NO. 124A24 TWENTY SIXTH DISTRICT

NORTH CAROLINA SUPREME COURT

****

Atlantic Coast Conference, Plaintiff-Appellee, v. Board of Trustees of Florida State University, Defendant-Appellant.	From Mecklenburg County

****

AMICUS BRIEF OF FLORIDA, ALABAMA, ARKANSAS, IDAHO, KENTUCKY, LOUISIANA, MISSISSIPPI, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, AND UTAH IN SUPPORT OF DEFENDANT-APPELLANT BOARD OF TRUSTEES OF FLORIDA STATE UNIVERSITY

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INDEX

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Session Laws

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NATURE OF AMICI'S INTEREST

The Attorneys General of the States of Florida, Alabama, Arkansas, Idaho, Kentucky, Louisiana, Mississippi, Ohio, Oklahoma, South Carolina, South Dakota, and Utah submit this brief as amici curiae in support of Defendant-Appellant, the Board of Trustees of Florida State University ("FSU Board").[1] The FSU Board is a public body corporate in Florida with stewardship over Florida State University ("FSU"), a public university located in the State of Florida. The Attorney General of Florida is the chief legal officer for the State of Florida, Fla. Const. art. IV, § 4(b), and is responsible to "appear in and attend to" any suit in which the State is interested, including in the courts of other states, Fla. Stat. § 16.01(4)–(5). Plaintiff-Appellee, the Atlantic Coast Conference ("ACC"), is an unincorporated nonprofit association of university athletic programs of which FSU has been a member since 1991.

FSU and other member institutions assigned to the ACC certain media rights in a "grant of rights" that the ACC is now trying to use to prevent FSU from leaving the ACC. The ACC has sued the FSU Board in North Carolina, seeking a declaratory judgment that the grant of rights transferred

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[1] No person or entity other than amici and amici's counsel helped write or contributed money for the preparation of this brief. N.C. R. App. P. 28.1(b)(3)c.

ownership of all of FSU's sports media rights through 2036 regardless of whether FSU is a member of the association; an injunction preventing FSU from ever challenging the grant of rights, participating in ACC governance, or disclosing confidential information; and over $5 million in damages for FSU's actions in attempting to assert its rights under the grant of rights and the ACC's constitution and bylaws.

The amici states have an interest in preserving the rights secured to them and their constituent institutions by the U.S. Constitution, including the immunity of their public universities from suit in other states' courts without the amici states' clear and unequivocal consent.

ISSUE ADDRESSED

The ACC is an unregistered, unincorporated nonprofit association in North Carolina under the Uniform Unincorporated Nonprofit Association Act ("UUNAA"), which North Carolina adopted in 2006. *See* N.C. Sess. Law 2006-226. At that time, *Nevada v. Hall*, 440 U.S. 410 (1979), already permitted a state entity, like the FSU Board, to be sued in another state's courts. The U.S. Supreme Court has since overruled *Nevada v. Hall* and restored the sovereign immunity of states from suits in other states' courts. *See Franchise Tax Bd. of Cal. v. Hyatt*, 587 U.S. 230, 236 (2019) ("*Hyatt III*"). As part of this doctrine, the U.S. Supreme Court has "insisted" that a state's consent to be

sued be "unequivocally expressed." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984).

The question in this case is whether the FSU Board "unequivocally expressed" its consent to be sued in North Carolina's courts, simply because North Carolina (not Florida) enacted a statute (the UUNAA) providing that "[a] nonprofit association may assert a claim against a member or a person referred to as a 'member' by the nonprofit association." N.C.G.S. § 59B-7(e).

ARGUMENT

In its motion to dismiss this lawsuit, the FSU Board contended that it was constitutionally immune from suit in the North Carolina courts. In denying the FSU Board's motion, the Superior Court for Mecklenburg County recognized that the FSU Board possessed constitutional sovereign immunity as an arm of the State of Florida, but it went on to hold that the FSU Board had waived its immunity for two reasons. The first was that the FSU Board "knew that it was subject to the UUNAA and its sue and be sued clause when [FSU] chose to be a member of a North Carolina unincorporated nonprofit association" (even though the UUNAA was not adopted until 15 years later). The second reason was that the FSU Board had "engaged in extensive commercial activity in North Carolina" by virtue of its participation in the ACC. *Atl. Coast Conf. v. Bd. of Trs. of Fla. State Univ.*, No. 23-CV-40918, 2024 WL 1462914, at *14 (N.C. Super. Apr. 4, 2024) ("*ACC v. FSU*"). Neither

of these justifications for inferring a waiver on the part of FSU was constitutionally valid.

Under longstanding U.S. Supreme Court precedent, a state is amenable to suit in federal court or in another state's court when "a particular set of state laws, rules, or activities" could show that the state had plainly consented to the lawsuit being brought. *Lapides v. Bd. of Regs. of Univ. Sys. of Ga.*, 535 U.S. 613, 616–17, 623 (2002). The Florida Legislature has not waived its sovereign immunity, and the FSU Board cannot be deemed to have done so by not withdrawing FSU from the ACC after the passage of the UUNAA.

The Superior Court's contrary ruling was based on a constructive-waiver theory that the U.S. Supreme Court sternly repudiated in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999). To constitute a waiver under *Florida Prepaid*, a statute must contain "express language or . . . such overwhelming implications from the text," so as to "leave no room for any other reasonable construction" than that Florida expressly and unequivocally consented to suit in North Carolina when it remained in the ACC after the North Carolina Legislature enacted the UUNAA. *Id.* at 678 (quoting *Edelman v. Jordan*, 415 U.S. 651, 673 (1974)). Even assuming Florida's non-litigation actions could ever manifest its unequivocal consent to suit, the UUNAA contains no "express language"

or "overwhelming implications" that would make failing to leave an association after passage of that law tantamount to an expression of a clear intent to waive sovereign immunity. *Fla. Prepaid*, 527 U.S. at 679.

That conclusion should not be surprising. North Carolina adopted the statute in 2006, when a state's immunity from suit in another state's courts was still deemed a mere "matter of comity" on the part of the second state's courts. *Hall*, 440 U.S. at 416. The FSU Board therefore did not waive its sovereign immunity to suit in North Carolina court, and the ACC's lawsuit against the FSU Board should be dismissed.

I. The FSU Board is not subject to suit in the courts of North Carolina.

A. Under the U.S. Constitution, neither the State of Florida nor the FSU Board can be sued in North Carolina's courts absent clear and unambiguous consent.

The federal Constitution guarantees states sovereign immunity from suit in the courts of other states. *See Hyatt III*, 587 U.S. at 240–41. In *Hall*, a 1979 decision, the U.S. Supreme Court had held that a state's immunity from suit in another state's courts "must be found either in an agreement, express or implied, between the two sovereigns, or in the voluntary decision of the second to respect the dignity of the first as a matter of comity." 440 U.S. at 416. But *Hyatt III* interred that erroneous ruling, unifying the doctrine governing a state's immunity from suit in other states with the Supreme

Court's doctrine governing a state's immunity from suit in its own courts and in federal courts. *See* 587 U.S. at 245 (interstate immunity); *Alden v. Maine*, 527 U.S. 706, 715–16 (1999) (own-court immunity); *Hans v. Louisiana*, 134 U.S. 1, 11–17 (1890) (federal-court immunity). As a result, states are immune from nonconsensual lawsuits in their own courts, in federal courts, and in other states' courts. *Hyatt III*, 587 U.S. at 249; *see also Glob. Innovative Concepts v. State of Fla., Div. of Emergency Mgmt.*, 105 F.4th 139, 143 (4th Cir. 2024). And because immunity is rooted in the federal Constitution, whether a state has waived its sovereign immunity "is a question of federal law." *Lapides*,535 U.S. at 623; *Glob. Innovative Concepts*, 105 F.4th at 142.

Contrary to the ACC's contentions, the "form" and "method" by which a sovereign state must express its consent to be sued in another state's court was not "left open in *Hyatt*." Pl.'s Br. in Opp. p. 10, *ACC v. FSU*, No. 23-CV-40918, ECF No. 30, 2024 WL 1905413 (Feb. 27, 2024). By virtue of *Hyatt III*'s unification of the doctrines of interstate, own-court, and federal-court immunity, the precedents governing other waivers of constitutional immunity now apply to waivers of interstate immunity, including precedents that dictate the "form" and "method" of waiver. *See Glob. Innovative Concepts*, 105 F.4th at 143 (observing that a state's immunity from suit in another sovereign's courts can be waived only by "express language" or "overwhelming implication" based on pre-*Hyatt III* precedents). Those

precedents have long made clear that any state's waiver of its sovereign immunity must be made in the clearest and most unmistakable terms. Indeed, a state's law consenting to suits in its own courts, or even "in any court of competent jurisdiction," cannot be considered to evince consent to suits in another sovereign's courts. *Fla. Prepaid*, 527 U.S. at 676. Nor can a state's law reflecting a general intention to authorize a state entity to "sue and be sued." *Id.*

It follows from these principles that a state's sovereign immunity, woven as it is into the very fabric of the Constitution, leaves no room for any doctrine of "constructive waiver," as once was allowed in *Parden v. Terminal Railway of Alabama Docks Department*, 377 U.S. 184 (1964). *See Fla. Prepaid*, 527 U.S. at 671. In *Parden*, a state's operation of a railroad was deemed sufficient to waive the state's immunity to suit by railroad employees under a federal statute with a general provision subjecting to suit "every common carrier by railroad . . . engag[ed] in commerce between . . . the several States." 377 U.S. at 185 (parentheses omitted). The U.S. Supreme Court overruled that decision in *Florida Prepaid*, declaring "the constructive-waiver experiment of *Parden*" to be "ill conceived." *Fla. Prepaid*, 527 U.S. at 680. The Court rejected the petitioner's suggestion that a "*Parden*-style" constructive waiver was still available if a state was not engaged in a core government activity, like running a police force, and instead was "operat[ing]

in a field traditionally occupied by private persons or corporations," like "run[ning] an enterprise for profit." *Id.* at 679–80.

In *Florida Prepaid*, the respondent Florida Prepaid Postsecondary Education Expense Board was sued by a New Jersey bank in federal court for violating the Lanham Act in connection to the Board's administration of a tuition prepayment program. *Id.* at 671. The Lanham Act in turn provided that state entities "shall not be immune, under the eleventh amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person, including any governmental or nongovernmental entity for any violation under" it. 15 U.S.C. § 1122. The tuition prepayment program unquestionably took place in interstate commerce and fell within the coverage of the Lanham Act, which created a private right of action against "any person," defined to include state entities, for making false descriptions in interstate commerce. 527 U.S. at 670–71.

The Supreme Court nonetheless upheld Florida's immunity from the lawsuit. "There is a fundamental difference," the Court said, "between a State's expressing unequivocally that it waives its immunity and Congress's expressing unequivocally its intention that if the State takes certain action it shall be deemed to have waived that immunity." *Fla. Prepaid*, at 680–81. "In the latter situation, the most that can be said with certainty is that the State

has been put on notice that Congress intends to subject it to suits brought by individuals." *Id.* at 681. "That is very far from concluding that the State made an 'altogether voluntary' decision to waive its immunity." *Id.* (quoting *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1858)).

The U.S. Supreme Court reinforced its opposition to constructive waiver in *Sossamon v. Texas*, which held that the Religious Land Use and Institutionalized Persons Act's authorization of "appropriate relief against a government" as a condition of a state agency's receipt of federal funds was "not the unequivocal expression of state consent that our precedents require." 563 U.S. 277, 283, 285 (2011). In so ruling, the Court rejected the petitioner's argument that Spending Clause conditions operate like contracts, and that recipients of federal funding should therefore generally be on notice that they are subject to the traditional remedies associated with breach of contract. *Id.* at 289. This "implied-contract-remedies proposal," the Court said, "cannot be squared with our longstanding rule that a waiver of sovereign immunity must be expressly and unequivocally stated in the text of the relevant statute." *Id.* at 290. "The requirement of a clear statement in the text of the statute ensures that Congress has specifically considered state sovereign immunity and has intentionally legislated on the matter." *Id.*

Florida Prepaid and *Sossamon* thus make clear that a state cannot impliedly or constructively waive its immunity from suit in the courts of a

sister state. The courts of numerous other states have recognized as much. *See Ohio v. Great Lakes Minerals, LLC*, 597 S.W.3d 169, 172 (Ky. 2019); *Belfand v. Petosa*, 148 N.Y.S.3d 457, 463–64 (N.Y. Sup. Ct. App. Div. 2021); *Marshall v. Se. Pa. Transp. Auth.*, 300 A.3d 537, 549–51 (Pa. Comm. Ct. 2023); *Shoemaker v. Tazewell Cnty. Pub. Schs.*, 249 W.Va. 451, 456–57, 895 S.E.2d 854 (W. Va. Ct. App. 2023). In *Belfand*, for example, a New York court emphasized that "[t]he U.S. Constitution bars suits against nonconsenting states based on a mere inference of consent." 148 N.Y.S.3d at 463. The court cited Supreme Court precedents holding that a sue-and-be-sued clause does not constitute express consent, *Fla. Dep't of Health & Rehab. Servs. v. Fla. Nursing Home Ass'n*, 450 U.S. 147 (1981), and that allowing suits "in any court of competent jurisdiction" does not waive sovereign immunity either, *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573 (1946). "The constitutional principle is clear—consent to suit in a sister state by legislation will exist 'only where stated by the most express language or by such overwhelming implications from the text as (will) leave no room for any other reasonable construction.'" *Belfand*, 148 N.Y.S.3d at 464 (quoting *Edelman*, 415 U.S. at 651, 673); *see also Shoemaker*, 249 W.Va. at 456–57 ("A '[w]aiver [of sovereign immunity] may not be implied.'") (quoting *Sossamon*, 563 U.S. at 284 (quoting *Fla. Prepaid*, 527 U.S. at 682)); *Marshall*, 300 A.3d at 551–52 (following *Belfand*).

B. Neither the State of Florida nor the FSU Board has given clear and unambiguous consent to be sued in North Carolina's courts.

The Superior Court's decision, together with the ACC's theory of the case, cannot be reconciled with the foregoing precedents that require any waiver of state immunity to be clear and unequivocal, not simply constructed or implied. The Superior Court and the ACC effectively attempt to revive the "constructive-waiver experiment of *Parden*" that *Florida Prepaid* so resoundingly rejected. The ACC contends that the FSU Board chose to allow FSU to continue to participate in ACC governance after North Carolina enacted the UUNAA, which generally allows unincorporated nonprofit associations to bring suits against their members. But that participation does not rise to the level of an unequivocal expression of state consent on the part of Florida or the FSU Board to be sued in North Carolina's courts.

To begin, the UUNAA is North Carolina, not Florida, legislation. And nothing in the text of the UUNAA equates a foreign sovereign's choice to remain subject to that law tantamount to unequivocal consent to suit in the courts of North Carolina. At most, the UUNAA provides that "[a] nonprofit association may assert a claim against a member or a person referred to as a 'member' by the nonprofit association." N.C.G.S. § 59B-7(e). But that provision does not say where and how the nonprofit association can assert such a claim. And though the UUNAA contemplates governmental members,

id. § 59B-2, the provision in § 59B-7(e) says nothing whatsoever about how it applies to an unincorporated nonprofit association with governmental members.

As a local enactment of a "uniform" law, the purpose of the UUNAA is to "make uniform the law with respect to" unincorporated nonprofit associations "among states enacting it." *Id.* § 59B-14. As comments to the model legislation make clear, that language simply indicates departure from "the common law aggregate theory," under which "a nonprofit association was not an entity separate from its members" and "a nonprofit association could not assert a claim against a member . . . because the nonprofit association technically d[id] not exist." Nat'l Conf. of Comm'rs on Uniform State Laws, *Uniform Unincorporated Nonprofit Association Act with Prefatory Note and Comments* 19–20 (2011).

In other words, the UUNAA merely describes the ways in which an association is legally separate from its members. This is apparent from the subsections surrounding the at-issue language. *See* N.C.G.S. § 59B-7.

Other states' dealings with the UUNAA confirm this narrower goal. *See, e.g.*, *City of Dallas v. East Vill. Ass'n*, 480 S.W.3d 37, 44 (Tex. App. Dallas 2015, pet. denied) (parallel provision "does not purport to address, much less to confer or restrict, the standing of an association"); *Palladino v. CNY Centro, Inc.*, 23 N.Y.3d 140, 149–50, 12 N.E.3d 436 (N.Y. 2014) (UUNAA

"makes clear that an unincorporated nonprofit association is a legal entity separate from its members and managers that, among other things, can sue and be sued in its own name"); *Citizens Against Linscott/Interstate Asphalt Plant v. Bonner Cnty. Bd. of Comm'rs*, 168 Idaho 705, 712, 486 P.3d 515 (Idaho 2021) (UUNAA "is an expression of the same departure from the common-law rule treating an unincorporated nonprofit association as an aggregate of its members").

Thus, nothing in the UUNAA provides any basis for inferring that mere membership of a foreign state entity in an unincorporated nonprofit association would expressly waive sovereign immunity by that foreign state.

Notably, this sovereignty protection is heightened with respect to lawsuits against states *for money damages*, like the ACC is bringing here. *See Sossamon*, 563 U.S. at 285 ("[W]aiver of sovereign immunity to other types of relief does not waive immunity to damages[.]"); *cf. also U.S. Dep't of Energy v. Ohio*, 503 U.S. 607, 619 & n.15 (1992) (same as to federal sovereign immunity). The Superior Court's decision to "step in and abrogate [Florida's] sovereign immunity" in this case is therefore especially problematic. *Sossamon*, 563 U.S. at 291.

Additionally, even if the UUNAA generally established that a member opens itself up to lawsuits by joining an unincorporated nonprofit association, no foreign sovereign would have had reason to think that it would clearly

consent to such lawsuits by virtue of being subject to the UUNAA. This is because the UUNAA was enacted in 2006. *See* N.C. Sess. Laws 2006-226. At that time, *Nevada v. Hall*—a decision rendered in 1979 and not overruled until 2019—was still the law of the land and provided that states were not immune from suit in other states' courts regardless of its consent.

Finally, and contrary to the "question[ing]" of the Superior Court, *see ACC v. FSU*, 2024 WL 1462914, at *16, the State of Florida has not waived its sovereign immunity from suits of this nature through Section 1001.72 of the Florida Statutes. That statute provides that the board of trustees for a Florida public university "shall be a public body corporate . . . with all the powers of a body corporate, including the power . . . to sue and be sued [and] to plead and be impleaded in all courts of law or equity." Fla. Stat. § 1001.72(1). But the U.S. Supreme Court has made clear that a sue-and-be-sued clause is not sufficient to constitute a waiver of sovereign immunity in federal court. *Fla. Prepaid*, 527 U.S. at 676. The Florida Supreme Court has likewise ruled that a sue-and-be-sued clause in a state agency's authorizing legislation does not establish waiver by the Florida Legislature of the State's sovereign immunity from suit even in its own courts. *Spangler v. Fla. State Tpk. Auth.*, 106 So.2d 421, 423 (1958). It follows with even greater force that such a clause does not constitute consent to suit in another state's court. *See Fla. Prepaid*, 527 U.S. at 676.

II. This Court's decision in *Farmer* does not require a different result.

Instead of following *Florida Prepaid* and *Sossamon*, the Superior Court leaned heavily on this Court's recent decision in *Farmer v. Troy University*, 382 N.C. 366, 879 S.E.2d 124 (N.C. 2022). In *Farmer*, this Court ruled that Troy University, a public university in the State of Alabama, had waived its immunity to suit in North Carolina's courts by virtue of a sue-and-be-sued clause contained in North Carolina legislation, namely, the North Carolina Nonprofit Corporation Act ("NCNCA"). 382 N.C. at 375–76, 879 S.E.2d at 131. *Farmer* concerns a different statute and is inapplicable to this case. Even if it were applicable, it was wrongly decided and should be overruled.

A. *Farmer* is distinguishable from this case.

The Superior Court erred by interpreting *Farmer* to require finding waiver simply because a sister-state entity purportedly operates within North Carolina pursuant to a statute authorizing the entity to sue and be sued. *Farmer*'s holding was much more limited.

In *Farmer*, this Court attached great significance to the fact that Troy University had deliberately obtained a certificate of authority to operate in North Carolina as an out-of-state corporation, as required by the NCNCA. *Id.* at 374–75, 879 S.E.2d at 130. Certificates of authority "authorize[] the foreign corporation to which it is issued to conduct affairs in" North Carolina and

grant the foreign corporation "the same but no greater rights and . . . the same but no greater privileges as" a "domestic corporation of like character." *Id.* at 374, 879 S.E.2d at 130. One of these rights or privileges is the "power . . . to sue and be sued." N.C.G.S. § 55A-3-02(a)(1).

This Court held that Troy's decision to "register[] as a nonprofit corporation . . . and engage[] in business in North Carolina" indicated acceptance of the sue-and-be-sued clause, thereby waiving Troy's sovereign immunity. *Farmer*, 382 N.C. at 371. This Court thought Troy was more akin to a private university than to a public university because it was established—insofar as North Carolina is concerned—as a nonprofit corporation rather than by statute. *Id.* at 374 n.4. Despite recognizing that a North Carolina university would maintain its immunity, this Court concluded that Troy had unequivocally subjected itself to the same liabilities as private universities, which can sue and be sued, and consequently had waived its sovereign immunity. *Id.*

The ACC's lawsuit against FSU does not fit within *Farmer* because neither the FSU Board nor FSU has ever sought to operate in North Carolina as an out-of-state corporation subject to the NCNCA, a statute the ACC understandably does not invoke. Unlike Troy University, which in *Farmer*'s view had subjected itself "to the same duties, restrictions, penalties, and liabilities now or later imposed on" private universities under the NCNCA,

id. at 374, FSU merely participated as a member of an unincorporated nonprofit association based in North Carolina, *see Sossamon*, 563 U.S. at 290 (rejecting implied-contract theory of waiver). The ACC thus turns to a different North Carolina statute, the UUNAA, to argue the FSU Board waived sovereign immunity.

But at the time FSU joined the ACC, the UUNAA was not even in effect. FSU's act of joining the ACC thus carried with it no formal notice of rights and liabilities—quite unlike Troy University's act of registering as an out-of-state corporation under the NCNCA. The most that can be said is that the FSU Board did not withdraw FSU from the ACC after 2006, when the North Carolina Legislature adopted the UUNAA. But for the reasons already discussed, that "choice"—even assuming the FSU Board knew of the enactment and was in a position practically to decide whether to remain in the ACC or move elsewhere, *cf. Nat'l Fed'n of Indep. Business v. Sebelius*, 567 U.S. 519, 580–81 (2012) (midstream change in Spending Clause conditions was unconstitutionally coercive)—does not come close to a clear and unequivocal consent by Florida to be sued in the North Carolina courts.

The Superior Court also misapplied *Farmer*'s reasoning even on its own terms. *Farmer* relied on the U.S. Supreme Court's decision in *Thacker v. Tennessee Valley Authority*, 587 U.S. 218 (2019), which held that Congress waived the sovereign immunity of a federal agency by including a sue-and-be-

sued clause in the authorizing legislation for that agency. At the outset, that reliance was misplaced. *See infra* Part II.B. But even assuming *Thacker* applies, it would not counsel in favor of abrogating Florida's immunity here.

Thacker adopted the three-part test of *Federal Housing Administration v. Burr*, 309 U.S. 242 (1940). Under the *Burr* test, a waiver of sovereign immunity may be inferred only if (1) it would be "consistent with the statutory or constitutional scheme"; (2) it would not cause a "grave interference with the performance of a governmental function"; and (3) it was "plainly" not the purpose of the legislature "to use the 'sue and be sued' clause in a narrow sense," *Burr*, 309 U.S. at 245 (relied on by *Thacker*, 587 U.S. at 224). These factors weigh against inferring a waiver of sovereign immunity in this case.

First, the UUNAA has nothing to do with sovereign immunity. *See supra* Part I.B. Nor would an inference of waiver be consistent with the constitutional scheme, given the Full Faith and Credit Clause concerns that would immediately arise. *See infra* p. 21.

Second, running a university athletic program is a part of the mission of any public educational institution. Public universities, as a practical matter, must affiliate themselves with intercollegiate athletic conferences, which play a central role in provision and regulation of intercollegiate athletic contests. In North Carolina and elsewhere, "operation of an athletic

program is a traditional government function," regardless of whether money is changing hands in doing so. *Willett v. Chatham Cnty. Bd. of Educ.*, 176 N.C. App. 268, 271, 625 S.E.2d 900 (2006). But it is true that private universities often perform a similar function, even within the ACC. And *Thacker* suggests that, within its framework, there is no special protection for "the kind of thing any [university] might do." 587 U.S. at 228–29.

Finally, the UUNAA provision allowing an association to assert a "claim" against its members is even narrower than the traditional sue-and-be-sued clause contained in the NCNCA, the statute at issue in *Farmer*. Rather than evincing consent on the part of a foreign state member to be sued by the association in a North Carolina court, the UUNAA primarily tells private actors who wish to create or join an unincorporated nonprofit association how those associations operate vis-à-vis their members. By contrast, the sue-and-be-sued clause in the NCNCA required out-of-state entities to agree, in writing, to be treated like domestic corporations of similar character.

For these reasons, *Farmer* does not support the Superior Court's ruling in this case.

B. *Farmer* was wrongly decided.

In all events, *Farmer* was wrongly decided and should be overruled. This Court has "not hesitated to revisit and overrule prior decisions that are

erroneous." *Harper v. Hall*, 384 N.C. 292, 374, 886 S.E.2d 393, 445 (2023). *Farmer* was rendered just two years ago and has gained little precedential traction since. This Court has declined to adhere to decisions that are "neither long-standing nor . . . relied upon in other cases." *Id.*

For two primary reasons, *Farmer* warrants a departure from *stare decisis*.

First, the U.S. Supreme Court has decisively rejected *Farmer*'s core reasoning that an arm of the state waives immunity simply by doing business in the state subject to a sue-and-be-sued clause. *See supra* pp. 7–11 (discussing *Fla. Prepaid*, 527 U.S. at 676). But instead of stopping with *Florida Prepaid*, *Farmer* derived a contrary principle from the U.S. Supreme Court's decision in *Thacker*.

The *Thacker* Court held that Congress waived a federal agency's immunity in federal courts by providing in the federal legislation itself that the agency could "sue or be sued in its corporate name." *Farmer*, 382 N.C. at 372. Looking to New Deal precedent, *Thacker* held that Congress's words "should be liberally construed" to waive federal agencies' immunity. 587 U.S. at 224 (quoting *Burr*, 309 U.S. at 245). *Burr*, in turn, recognized Congress's unquestionable power to waive the federal government's immunity when establishing federal agencies and noted "the increasing tendency of Congress

to waive the immunity where federal governmental corporations [we]re concerned." 309 U.S. at 244–45.

But the New Deal-era principles applied in *Thacker* to Congress devising its own sovereign powers to a subsidiary have no bearing on the principles applicable in state sovereign-immunity cases. In the latter context, U.S. Supreme Court precedent demands more than a sue-and-be-sued clause before jettisoning a state's sovereign immunity.

As Justice Barringer noted in her dissent, moreover, *Farmer*'s reasoning is especially problematic given that this Court has held that a sue-and-be-sued clause enacted by the North Carolina Legislature is generally insufficient to waive the immunity of North Carolina sovereign entities. *See Farmer*, 382 N.C. at 384 (Barringer, J., dissenting) (citing *Evans ex. rel. Horton v. Hous. Auth. of Raleigh,* 359 N.C. 50, 56, 602 S.E.2d 668, 672 (2004)); *Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 537–38, 299 S.E.2d 618, 626–27 (1983)).

The *Farmer* majority opinion distinguished those cases in part because they involved North Carolina sovereign entities rather than an arm of a "sister state[]." 382 N.C. at 373–74. But that reasoning clashes with the Full Faith and Credit Clause, which does not permit a State to apply a less favorable rule of sovereign immunity to out-of-state entities than to its own sovereign entities. *See Franchise Tax Bd. of Cal. v. Hyatt*, 578 U.S. 171, 178–

79 (2016) ("*Hyatt II*"). As Justice Barringer stressed, "this [North Carolina] Court cannot unilaterally impose a waiver of sovereign immunity on Alabama. Rather, Alabama must consent to be haled into North Carolina courts." *Farmer*, 382 N.C. at 385.

Second, *Farmer* inappropriately relied upon *Georgia v. City of Chattanooga*, 264 U.S. 472 (1924). That case—decided years before the U.S. Supreme Court established the contemporary framework governing waivers of state sovereign immunity—is inapposite. *City of Chattanooga* involved Tennessee legislation allowing Georgia to acquire land for the purpose of building railroads. *Id.* at 478. Chattanooga sought to exercise its power of eminent domain to create a right of way for one of its principal streets. *Id.* at 479. The U.S. Supreme Court found that "Tennessee, by giving Georgia permission to construct a line of railroad from the state boundary to Chattanooga, did not surrender any of its territory, or give up any of its governmental power," including its power of eminent domain. *Id.* at 480–81. Thus, the Court concluded that Georgia's sovereign immunity did not protect the land it held in Tennessee from eminent domain.

While Tennessee did argue that a "sue and be sued" clause in the statute at issue was sufficient to indicate Georgia's waiver of sovereign immunity from suit, the Supreme Court found it unnecessary to reach that argument, ruling that "[t]he power of the city to condemn does not depend

upon the consent or suability of the owner." *Id.* at 481–82; *see also id.* at 483 ("The taking is a legislative and not a judicial function."). If Georgia wished to be heard on the decision to condemn, it was given notice and could avail itself of Tennessee courts to raise any defenses or objections under Tennessee law. *Id.*

As this shows, the *City of Chattanooga* decision simply reflects that one state cannot de facto capture another's territory simply by buying land for commercial purposes. Any indication that a sue-and-be-sued clause or the mere conduct of commercial activity could be deemed to waive sovereign immunity was mere dicta and, in any event, supplanted by any number of cases decided within the last half-century. *See, e.g.*, *Fla. Prepaid*, 527 U.S. at 676.

City of Chattanooga therefore does nothing to establish a presumption that engaging in commercial activity within another state will deprive a sovereign of its immunity.

* * * * *

In short, neither *Thacker* nor *City of Chattanooga* displaces the core principle recognized in *Florida Prepaid* and *Sossamon*, which is that a state cannot be deemed to waive its sovereign immunity from suit except through an express and unequivocal statement of intent by that state. Conducting business in a foreign state, even if subject to a sue-and-be-sued clause

contained in the foreign state's law, does not amount to express and unequivocal intent to waive sovereign immunity. It follows with even greater force that a state does not waive its sovereign immunity by remaining a member of an unincorporated nonprofit association that is subject to the UUNAA.

For these reasons, *Farmer* is inapposite. And even if the trial court was correct to apply *Farmer*, it was wrongly decided and should be overruled.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment below and dismiss the FSU Board as protected by Florida's constitutional sovereign immunity.

Respectfully submitted the 21st day of November, 2024.

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Rule 33(b) certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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