So. 2d at 109–10.

¶ 21 In addition, although the *Hyatt III* Court did not address the governmental and proprietary function distinction, the United States Supreme Court has previously made clear that a state's waiver of its sovereign immunity must be explicit; as will be more thoroughly explained below, states cannot implicitly waive sovereign immunity. *See Sossamon v. Texas*, 563 U.S. 277, 284, 179 L. Ed. 2d 700, 709 (2011); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682, 144 L. Ed. 2d 605, 620 (1999).

¶ 22 Finally, we note that in advancing this argument, Plaintiff conflates our jurisprudence

regarding the doctrines of sovereign immunity and governmental immunity.

> Under the doctrine of sovereign immunity, the State is immune from suit absent waiver of immunity. Under the doctrine of governmental immunity, a county is immune from suit for the negligence of its employees in the exercise of governmental functions absent waiver of immunity. These immunities do not apply uniformly. *The State's sovereign immunity applies to both its governmental and proprietary functions*, while the more limited governmental immunity covers only the acts of a municipality or a municipal corporation committed pursuant to its governmental functions.

Evans v. Hous. Auth., 359 N.C. 50, 53, 602 S.E.2d 668, 670 (2004) (emphasis added) (citation and internal quotation marks omitted).

¶ 23 As an arm of the State of Alabama,[1] Troy University is immune from suit under the doctrine of sovereign immunity, not governmental immunity. This immunity applies to both its proprietary and governmental functions, *see id.*, unless that immunity is explicitly waived, *see Sossamon*, 563 U.S. at 284, 179 L. Ed. 2d at 709.

¶ 24 Accordingly, Plaintiff's argument that interstate sovereign immunity does not apply in this case lacks merit. Having so concluded, we address Plaintiff's argument that Troy University waived sovereign immunity.

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[1] *See* Ala. Code § 16-56-1 (2018).

III. Waiver of Sovereign Immunity

¶ 25 Plaintiff next argues that the trial court erred in granting Defendants' motion to dismiss because Troy University waived its sovereign immunity by registering with the North Carolina Secretary of State as a nonprofit corporation, thus enabling it to sue and be sued in its corporate name. We disagree.

¶ 26 As an Alabama nonprofit corporation, Troy University applied for and received a certificate of authority to conduct its affairs in North Carolina as a foreign nonprofit corporation, pursuant to Article 15 of the Nonprofit Corporation Act. *See* N.C. Gen. Stat. § 55A-15-03 (2019). The Nonprofit Corporation Act states, in pertinent part:

> (a) Unless its articles of incorporation or this Chapter provides otherwise, every corporation has perpetual duration and succession in its corporate name and has the same powers as an individual to do all things necessary or convenient to carry out its affairs, including without limitation, power:
>
> (1) *To sue and be sued, complain and defend in its corporate name*[.]

Id. § 55A-3-02(a)(1) (emphasis added).[2]

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[2] Article 15 of the Nonprofit Corporation Act further states:

> Except as otherwise provided by this Chapter, a foreign corporation with a valid certificate of authority has the same but no greater rights and has the same but no greater privileges as, and is subject to the same duties, restrictions, penalties, and

¶ 27 The United States Supreme Court has held that a state's waiver of its sovereign immunity cannot be implied; it must be explicitly expressed. *Sossamon*, 563 U.S. at 284, 179 L. Ed. 2d at 708–09. "Courts indulge every reasonable presumption against waiver of fundamental constitutional rights." *Coll. Sav. Bank*, 527 U.S. at 682, 144 L. Ed. 2d at 620 (citation and internal quotation marks omitted).

¶ 28 The *Hyatt III* Court held that one state may not be "haled involuntarily" into the courts of a sister state without its consent. *See* ___ U.S. ___, 203 L. Ed. 2d at 780. Here, Alabama has explicitly *not* consented to be sued:

> The wall of immunity erected by [Ala. Const. 1901] § 14 is nearly impregnable. This immunity may not be waived. This means not only that the state itself may not be sued, but that this cannot be *indirectly* accomplished by suing its officers or agents in their official capacity, when a result favorable to plaintiff would be directly to *affect the financial status of the state treasury*.

Patterson v. Gladwin Corp., 835 So. 2d 137, 142 (Ala. 2002) (citations omitted).

¶ 29 Our Supreme Court has similarly held that "[w]aiver of sovereign immunity may not be lightly inferred and State statutes waiving this immunity, being in derogation of the sovereign right to immunity, must be strictly construed." *Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 537–38, 299

> liabilities now or later imposed on, a domestic corporation of like character.

N.C. Gen. Stat. § 55A-15-05(b).

S.E.2d 618, 627 (1983). "Statutory authority to 'sue or be sued' is not always construed as an express waiver of sovereign immunity and is not dispositive of the immunity defense when suit is brought against an agency of the State." *Id.* at 538, 299 S.E.2d at 627.

¶ 30 In *Guthrie*, our Supreme Court determined that an enabling statute that "vests the Ports Authority with the authority to 'sue or be sued,' " when read together with the provisions of the State Torts Claims Act, N.C. Gen. Stat. § 143-291 *et seq.*, did not constitute "consent for the Ports Authority to be sued in the courts of the State[,]" *Guthrie*, 307 N.C. at 538, 299 S.E.2d at 627. Rather, the Court concluded that the statutes evince "a legislative intent that the Authority be authorized to sue as [a] plaintiff in its own name in the courts of the State but contemplates that all tort claims against the Authority for money damages will be pursued under the State Tort Claims Act." *Id.*

¶ 31 Plaintiff's argument in the case at bar is no more successful than that considered and rejected by our Supreme Court in *Guthrie*. Assertions of statutory waivers of state sovereign immunity are subject to strict construction. *Id.* at 537–38, 299 S.E.2d at 627. Unlike *Guthrie*, which concerned a suit against an agency of the State of North Carolina upon which the enabling legislation explicitly bestowed the authority to "sue or be sued," *id.*, Plaintiff here has not shown any similarly explicit waiver of state sovereign immunity, either in the Alabama statutes authorizing Troy University's activities or in our General Statutes.

¶ 32 In that interstate sovereign immunity is a fundamental right "embed[ded] . . . within the constitutional design," *Hyatt III*, ___ U.S. ___, 203 L.

Ed. 2d at 780, we must "indulge every reasonable presumption against [its] waiver," *Coll. Sav. Bank*, 527 U.S. at 682, 144 L. Ed. 2d at 620. Accordingly, we will not read into the Nonprofit Corporation Act a blanket waiver of interstate sovereign immunity for an arm of another state that registers as a nonprofit corporation in the State of North Carolina, absent clear and express statutory authority to do so.

¶ 33 Troy University has not waived its interstate sovereign immunity by registering with the North Carolina Secretary of State as a nonprofit corporation. We therefore proceed to Plaintiff's next issue presented: whether the Supreme Court's decision in *Hyatt III* may be applied retroactively.

IV. Retroactive Application of Hyatt III

¶ 34 Plaintiff next asserts that *Hyatt III* "must be construed prospectively such that it only applies to causes of action that accrue after May 13, 2019, the date of the Supreme Court Opinion," and consequently, the decision cannot affect his case, because his "legal rights vested on September 9, 2015," the date Defendant Gainey terminated Plaintiff's employment with Troy University. We disagree.

¶ 35 To support this contention, Plaintiff cites the landmark case of *Smith v. State*, in which our Supreme Court held that when the State enters into a valid contract, it implicitly waives its sovereign immunity with regard to claims for breach of that contract. 289 N.C. 303, 320, 222 S.E.2d 412, 424 (1976). In *Smith*, the Court also denied retroactive application of its holding, stating that "in this case, and in causes of action on contract arising after the

filing date of this opinion, . . . the doctrine of sovereign immunity will not be a defense to the State." *Id.*

¶ 36 Our Supreme Court's decision in *Smith* is clearly distinguishable from *Hyatt III* and the case before us. *Smith* addressed the sovereign immunity of the State of North Carolina, in its own courts, from suits arising out of contracts into which the State entered voluntarily. *See id.* at 309–11, 222 S.E.2d at 417–18. Interpreting such questions of *intrastate* sovereign immunity is a matter of state law. *See id.* at 313–20, 222 S.E.2d at 419–23.

¶ 37 Conversely, *Hyatt III* concerns the federal constitutional implications of *interstate* sovereign immunity, in which one state is haled into the courts of another state without its consent. ___ U.S. ___, 203 L. Ed. 2d at 774. As the Supreme Court explained, "although the [federal] Constitution assumes that the States retain their sovereign immunity except as otherwise provided, it also fundamentally adjusts the States' relationship with each other and curtails their ability, as sovereigns, to decline to recognize each other's immunity." *Id.* at ___, 203 L. Ed. 2d at 775. Stated another way, "[i]nterstate immunity . . . is implied as an essential component of federalism." *Id.* at ___, 203 L. Ed. 2d at 781 (citation and internal quotation marks omitted). Accordingly, in that *Smith* addressed *intrastate* sovereign immunity—a matter of state law—and not *interstate* sovereign immunity with its attendant federal constitutional concerns, *Smith* is not persuasive on the issue of whether *Hyatt III* applies retroactively, or merely prospectively, as Plaintiff contends.

¶ 38 Furthermore, *Smith* stands as a clear exception to our appellate courts' traditional adherence to the "Blackstonian Doctrine":

> Under a long-established North Carolina law, a decision of a court of supreme jurisdiction overruling a former decision is, as a general rule, retrospective in its operation. This rule is based on the so-called "Blackstonian Doctrine" of judicial decision-making: courts merely discover and announce law; they do not create it; and the act of overruling is a confession that the prior ruling was erroneous and was never the law.

Cox v. Haworth, 304 N.C. 571, 573, 284 S.E.2d 322, 324 (1981) (citations omitted). The presumption of retrospectivity "is one of judicial policy, and should be determined by a consideration of such factors as reliance on the prior decision, the degree to which the purpose behind the new decision can be achieved solely through prospective application, and the effect of retroactive application on the administration of justice." *Id.*

¶ 39 *Hyatt III* appears to portend its own retroactive application. In considering the effect of overruling *Nevada v. Hall*, the Supreme Court "acknowledge[d] that some plaintiffs, such as Hyatt," had demonstrated reliance upon *Hall* "by suing sovereign States." *Hyatt III*, ___ U.S. ___, 203 L. Ed. 2d at 782. Yet, despite this recognition, the Court noted the unfortunate reality that "in virtually every case that overrules a controlling precedent, the party relying on that precedent will incur the loss of litigation expenses and a favorable decision below." *Id.* "Those case-specific costs are not among the reliance interests that would persuade . . . an incorrect resolution of an important constitutional question." *Id.*

¶ 40 Moreover, the Court was quite clear that its prior holding in *Hall* was "irreconcilable with our constitutional structure and with the historical evidence showing a widespread preratification understanding that States retained immunity from private suits, both in their own courts and in other courts." *Id.*

¶ 41 After careful consideration of the Supreme Court's opinion in *Hyatt III*, and in light of our courts' presumption that the decision of a higher court generally operates retroactively, *Cox*, 304 N.C. at 573, 284 S.E.2d at 324, we conclude that retroactive application of *Hyatt III* is required to achieve the purpose of the Court's holding. In so concluding, this Court simply recognizes the interstate sovereign immunity—an implicit and "essential component of federalism[,]" *Hyatt III*, ___ U.S. ___, 203 L. Ed. 2d at 781—which the State of Alabama never waived.

¶ 42 We find additional support for our conclusion in the opinions of other states that have already decided this issue. "In the absence of persuasive and binding North Carolina cases, we examine the law of other states." *Russell v. Donaldson*, 222 N.C. App. 702, 706, 731 S.E.2d 535, 538 (2012).

¶ 43 Several other states have applied *Hyatt III* retroactively. The Supreme Court of Kentucky applied *Hyatt III* retroactively, reversing the denial of the State of Ohio's motion to dismiss claims against it in a lawsuit filed in Kentucky before *Hyatt III* was decided. *Ohio v. Great Lakes Minerals, LLC*, 597 S.W.3d 169, 171–73 (Ky. 2019), *cert. denied*, ___ U.S. ___, 208 L. Ed. 2d 87 (2020). The Appellate Court of Connecticut similarly applied *Hyatt III* retroactively, affirming the dismissal of a suit filed in 2018 by one

of its citizens against the State of Rhode Island, one of its agencies, and several of its agents. *Reale v. State*, 218 A.3d 723, 726–27 (Conn. App. Ct. 2019). And the Supreme Court of New York, Appellate Division, applied *Hyatt III* retroactively in affirming a New York trial court's pre-*Hyatt III* grants of motions to dismiss made by an agency of the State of Arizona and one of its employees. *Trepel v. Hodgins*, 121 N.Y.S.3d 605, 606 (N.Y. App. Div. 2020).

¶ 44 Recognizing that "sovereign immunity is a jurisdictional issue[,]" *M Series Rebuild, LLC v. Town of Mount Pleasant, N.C.*, 222 N.C. App. 59, 62, 730 S.E.2d 254, 257, *disc. review denied*, 366 N.C. 413, 735 S.E.2d 190 (2012), and consonant with *Hyatt III*'s analysis of interstate sovereign immunity as a "fundamental aspect" of each state's sovereignty, ___ U.S. ___, 203 L. Ed. 2d at 775, as well as our courts' presumption of retrospectivity, *see Cox*, 304 N.C. at 573, 284 S.E.2d at 324, we conclude that *Hyatt III* is appropriately applied retroactively, and that Plaintiff's argument to the contrary must fail.

V. North Carolina Constitutional Claim

¶ 45 Plaintiff also contends that the trial court erred in granting Defendants' motion to dismiss his claim under Article 1, Section 19 of the North Carolina Constitution alleging "a violation of equal protection of the law," which he asserted in the event that the trial court determined that his other claims were barred by sovereign immunity. Citing our Supreme Court's decision in *Corum v. Univ. of N.C.*, 330 N.C. 761, 413 S.E.2d 276, *cert. denied*, 506 U.S. 985, 121 L. Ed. 2d 431 (1992), Plaintiff maintains that his "alternative state constitutional claim . . .

trump[s] the doctrine of sovereign immunity." We disagree.

¶ 46 It is well established that a plaintiff may not proceed with a claim directly under the North Carolina Constitution when an adequate alternative remedy is available. *Corum*, 330 N.C. at 784, 413 S.E.2d at 291. In *Corum*, a North Carolina resident complaining of injury resulting from the actions of an arm of the State of North Carolina asserted a direct constitutional claim, which the State contended was barred by the doctrine of sovereign immunity. *Id.* at 766, 413 S.E.2d at 280. Our Supreme Court determined that "[t]he doctrine of sovereign immunity cannot stand as a barrier to North Carolina citizens who seek to remedy violations of their rights guaranteed by the Declaration of Rights" of our State Constitution. *Id.* at 785–86, 413 S.E.2d at 291. "[W]hen there is a clash between these constitutional rights and sovereign immunity, the constitutional rights must prevail." *Id.* at 786, 413 S.E.2d at 292. Thus, "in the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under [the North Carolina] Constitution." *Id.* at 782, 413 S.E.2d at 289.

¶ 47 Nonetheless, *Corum*, like *Smith* discussed above, involved issues of *intrastate* sovereign immunity, and is therefore similarly inapplicable to the case at bar. Again, the instant case raises an issue of *interstate* sovereign immunity, in that Plaintiff has asserted claims against an arm of the State of Alabama and its agents, the individual Defendants. While the Declaration of Rights in the North Carolina Constitution may indeed trump our State's *intrastate* sovereign immunity, in the

interstate context, the federal Constitution protects the several states' sovereign immunity vis-à-vis one another; indeed, it is "embed[ded] . . . within the [federal] constitutional design." *Hyatt III*, ___ U.S. ___, 203 L. Ed. 2d at 780.

> Interstate sovereign immunity is . . . integral to the structure of the Constitution. Like a dispute over borders or water rights, a State's assertion of compulsory judicial process over another State involves a direct conflict between sovereigns. *The Constitution implicitly strips States of any power they once had to refuse each other sovereign immunity*, just as it denies them the power to resolve border disputes by political means. Interstate immunity, in other words, is implied as an essential component of federalism.

Id. at ___, 203 L. Ed. 2d at 781 (emphasis added) (citation and internal quotation marks omitted).

¶ 48 Accordingly, Plaintiff's *Corum* claim is without merit. The trial court did not err in granting Defendants' motion to dismiss this claim.

VI. The Individual Defendants

¶ 49 Lastly, Plaintiff argues that the trial court committed reversible error by granting Defendants' motion to dismiss with respect to the individual Defendants as well as Troy University. Two of Plaintiff's assertions on this issue sound from his prior arguments: (1) that Troy University is not entitled to sovereign immunity, so "the individual Defendants, who are residents and citizens of North Carolina, cannot legitimately raise the issue of sovereign immunity"; and (2) the individual Defendants committed intentional torts as

"employees of a non-profit corporation doing business in North Carolina" and "should be treated like any other employees of a non-profit corporation in this state." These arguments lack merit.

¶ 50 "A suit against a public official in [her] official capacity is a suit against the State." *White v. Trew*, 366 N.C. 360, 363, 736 S.E.2d 166, 168 (2013) (citation and internal quotation marks omitted). Our Supreme Court has held that "when the complaint does not specify the capacity in which a public official is being sued for actions taken in the course and scope of [her] employment, we will presume that the public official is being sued only in [her] official capacity." *Id.* at 360–61, 736 S.E.2d at 167.

¶ 51 In his complaint, Plaintiff avers that the individual Defendants were "agent[s] and employee[s]" of Troy University. At no point in his complaint, however, does Plaintiff specify that he is suing either individual Defendant in her personal capacity. Accordingly, we must presume that he sued the individual Defendants in their official capacities. *Id.* As such, his claims against the individual Defendants are as much against the State of Alabama as are his claims against Troy University, *see id.* at 363, 736 S.E.2d at 168, and his argument to the contrary is without merit. Thus, the individual Defendants are protected by the sovereign immunity afforded to Troy University, and the trial court did not err in dismissing Plaintiff's claims against the individual Defendants.

Conclusion

¶ 52 For the foregoing reasons, Plaintiff has not shown that the trial court erred in granting

Defendants' motion to dismiss. Accordingly, we affirm the trial court's order.

AFFIRMED.

Judges MURPHY and COLLINS concur.

FILED
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CUMBERLAND CO., C.S.C.
BY _____

STATE OF NORTH CAROLINA	)	IN THE GENERAL COURTS OF JUSTICE
COUNTY OF CUMBERLAND	)	SUPERIOR COURT DIVISION
	)	18CVS5146
SHARELL FARMER,	)	
Plaintiff,	)	**ORDER GRANTING MOTION TO DISMISS**
v.	)	
	)	[2019 WL 6999625]
TROY UNIVERSITY, PAMELA GAINEY, AND KAREN TILLERY,	)	
Defendants,	)	

THIS MATTER being heard on June 3, 2019, before Andrew T. Heath, Superior Court Judge Presiding, upon Defendants' Amended Motion to Dismiss and, Alternatively, Motion for Judgment on the Pleadings pursuant to 12(b)(2), 12(b)(6) and 12(c).

Sharrell Farmer was present and was represented by his attorneys of record, and the Defendants were represented by their attorneys of record. The Court, having reviewed the filings and the case file, having heard argument of counsel, having reviewed the

memorandum submitted by the parties, and having reviewed the applicable law, determines that the Motion to Dismiss should be GRANTED as specifically set forth in this Order.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendants' Motion to Dismiss pursuant to Rule 12(b)(2) and 12(b)(6) of the North Carolina Rules of Civil Procedure and under *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485 (2019), is hereby GRANTED and the Plaintiff's claims are dismissed with prejudice.

Each party shall bear its own costs.

This the 27 day of JUNE, 2019.

/s/

Andrew T. Heath
Special Superior Court Judge

SOSID: 868265
Date Filed: 9/25/2006 11:51:00 AM
Elaine F. Marshall
North Carolina Secretary of State
222769115

State of North Carolina
Department of the Secretary of State

APPLICATION FOR CERTIFICATE OF AUTHORITY FOR NONPROFIT CORPORATION

Pursuant to §55A-15-03 of the General Statutes of North Carolina, the undersigned corporation hereby applies for a Certificate of Authority to conduct affairs in the State of North Carolina, and for that purpose submits the following:

1. The name of the corporation is Troy University and if that name is unavailable for use in the State of North Carolina, the name the corporation wishes to use is: _____
2. The state or country under whose laws the corporation was organized is: Alabama
3. The date of incorporation was February 2, 1887 ; its period of duration is: Indefinite
4. The street address of the principal office of the corporation is:

   Number and Street Troy University

   City, State, Zip Code Troy, Alabama 36082

5. The mailing address ***if different from the street address*** of the principal office of the corporation is:

   _____

6. The street address and county of the registered office in the State of North Carolina is:

   Number and Street 811 Stamper Road

   City, State, Zip Code Fayetteville, NC 28303 County: Cumberland

7. The mailing address ***if different from the street address*** of the registered office in the State of North Carolina is:

   _____

8. The name of the registered agent in the State of North Carolina is: Patricia Bush-McManus

9. The names and usual business addresses of the current officers of the corporation are:

Name	Title	Business Address
Jack Hawkins, Jr., Ph.D.	Chancellor	216 Adams Administration Bldg., Troy, Alabama 36082
Earl Ingram, II, Ph.D.	Vice Chancellor	204 Adams Administration Bldg., Troy, Alabama 36082

* * *

10. *(Check one of the following.)*

    a. ___ The corporation has members.

    b. ✓ The corporation does not have members.

11. Attached is a certificate of existence (or document of similar import), duly authenticated by the Secretary of State or other official having custody of corporate records in the state or country of incorporation.

12. If the corporation is required to use a fictitious name in order to conduct affairs in this State, a copy of the resolution of its board of directors, certified by its secretary, adopting the fictitious name is attached.

13. This application will be effective upon filing, unless a date and/or time is specified: _____.

This the 13 day of September, 2006

Troy University
Name of Corporation

/s/ Jack Hawkins, Jr.
Signature

Jack Hawkins, Jr., Ph.D., Chancellor
Type or Print Name and Title

* * *

Nancy L. Worley
Secretary of State

P.O. Box 5616
Montgomery, AL 36103-5616

STATE OF ALABAMA

I, Nancy L. Worley, Secretary of State of the State of Alabama, having custody of the Great and Principal Seal of said State, do hereby certify that

the domestic corporation records on file in this office disclose that Troy University, a non-profit corporation, incorporated in Alabama, Troy, Alabama on February 2, 1887. I further certify that the records do not disclose that said Troy University has been dissolved.

In Testimony Whereof, I have hereunto set my hand and affixed the Great Seal of the State, at the Capitol, in the City of Montgomery, on this day.

[seal omitted]

September 20, 2006
Date

/s/ Nancy L. Worley
Nancy L. Worley Secretary of State

* * *

Ala. Const. art. I, § 14

ARTICLE I

Declaration of Rights

That the great, general, and essential principles of liberty and free government may be recognized and established, we declare:

* * *

§ 14. That the State of Alabama shall never be made a defendant in any court of law or equity.

* * *

Ala. Code § 16-56-1

Title 16. Education.

Chapter 56. Troy University

§ 16-56-1. Body corporate; rights, duties, property, etc., of Troy University.

(a)(1) The Governor, by virtue of the office and the trustees appointed from designated areas of the state, pursuant to Section 16-56-3, and their successors in office, shall constitute a body corporate under the name of Troy University, or by any name the board of trustees may from time to time designate as successor. The name Troy University shall refer to each campus.

(2) All rights, duties, property, real or personal, and all other effects existing in the name of Troy State University, the Troy State University System, or in any other name by which the institution has been known, shall continue in the name of Troy University. Any reference to Troy State University, the Troy State University System, or any other name by which the institution has been known, in any existing law, contract, or other instrument shall constitute a reference to Troy University. All acts of Troy State University lawfully done prior to August 1, 1997, by the board of trustees or by the executive officer are approved, ratified, and confirmed. All acts of the Troy State University System lawfully done prior to June 1, 2009, by the board of trustees or by the executive officer are approved, ratified, and confirmed.

(b) Troy University shall provide, maintain, and operate public higher education programs with facilities dedicated to the preparation of students in a variety of pre-professional and professional fields

at the associate, baccalaureate, and graduate degree levels. The university shall provide educational services for the greater community including adult education and advanced education for mature students, private citizens, and service men and women. Troy University shall provide an academic, cultural, and social environment that fosters individuality and develops productive members of society. The mission of Troy University shall be accomplished by providing services to students and the greater community through the utilization of its staff and facilities and through research, creative activities, superior teaching, scholarship, and public service.

N.C. Gen. Stat. § 55A-1-40

Chapter 55A. North Carolina Nonprofit Corporation Act

Article 1. General Provisions.

* * *

Part 4. Definitions.

§ 55A-1-40. Chapter definitions.

In this Chapter unless otherwise specifically provided:

* * *

(5) "Corporation" or "domestic corporation" means a nonprofit corporation subject to the provisions of this Chapter, except a foreign corporation.

* * *

(11) "Foreign corporation" means a corporation (with or without capital stock) organized under a law other than the law of this State for purposes for which a corporation might be organized under this Chapter.

* * *

N.C. Gen. Stat. § 55A-3-02

Chapter 55A. North Carolina Nonprofit Corporation Act.

Article 3. Purposes and Powers.

* * *

§ 55A-3-02. General powers.

(a) Unless its articles of incorporation or this Chapter provides otherwise, every corporation has perpetual duration and succession in its corporate name and has the same powers as an individual to do all things necessary or convenient to carry out its affairs, including without limitation, power:

(1) To sue and be sued, complain and defend in its corporate name;

(2) To have a corporate seal, which may be altered at will, and to use it, or a facsimile of it, by impressing or affixing it or in any other manner reproducing it;

(3) To make and amend bylaws not inconsistent with its articles of incorporation or with the laws of this State, for regulating and managing the affairs of the corporation;

(4) To purchase, receive, lease, or otherwise acquire, and own, hold, improve, use, and otherwise deal with, real or personal property, or any legal or equitable interest in property, wherever located;

(5) To sell, convey, mortgage, pledge, lease, exchange, and otherwise dispose of all or any part of its property;

(6) To purchase, receive, subscribe for, or otherwise acquire; own, hold, vote, use,

sell, mortgage, lend, pledge, or otherwise dispose of; and deal in and with shares or other interests in, or obligations of, any other entity;

(7) To make contracts and guarantees, incur liabilities, borrow money, issue its notes, bonds, and other obligations, and secure any of its obligations by mortgage or pledge of any of its property, franchises, or income;

(8) To lend money, invest and reinvest its funds, and receive and hold real and personal property as security for repayment, except as limited by G.S. 55A-8-32;

(9) To be a promoter, partner, member, associate or manager of any partnership, joint venture, trust, or other entity;

(10) To conduct its affairs, locate offices, and exercise the powers granted by this Chapter within or without this State;

(11) To elect or appoint directors, officers, employees, and agents of the corporation, define their duties, and fix their compensation;

(12) To pay pensions and establish pension plans, pension trusts, and other benefit and incentive plans for any or all of its current or former directors, officers, employees, and agents;

(13) To make donations for the public welfare or for charitable, religious, cultural, scientific, or educational purposes, and to make payments or donations not

inconsistent with law for other purposes that further the corporate interest;

(14) To impose dues, assessments, admission and transfer fees upon its members;

(15) To establish conditions for admission of members, admit members and issue memberships;

(16) To carry on a business;

(17) To procure insurance for its benefit on the life or physical or mental ability of any director, officer or employee and, in the case of a charitable or religious corporation, any sponsor, contributor, pledgor, student or former student whose death or disability might cause financial loss to the corporation, and for these purposes the corporation is deemed to have an insurable interest in each such person; and to procure insurance for its benefit on the life or physical or mental ability of any other person in whom it has an insurable interest;

(18) To engage in any lawful activity that will aid governmental policy;

(19) To do all things necessary or convenient, not inconsistent with law, to further the activities and affairs of the corporation.

(b) It shall not be necessary to set forth in the articles of incorporation any of the powers enumerated in this section.

N.C. Gen. Stat. § 55A-15-01

Chapter 55A. North Carolina
Nonprofit Corporation Act.
Article 15. Foreign Corporations.
Part 1. Certificate of Authority.

§ 55A-15-01 Authority to conduct affairs required.

(a) A foreign corporation shall not conduct affairs in this State until it obtains a certificate of authority from the Secretary of State.

(b) Without excluding other activities which might not constitute conducting affairs in this State, a foreign corporation shall not be considered to be conducting affairs in this State solely for the purposes of this Chapter, by reason of carrying on in this State any one or more of the following activities:

(1) Maintaining or defending any action or suit or any administrative or arbitration proceeding, or affecting the settlement thereof or the settlement of claims or disputes;

(2) Holding meetings of its directors or members or carrying on other activities concerning its internal affairs;

(3) Maintaining bank accounts or borrowing money in this State, with or without security, even if such borrowings are repeated and continuous transactions;

(4) Maintaining offices or agencies for the transfer, exchange, and registration of memberships or securities, or appointing and maintaining trustees or

despositories with relation to those securities;

(5) Soliciting or procuring orders, whether by mail or through employees or agents or otherwise, where the orders require acceptance without this State before becoming binding contracts;

(6) Making or investing in loans with or without security including servicing of mortgages or deeds of trust through independent agencies within the State, the conducting of foreclosure proceedings and sale, the acquiring of property at foreclosure sale, and the management and rental of such property for a reasonable time while liquidating its investment, provided no office or agency therefor is maintained in this State;

(7) Taking security for or collecting debts due to it or enforcing any rights in property securing the same;

(8) Conducting affairs in interstate commerce;

(9) Conducting an isolated transaction completed within a period of six months and not in the course of a number of repeated transactions of like nature;

(10) Selling through independent contractors;

(11) Owning, without more, real or personal property.

N.C. Gen. Stat. § 55A-15-03

Chapter 55A. North Carolina Nonprofit Corporation Act.

Article 15. Foreign Corporations.

Part 1. Certificate of Authority.

* * *

§ 55A-15-03 Application for certificate of authority.

(a) A foreign corporation may apply for a certificate of authority to conduct affairs in this State by delivering an application to the Secretary of State for filing. The application shall set forth:

(1) The name of the foreign corporation or, if its name is unavailable for use in this State, a corporate name that satisfies the requirements of Article 3 of Chapter 55D of the General Statutes;

(2) The name of the state or country under whose law it is incorporated;

(3) Its date of incorporation and period of duration;

(4) The street address, and mailing address if different from the street address, of its principal office;

(5) The street address, and the mailing address if different from the street address, of its registered office in this State, the county in which the registered office is located, and the name of its registered agent at that office;

(6) The names and usual business addresses of its current officers; and

(7) Whether it has members.

(b) The foreign corporation shall deliver with the completed application a certificate of existence (or a document of similar import) duly authenticated by the Secretary of State or other official having custody of corporate records in the state or country under whose law it is incorporated.

(c) If the Secretary of State finds that the application conforms to law, the Secretary of State shall when all fees have been tended as prescribed in this Chapter:

(1) Endorse on the application and an exact or conformed copy thereof the word "filed" and the hour, day, month, and year of the filing thereof;

(2) File in the Secretary of State's office the application and the certificate of existence (or document of similar import as described in subsection (b) of this section);

(3) Issue a certificate of authority to conduct affairs in this State to which the Secretary of State shall affix the exact or conformed copy of the application; and

(4) Send to the foreign corporation or its representative the certificate of authority, together with the exact or conformed copy of the application affixed thereto.

N.C. Gen. Stat. § 55A-15-05

Chapter 55A. North Carolina Nonprofit Corporation Act.
Article 15. Foreign Corporations.
Part 1. Certificate of Authority.

* * *

§ 55A-15-05 Effect of certificate of authority.

(a) A certificate of authority authorizes the foreign corporation to which it is issued to conduct affairs in this State subject, however, to the right of the State to revoke the certificate as provided in this Chapter. A foreign corporation, however, is not eligible or entitled to qualify in this State as executor, administrator, or guardian, or as trustee under the will of any person domiciled in this State at the time of his death.

(b) Except as otherwise provided by this Chapter, a foreign corporation with a valid certificate of authority has the same but no greater rights and has the same but no greater privileges as, and is subject to the same duties, restrictions, penalties, and liabilities now or later imposed on, a domestic corporation of like character.