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

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

STATUTES

INTRODUCTION

Because Farmer's new Supreme Court counsel has little interest in defending it, we begin by restating the decision below. The North Carolina Supreme Court stripped Troy University—an arm of the State of Alabama—of its constitutionally protected sovereign immunity for one reason: The court deemed that immunity "waived" because Troy registered to do business in North Carolina subject to the North Carolina Nonprofit Corporation Act and its "sue and be sued" clause. Pet. App. 1a, 9a. That holding "unilaterally impose[s] a waiver of sovereign immunity on Alabama" without its consent, in "violat[ion of] the Constitution of the United States." *Id.* at 30a, 32a (Barringer, J., dissenting). It flagrantly departs from the decisions of this Court and other state courts requiring a "clear declaration" by the State "expressing unequivocally that it waives its immunity." *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680-81 (1999); *see Sossamon v. Texas*, 563 U.S. 277, 290 (2011). And, as 19 States explain, if left to stand, it will cause "widespread harm to our nation's constitutional order." States Br. 23.

Farmer does not seriously dispute any of this. Instead, he largely runs away from the decision below, doing summersaults to recast the North Carolina Supreme Court's reasoning and contriving new but equally meritless arguments he never raised below. Farmer says the North Carolina Supreme Court's ruling rests on an "*affirmative* request" to operate as a non-profit corporation, but even he acknowledges that the court's ruling ultimately was that Troy's "*actions* constituted consent to suit." BIO

14-15 (second emphasis added). That *constructive*-waiver ruling starkly conflicts with this Court's precedents, as well as the decisions of other state courts, requiring an express and unequivocal waiver.

All this weighs strongly in favor of certiorari. But as the amici States explain (at 2), this Court also has a special duty "to step in when a state court impinges on the sovereignty of other States." The decision below not only impinges on Alabama's sovereignty, but risks eradicating interstate sovereign immunity across the nation since nearly every State has a non-profit registration scheme like North Carolina's. Pet. 28-29 n.9. The petition should be granted.

ARGUMENT

A. The Decision Below Flagrantly Disregards This Court's Precedents

Farmer's attempt to account for this Court's precedents confirms the need for review.

1. In *College Savings*, this Court held that the Constitution requires a "'clear declaration' *by the State* . . . expressing unequivocally that it waives its immunity." 527 U.S. at 680. In so holding, the Court overruled the constructive-waiver theory of *Parden v. Terminal Railway of the Alabama State Docks Department*, 377 U.S. 184 (1964), under which a State could waive its immunity merely by engaging in conduct, without a clear and unequivocal declaration. Yet, that is exactly what the North Carolina Supreme Court allowed here. Pet. 13-16.

Instead of seriously attempting to show that the decision below complies with *College Savings*, Farmer offers "two reasons" for discarding it here. BIO 14-15. Neither works. *First*, Farmer suggests (at 14) that *College Savings* applied a "more stringent" "standard

for waiver" because it involved "Eleventh Amendment immunity," rather than immunity that "derives from the structure of the Constitution." This argument—which was not raised below—is meritless. This Court has consistently held—in cases not covered by the text of the Eleventh Amendment—that "the proper standard for a waiver of [sovereign] immunity by a State" is the same "express" and unequivocal standard applied in *College Savings*. *Florida Dep't of Health & Rehab. Servs. v. Florida Nursing Home Ass'n*, 450 U.S. 147, 149-50 (1981) (per curiam); *see also, e.g.*, *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238-41 (1985); *Edelman v. Jordan*, 415 U.S. 651, 673 (1974).[1] Indeed, *College Savings* itself relied on these cases in its waiver analysis. *See* 527 U.S. at 675-76, 678. Thus, it is clear that the express-and-unequivocal standard applies here.

Farmer points to Justice Gorsuch's dissent in *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2264-65 (2021), arguing that Eleventh Amendment immunity "cannot be waived" at all. BIO 14. But that view says nothing about the *standard* for waiver applicable to the structural immunity recognized in *Franchise Tax Board of California v. Hyatt*, 139 S. Ct. 1485 (2019). Indeed, Justice Gorsuch recognized that such immunity may be waived only by the State's "consent." 141 S. Ct. at 2264. And if Eleventh Amendment immunity cannot be waived at all, then this Court's precedents adopting the express-and-unequivocal waiver standard—including the lengthy

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[1] To the extent some of these cases refer to "Eleventh Amendment immunity," they do so imprecisely (as they do not involve suits between States and citizens of other States). *See Alden v. Maine*, 527 U.S. 706, 713 (1999).

waiver analysis in *College Savings*—can *only* apply to the structural immunity at issue here.

Second, Farmer contends (at 14-15) that this case does not involve the kind of "constructive waiver" that *College Savings* rejected because Troy's conduct included an "*affirmative* request" to register as a foreign non-profit corporation and operate as a "domestic corporation of like character." But that is just a backdoor way of arguing that *conduct* amounts to waiver, and thus is an attempt to resurrect the "constructive-waiver experiment of *Parden*" that *College Savings* put to rest. *College Savings*, 527 U.S. at 680; *see* Pet. 14-15; States Br. 6, 8. Indeed, Farmer ultimately describes the alleged waiver here as Troy having "accepted [a] condition by operating its business" (BIO 17)—language virtually identical to the very passage from *Parden* that *College Savings* overruled. *See College Savings*, 527 U.S. at 677 (quoting *Parden*, 377 U.S. at 192).[2]

2. Farmer's attempts to reconcile the decision below with *Hyatt* and *Sossamon* also fail. Farmer argues that *Hyatt*'s rule against States "apply[ing] their own law" to "refuse each other sovereign immunity," 139 S. Ct. at 1498, does not apply here because the decision below "was *not* an application of" the North Carolina Nonprofit Corporation Act. BIO 13. That is nonsense. The Act was the *entire* basis for the decision below: The court held that the "sue and

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[2] Farmer's argument (at 2, 19-20) that "commercial" activity is not entitled to any immunity also disregards *College Savings*, which rejected any "distinction between commercial and noncommercial state activities" in the context of state sovereign immunity. 527 U.S. at 684-86 & n.4; *see* Pet. 22. Nor is there any clear delineation between such activities for a public university created, funded, and overseen by the State. Pet. 6.

be sued clause in the North Carolina Nonprofit Corporation Act" could "act as a waiver of sovereign immunity" in this case. Pet. App. 9a-12a; *see id.* at 1a, 16a. *Hyatt* forbids that result.

Farmer's effort to distinguish *Sossamon* likewise misses the mark. *Sossamon* was not, as Farmer contends (at 15), an abrogation case. Instead, it turned on the Court's "longstanding rule that a *waiver* of sovereign immunity must be expressly and unequivocally stated in the text of the relevant statute." *Sossamon*, 563 U.S. at 290 (emphasis added). *Sossamon* thus confirms that—even when a State "appl[ies] for a benefit, the provision of which is subject to specified obligations," BIO 19—a constructive waiver will not do; rather, a waiver must be express and unequivocal. Pet. 16-17.

3. Faced with these clear precedents, Farmer—like the court below—tries (at 15-18) to erase them based on expansive interpretations of *Thacker v. Tennessee Valley Authority*, 139 S. Ct. 1435 (2019), and *Georgia v. City of Chattanooga*, 264 U.S. 472 (1924). These arguments fail, too.

Thacker is clearly inapposite. It construed the scope of an undisputed waiver by Congress of a federal agency's immunity—and said nothing about one State's authority to waive *another State's* immunity. Pet. 20-22; States Br. 11. Moreover, *Thacker*'s interpretation of the sue-and-be-sued clause was based on the principle—drawn from *Federal Housing Administration v. Burr*, 309 U.S. 242 (1940)—that certain "waivers by Congress of governmental immunity in the case of [federal agencies] should be *liberally* construed." *Id.* at 245 (emphasis added); *see Thacker*, 139 S. Ct. at 1443 (citing *Burr* and same principle). But, when it comes

to state sovereign immunity, the opposite rule of construction applies—waivers must be *strictly* construed. *Sossamon*, 563 U.S. at 285 & n.4. And, under the express-and-unequivocal standard, it is generally established that sue-and-be-sued clauses do *not* waive sovereign immunity. *Infra* at 7.

Farmer thus focuses his energy on the Court's century-old decision in *Chattanooga*. BIO 16-18. But *Chattanooga* cannot bear that weight. Pet. 22-23; States Br. 11-12. As both members of this Court and the Solicitor General recently stressed (Pet. 23), *Chattanooga* addressed only a State's "power of eminent domain" over "[l]and acquired" by another State. 264 U.S. at 479-80; *see id.* at 482 (confining ruling to "the matter of the condemnation of land"). Farmer admits (at 17) that "this case is not about real property." That disposes of *Chattanooga* here. Farmer's decision to double-down on the North Carolina Supreme Court's reliance on dicta from *Chattanooga* (Pet. App. 13a-14a) only underscores the need for this Court's review. Pet. 24-25.

B. The Decision Below Conflicts With The Decisions Of Other State Courts

Farmer also fails to answer the separate conflicts with the decisions of other state courts.

1. As explained (Pet. 18-19), state courts have rejected the argument that registration to operate in a State as a foreign corporation with the power to sue and be sued is sufficient to waive tribal sovereign immunity under the same express-and-unequivocal waiver standard applicable here. Farmer argues (at 2, 11) that the "nature and origin" of tribal immunity is different. But whatever its source, tribal immunity cannot possibly require greater protection than the

constitutional immunity recognized in *Hyatt*. More to the point, the waiver of tribal immunity is subject to the same express-and-unequivocal standard as the waiver of state sovereign immunity. *See Ransom v. St. Regis Mohawk Educ. & Cmty. Fund, Inc.*, 658 N.E.2d 989, 995 (N.Y. 1995); Pet. 19. These state court decisions thus irreconcilably conflict with the waiver ruling below—they find *no* waiver in the *same* circumstances based on the *same* standard.[3]

2. Farmer also just ignores the many cases in which state courts have held that "a statute allowing a governmental entity to 'sue and be sued'" does *not* establish an express and unequivocal waiver of sovereign immunity. States Br. 8-11; *see, e.g.*, *Harrison v. Massachusetts Bay Transp. Auth.*, No. 1884CV02939BLS2, 2020 WL 4347511, at *4 & n.3 (Mass. Sup. Ct. June 18, 2020) (collecting cases showing that numerous States hold sue-and-be-sued clauses do not waive sovereign immunity), *aff'd*, 195 N.E.3d 914 (Mass. App. Ct. 2022), *review denied*, 205 N.E.3d 271 (Mass. 2023). In those cases, the question was whether a sue-and-be-sued provision waived the State's *own* sovereign immunity from suit. But if anything, this conclusion is even stronger when it comes to *another* State's immunity.

These conflicts independently warrant review.

C. The Question Presented Is Undeniably Important And Warrants Review Here

On importance, Farmer is again tellingly silent—remarkably ignoring what 19 States have to say on this core issue of state sovereignty.

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[3] The other distinctions Farmer floats (at 12) with *Ransom* are immaterial to its waiver analysis.

1. As the amici States explain, the immunity at issue here protects the "equal dignity" of States and is critical to ensuring constitutional order. States Br. 1. Because "virtually every State has a parallel statutory scheme" governing non-profit corporations, *id.* at 19; *see* Pet. 28-29, the decision below is a recipe for eradicating the constitutional immunity recognized in *Hyatt* nationwide. Meanwhile, the uncertainty created by the decision below is itself "damaging," as it will impair important operations, cast a cloud over an immunity granted by the Constitution, and promote conflict among the States. States Br. 1-2. The States "rely on this Court to police border disputes between them," and to "step in when a state court impinges on the sovereignty of other States," as North Carolina has here. *Id.* at 2.

The practical importance of this case is also beyond dispute. "States regularly operate beyond their borders, benefitting their own citizens as well as citizens of other States." *Id.* at 1. Universities are just one example. Farmer does not dispute that several other States operate public universities in North Carolina that are *already* subject to the ruling below. Pet. 27 n.8. And "[m]any [other] state universities operate in some fashion in another State." States Br. 20-22 & n.6. Yet, the decision below will deter such operations, denying an important educational benefit to countless Americans. "[T]o maintain their sovereignty and their solvency, States will be forced to keep to themselves and avoid operations in foreign States, a result inconsistent with the constitutional design of equally dignified but *unified* States." *Id.* at 20.

Instead of denying any of this, Farmer mainly suggests (at 25-26) that States should just scrap their

out-of-state activities—precisely what petitioners (at 30-31) and the amici States (at 20) warned against if the decision below is allowed to stand. Here, that would have the effect of limiting U.S. servicemembers' access to valuable educational programs. Pet. 7. And, more broadly, it would not only restrict or end beneficial public programs and services, but ultimately erode the relations among the States that the Constitution was adopted to preserve. It is therefore no surprise that 19 States have urged this Court to intervene "to prevent widespread harm to our nation's constitutional order." States Br. 23.[4]

2. Grasping at straws, Farmer attempts (at 19-24) to manufacture various "vehicle" problems with this case. None of them has any merit.

First, Farmer contends that, in addition to the sue-and-be-sued clause, the court below also relied on N.C. Gen. Stat. § 55A-15-05(b), which provides that a registered foreign non-profit corporation is to be "treated like 'a domestic corporation of like character.'" BIO 19-20 (quoting Pet. App. 16a). But that provision was just the hook for invoking the sue-and-be-sued clause—the provision that drove the court's decision. *See* Pet. App. 1a (invoking "sue-and-be-sued clause"); *id.* at 9a (same); *id.* at 14a ("Troy

[4] Farmer claims that the decision below is "limited" to "entities 'engaged in commercial rather than governmental activity.'" BIO 19 (citation omitted). Not only is that distinction misguided (*supra* at 4 n.2), but the North Carolina Supreme Court itself drained this "limit[]" of any significance. The court found it "difficult to posit" *any* circumstances in which a State could engage in "governmental" activity in another State for purposes of sovereign immunity. Pet. App. 11a n.3. If that were true, it would eliminate *Hyatt* immunity altogether (since, under the court's view, "commercial" activity is not protected at all).

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*." (emphasis added) (citing N.C. Gen. Stat. §§ 55A-3-02(a)(1), 55A-15-05)). Moreover, the general reference to "a domestic corporation of like character" is no more an express and unequivocal waiver of immunity than the sue-and-be-sued clause.[5]

Second, Farmer attacks (at 20-22) the premise accepted by both courts below that Troy is an arm of the State of Alabama entitled to invoke Alabama's sovereign immunity. Pet. App. 7a-8a, 42a-43a. This argument was not raised below and is thus forfeited. *See OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 37-38 (2015); *Florida v. Harris*, 568 U.S. 237, 249 (2013). This case was decided on the undisputed premise that Troy is an arm of Alabama, entitled to the same immunity as Alabama itself. Thus, the North Carolina Supreme Court recognized that its decision will apply anytime "*another State* engage[s] in business in North Carolina." Pet. App. 15a (emphasis added). Indeed, it is precisely that feature of the case that makes it such a clean vehicle for addressing the waiver question presented.

In any event, Farmer's new argument is meritless. This Court and others have long recognized that public universities are arms of States for purposes of sovereign immunity. *See, e.g.*, *Regents of the Univ. of*

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[5] Worse, Troy was not even treated like a "domestic corporation of like character." North Carolina's own public universities retain sovereign immunity despite being subject to sue-and-be-sued provisions. Pet. App. 7a; States Br. 18-19; *Jones v. Pitt Cnty. Mem'l Hosp., Inc.*, 410 S.E.2d 513, 514-15 (N.C. Ct. App. 1991). Such blatant discrimination in the sovereign-immunity analysis bolsters the need for review.

Cal. v. Doe, 519 U.S. 425, 427 & n.3, 429-32 (1997) (University of California); *Nevada v. Hall*, 440 U.S. 410, 411 (1979) (University of Nevada); *see also Maryland Stadium Auth. v. Ellerbe Becket Inc.*, 407 F.3d 255, 262-65 (4th Cir. 2005) (collecting cases). And Troy is unquestionably an arm of the State of Alabama entitled to sovereign immunity. *See, e.g.*, *Ex parte Troy Univ.*, 961 So. 2d 105, 109 (Ala. 2006); *Harden v. Adams*, 760 F.2d 1158, 1163-64 (11th Cir.) (collecting cases regarding Troy University), *cert. denied*, 474 U.S. 1007 (1985). Farmer relies on a recent concurrence advancing the novel position that "state-created corporations" are *never* entitled to sovereign immunity. BIO 21-22 (citing *Springboards to Educ., Inc. v. McAllen Indep. Sch. Dist.*, 62 F.4th 174, 195 (5th Cir. 2023) (Oldham, J., concurring)). But that case did not involve a public university. And as even Judge Oldham recognized, in *College Savings* this Court accepted the premise that the separately incorporated educational entity there was an arm of the State. *Springboards*, 62 F.4th at 198 n.5.

Third, Farmer suggests (at 23-24) that the individual defendants may not enjoy the sovereign immunity of their state employer. But the North Carolina Court of Appeals rejected that argument, *see* Pet. App. 53a-54a, and as Farmer admits, "the North Carolina Supreme Court explicitly did not address this question." BIO 23. In fact, the North Carolina Supreme Court denied review of it. *Compare* Pet. App. 34a, *with* Farmer N.C. Pet. for Review 32 (Apr. 6, 2021). Accordingly, this provides no basis for not resolving the waiver question that *was* decided below.

In sum, there is zero impediment to this Court addressing the extraordinarily important question presented.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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