No. 22-787

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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the North Carolina Supreme Court correctly held that an Alabama-affiliated corporation's agreement to be subject to the same duties and liabilities as similar North Carolina-based businesses, including the right to "sue and be sued" in North Carolina, served as consent to suit in North Carolina's courts for claims arising out of its commercial operations there.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

In *Franchise Tax Board of California v. Hyatt*, 139 S. Ct. 1485, 1490 (2019), this Court held that the Constitution does not "permit[ ] a State to be sued by a private party without its consent in the courts of a different State." This case raises a question left open by *Hyatt* and not yet addressed by any state court of last resort, other than the court below: whether a state-affiliated entity consents to suit when it engages in commercial activity in another state pursuant to an agreement to be subject to the duties and liabilities of a domestic corporation, including the right to sue and be sued.

In resolving this question of first impression, the North Carolina Supreme Court looked to decisions of this Court and to what Troy University—an Alabama public corporation—agreed to when it sought and obtained permission to open an office in North Carolina, employing North Carolina residents, for the purpose of marketing online classes to students in North Carolina. Based on the case law and the allegations of this case, involving sexual harassment of and a smear campaign against a North Carolina citizen (respondent Sharell Farmer) by other North Carolina citizens (petitioners Pamela Gainey and Karen Tillery), and expressly limiting its holding to claims arising out of the in-state commercial activity, the North Carolina Supreme Court held that Troy's acceptance of two separate conditions on doing business in North Carolina demonstrated explicit consent to suit in its courts. That holding was grounded in this Court's recognition that the ordinary meaning of a sue-and-be-sued clause waives sovereign immunity, and the fact that Troy's voluntary agreement to that condition could not reasonably be

construed otherwise. Moreover, Troy agreed to be subject to the same duties and liabilities of a "domestic corporation of like character" in conducting its commercial activities in North Carolina. Thus, like North Carolina's nonprofit universities, which sell similar services as Troy, Troy consented to the jurisdiction of North Carolina's courts to adjudicate alleged violations of North Carolina law.

Troy does not dispute North Carolina's authority to require it to obtain permission to conduct the intrastate business at issue here: in-state recruitment by employees residing in North Carolina of students in North Carolina. And Troy does not dispute that it voluntarily sought that permission and accepted the benefits that came with it. Nonetheless, it asks this Court to free it from the obligations it agreed to in exchange for those benefits. As Justice Berger emphasized in his concurrence below, however, and as reflected in decisions of this Court, when a public corporation decides to engage in commercial activities in another state and agrees to do so under the same terms as an in-state business, it waives sovereign immunity for claims arising out of that activity.

The North Carolina Supreme Court's factbound holding does not warrant review under this Court's criteria. No other state court of last resort has yet considered what constitutes consent to suit under *Hyatt*, much less the question whether facts like those here establish consent. Troy's suggestion of conflict is based on cases that involve tribal immunity—which differs in nature and origin from the interstate sovereign immunity recognized in *Hyatt*—and are *consistent* with the decision below.

The North Carolina Supreme Court's decision also does not conflict with any decision of this Court. The only decision of this Court to address whether a foreign commercial state entity's agreement to be subject to the obligations of a similar domestic entity waives that state's sovereign immunity, *Georgia v. City of Chattanooga*, 264 U.S. 472 (1924), is consistent with, and was relied upon, below. And cases addressing whether Congress validly abrogated Eleventh Amendment immunity to suit in *federal* court do not govern the question of when a state entity has consented to suit in other *state* courts—a question tied to a different immunity, grounded in personal jurisdiction.

Beyond the lack of conflict, this case presents a poor vehicle for this Court to address the question of what constitutes consent sufficient to waive interstate sovereign immunity. Here, there are significant questions whether the defendants would be imbued with Alabama's sovereign immunity under *Hyatt*, even absent the waiver. The historical record suggests that, at the time of the Founding, state sovereign immunity did not extend to state-established corporate entities like Troy. That record calls into question whether Troy University can invoke interstate sovereign immunity at all—a predicate question to considering the question presented. Furthermore, the Alabama state constitutional provision cited by Troy does not concern the structural immunity at issue in this case and in *Hyatt*, and it is not pertinent here. In addition, two of the defendant-petitioners in this case are *North Carolina* citizens, sued for intentional torts that they allegedly committed in North Carolina against another North Carolina citizen. It is unclear whether, as a matter of

North Carolina's own sovereignty, Alabama can bestow immunity on North Carolina residents from suit in such a case, and also unclear whether Alabama law purports to do so. These antecedent questions were barely addressed by the lower courts and would necessarily have to be resolved before consideration of whether any immunity that might exist has been waived.

Petitioners' primary argument for review is that the question presented—which omits significant facts, including Troy's agreement to be treated like a domestic corporation—is important. If that is so, the question is likely to recur—and likely to do so in a case where the defendants' entitlement to invoke sovereign immunity is on firmer ground. In this case, at this time, review is not warranted.

STATEMENT OF THE CASE

Factual background

Since the 2000s, online post-secondary education programs have grown significantly. *See* Alexandria Walton Radford, *Learning at a Distance: Undergraduate Enrollment in Distance Education Courses and Degree Programs*, Nat'l Ctr. for Educ. Statistics, U.S. Dep't of Educ. (Oct. 2011).[1] Online education has been particularly popular for active-duty members of the military and military veterans, who have taken advantage of both the flexibility of online programs and expanded military education benefits. *See* Alexandria Walton Radford, et al., *After the Post-9/11 GI Bill: A Profile of Military Service Members and Veterans Enrolled in Undergraduate*

[1] https://nces.ed.gov/pubs2012/2012154.pdf.

and Graduate Education 16–17, Nat'l Ctr. for Educ. Statistics, U.S. Dep't of Educ. (Aug. 2016).[2]

Petitioner Troy University, based in Alabama, "participates in online learning programs with all service branches." Pet. 7. It has developed a strategic plan to market its offerings to members of the military—with great success. *See* Troy University, 2020–2025 Strategic Plan, Key Performance Indicators (stating that approximately one-fourth of Troy students are members of the military)[3]; *Marketing to Military Personnel as Non-Traditional Students*, Stamats Insights (Dec. 18, 2018) (interview with Troy recruiter discussing the need to "get on a base or post" to recruit military students).[4]

As part of its military recruitment strategy, Troy decided to open a recruiting office in Fayetteville, North Carolina, near Fort Bragg. Pet. 2a. Under North Carolina law, if Troy wanted to employ North Carolina residents in a North Carolina office to sell its programs to North Carolina residents, Troy was required to obtain a Certificate of Authority from the North Carolina Secretary of State. *See* N.C. Gen. Stat. § 55A-15-01(a). Troy applied for the certificate, stating in its application that it had been incorporated as a non-profit corporation in Alabama in February 1887. Pet. 58a, 61a. It made no reference to its creation by the Alabama Legislature, and it did not suggest that it was affiliated with the State of Alabama. By virtue of applying for and obtaining this certificate, Troy was

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[2] https://nces.ed.gov/pubs2016/2016435.pdf.

[3] https://www.troy.edu/_assets/20-25-strategic-plan/_documents/recruitment-2022.pdf.

[4] https://www.stamats.com/insights/marketing-military-personnel-non-traditional-students.

granted "the same but no greater privileges as, and [was] subject[ed] to the same duties, restrictions, penalties, and liabilities now or later imposed on, a domestic corporation of like character." N.C. Gen. Stat. § 55A-15-05(b). These privileges and duties included the power "[t]o sue and be sued, complain and defend in its corporate name." *Id.* § 55A-3-02(a)(1).

In May 2014, Troy hired respondent Sharell Farmer to work in its Fayetteville office. Pet. 2a. His job was to recruit military personnel to take Troy's online courses, paid for by federal military education benefits. *Id.* Mr. Farmer was good at his job—in fact, he was the top recruiter for Troy in his district. *Id.*

From his first day on the job, however, Mr. Farmer was subjected to frequent and ongoing sexual harassment by two other Troy employees—the manager of the Fayetteville office, Pamela Gainey, and her administrative assistant, Karen Tillery. *Id.* On that first day, for example, Ms. Gainey ordered Ms. Tillery to give him "the test"—at which point Tillery ran a magic marker down his chest, over his nipples, and down his abs and and stomach—without his consent. Compl. ¶ VIII. Tillery repeatedly subjected him to sexual, unwanted physical touching. *See* Farmer Aff. ¶ 12. Mr. Farmer also observed sexual harassment of male students. Pet. 2a.

Mr. Farmer reported the harassment to Troy management, providing the names of five U.S. Army veterans who had been sexually harassed by Ms. Gainey and Ms. Tillery in the North Carolina office. Pet. 3a; Farmer Aff. ¶ 15. Troy closed its investigation without contacting any of these men. Pet. 3a.

A pattern of retaliation unfolded. Ms. Gainey increased Mr. Farmer's working hours, made his working conditions more onerous, and, with Ms. Tillery, spread false rumors accusing him of various sexual exploits. Pet. 3a; Compl. ¶ XVIII.

On September 9, 2015, Ms. Gainey walked into Mr. Farmer's Fayetteville office and fired him. Compl. ¶ XIII. He was unable to find another job and became homeless. Farmer Aff. ¶ 21. He was later diagnosed with post-traumatic stress disorder and major depressive order as a result of the sexual harassment and termination he suffered while working for Troy. *Id.*

Procedural background

Mr. Farmer brought this action against Troy University, Gainey, and Tillery in the Superior Court of North Carolina in July 2018, asserting violations of North Carolina tort law and the North Carolina Constitution. The complaint did not state whether the individual defendants were sued in their personal or official capacities. After this Court decided *Hyatt*, the defendants moved to dismiss Mr. Farmer's claims, claiming protection from suit in North Carolina based on Alabama's sovereign immunity. As to Troy, the motion argued that it was an arm of the state of Alabama. As to the two individual defendants, the motion argued that, although the complaint did not specify, the court should presume that they were sued in their official capacities and, therefore, that Alabama's sovereign immunity applied to them.[5] In a

[5] The motion also argued that the claims against the individual defendants should be dismissed as moot based on a disputed interpretation of a stipulation. That argument was not addressed by the courts below.

brief order citing *Hyatt*, the superior court granted the motion and dismissed the case with prejudice. Pet. 57a.

Mr. Farmer appealed to the North Carolina Court of Appeals, which affirmed. *Id.* at 35a. Based on its interpretation of North Carolina sovereign immunity case law, that court held that Troy had not waived Alabama's sovereign immunity. *Id.* at 44a–47a. The court "presume[d]" that the intentional tort claims against defendants Gainey and Tillery were brought against them in their official capacities, and thus found Alabama's sovereign immunity barred the suit against them as well. *Id.* at 54a.

The North Carolina Supreme Court granted Mr. Farmer's petition for discretionary review and reversed. *Id.* at 16a, 34a. That court held that Troy had explicitly waived its sovereign immunity.

To start, the court noted 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." *Id.* at 9a. The court then looked to this Court's analysis of the effects of a sue-and-be-sued-clause in the context of federal sovereign immunity in *Thacker v. Tennessee Valley Authority*, 139 S. Ct. 1435 (2019), which held that such a clause can act as a waiver of sovereign immunity where a suit challenges acts that are "not governmental but commercial in nature," *id.* at 1442. The court explained that, "while *Hyatt* … 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." Pet. 11a (citing *Hyatt*, 139 S. Ct. at 1492, and *Thacker*, 139 S. Ct. at 1443).

Looking at the facts here, the court concluded that Troy's "business of recruiting students for on-line education—recruitment that occurred in North Carolina for students who remained in North Carolina"—was not a governmental activity. *Id.* at 11a–12a. Rather, based on the allegations of the complaint, the court concluded that "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." *Id.* at 12a. Accordingly while recognizing that "a waiver of sovereign immunity cannot be 'implied,'" the court held that, under *Thacker*, "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, it explicitly waived its sovereign immunity." *Id.* (citations omitted).

The court found "additional support" for Troy's consent in the provisions of the North Carolina Nonprofit Corporation Act that prohibit out-of-state corporations from doing business in the state absent a certificate of authority, and provide those that *do* have a valid certificate of authority the "same but no greater privileges as" and "same duties, restrictions, penalties, and liabilities now or later imposed on, a domestic corporation of like character." Pet. 13a (citing N.C. Gen. Stat. § 55A-15-05(a) and quoting *id.* § 55A-15-05(b)). By applying for a certificate of authority, the Court reasoned, Troy "agreed to be treated like a domestic corporation of like character,"—here, a private nonprofit university that lacks sovereign immunity. *Id.* at 13a & n.4 (cleaned

up). Under *City of Chattanooga*, that agreement constituted a waiver of sovereign immunity. *Id.* at 13a–14a.

Justice Berger concurred, noting that he "would have decided the case with greater emphasis on the proprietary actions by Troy University" and citing *City of Chattanooga* and *Thacker*. *Id.* at 17a. Dissenting, Justice Barringer would have found no waiver based on her interpretation of North Carolina law as to the significance of sue-and-be-sued clauses, *id.* at 30a–31a, and distinguishing *City of Chattanooga* and *Thacker*, *id.* at 31a–32a. In so doing, she acknowledged that *Hyatt* "did not address the distinction between commercial and governmental activity" and that "this door may have been left open by" this Court. *Id.*

REASONS FOR DENYING THE WRIT

I. No lower court decision addresses the question presented or conflicts with the decision below.

For forty years, state courts around the country followed *Nevada v. Hall*, 440 U.S. 410 (1979), which held that the Constitution does not provide the states with sovereign immunity from suit in the courts of the other states. *See, e.g.*, *Faulkner v. Univ. of Tenn.*, 627 So. 2d 362, 365–66 (Ala. 1992) (citing *Hall* and declining to recognize sovereign immunity in a lawsuit brought against an out-of-state state university). In *Hyatt*, the Court overruled *Hall*, concluding that the notion that one state could not be sued in the courts of another was inherent in the structure of the Constitution, as understood at the Founding. *See Hyatt*, 139 S. Ct. at 1493–99.

In *Hyatt*, where the defendant was a state agency performing governmental functions, *id.* at 1490–91, the Court did not address either whether interstate sovereign immunity applies where a state corporation undertakes commercial activity in another state or what constitutes consent to suit in another state. In the four years since, these questions have seldom arisen. Indeed, the North Carolina Supreme Court's decision in this case appears to be the *only* state high court decision touching on them.[6]

Faced with the absence of decisions on point, Troy argues that the state high courts are in conflict by pointing to two decisions from nearly thirty years ago involving tribal sovereign immunity. *See* Pet. 18–19 (citing *Ransom v. St. Regis Mohawk Educ. & Cmty. Fund, Inc.*, 658 N.E.2d 989 (N.Y. 1995), and *Gavle v. Little Six, Inc.*, 555 N.W.2d 284 (Minn. 1996)). Tribal sovereign immunity, however, implicates a "special brand of sovereignty" that differs both in "its nature and its extent" from that at issue in *Hyatt*. *Michigan v. Bay Mills Indian Cmty.* , 572 U.S. 782, 800 (2014). Moreover, both *Ransom* and *Gavle* precede this Court's decision in *Thacker*, which was central to the North Carolina Supreme Court's analysis.

Even beyond those distinctions, neither case poses a conflict here. In *Ransom*, a case brought by members of the St. Regis Mohawk Tribe against a tribal entity

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[6] The New York Court of Appeals recently dismissed an appeal by a New Jersey entity on the ground that it failed to preserve its *Hyatt*-based sovereign immunity argument. *See Henry v. N.J. Transit Corp.,* __ N.E.3d __, No. 11, 2023 WL 2575220, at *6 (N.Y. Mar. 21, 2023). Dissenting Judge Wilson addressed the merits, offering an analysis consistent with the North Carolina Supreme Court's in this case. *See id.* at *18 (Wilson, J., dissenting).

and the Tribal Chiefs, the New York Court of Appeals based its decision that the defendants had sovereign immunity on the fact that they were engaged in traditional governmental functions. *See* 658 N.E.2d at 993. By contrast, the North Carolina Supreme Court's decision in this case was expressly tied to the fact that *nongovernmental*, commercial activity is at issue. Pet. 11a. Additionally, although the court in *Ransom* held that a state statutory sue-and-be-sued clause was not sufficient to waive the tribe's sovereign immunity in connection with its governmental activity, the opinion nowhere suggests that the defendants there—unlike the defendant Troy here—had agreed to be subject to the same duties and liabilities of a "domestic corporation of like character." *See* Pet. 13a–14a (majority opinion); *id.* at 21a–22a (concurring opinion).

As for *Gavle*, that case did not involve either an agreement to be subject to the duties and liabilities of a domestic corporation or a sue-and-be-sued clause. In holding that consent to service of process was insufficient to serve as a waiver of tribal sovereign immunity, the court expressly noted that "[i]f there were" a sue-and-be-sued clause, its "conclusion might indeed be different." 555 N.W.2d at 297.

As the case law develops in response to *Hyatt*, as well as the 2019 decision in *Thacker*, it is possible that courts' fact-bound applications may develop into rules of law regarding specific fact patterns that could conceivably come into conflict. To date, however, because no other state high court has addressed the question presented, certiorari is not warranted.

II. The decision below is consistent with this Court's precedent.

A. Troy contends that the North Carolina Supreme Court's decision conflicts with this Court's decisions in *Hyatt, College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), and *Sossamon v. Texas*, 563 U.S. 277 (2011). Pet. 13–18. Troy is wrong.

As to *Hyatt*, the North Carolina Supreme Court repeatedly cited the case and properly stated the rule it sets out: A state is "entitled to sovereign immunity from suit without its consent in the state courts of every state in the country." Pet. 8a (citing *Hyatt*, 139 S. Ct. at 1490). *Hyatt* did not address the issue presented by this case: what suffices to demonstrate a state entity's consent to be sued in the courts of a different state. Nor did it address how a state's immunity from suit in another state applies to commercial activity undertaken in that other state.

Nonetheless, Troy argues that the North Carolina Supreme Court ran afoul of *Hyatt* by "applying" state law—the North Carolina Nonprofit Corporation Act—to the question whether the school waived sovereign immunity. Pet. 16. The court's conclusion that Troy waived sovereign immunity, however, was *not* an application of that law. The court's conclusion was based on application of this Court's decisions—*Hyatt*, *Thacker*, and others—to the facts before it, including the fact that Troy affirmatively "consented to be treated like 'a domestic corporation of like character' and therefore to be sued in North Carolina." *Id.* at 16a. Indeed, the opinion cites only two North Carolina decisions: one to respond to an argument made by

Troy and one to distinguish a case on which the court of appeals had relied. *Id.* at 12a, 14a.

Troy also argues that the decision below conflicts with this Court's decision in *College Savings*, which held that a state would not be deemed to have waived its Eleventh Amendment sovereign immunity absent a "clear" waiver. 527 U.S. at 680; *see* Pet. 13–16. This case presents no conflict for two reasons. To begin with, as Justice Gorsuch recently explained, the standard for waiver of Eleventh Amendment immunity is more stringent than that which applies to the immunity at issue in *Hyatt*—and here—which derives from the structure of the Constitution. "Structural immunity sounds in personal jurisdiction, so the sovereign can waive that immunity by 'consent' if it wishes." *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2264 (2021) (Gorsuch, J., dissenting) (citing *Hyatt*, 139 S. Ct. at 1493–94, and *Wisc. Dep't of Corrections v. Schacht*, 524 U.S. 381, 394 (1998) (Kennedy, J., concurring)). The Eleventh Amendment, on the other hand, is a matter of federal subject-matter jurisdiction and, accordingly, cannot be waived. *Id.* at 2264–65. *College Savings* is thus not on point here.

Just as importantly, in addition to addressing a meaningfully different type of immunity, *College Savings* addressed a meaningfully different question: whether "Congress, in the exercise of its Article I powers," was permitted "to extract 'constructive waivers' of state sovereign immunity" by putting states on notice that engaging in certain activity would subject them to suit in federal court. 527 U.S. at 686. No such "constructive waiver" is presented here. Here, the North Carolina Supreme Court relied on Troy's *affirmative* request to be imbued with the

rights and responsibilities of a "domestic corporation of like character." N.C. Gen. Stat. § 55A-15-05(b). Further, nothing in *College Savings*, which concerns interstate commercial activity, addresses whether one state may require an entity associated with another state to be treated like a similar in-state entity for purposes of conducting commercial operations within its borders.

Last, Troy points to *Sossamon*, another case examining whether Congress validly abrogated Eleventh Amendment immunity. *Sossamon*'s holding that Spending Clause legislation must be explicit to abrogate state immunity, 563 U.S. at 284, *cited in* Pet.8a–9a, says nothing about whether Troy's voluntary actions here constituted consent to suit.

B. Although the court below cited *Hyatt*, *College Savings*, and *Sossamon* to the extent that they bore on the question before it, its analysis relied more heavily on two of this Court's other cases, *Thacker* and *City of Chattanooga*. Contrary to Troy's contention, the North Carolina court's reliance on those cases does not support its request for review.

In its unanimous decision in *Thacker*, this Court addressed the effect of sue-and-be-sued clauses on federal sovereign immunity. The Court explained that, when an entity is "launched with such a clause into the commercial world and authorized to engage in business transactions with the public," the plain meaning of the term "sue and be sued" is that the entity has "the same amenability to judicial process as a private enterprise under like circumstances." 139 S. Ct. at 1442 (quoting *Fed. Housing Admin. v. Burr*, 309 U.S. 242, 245 (1940)) (cleaned up). In a suit "based on a public corporation's *commercial* activity," there is no

reason to depart from the plain meaning of the term, even if there may be an "implied limit on [a] sue-and-be-sued clause'" in "suits challenging the entity's *governmental* activity." *Id.* at 1443.

Troy contends that the court below erred in relying on *Thacker* because this case does not involve federal legislation waiving federal sovereign immunity. But the Court's decision in *Thacker* was not based on a unique aspect of federal sovereign immunity; it was based on the "usual and ordinary" meaning of the words "sue and be sued." *Id.* at 1441 (citation omitted). Troy offers no support for the suggestion that, in this case, which, like *Thacker*, involves a "public corporation's *commercial* activity," *id.* at 1443, some other meaning applies to that identical term. Troy's suggestion that the court below erred in applying the "usual and ordinary" meaning expressly identified by this Court should be rejected. *See* Pet. 10a–11a (citing *Thacker*, 139 S. Ct. at 1441, 1443).

As for *City of Chattanooga*, there, Tennessee had enacted a statute allowing Georgia to construct and manage a railroad business within the state, and to acquire a right of way and land for the facilities, subject to the same "rights, privileges and immunities with the same restrictions which are given and granted" to a domestic railroad. 264 U.S. at 479, 481. When Tennessee later sought to condemn part of the land, Georgia asserted sovereign immunity. Rejecting that claim, this Court held that "[t]he terms on which Tennessee gave Georgia permission to acquire and use the land and Georgia's acceptance amount [to] consent that Georgia may be made a party to condemnation proceedings." *Id.* at 480. By accepting the conditions imposed on it by the Tennessee legislature and proceeding with its commercial operations subject to

those conditions, Georgia "divested itself of its sovereign character" and "t[ook] on the character of those engaged in the railroad business in Tennessee." *Id.* at 482.

Arguing that *City of Chattanooga* addresses only suits concerning real property, Troy claims that the court below erred in relying on that case to support its holding that Alabama consented to suit in North Carolina for claims related to its business activity in North Carolina. But Troy ignores key aspects of the Court's opinion, which more than once highlights Georgia's consent to be sued by accepting the terms of Tennessee's permission to operate in the state. *Id.* And while the Court declined to address "the broad question whether Georgia has consented generally to be sued in the courts of Tennessee in respect of all matters arising out of" its ownership of the railroad in that state, *id.*, it stated clearly that "the acceptance by Georgia of the permission given it to acquire the railroad land in Tennessee is inconsistent with an assertion of its own sovereign privileges in respect of that land … and amounts to a consent," *id.* at 482–83.

Although this case is not about real property, the cases plainly present other analogous facts. There, the statute that granted Georgia the right to operate its business conditioned that approval onbeing subject to the duties of a similar domestic corporation, and Georgia accepted that condition by proceeding with its business. *See id.* at 481–82. Here, North Carolina granted Troy the right to operate its business subject to its acceptance of the duties of "domestic corporation[s] of like character," including the ability to be sued in North Carolina courts, *see* N.C. Gen. Stat. § 55A-15-05(b), and Troy accepted that condition by operating its business in North Carolina. The court

below committed no error in relying on *City of Chattanooga* as "additional support," Pet. 13a, for its holding.

Troy contends that *Paulus v. South Dakota*, 227 N.W. 52, 55 (N.D. 1929), supports its argument that the North Carolina Supreme Court misread *City of Chattanooga*. Troy correctly states that *Paulus* rejects the argument that *City of 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." Pet. 24 (quoting *Paulus*, 227 N.W. at 55). The decision below, however, cannot reasonably be read to stand for that broad proposition, given its focus on the specific terms to which Troy agreed when it sought permission to do business in North Carolina.

Troy also contends that its argument with respect to *City of Chattanooga* is supported by *Cayuga Indian Nation of New York v. Seneca County*, 978 F.3d 829 (2d Cir. 2020). Specifically, Troy claims that a "see also" citation to *City of Chattanooga* in a footnote in *Cayuga Indian Nation* about the "immovable property" exception to immunity demonstrates a conflict. Pet. 25 (citing 978 F.3d at 836–37 n.6). Troy is wrong. *Cayuga Indian Nation* does not involve a sue-and-be-sued clause, does not address consent, and does not discuss *City of Chattanooga*. A citation does not create a conflict, and *Cayuga Indian Nation* is not inconsistent with the decision below.

III. This case is a poor vehicle to address the question presented.

Beyond the lack of a conflict, several aspects of this case make it a particularly poor vehicle to address the question presented. First, the petition's "question presented" does not accurately represent the holding of the North Carolina Supreme Court. Second, the facts of this case raise the antecedent question whether petitioners had sovereign immunity to begin with. Finally, the wholly intrastate nature of the allegations in this case raise issues of competing sovereignty that complicate the development of a broad rule.

A. The question presented by petitioners does not align with the holding below.

The question presented in the petition is whether a state "operating" in a foreign state "under a corporate registration statute with a sue-and-be-sued clause" constitutes waiver of the structural sovereign immunity recognized in *Hyatt*. Pet. i. The North Carolina Supreme Court did not purport to answer that broad question. As to sue-and-be-sued clauses, the court limited its analysis to entities "engaged in commercial rather than governmental activity" and the facts of this case. *Id.* at 12a. The facts here do not involve mere "operation" in a foreign state, but the affirmative act of applying for a benefit, the provision of which is subject to specified obligations.

More fundamentally, petitioners' question ignores that the majority explicitly did *not* base its holding solely on a sue-and-be-sued clause. It grounded its finding of consent on the additional basis that "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.* at 16a (quoting N.C. Gen. Stat. § 55A-15-05(b)). None of the cases cited by petitioners involved similar provisions, and the petition largely ignores this aspect of the North Carolina Supreme Court's decision. These additional facts make this case a poor vehicle to address the impact of sue-and-be-sued clauses in the abstract.

B. Even absent consent, petitioners' entitlement to state sovereign immunity is uncertain.

The question whether an entity has waived sovereign immunity arises, of course, only if the entity is entitled to sovereign immunity in the first place. Here, it is not certain whether, absent a waiver, any of the three defendants were entitled to invoke the immunity recognized in *Hyatt*.

1. Troy University is not the State of Alabama.

a. With little discussion, the North Carolina Supreme Court stated that Troy University itself was entitled to invoke the state's sovereign immunity, citing cases involving in-state educational activities and the immunity created by the Alabama Constitution. Pet. 7a (citing *Ala. State Univ. v. Danley*, 212 So. 3d 112, 122 (Ala. 2016) (quoting *Taylor v. Troy State Univ.*, 437 So. 2d 472, 474 (Ala. 1983)). But the original understanding of sovereign immunity at the time the Constitution was adopted casts doubt on whether Troy University—a separately incorporated entity—is entitled to the sovereign immunity at issue in *Hyatt* and here.

As recently explicated by Judge Oldham, the historical record shows that, at the Founding, state-created corporations—including state universities—did not qualify as "the State" for purposes of sovereign immunity. *See Springboards to Educ., Inc. v. McAllen Indep. Sch. Dist.*, 62 F.4th 174, 195 (5th Cir. 2023) (Oldham, J., concurring) ("Even when a college 'acquire[d] the character of a public institution,' it retained its corporate status. It didn't miraculously become the State. Regardless of the types of corporations or the State's involvement in them, the Court consistently found corporations weren't entitled to sovereign immunity." (citation omitted)). Judge Oldham explained that, according to Blackstone's *Commentaries on the Laws of England*, many types of corporations that existed at common law, including "colleges and universities," "could only be created with the consent of the sovereign" but "could not assert the sovereign's immunity from suit." *Id.* at 191. That sovereign immunity did not extend to state-created corporations is reflected in a series of nineteenth-century cases where this Court held that state-created banks were not imbued with the sovereign privileges of the states that created or owned them. *See id.* at 194 (citing *Curran v. Arkansas*, 56 U.S. 304, 309 (1853); *Darrington v. Bank of Ala.*, 54 U.S. 12, 16–17 (1851); *Briscoe v. Bank of Commonwealth of Ky.,* 36 U.S. 257, 327 (1837); *Bank of Commonwealth of Ky. v. Wister*, 27 U.S. 318, 319 (1829); *Bank of U.S. v. Planters' Bank of Ga.*, 22 U.S. 904, 908 (1824)).

This evidence suggests that, at the time of the Constitution's ratification, a state university, such as Troy, was not understood to have been imbued with the privileges of state sovereignty inherent in the constitutional structure. As Judge Oldham concluded,

"[i]f an entity has a separate legal status from the State (*e.g.*, as a corporation, LLC, or § 501(c)(3) nonprofit organization) … the entity is not 'the State' and hence is not entitled to sovereign immunity." *Id.* at 198. Troy is just such a corporation: The Alabama Secretary of State lists it as a "domestic non-profit corporation,"[7] and Troy stated on its Application for Certificate of Authority to do business in North Carolina that it is a corporation, Pet. 58a.

The question whether, absent consent, Troy would be entitled to share in the state's structural immunity is necessarily antecedent to the question presented in the petition.[8] Because the defendant in *Hyatt* was a state government agency engaged in the governmental function of taxation, this Court did not have the opportunity to address there the question whether the interstate sovereign immunity that was preserved in the constitutional structure includes such corporate entities. In the four years since *Hyatt*, the lower courts have not addressed this question either. Consistent with its usual practice, this Court should not be the first to do so.

b. In a footnote, Troy briefly suggests that Article I, section 14 of the Alabama Constitution

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[7] https://arc-sos.state.al.us/cgi/corpdetail.mbr/detail?corp=000815493&page=name&file=&type=ALL&status=ALL&place=ALL&city=.

[8] That Eleventh Amendment immunity has sometimes been extended to educational institutions like Troy does not mean that the immunity recognized in *Hyatt* extends to such entities. The two immunities are not co-extensive. *See PennEast Pipeline*, 141 S. Ct. at 2264 (Gorsuch, J., dissenting). And in looking to the scope of the *Hyatt* immunity, it makes sense to look to the same historical record that this Court relied upon in *Hyatt*. *See* 139 S. Ct. at 1493–95.

confers sovereign immunity on Troy and makes that immunity unwaivable. *See* Pet. 16 n.4; s*ee also* Ala. Amicus Br. 3. Section 14 is not relevant here. As Alabama Supreme Court Justice Shaw recently explained, that provision addresses the type of immunity grounded in "subject-matter jurisdiction." *In re Space Race, LLC*, __ So. 3d __, No. 1200685, 2021 WL 6141625, at *8 (Ala. Dec. 30, 2021) (Shaw, J., concurring). It does not address the state sovereign immunity inherent in the federal constitutional structure—that is, the type of immunity at issue here and in *Hyatt*. *See Hyatt*, 139 S. Ct. at 1492; *see also supra* p.14.

2. Petitioners Gainey and Tillery are not the State of Alabama.

Whether the individual petitioners—North Carolina residents sued for actions they took in North Carolina—are entitled to share in the sovereign immunity of Alabama is also disputed in this case. The claims against petitioners Gainey and Tillery are intentional tort claims. The parties dispute whether these are official capacity claims, to which sovereign immunity might apply, or personal capacity claims, to which it cannot, *see, e.g.*, N.C. Sup. Ct. Pl.-Appellant's Reply Br. at 17–18. And the North Carolina Supreme Court explicitly did not address this question. *See* Pet. 6a n.2. But the allegations against Ms. Gainey and Ms. Tillery—for intentional infliction of emotional distress and intentional interference with a contract between Mr. Farmer and Troy itself—suggest Mr. Farmer intended to bring personal capacity claims. *See Mabrey v. Smith*, 548 S.E.2d 183, 187 (N.C. Ct. App. 2001) (looking to nature of allegations and concluding claims were brought against state employees in their individual capacities).

This predicate issue and independent basis for finding that two of the three petitioners lack sovereign immunity makes this case poorly suited for review.

C. The allegations of harassment of one North Carolina citizen by two North Carolina citizens acting in North Carolina make this case unusual.

Hyatt involved claims against a California government agency involved in a traditional governmental function and actions taken by California-based employees—predominantly taken in California. This case, by contrast, involves claims about the conduct of an Alabama state-affiliated entity engaged in commercial activity in North Carolina and actions taken by North Carolina residents working *exclusively* in North Carolina. Thus here, North Carolina's own sovereign interest in regulating conduct by its *own* citizens, within its *own* borders, is at a maximum.

Unlike cases cited by Troy, this case thus poses the issue whether, as part of a commercial enterprise, one state can confer its immunity on the citizens of another state for acts they take in their home state. The need to address this additional issue, not addressed below or in other cases, is further reason why this case would be a poor vehicle for consideration of the question presented in the petition.

IV. Troy is wrong as to the consequences of the decision below.

Troy argues that this case is exceptionally important because (1) other states' universities have opened similar businesses in North Carolina, and (2) other states have similar business registration

regimes. Pet. 27–31. Yet Troy does not point to any other case where the question presented has arisen. The argument that other courts might later address the question and might agree with North Carolina does not satisfy this Court's criteria for review.

Moreover, not only does the decision below address only commercial activity, but claims like those at issue can already be brought in federal court. The underlying allegations of sexual harassment of a university employee and of students would likely give rise to federal court litigation under Title VII and Title IX—claims as to which sovereign immunity does not serve as a shield. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 447–48 (1976) (Title VII); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 284 (1998) (Title IX).

In addition, under the decision below, state-affiliated universities like Troy can still recruit military students based in North Carolina and also avoid waiving any immunity that they may have as arms of their states. Troy chose to undertake to recruit North Carolina students by leasing an office and employing staff wholly within North Carolina. To do so, it was required to consent to the jurisdiction of the North Carolina courts for claims arising out of those activities. However, not all recruitment activities directed at individuals in the state require that consent. North Carolina does not require foreign corporations to seek and obtain a certificate of authority in order to "[c]onduct[ ] affairs in interstate commerce" or "[s]ell[ ] through independent contractors." N.C. Gen. Stat. § 55A-15-01(b)(8), (10) . That is, a foreign entity is *not* required to obtain a certificate of authority—and therefore not required to consent to suit in the state—in order to solicit sales to North Carolina residents if it does not maintain an office in

the state. *Snelling & Snelling, Inc. v. Watson*, 254 S.E.2d 785, 790 (N.C. Ct. App. 1979). Other states have similarly held that merely soliciting business in a state does not require a foreign corporation to be qualified to conduct affairs there. *See, e.g.*, *SGB Constr. Servs., Inc. v. Ray Sumlin Constr. Co.*, 644 So. 2d 892, 894 (Ala. 1994). To the extent that state-affiliated businesses would like to obtain the benefits of selling their products to North Carolina students without subjecting themselves to suit in North Carolina state courts, there are ways they can do so.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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