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

BRIEF OF ALABAMA AND 18 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

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.

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INTEREST OF *AMICI CURIAE*[1]

The States of Alabama, Arkansas, Florida, Georgia, Indiana, Iowa, Kansas, Louisiana, Mississippi, Montana, Nebraska, North Dakota, Ohio, South Carolina, South Dakota, Tennessee, Texas, Utah, and Virginia respectfully submit this brief as *amici curiae* in support of Petitioners. *Amici* States regularly operate beyond their borders, benefiting their own citizens as well as the citizens of other States. Interstate sovereign immunity is an essential part of those out-of-state operations as well as our nation's constitutional design. Immunity ensures equal dignity between the States by preventing state courts from exercising jurisdiction over a separate sovereign without that State's express consent. And clear rules governing when immunity applies or is waived are critical to any State's ability to operate throughout the nation as one of the several United States. This Court has thus repeatedly held that States do not waive their sovereign immunity unless they do so unequivocally.

The North Carolina Supreme Court's decision defies those holdings and thereby injects damaging uncertainty into our federal system. The court held that whenever another State operates in North Carolina under North Carolina's general Nonprofit Corporation Act, the foreign State has waived its sovereign immunity based on the Act's general sue-and-be-sued clause. But the Act does not even mention other sovereigns, much less waivers of sovereign immunity.

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[1] More than 10 days before this brief was due, Alabama ensured that counsel of record for all parties received notice of Alabama's intent to file this brief. *See* S. Ct. R. 37.2.

And in decisions from this Court and numerous state courts (North Carolina included), similar sue-and-be-sued clauses have been found inadequate to waive sovereign immunity. That language thus cannot signal an unequivocal waiver of sovereign immunity. Accordingly, the decision below will subject States that have not expressly waived their immunity to the jurisdiction of North Carolina courts.

Worse still, the North Carolina court held that Petitioner Troy University waived Alabama's sovereign immunity even though Alabama law makes clear that the university could not do so. Many other States likewise carefully limit whether and how an arm of the State can waive the State's immunity. The North Carolina Supreme Court ignored all this, further eroding its sister States' sovereignty.

If this Court does not correct these errors, costly uncertainty is guaranteed, as nearly every State in the nation has a nonprofit corporations act like North Carolina's with a similar sue-and-be-sued clause. State courts around the country will be free to sidestep sovereign immunity and let plaintiffs recover monetary damages from States that never consented to such suits. And short of ceasing all out-of-state operations, States can do nothing to stop them. As *Amici* States rely on this Court to police border disputes between them, *Amici* States rely on this Court to step in when a state court impinges on the sovereignty of other States. The States thus urge the Court to grant the petition for a writ of certiorari.

SUMMARY OF ARGUMENT

States' immunity in the courts of their sister States is "integral to the structure of the Constitution." *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1498 (2019) (*Hyatt III*). Because of "[e]ach State's equal dignity and sovereignty under the Constitution," no State can "hale another into its courts without the latter's consent." *Id.* at 1497. And that consent isn't easy to come by. Any waiver of immunity "must be 'unequivocally expressed' in the text of the relevant statute." *Sossamon v. Texas*, 563 U.S. 277, 284 (2011) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984)). That is, it must be express; "it may not be implied." *Id.* And a purported waiver "'will be strictly construed, in terms of its scope, in favor of the sovereign.'" *Id.* at 285 (quoting *Lane v. Peña*, 518 U.S. 187, 192 (1996)).

It is undisputed that Troy University is an arm of the State of Alabama and 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. 1985). And it is undisputed that waiver of state sovereign immunity is governed by a most rigorous standard. Yet, the court below held that Troy University "explicitly waived its sovereign immunity from suit." Pet.App.9a. To find that waiver, the court didn't look to Alabama law; after all, under Alabama law, Troy University *cannot* waive sovereign immunity. *Larkins v. Dep't of Mental Health & Mental Retardation*, 806 So. 2d 358, 363 (Ala. 2001) ("State … immunity cannot be waived by the Legislature or by any other State authority."). Instead, the court looked at Troy University's conduct paired with

a boilerplate sue-and-be-sued clause in a North Carolina statute that applies to *all* nonprofit entities that operate in the Tar Heel State. This finding of "express waiver" (Pet.App.12a) based on non-litigation conduct and *another State's* statute is a far cry from the "unequivocal expression" of waiver this Court has long required to establish a waiver of sovereign immunity. The North Carolina Supreme Court's decision ignores this Court's precedent and undermines principles integral to our constitutional design. It requires this Court's review.

First, the decision below cannot be squared with this Court's requirement that any purported waiver of sovereign immunity be strictly construed. The North Carolina Supreme Court found waiver by looking to the North Carolina Nonprofit Corporation Act, a general statute that grants nonprofit corporations the power of the corporate form in North Carolina. N.C. Gen. Stat. Ann. §55A-3-02. The statute has nothing to do with sovereign immunity, and certainly not the sovereign immunity of foreign States. If this commonplace language in a general statute is enough to satisfy the rigorous standards for waiver of sovereign immunity, then States throughout the country have unknowingly waived their sovereign immunity by merely operating beyond their borders.

But no unequivocal waiver was effected by this clause. Indeed, numerous state courts have concluded that even a sue-and-be-sued clause in a statute enacted by the State defendant's own legislature that addresses the specific state entity being sued does not waive sovereign immunity for that entity. Even the North Carolina Supreme Court held as much forty

years ago—albeit when it was North Carolina asserting immunity. A fortiori, Troy University's decision to do business in North Carolina under the State's general Nonprofit Corporation Act cannot be deemed an unequivocal waiver of immunity.

The North Carolina Supreme Court committed a similarly serious error by assessing whether Troy University waived Alabama's sovereign immunity without once consulting Alabama law on such waivers. Had the court looked, it would have seen that the Alabama Constitution prevents any arm of the State from waiving sovereign immunity under any circumstance. This Court and other federal courts have recognized and applied this feature of Alabama law, but the North Carolina court ignored it altogether. This error too has wide-ranging consequences beyond this case, as many States have specific restrictions relating to whether and how they may waive sovereign immunity. If other States' courts can disregard how a defendant State governs the terms of its own immunity, then States across the country will be left guessing as to when they might end up defending litigation in another State's courts.

The consequences of the North Carolina Supreme Court's decision thus extend far beyond this case. By relying on language present in the nonprofit corporation statutes of nearly every State and ignoring whether a State even has authority to waive sovereign immunity, the decision calls into question whether States across the country have waived their sovereign immunity merely by operating beyond their borders. Even before any judgments are entered, that uncertainty creates costs for States, which is precisely why

"jurisdictional rules should be clear." *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 621 (2002). Thus, the damage is already being done, as States must now decide whether to curtail their operations or try to budget for when the next state court surprises them with the news that they have unexpectedly (yet somehow unequivocally) consented to damages suits in another State's courts. These widespread threats to state sovereignty and solvency merit this Court's attention. The petition for a writ of certiorari should be granted.

ARGUMENT

I. A State Does Not Unequivocally Waive Its Sovereign Immunity By Operating Subject To A Generic Sue-And-Be-Sued Clause.

"[I]mmunity from private suits" is "[a]n integral component of the States' sovereignty." *Hyatt III*, 139 S. Ct. at 1493 (quotation marks omitted). Thus, the "test for determining whether a State has waived its immunity … is a stringent one." *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999) (citation omitted). And since this Court ended the "constructive-waiver experiment of *Parden*,"[2] *id.* at 680, there have been only two ways a State can waive its sovereign immunity: (1) when "the State voluntarily invokes" the jurisdiction of another sovereign's court, or (2) when "the State makes a 'clear declaration' that it intends to submit itself to" that court's jurisdiction, *id.* at 675-76.

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[2] *See Parden v. Terminal R. Co. of Ala. Docks Dept.*, 377 U.S. 184 (1964).

How "clear" a "declaration"? "[C]onsenting to suit in the courts of its own creation" isn't enough. *Id.* at 676. Nor is "authorizing suits against it 'in any court of competent jurisdiction.'" *Id.* (quoting *Kennecott Copper Corp. v. State Tax Comm'n,* 327 U.S. 573, 577-79 (1946)). And, most relevant here, a State proclaiming "its intention to 'sue and be sued'" still has not "unequivocally expressed" its intent to submit itself to the jurisdiction of another sovereign's courts. *Id.* (quoting *Fla. Dept. of Health & Rehab. Servs. v. Fla. Nursing Home Assn.*, 450 U.S. 147, 149-50 (1981) (per curiam)). Requiring such a clear legislative statement of waiver is necessary because "[o]nly by requiring this 'clear declaration' by the State can we be 'certain that the State in fact consents to suit.'" *Sossamon*, 563 U.S. at 284 (quoting *Coll. Sav. Bank*, 527 U.S. at 680).

The court below recognized that "any waiver of sovereign immunity must be explicit." Pet.App.8a-9a (citing *Sossamon*, 563 U.S. at 284, *and Coll. Sav. Bank*, 527 U.S. at 682). Yet the court found waiver in a curious place: the "North Carolina Nonprofit Corporation Act." Pet.App.9a. That statutory scheme is what it sounds like: a set of general provisions that govern the formation and operation of nonprofit corporations in North Carolina. No part of the law mentions sovereign immunity or state actors.[3] Yet the

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[3] The statute provides in relevant 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:

North Carolina Supreme Court held 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." Pet.App.9a.

That holding eviscerates this Court's "stringent" test for waiver. *Coll. Sav. Bank*, 527 U.S. at 675. To begin, like the statute at issue in *Parden*, the North Carolina statute is merely a "general provision" that does not "specifically refer[] to the States." *Coll. Sav. Bank*, 527 U.S. at 676. Since *Parden* was overruled, it has been clear that such a general statute cannot cause a State to unambiguously waive its sovereign immunity.

Numerous decisions from this Court and state courts—including the North Carolina Supreme Court—confirm that a general sue-and-be-sued clause does not constitute clear waiver, even when the sovereign possessing the immunity enacts the clause. As this Court has recognized when considering sovereign immunity, courts should not read such a "provision, disconnected from its context, [to] sustain the conclusion that there exists a general liability to be sued without reference to consent." *People of Porto Rico v. Rosaly y Castillo*, 33 S. Ct. 352, 354 (1913). Thus, in interpreting the organic act that gave Puerto Rico the power "to sue and be sued," this Court rejected the

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

N.C. Gen. Stat. Ann. §55A-3-02.

notion that the language waived sovereign immunity. The context of the act showed that the clause was "but an expression of the power to sue arising from the terms of the organic act, and a recognition of a liability to be sued consistently with the nature and character of the government; that is, only in case of consent duly given." *Id.* at 354-55.

Many state courts agree. "The rule in most States is that a statute allowing a governmental entity to 'sue and be sued' merely clarifies that the entity has the status and capacity to be a party to a civil action, but does not operate as a waiver of sovereign immunity." *Harrison v. Mass. Bay Transp. Auth.*, No. 1884-cv-02939-BLS2, 2020 WL 4347511, at *4 (Mass. Super. June 18, 2020), *aff'd*, 195 N.E.3d 914 (Mass. 2022); *see id.* at *4 n.3 (collecting cases).

The Texas Supreme Court, for example, rejected the argument that "'sue and be sued', by itself, in an organic statute always waives immunity." *Tooke v. City of Mexia*, 197 S.W.3d 325, 342 (Tex. 2006). The court analyzed decisions about sue-and-be-sued clauses from this Court and Texas courts and found that "[t]he phrase is often used to mean only that an entity has the capacity to sue and be sued in its own name," while not waiving immunity. *Id.* "Because the phrase means different things in different statutes," the court concluded that "it cannot be said to be clear and unambiguous" and thus cannot alone "waive immunity." *Id.*

Likewise, though Nebraska law creates "the Board of Trustees of the Nebraska State Colleges" as "a body corporate" that "may sue and be sued," Neb. Rev. Stat.

Ann. §85-302, the Nebraska Supreme Court held that the statute "is not an express legislative waiver of sovereign immunity," *Burke v. Bd. of Trs. of Neb. State Colls.*, 924 N.W.2d 304, 307, 313 (Neb. 2019).

The North Carolina Supreme Court reached a similar conclusion when it was North Carolina defending against a plaintiff seeking "damages in the amount of several million dollars." *Guthrie v. N. Carolina State Ports Auth.*, 299 S.E.2d 618, 620 (N.C. 1983). The court held that the North Carolina "State Ports Authority, as an agency of the State, is entitled to claim the defense of sovereign immunity absent express statutory waiver." *Id.* at 625. The plaintiff responded that the statute creating the Authority provided that it could "sue or be sued," meaning the State had "consented that tort claims against the Authority may be prosecuted in the civil courts." *Id.* at 627. But the North Carolina Supreme Court would not allow "[w]aiver of sovereign immunity" to be so "lightly inferred." *Id.* The court held that "[s]tatutory 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.* The clause meant only that the Authority could "sue as plaintiff in its own name in the courts of the State." *Id.* Any claims against the Authority, in contrast, could proceed only in administrative proceedings under the State's Tort Claims Act, where damages were capped at one hundred thousand dollars. *Id.* at 626-27. Thus, generic sue-and-be-sued clauses have been repeatedly deemed insufficiently clear to constitute a waiver of sovereign immunity, even when the sovereign possessing the

immunity has applied the language to itself. It should be evident that a State cannot use that same language to waive *another State's* immunity.

Nevertheless, the North Carolina Supreme Court reached that conclusion here, largely by relying on *Thacker v. Tennessee Valley Authority*, 139 S. Ct. 1435 (2019), but *Thacker* did not alter the normal analysis for waivers of state sovereign immunity. Critically, *Thacker* involved a federal statute waiving the immunity of a federal agency in a federal court—not one State's statute waiving the immunity of *another* sovereign State. *Id.* at 1438. Though this Court has read congressional waivers of federal agency immunity "liberally," *id.* at 1441, it has done just the opposite in the context of the waiver of state sovereign immunity. *See, e.g.*, *Coll. Sav. Bank*, 527 U.S. at 676; *Fla. Dept. of Health*, 450 U.S. at 149-50. And, as set forth above, numerous state courts have likewise so held. As the court below understands it, *Thacker* upended decades of authority that strictly limited the waiver of sovereign immunity in favor of a lax standard if a sue-and-be-sued clause is involved. This Court should step in to correct that misunderstanding.

The court was similarly mistaken in its reliance on *Georgia v. Chattanooga*, 264 U.S. 472 (1924), a case involving Georgia's operation of a railroad corporation on land it purchased in Tennessee. There, Georgia argued that its sovereignty barred a condemnation proceeding against it in Tennessee, but this Court explained that *Tennessee* had not waived *its* sovereign authority to exercise the power of eminent domain: "The taking of private property for public use upon just compensation is … essential to the life of the

state." *Id.* at 480. "It cannot be surrendered, and, if attempted to be contracted away, it may be resumed at will." *Id.* The decision did not involve Tennessee waiving Georgia's sovereign immunity; it did not hinge on Georgia waiving its sovereign immunity at all. Indeed, the Court expressly "[did] not decide the broad question whether Georgia has consented generally to be sued in the courts of Tennessee." *Id.* at 482. Instead, *Chattanooga* held that a condemnation proceeding in Tennessee against Georgia wasn't barred because *Tennessee* could never waive its sovereign authority to condemn property in Tennessee. Ultimately, the decision reinforces State sovereignty; it does not create an end run around it.

Returning to the statute at issue here, the North Carolina Nonprofit Corporation Act's sue-and-be-sued clause "should be construed with reference to the powers conferred by the provisions to which they relate, and therefore" should not "be treated as destructive of the authority otherwise conferred," *People of Porto Rico*, 33 S. Ct. at 354. The clause "is but an expression of the power to sue … and a recognition of a liability to be sued consistently with the nature and character of the government; that is, only in case of consent duly given." *Id.* Understood in context, the sue-and-be-sued clause is clearly one of "generality and natural import." *Lightfoot v. Cendant Mortg. Corp.*, 580 U.S. 82, 89-90 (2017) (quoting *Bankers Tr. Co. v. Tex. & Pac. Ry. Co.*, 241 U.S. 295, 302 (1916)). "[A]ll that was intended was to render this corporation capable of suing and being sued by its corporate name in any court ... whose jurisdiction as otherwise competently defined was adequate to the occasion." *Id.* The

"language means only that the entity has the status and capacity to enter our courts, and does not signify a waiver of sovereign immunity against suit." *Self v. City of Atlanta*, 377 S.E.2d 674, 676 (Ga. 1989).

But even if the Nonprofit Corporation Act's sue-and-be-sued clause could be read to implicate sovereign immunity, the clause lacks the obvious clarity required for waiver. Decisions from this Court, the North Carolina Supreme Court, and other state courts make at least one thing clear: "the words 'sue and be sued', standing alone, are if anything, unclear and ambiguous." *Tooke*, 197 S.W.3d at 342. They thus cannot constitute a "'clear declaration' that [a State] intends to submit itself to [North Carolina's] jurisdiction." *Coll. Sav. Bank*, 527 U.S. at 676 (quoting *Great Northern Life Ins. Co. v. Read,* 322 U.S. 47, 54 (1944)).

II. The Decision Below Ignores Alabama Law And Thus Conflicts With This Court's Precedents.

Generally, whether a State has waived its sovereign immunity is a question of that State's law. *Ford Motor Co. v. Dep't of Treasury of Ind.*, 323 U.S. 459, 467 (1945), *overruled on other grounds by Lapides*, 535 U.S. at 613. To decide whether a State has waived its sovereign immunity, courts look to "the general policy of the state as expressed in its Constitution, statutes and decisions." *Ford Motor Co.*, 323 U.S. at 467. This Court did exactly that when it reversed a lower court decision against the State of Alabama on the ground that Alabama could not have waived its sovereign immunity under the Alabama Constitution.

Alabama v. Pugh, 438 U.S. 781, 782 (1978). And other courts have continued to do the same. *See, e.g.*, *Beaulieu v. Vermont*, 807 F.3d 478, 484 (2d Cir. 2015) ("The question of whether a state has waived its immunity from private FLSA suits is answered, in the first instance, by reference to state law."); *Lombardo v. Pa. Dep't of Pub. Welfare*, 540 F.3d 190, 195 (3d Cir. 2008) (construing Pennsylvania law to decide waiver issue); *Fletcher v. La. Dep't of Transp. & Dev.*, 19 F.4th 815, 817-19 (5th Cir. 2021) (construing Louisiana law to decide waiver issue).

To be sure, "whether a particular set of state laws, rules, or activities amounts to a waiver … is a question of federal law" such that this Court has jurisdiction to consider the decision of the court below. *Lapides*, 535 U.S. at 623. And, in limited circumstances, a State's litigation-related conduct can effect a waiver of sovereign immunity notwithstanding state law that prohibits such a waiver. *Id.* But a waiver based on litigation conduct is the exception, not the rule. *See id.* at 620 (distinguishing litigation-conduct waivers from an impermissible constructive waiver); *see also Hyatt III*, 139 S. Ct. at 1492 ("States retain their sovereign immunity from private suits brought in the courts of other States."). As a general matter, a State's laws control the authority of the State to act. It follows that States can restrict whether and how their various instrumentalities can waive sovereign immunity and that sister States must respect other States' laws on questions of waiver. Along these lines, in the past two years alone, federal courts—including

in North Carolina—rejected assertions of waiver against Alabama like the one found by the court below. *Starpoint, Inc. v. Univ. of S. Ala.*, 600 F. Supp. 3d 590, 596 (M.D.N.C. 2022) ("Because Defendants cannot waive sovereign immunity through contract, Defendants are immune from suit.") (citing *Ex parte Ala. Dep't of Fin.*, 991 So. 2d 1254, 1257 (Ala. 2008)); *Wiley v. Dep't of Energy*, No. CV 21-933, 2021 WL 5051952, at *5 (E.D. La. Nov. 1, 2021).

Even so, the North Carolina Supreme Court ignored Alabama law about waiver of sovereign immunity. Indeed, it cited no Alabama authority whatsoever on the question of waiver. *See* Pet.App.8a-15a; *but see* Pet.App.30a (Barringer, J., dissenting) (opining that the court "violates the Constitution of the United States by subjecting Alabama to its jurisdiction" because "Alabama's Constitution prohibits waiver"). Had the court looked to Alabama law, there would be no question that Troy University did not waive Alabama's sovereign immunity because Troy University cannot waive Alabama's sovereign immunity. *See Larkins*, 806 So. 2d at 363; *Pugh*, 438 U.S. at 782.

The North Carolina Supreme Court's decision to ignore the foreign State's law about the waiver of sovereign immunity will have far-reaching consequences if not corrected. Alabama is not alone among States in restricting whether and how State actors waive sovereign immunity. Instead, "the general rule" among the States is that "specific authority [must be] conferred by an enactment of the legislature" for a State to waive sovereign immunity. *Alden v. Maine*, 527 U.S. 706, 757-58 (1999) (citation omitted); *Wilson-Jones v.*

Caviness, 99 F.3d 203, 206 n.1 (6th Cir. 1996) ("A state … may consent to waive its Eleventh Amendment immunity, but this usually occurs only by explicit language in state legislation.").[4]

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[4] *See, e.g.*, *Redgrave v. Ducey*, 493 P.3d 878, 880 (Ariz. 2021) ("The Arizona Constitution … grants to the legislature express authority to define those instances in which public entities and employees are entitled to immunity." (cleaned up)); *Duguay v. Hopkins*, 464 A.2d 45, 49 (Conn. 1983) ("The question whether the principles of governmental immunity from suit and liability are waived is a matter for legislative, not judicial, determination."); *Turnbull v. Fink*, 668 A.2d 1370, 1376-77 (Del. 1995) ("A waiver of sovereign immunity must be a clear and specific act of the General Assembly."); *Am. Home Assur. Co. v. Nat'l R.R. Passenger Corp.*, 908 So. 2d 459, 471 (Fla. 2005) ("Only the Legislature has authority to enact a general law that waives the state's sovereign immunity."); Ga. Const. Art. I, §II, Par. IX (e) ("The sovereign immunity of the state and its departments and agencies can only be waived by an Act of the General Assembly which specifically provides that sovereign immunity is thereby waived and the extent of such waiver."); *Kaleikini v. Yoshioka*, 304 P.3d 252, 265 (Haw. 2013) ("[I]t is not a court's right to extend the waiver of sovereign immunity more broadly than has been directed by the [legislature]."); *Grant Const. Co. v. Burns*, 443 P.2d 1005, 1009 (Idaho 1968) ("[T]he state cannot be sued without its consent, and … such consent cannot be implied but must be expressly given by constitutional or statutory provisions."); 745 ILL. COMP. STAT. 5/1 (2011) ("Except as provided in [state legislation], the State of Illinois shall not be made a defendant or party in any court."); *Esserman v. Ind. Dep't of Env't Mgmt.*, 84 N.E.3d 1185, 1192 (Ind. 2017) ("We will thus find a waiver of sovereign immunity only when the statute at issue contains an unequivocal affirmative statement that clearly evinces the legislature's intention to subject the State to suit."); *Segura v. State*, 889 N.W.2d 215, 220 (Iowa 2017) ("The state is immune from suit except where immunity is waived by statute." (cleaned up)); *Connelly v. State Highway Patrol*, 26 P.3d 1246, 1259 (Kan. 2001) ("The

consent to suit or waiver of sovereign immunity must be based on State action which we deem to be legislative enactments expressing the will of elected officials and cannot be based on acts of agents."); *Withers v. Univ. of Ky.*, 939 S.W.2d 340, 344 (Ky. 1997) ("[T]he granting of waiver is a matter exclusively legislative."); *Knowlton v. Att'y Gen.*, 976 A.2d 973, 977–78 (Me. 2009) ("[T]he immunity of the sovereign from suit is one of the highest attributes inherent in the nature of sovereignty and can only be waived by specific authority conferred by an enactment of the Legislature." (cleaned up)); *State v. Sharafeldin*, 854 A.2d 1208, 1214 (Md. 2004) ("[A]ny waiver of that immunity must come from the Legislature."); *Sanford v. State*, 17, 954 N.W.2d 82, 86 (Mich. 2020) ("It is the exclusive province of the Legislature to define when and to what extent the state of Michigan relinquishes its sovereign immunity."); *Johnson v. State*, 553 N.W.2d 40, 43 (Minn. 1996) ("[I]mmunity may be waived only if the state is expressly mentioned in a claim-creating statute or if the legislature's intention to waive the state's sovereign immunity otherwise is plain, clear, and unmistakable."); *Wells by Wells v. Panola Cnty. Bd. of Educ.*, 645 So. 2d 883, 889 (Miss. 1994) ("[T]he judiciary was not the appropriate branch of government to regulate sovereign immunity. In other words, the judiciary was encroaching into legislative territory."); *Poke v. Indep. Sch. Dist.*, 647 S.W.3d 18, 21 (Mo. 2022) ("To overcome the general rule of sovereign immunity, it must be shown that the legislature expressly intended to waive sovereign immunity."); Neb. Const. Art. V, §22 ("The state may sue and be sued, and the Legislature shall provide by law in what manner and in what courts suits shall be brought."); *Mack v. Williams*, 522 P.3d 434, 452 (Nev. 2022) ("[O]nly the Legislature may waive sovereign immunity of state actors."); *XTL-NH, Inc. v. N.H. State Liquor Comm'n*, 183 A.3d 897, 900 (N.H. 2018) ("[T]he enactment in 1978 of RSA chapter 99–D, … adopted sovereign immunity 'as the law of the state,' except as otherwise provided by statute."); OKLA. STAT. ANN. Tit. 51, §152.1 ("The state, only to the extent and in the manner provided in this act, waives its immunity and that of its political subdivisions."); *Espinosa v. S. Pac. Transp. Co.*, 635 P.2d 638, 644 n.13 (Or. 1981) ("[W]aiver of immunity must be based on

The decision below thus disregards other States' laws and focuses solely on State officials' conduct. The "general rule" among the States is ignored, and North Carolina is empowered to impose its will on other States. Thus, even though Troy University could not under Alabama law subject Alabama and its taxpayers to the risk of unbounded damages suits, Troy University may soon find itself before a North Carolina jury. All based on alleged conduct for which the University of North Carolina enjoys immunity. *See Lannan v. Bd. of Governors of Univ. of N.C.*, 879 S.E.2d 290, 298 (N.C. Ct. App. 2022) ("Defendant Board of Governors [of the University of North Carolina] is an

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general law enacted by the legislature."); 1 PA. STAT. AND CONS. STAT. ANN. §2310 ("[T]he Commonwealth, and its officials and employees acting within the scope of their duties, shall continue to enjoy sovereign immunity and official immunity and remain immune from suit except as the General Assembly shall specifically waive the immunity."); *Torres v. Damicis*, 853 A.2d 1233, 1237 (R.I. 2004) ("We presume that sovereign immunity has not been waived … 'unless the intent to do so is clearly expressed or arises by necessary implication from the statutory language.'"); TEX. GOV'T CODE ANN. §311.034 ("In order to preserve the legislature's interest in managing state fiscal matters through the appropriations process, a statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language."); UTAH CODE ANN. §63G-7-101 ("A governmental entity and an employee of a governmental entity retain immunity from suit unless that immunity has been expressly waived in this chapter."); *LaShay v. Dep't of Soc. & Rehab. Servs.*, A.2d 224, 228 (Vt. 1993) (similar); Wash. Const. Art. II §26 ("The legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state.); Wyo. Const. Art. I, §8 ("Suits may be brought against the state in such manner and in such courts as the legislature may by law direct.").

agency of the State. … As a result, it can claim the protection of sovereign immunity."). The North Carolina Supreme Court's refusal to apply Alabama law about the waiver of sovereign immunity is thus another clear reason to review the decision below.[5]

III. The Decision Below Threatens State Sovereignty Nationwide.

The North Carolina Supreme Court currently stands alone in using a Nonprofit Corporation Act's sue-and-be-sued clause to waive another State's sovereign immunity. But North Carolina is not the only State with a similarly worded Nonprofit Corporation Act. As Petitioners note, virtually every State has a parallel statutory scheme governing the formation and operation of nonprofit corporations. Pet.28 n.9. That means that, notwithstanding this Court's straightforward and rigorous limitations on waivers of sovereign immunity, States could be haled into the courts of their sister States merely by operating there.

The result of widespread abrogation of sovereign immunity would amount to significant harm to the fabric of our nation. Even the risk that other state courts might follow the North Carolina court's lead "cannot help but induce some 'Balkanization' in state relationships as States try to isolate assets from

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[5] *Amici* States do not contend that the Constitution requires state courts to apply foreign law governing sovereign immunity when considering suits filed against foreign States. *See Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488, 494 (2003) (*Hyatt I*). Rather, our point is that state courts must respect and apply the law of their sister States as to the *waiver* of sovereign immunity. *Ford Motor Co.*, 323 U.S. at 467.

foreign judgments and generally reduce their contacts with other jurisdictions." *Nevada v. Hall*, 440 U.S. 410, 443 (1979) (Rehnquist, J., dissenting), *overruled by Hyatt III*, 139 S. Ct. 1485. After all, "concerns about state-court parochialism" date back to the Founders. *Hyatt III*, 139 S. Ct. at 1498. And the litigation in *Hyatt* demonstrated well why such concerns persist to the present day. Following a four-month trial before a Nevada jury, Nevada resident Gilbert Hyatt initially secured a verdict against the Franchise Tax Board of California totaling nearly $500 million. *Id.* at 1491. While the Nevada Supreme Court later "rejected most of the damages awarded by the lower court," *id.*, the risk to States of facing out-of-state juries with little sympathy for them or their taxpayers is obvious.

Thus, to maintain both their sovereignty and solvency, States will be forced to keep to themselves and avoid operations in foreign States, a result inconsistent with a constitutional design of equally dignified but *unified* States. Our Constitution "embeds interstate sovereign immunity within the constitutional design" to avoid just such a result. *Hyatt III*, 139 S. Ct. at 1497. The North Carolina Supreme Court must not be allowed to undermine that design.

Widespread harm is not difficult to imagine given that States operate numerous public universities across state lines. Many state universities operate in some fashion in another State, whether to engage in outreach or to provide their students the opportunity

to learn in a new place.[6] These efforts would be threatened if a State is deemed to have waived sovereign

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[6] For example, Washington, D.C. alone hosts satellite campuses and educational and outreach programs of public universities from dozens of States. *See, e.g.*, *ASU Team—Washington, D.C.*, ALA. STATE UNIV., https://www.alasu.edu/washington-dc; *ASU in Washington, D.C.*, ARIZ. STATE UNIV., https://washingtondc.asu.edu/; *Programs in DC*, UNIV. OF CAL. WASHINGTON CTR., https://www.ucdc.edu/who-we-are/programs-dc; *CSU in D.C. Internship*, COLO. STATE UNIV., https://polisci.colostate.edu/internships-and-careers/#dc; *Semester in DC Program*, UNIV. OF CONN. SCH. OF L., https://law.uconn.edu/academics/clinics-experiential-education/semester-in-dc-program/; *FIU in Washington, D.C.*, FLA. INT'L UNIV., https://washingtondc.fiu.edu/; *Washington Semester*, UNIV. OF GA., https://dcsemester.uga.edu/; *Mānoa Political Internship Program*, UNIV. OF HAW. AT MĀNOA, https://socialsciences.manoa.hawaii.edu/study-at-css/experiential-learning/internships/manoa-political-internships/; *Illinois in Washington*, UNIV. OF ILL. URBANA-CHAMPAIGN, https://washington.illinois.edu/; *Washington, D.C.*, IND. UNIV., https://advancementcenters.iu.edu/washington-dc/; *Topeka and D.C. Internships*, UNIV. OF KAN., https://kups.ku.edu/washington-dc-and-topeka-internships; *Wildcats at the Capitol*, UNIV. OF KY., https://www.uky.edu/wildcatsatthecapitol/home; *Washington DC*, UNIV. OF MD. ROBERT H. SMITH SCH. OF BUS., https://networth.rhsmith.umd.edu/smith/campus/washington-dc; *Michigan in Washington Program*, UNIV. OF MICH., https://lsa.umich.edu/michinwash; *Study USA: Washington, D.C.*, UNIV. OF MISS., https://www.outreach.olemiss.edu/study_usa/washington_18.html; *Kinder Scholars D.C. Summer Program*, UNIV. OF MO., https://democracy.missouri.edu/undergraduate/kinder-scholars-d-c-summer-program/; *Baucus Leaders DC*, UNIV. OF MONT., https://www.umt.edu/law/baucus-institute/baucus-leaders/baucus-leaders-dc.php; *D.C. Academy*, UNIV. OF NEB., https://ppc.unl.edu/dc-professional-enrichment-academy/academics; *The Washington Center Program*, UNIV. OF N.H., https://www.unh.edu/washington/; SUNY Washington, DC Internship Program, BINGHAMTON UNIV.: STATE

immunity simply because it conducts activities in another State. Pet.App.11a.

At a minimum, if a State is to condition another State's operation within its borders on a waiver of sovereign immunity, the host State must make this condition clear. But the reasoning below allows for a bait-and-switch, with generic language that a state court already declared does *not* waive sovereign immunity being later read by that court as an unequivocal waiver of another sovereign's immunity. Though "jurisdictional rules should be clear," *Lapides*, 535 U.S. at 621, States operating anywhere in the country are now unable to predict when another state court might

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UNIV. OF N.Y., https://careertools.binghamton.edu/resources/suny-washington-dc-internship-program/; *Washington D.C.*, UNIV. OF N.C. KENAN-FLAGLER BUS. SCH., https://www.kenan-flagler.unc.edu/programs/undergraduate-business/washington-d-c/; *College of Professional and Continuing Studies North America—Washington, D.C.*, UNIV. OF OKLA., https://pacs.ou.edu/military/military-student-services/ou-north-america/ou-north-america-washington-dc/; *Penn State Washington Program*, PA. STATE UNIV., https://www.bellisario.psu.edu/current/washington-program; *Washington Semester*, UNIV. OF S.C., https://sc.edu/study/colleges_schools/honors_college/experience/internships/washington_semester/index.php; *Bush School DC*, TEX. A&M UNIV., https://bush.tamu.edu/dc/; *The Hinckley Institute Will Have a Permanent Home in Washington, DC*, UNIV. OF UTAH HINCKLEY INST., https://www.hinckley.utah.edu/hatch-center; *The Washington Center*, UNIV. OF VT., https://www.uvm.edu/cas/washington-center-academic-internship-program; *Washington DC Area*, UNIV. OF VA. DARDEN SCH. OF BUS., https://www.darden.virginia.edu/about/locations/dc; *Government Relations*, UNIV. OF WASH., https://www.washington.edu/externalaffairs/govrelations/; *Wisconsin in Washington, DC*, UNIV. OF WISCONSIN-MADISON, https://internships.international.wisc.edu/internships/wisconsin-in-washington/.

apply this reasoning to them. This Court thus should grant the petition to correct the North Carolina Supreme Court's errors, provide clarity to the States, and prevent widespread harm to our nation's constitutional order.

CONCLUSION

The petition for a writ of certiorari should be granted.

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