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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Alex Kinlaw, Jr., Circuit Court Judge

Appellate Case No.: 2021-000424

The NEXT School, Inc., a Public, Not-for-Profit Corporation  
Incorporated & Existing under the Laws of the State of South Carolina, . . . . . Appellant,

v.

AT-NET Services-Charlotte, Inc., a Private Corporation  
Incorporated & Existing under the Laws of the State of North Carolina,  
and American Arbitration Association, Inc., a Not-for-Profit Corporation  
Incorporated & Existing under the Laws of the State of New York, . . . . . Respondent.

AND

AT-NET Services-Charlotte, Inc., . . . . . Respondent,

v.

The NEXT School, Inc., . . . . . Appellant.

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**INITIAL OPENING BRIEF OF APPELLANT**

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## **STATEMENT OF THE ISSUES ON APPEAL**

1. Did the trial court commit reversible error in determining that the School, a South Carolina public charter school, is not a South Carolina state actor and is therefore not entitled to sovereign immunity?
2. Did the trial court commit reversible error by holding that the School, by entering into a contract with an arbitration clause, waives sovereign immunity in North Carolina and is subject to the jurisdiction of an arbitration in North Carolina and the North Carolina state courts?
3. Did the trial court commit reversible error by holding that a North Carolina statute can confer jurisdiction in North Carolina over a South Carolina state actor where South Carolina has not expressly waived its interstate sovereign immunity for South Carolina state actors?

## STATEMENT OF THE CASE

AT-Net Services–Charlotte, Inc. (“ATNSC”) is a private North Carolina company. The NEXT School (“the School”) is a free public charter school in Greenville, South Carolina. (School’s Charter; Alexander Op.) ATNSC and the School entered into a Master Services Agreement (“the Agreement”) on July 2, 2015. (Agreement.)

Under Article 13–Governing Law, “The Agreement and subsequent Amendments shall be governed by the laws of the State of North Carolina.” Under Article 18–Arbitration:

18.1 All Disputes to be Arbitrated. All disputes related to this Agreement shall be decided by arbitration in accordance with the American Arbitration Association then in effect unless the Parties mutually agree otherwise. This agreement shall be specifically enforceable under the prevailing arbitration law. All awards rendered by the arbitrator(s) shall be final and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction.

(Agreement p. 6.)

Following a dispute regarding payment, ATNSC filed an action against the School in Mecklenburg County, North Carolina for breach of contract. Prior counsel for the School advised ATNSC’s counsel that the School did not waive its arbitration rights under the Agreement. In response, ATNSC dismissed its lawsuit in Mecklenburg County and immediately commenced arbitration proceedings. Under protest of the School as to jurisdiction and sovereign immunity, the arbitration occurred in Charlotte, North Carolina because the American Arbitration Association (the “AAA”) informed counsel for the School that an arbitrator would not be assigned until the parties selected a forum and the School’s jurisdictional arguments would only be addressed by the assigned arbitrator. (See Hr’g Tr., May 26, 2020, p. 14.)

On December 4, 2018, the School, in its answer to the arbitration complaint, asserted as its Fourth Defense Lack of Jurisdiction/Sovereign Immunity and asserted that the School, as a South Carolina state actor, is only amenable to proceedings in suits “instituted in the courts of the State of South Carolina.” (School’s Arb. Ans., pp. 5-6.) On December 6, 2018, the School also filed a Motion to Dismiss the arbitration proceeding in Charlotte because the School, as a South Carolina state actor, “may only be sued in a court or tribunal for which the State of South Carolina has given its consent.” (School’s Arb. Mot. Dismiss & Memo. Supp.) By letter dated December 18, 2018, the AAA declined to address the School’s jurisdictional arguments, reserving the issue for the arbitrator. (School’s Renewed Arb. Mot. Dismiss.)

On April 28, 2019, in the course of the arbitration proceedings, the School filed a Renewed Motion to Dismiss. The arbitrator did not decide the motion, but indicated that she would adjudicate the merits of the motion after receiving evidence and testimony in the arbitration proceeding.

On May 2, 2019, the final merits hearing of the arbitration was held. At the outset of the proceedings, the School filed a Notice of Protest to participation in the arbitration proceeding “consistent with its position that the doctrine of sovereign immunity prohibits [the School], as an actor of the State of South Carolina, from being subject to legal proceedings in any forum other than those expressly authorized by the South Carolina General Assembly.” (School’s Arb. Not. of Protest.) The School participated in the arbitration “under protest, subject to and without waiving its jurisdictional defense.” (Id.)

The arbitrator denied the School’s motions and entered an interim arbitration award in favor of ATNSC on May 12, 2019.

On May 13, 2019, the United States Supreme Court issued its ruling in Franchise Tax Board v. Hyatt, \_\_\_ U.S. \_\_\_, 139 S. Ct. 1485 (2019) (Hyatt III), holding that States retain their sovereign immunity from private suits brought in the courts of other States.

On May 20, 2019, the School filed a Renewed Objection to Jurisdiction and Motion to Vacate the Decision of the Arbitrator. (School's Arb. Renewed Objection.) The School renewed its objection to jurisdiction and moved to vacate the arbitrator's decision, expressly in part on the basis of the United States Supreme Court's decision in Hyatt III.

By letter dated May 23, 2019, the arbitrator denied the School's motion and entered a Final Arbitration Award in favor of ATNSC.

On October 7, 2019, ATNSC moved to confirm the arbitration award in the Mecklenburg County Superior Court pursuant to the North Carolina Uniform Arbitration Act, N.C.G.S. § 1-569.1 et seq. ("the NC Arbitration Act").

On November 19, 2019, the School filed a declaratory judgment action in the Court of Common Pleas of Greenville County, South Carolina, asking the court to declare the arbitration proceedings and award void *ab initio*. This action was indexed as Civil Action No. 2019-CP-23-6745 (the "6745 action").

On November 21, 2019, a hearing was held in Mecklenburg County, North Carolina on ATNSC's motion to confirm the arbitration award. The School did not attend the hearing in Mecklenburg County, precisely because South Carolina state actors are not amenable to proceedings in the courts of other States. On November 26, 2019, the Mecklenburg Superior Court confirmed the arbitration award, thereby making the arbitration award a judgment of the North Carolina court. (N.C. Or. Confirming Arb. Award.)

On February 17, 2020, ATNSC filed a notice of filing of foreign judgment in the Court of Common Pleas of Greenville County, South Carolina, pursuant to the Uniform Enforcement of Foreign Judgments Act, S.C. Code Ann. § 15-35-900 et seq. This action was indexed as Civil Action No. 2020-CP-23-00969 (“the 969 action”).

On May 21, 2020, the School filed a motion for judgment on the pleadings seeking judgment in its favor in its declaratory judgment action—the 6745 action, a motion to dismiss ATNSC’s counterclaims in the 6745 action, and a motion for relief from the North Carolina judgment in the 969 action. The School’s motions were all based on its prior and consistent contentions that the School, as a South Carolina state actor, is entitled to sovereign immunity in any adjudicative forum other than those explicitly authorized by the General Assembly, the North Carolina tribunals lacked jurisdiction, and the arbitration and North Carolina court decision are therefore void and a nullity, and should be vacated. Following a hearing on all three of the School’s motions, by Order dated July 7, 2020, the trial court denied the School’s motions and directed the clerk to docket and index the North Carolina judgment as any other judgment of South Carolina in Civil Action No. 2020-CP-23-00969. (Or. July 7, 2020.)

On July 16, 2020, the School, pursuant to Rule 59 of the South Carolina Rules of Civil Procedure, filed a Motion to Alter or Amend the Court’s July 7, 2020 Order. The School argued that the trial court erred in: (1) determining the School, as a public charter school, was a political subdivision of South Carolina, not a South Carolina state actor, and therefore not entitled to sovereign immunity; and (2) deciding that the School, by entering into a contract with an arbitration clause, was subject to the jurisdiction of an arbitration in North Carolina and the North Carolina state courts. Following a hearing held on March 1,

2021, the trial court, by Order dated March 25, 2021, denied the School's Rule 59 Motion to Alter or Amend the July 7, 2020 Order. The trial court based its decision on its prior reasoning in the July 7, 2020 Order and for the reasons set forth in the March 25, 2021 Order. (Or. Mar. 25, 2021.) On April 20, 2021, Appellant filed a timely notice of appeal from the July 7, 2020 Order and the March 25, 2021 Order.

For the reasons set out hereinafter, and for any other reason that may be apparent to the Court based on the record below, Appellant would respectfully request that the trial court's decisions from which appeal is now taken be reversed and vacated, and that the case be remanded for further proceedings consistent with the decision to be rendered by this Court.

### **ARGUMENT**

Appellant has consistently argued that the arbitration proceedings and North Carolina judgment confirming the arbitration award are invalid because of lack of jurisdiction and sovereign immunity. Appellant has consistently taken exception from every aspect of the trial court's July 7, 2020 and March 25, 2021 Orders, and in particular: (1) the determination that the School is not a South Carolina state actor and is therefore not entitled to sovereign immunity; (2) the determination that the School, by entering into a contract with an arbitration clause, has waived its sovereign immunity in North Carolina proceedings; and (3) a North Carolina statute under the North Carolina Arbitration Act can confer subject matter jurisdiction over proceedings against the State of South Carolina or its actors. Appellant contends that because the School is a South Carolina state actor entitled to interstate sovereign immunity, and because the General Assembly has not waived immunity against South Carolina state actors upon any claim other than those

commenced in South Carolina state courts, the arbitration proceeding presently at issue, and any other adjudicative proceeding that may occur outside the territorial boundaries of the State of South Carolina, are legal nullities.

**I. STANDARD OF REVIEW**

Because this appeal raises questions of law concerning subject matter jurisdiction, sovereign immunity, statutory interpretation, and the Full Faith and Credit Clause, this Court reviews the trial court's order *de novo*. Minorplanet Sys. USA Ltd. v. Am. Aire, Inc., 368 S.C. 146, 149, 628 S.E.2d 43, 44-45 (2006) (action to enforce foreign judgment is action at law); Catawba Indian Tribe of S.C. v. South Carolina, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (statutory interpretation is question of law), *cert. den'd*, 552 U.S. 888 (2007); Capital City Ins. Co. v. BP Staff, Inc., 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009) (subject matter jurisdiction is question of law); Unisys Corp. v. South Carolina Budget & Control Bd., 346 S.C. 158, 165, 551 S.E.2d 263, 267 (2001) (questions of jurisdiction and sovereign immunity are questions of law); Fesmire v. Digh, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2009) (on appeal, all questions of law are reviewed *de novo*). The appellate courts are free to decide questions of law with no particular deference to the lower court. I'on, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 411, 526 S.E.2d 716, 718-19 (2000) (citing S.C. Const. art. V, §§ 5 & 9; S.C. Code Ann. §§ 14-3-320 and -330 (1976 Sup. 1998); S.C. Code Ann. § 14-8-200 (granting Supreme Court and Court of Appeals the jurisdiction to correct errors of law in both law and equity actions)); South Carolina Dep't of Transp. v. M&T Enters. of Mt. Pleasant, LLC, 379 S.C. 645, 654, 667 S.E.2d 7, 12 (Ct. App. 2008).

The Full Faith and Credit Clause states that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.” U.S. Const. Art. IV, § 1. The courts of one state must therefore “give such force and effect to a foreign judgment as the judgment would receive in the state where rendered.” Minorplanet, 368 S.C. at 149, 628 S.E.2d at 44-45. Some limitations on this mandate, however, do exist. “Chief among these limitations is the caveat, consistently recognized by this Court, that ‘a judgment of a court in one State is conclusive upon the merits in another State only if the court in the first State had power to pass on the merits—had jurisdiction, that is, to render the judgment.’” Underwriters Nat’l Assurance Co. v. N.C. Life & Acc. & Health Ins. Guar. Ass’n, 455 U.S. 691, 704 (1982) (quoting Durfee v. Duke, 375 U.S. 106, 110 (1963)). “Consequently, before a court is bound by the judgment rendered in another State, it may inquire into the jurisdictional basis of the foreign court’s decree. If that court did not have jurisdiction over the subject matter or the relevant parties, full faith and credit need not be given.” Id. at 705. In other words, “a judgment rendered without subject matter jurisdiction or personal jurisdiction . . . is not entitled to full faith and credit.” Widenhouse v. Colson, 405 S.C. 55, 59, 747 S.E.2d 188, 190 n.2 (2013). “Where the court of the issuing state has fully and fairly litigated and finally decided the question of jurisdiction, further inquiry into the jurisdiction of the issuing court is precluded.” Pitts v. Fink, 389 S.C. 156, 162, 698 S.E.2d 626, 629 (Ct. App. 2010) (quoting Durfee, 375 U.S. at 111). “Otherwise, ‘before a court is bound by the judgment rendered in another State, it may inquire into the jurisdictional basis of the foreign court’s decree.’” Id. (quoting Underwriters, 455 U.S. 691, 705 (1982)). Furthermore, sovereign immunity and subject matter jurisdiction are “not forfeited by inattention at the trial level” and “can be raised for the first time on appeal.”

Virginia Dep't of Corr. v. Jordan, 921 F.3d 180, 187 (4th Cir. 2019), *cert. den'd*, 140 S. Ct. 672 (2019).

In this case, the North Carolina court did not fully and fairly litigate and finally decide the questions of jurisdiction and sovereign immunity, and there is no discussion in its order specifically addressing sovereign immunity or subject matter jurisdiction; therefore, the South Carolina trial court could inquire into the jurisdictional basis of the North Carolina's decree confirming the arbitration award. Pitts, 389 S.C. at 162, 698 S.E.2d 629. The South Carolina trial court, however, erred in determining the School is not a South Carolina state actor, erred in determining the School is not entitled to sovereign immunity, erred in determining the School waived sovereign immunity, and erred in determining the North Carolina proceedings had jurisdiction.

**II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DETERMINING THAT THE SCHOOL, A SOUTH CAROLINA PUBLIC CHARTER SCHOOL, IS NOT A SOUTH CAROLINA STATE ACTOR AND IS NOT ENTITLED TO SOVEREIGN IMMUNITY.**

**A. Identification of the Portion of the Order at Issue**

In relevant part, the trial court incorrectly determined the School is not a state actor:

Finally, political subdivisions of states “do not enjoy a constitutionally protected immunity from suit under the Eleventh Amendment of the United States Constitution.” Jinks v. Richland Cty., 538 U.S. 456, 466 (2003). As recently explained by the Utah Supreme Court, “Hyatt-which addressed constitutionally protected sovereign immunity-does not apply to political subdivisions. The principles set forth in Hall continue to govern a state's governmental immunity grant to its political subdivisions and the respect that should be attributed to it by other states.” Galindo v. City of Flagstaff, 452 P.2d 1185, 1187 (Sup. Ct. Utah 2019) (citing to Nevada v. Hall, 99 S. Ct. 1182 (1979) (providing that states are free to choose whether or not to accord immunity or respect limits on liability established by sister states when those states were sued in their courts.

Whether NEXT should be entitled to sovereign immunity in a foreign court should be analyzed under the same framework as whether it would be entitled to state governmental immunity under the Eleventh Amendment. The Fourth Circuit

has provided several factors in determining whether a political subdivision is an *alter ego* of the state, the most important of which being “whether the state treasury will be responsible for paying any judgment that might be awarded.” Ram Ditta v. Maryland National Capital Park and Planning Comm’n, 822 F.2d 456, 457 (1987). Other factors include “whether the entity exercises a significant degree of autonomy from the state, whether it is involved with local versus statewide concerns, and how it is treated as a matter of state law.” Id. Consideration of these factors weigh against finding that NEXT is an *alter ego* of the state and entitled to state sovereign immunity: The judgment will not be paid from the state treasury, charter schools were established to provide a high degree of autonomy from state regulations and requirements, and NEXT educates local students and has no statewide impact or presence. The only factor in favor is how it is treated as a matter of state law, but this is only one factor to be considered and is not determinative.

Because NEXT is a political subdivision, not a state actor, it is not entitled to the sovereign immunity discussed in Hyatt. Thus, even if NEXT’s interpretation of Hyatt were correct, which it is not, this case is properly analyzed under the Hall framework and North Carolina is free to ignore NEXT’s claims of immunity within its jurisdiction.”

(Or. July 7, 2020.) These conclusions that the School is not a South Carolina state actor and not entitled to sovereign immunity under an Eleventh Immunity analysis constitute legal error and must be reversed. The conclusion that Hall, which was overruled by Hyatt III, controls so that North Carolina is free to ignore the School’s claims of sovereign immunity also constitute legal error and must be reversed.

**B. The trial court erred in determining the School is not a South Carolina state actor in derogation of the fact that the South Carolina Supreme Court has explicitly held that public charter schools are state actors.**

The trial court first erred in determining that the School is not a South Carolina state actor. The South Carolina Supreme Court has clearly determined that public charter schools are state actors. The School is a public charter school established under the laws of South Carolina. A charter school “means a public, nonreligious, nonhome-based, nonprofit corporation forming a school that operates by sponsorship of a public school district, the South Carolina Public Charter School District, or a public or independent

institution of higher learning.” S.C. Code Ann. § 59-40-40(1). The South Carolina Supreme Court has specifically and explicitly held that a charter school is a state actor:

Section 59-40-40(2)(a) of the South Carolina Code provides that a charter school “is, **for purposes of state law and the state constitution, considered a public school** and part of the South Carolina Public Charter School District, the local school district in which it is located, or is sponsored by a public or independent institution of higher learning.” S.C. Code Ann. § 59-40-40(2)(a) (Supp. 2013). Section 59-17-10 of the South Carolina Code provides, in part, that “[e]very school district is and shall be a body politic and corporate . . . of . . . the State of South Carolina.” S.C. Code Ann. § 59-17-10 (Supp. 2013); *Camp v. Sarratt*, 291 S.C. 480, 481, 354 S.E.2d 390, 391 (1987). In its order awarding attorney’s fees, the trial court found that under section 59-40-40(2), when read together with sections 59-40-40(1) and 59-40-50, **a charter school is considered a state entity** and is subject to the provisions of section 15-77-300. We agree with the trial court’s conclusion.

McNaughton v. Charleston Charter Sch. for Math & Science, Inc., 411 S.C. 249, 266, 768 S.E.2d 389, 398 (2015) (emphasis added). The South Carolina Supreme Court emphasized that “state actors need not perform all possible governmental functions. Rather, [the charter school] is a state actor because it is classified as a public school; is funded by state money; and created by virtue of state law in furtherance of the state’s duty to provide public education pursuant to Article XI, section 3 of the South Carolina Constitution.” Id. Where the South Carolina Supreme Court has explicitly recognized public charter schools as state entities or state actors, the trial court erred in classifying the School as a political subdivision instead of a state actor.

**C. The trial court erred in determining the School is a political subdivision subject to the Fourth Circuit’s four-part test to determine entitlement to sovereign immunity under the Eleventh Amendment where the School is a state actor and interstate sovereign immunity, rather than Eleventh Amendment immunity, is at issue in this case.**

The trial court, despite the clear holding in McNaughton that public charter schools are state actors, simply states the School is a political subdivision, not a state actor, and

then analyzes under the Fourth Circuit's four-part test whether the School as a political subdivision should be considered an *alter ego* of the state for purposes of sovereign immunity under the Eleventh Amendment. The four-part analysis under the Eleventh Amendment does not apply in this case because the action is in state court, not federal court, and involves interstate sovereign immunity, not Eleventh Amendment immunity.

The guarantee of the Eleventh Amendment is that non-consenting States may not be sued by citizens of another state in **federal court**. Stewart v. North Carolina, 393 F.3d 484, 488 (4th Cir. 2005). "Eleventh Amendment immunity is but an example of state sovereign immunity as it applies to suits filed in federal court against unconsenting states by citizens of other states." Id. "[T]he Fourth Circuit has articulated a non-exclusive list of four factors to be considered when determining whether or not a state-created entity is an arm of the state, and thus protected from suit by the Eleventh Amendment." Hutto v. South Carolina Retirement Sys., 899 F. Supp. 2d 457, 467 (D.S.C. 2013), *aff'd*, 773 F.3d 536 (4th Cir. 2014). This four-part analysis must be explicitly performed "before making a ruling on an Eleventh Amendment immunity defense." Id. at 468. Where, as here, the School is not asserting an Eleventh Amendment immunity defense because this action is in state court, not federal court, and the South Carolina courts have already determined public charter schools are state actors for purposes of state sovereign immunity in state courts, the trial court erred in applying the Fourth Circuit's Eleventh Amendment immunity analysis.

The School further contends that if this Court determines the School is a political subdivision rather than a state actor, that determination is a distinction without a difference for purposes of sovereign immunity under South Carolina law. See Wright v. Colleton County Sch. Dist., 301 S.C. 282, 285, 391 S.E.2d 564, 566-67 (1990) (in enacting the South

Carolina Tort Claims Act, legislature waived sovereign immunity of the State, its political subdivisions, and employees with certain limitations). The South Carolina legislature, in enacting the SCTCA, declared:

The General Assembly seeks an orderly transition to the recognition of individual's rights against the tortious sovereign as defined herein. Consequently, it is declared to be the public policy of the State of South Carolina that the State, and its political subdivisions, are only liable for torts within the limitations of this chapter and in accordance with the principles established herein. It is further declared to be the public policy of the State of South Carolina that to insure an orderly transition from sovereign immunity to qualified and limited liability that the General Assembly intends to provide for liability on the part of the State and its political subdivisions only from July 1, 1986, forward in prospective fashion.

S.C. Code Ann. § 15-78-20(a); id. § 15-78-20(b) (“The General Assembly in this chapter intends to grant the State, its political subdivisions, and employees, while acting within the scope of official duty, immunity from liability and suit for any tort except as waived by this chapter.”). Based on the public policy as stated by the legislature in the SCTCA, under South Carolina law, political subdivisions are viewed as having the same sovereign immunity as the State, and such immunity must be waived to hold the State or its political subdivision liable.

Regardless, the Eleventh Amendment immunity analysis employed by the trial court does not apply since the School is asserting an interstate immunity defense in state court, not an Eleventh Amendment immunity defense in federal court. The trial court therefore erred in engaging in an Eleventh Amendment immunity analysis to determine the School is not entitled to sovereign immunity.

**D. The trial court committed reversible error in determining the School is not entitled to sovereign immunity even though the United States Supreme Court has specifically held that states retain their sovereign immunity from private suits brought in the courts of other States.**

The United States Supreme Court recently addressed the constitutionality of a private party seeking civil relief from a state actor in any forum other than a forum in which the opposing state has expressly consented to be sued. The Court specifically held “that States retain their sovereign immunity from private suits brought in the courts of other States.” Franchise Tax Bd. v. Hyatt, \_\_\_ U.S. \_\_\_, 139 S. Ct. 1485, 1492 (2019) (Hyatt III).

In Hyatt III, Hyatt, in the early 1990s, earned millions of dollars in royalties from a technology patent. Hyatt III, 139 S. Ct. at 1490. Prior to receiving the patent, Hyatt had been a long-term resident of California; however, in 1991, he moved to Nevada, which collects no personal income tax. Id. The Franchise Tax Board of California (the “Board”), charged with collecting personal income tax, suspected Hyatt’s move was a sham and conducted an audit. Id. at 1490-91. Hyatt sued the Board in Nevada state court for torts allegedly committed during the audit. Id.

The Supreme Court, in determining the Board was immune from suit in Nevada, held that the Constitution does not permit “a State to be sued by a private party without its consent in the courts of a different State.” Id. at 1490. In so holding, the Court overruled the decision to the contrary in Nevada v. Hall, 440 U.S. 410 (1979). Hyatt III, 139 S.Ct. at 1490. “[A]lthough the Constitution assumes that the States retain their sovereign immunity except as otherwise provided, it also fundamentally adjusts the States’ relationship with each other and curtails their ability, as sovereigns, to decline to recognize each other’s immunity.” Id. at 1493. “The founding generation thus took as given that States could not be haled involuntarily before each other’s courts.” Id. at 1494.

State sovereign immunity is derived not from the Eleventh Amendment, but from the Constitution itself. Id. at 1496. In overruling Nevada v. Hall, the Supreme Court stated: “Nevada v. Hall is irreconcilable with our constitutional structure and with the historical evidence showing a widespread preratification understanding that States retained immunity from private suits, both in their own courts and in other courts.” Id. at 1499. In a recent application of Hyatt III, the North Carolina Court of Appeals stated that “[i]t is evident that for the purposes of interstate sovereign immunity . . . the dispositive issue is whether one state has been ‘haled involuntarily’ into the courts of another state.” Farmer v. Troy Univ., 855 S.E.2d 801, 806 (N.C. Ct. App. 2021) (citing Hyatt III, \_\_\_ U.S. \_\_\_, 139 S.Ct. at 1494-95).

In Farmer v. Troy University, plaintiff Farmer appealed from a trial court order granting defendant Troy University’s motion to dismiss pursuant to Rules 12(b)(2) and (6) of the North Carolina Rules of Civil Procedure, on the grounds of sovereign immunity. Farmer, 855 S.E.2d at 804. Troy University is a public university in Alabama and maintains a recruiting office in North Carolina where plaintiff was based. Id. Farmer filed suit in North Carolina against Troy University and two individual defendants for wrongful discharge, negligent retention and/or supervision of an employee, intentional infliction of emotional distress and tortious interference with contractual rights. Id. The North Carolina Court of Appeals rejected the plaintiff’s argument that interstate sovereign immunity as articulated in Hyatt III did not apply: “[a]s an arm of the State of Alabama, Troy University is immune from suit under the doctrine of sovereign immunity . . . . This immunity applies to both its proprietary and governmental functions, see id., unless that immunity is explicitly waived.” Farmer, 855 S.E.2d at 807. Similarly, the School, as an arm of the State

of South Carolina, is immune from suit under the doctrine of sovereign immunity unless its immunity is explicitly waived.

The holding in Hyatt III is clear: it is unconstitutional for a state—or one of its actors—to be subject to suit in any forum whatsoever, in derogation of its inherent immunity, unless the state has consented to the jurisdiction of that forum. Any judgment, verdict, or award contrary to this constitutional principle is void. See Katzburg v. Katzburg, 410 S.C. 184, 187, 764 S.E.2d 3, 4 (Ct. App. 2014) (judgment of court without subject matter jurisdiction is void). Under Hyatt III, where the School objected to jurisdiction and venue in North Carolina at every stage of the arbitration proceedings, did not consent to be sued in North Carolina, and did not explicitly waive its immunity in North Carolina, the School has been “hailed involuntarily” into the North Carolina arbitration proceedings and courts, and the arbitration award and North Carolina judgment are void.

Furthermore, the trial court determined that because the School “is a political subdivision, not a state actor, it is not entitled to the sovereign immunity discussed in Hyatt. . . . [T]his case is properly analyzed under the Hall framework and North Carolina is free to ignore NEXTs claims of immunity within its jurisdiction.” (Or. July 7, 2020 p. 8). While the School has already pointed out that the trial court erred in determining the School is not a state actor, the trial court further erred in relying on Nevada v. Hall as it has been overruled by Hyatt III. The trial court also erred in relying on Galindo v. City of Flagstaff, 452 P.3d 1185 (Utah 2019), in reaching its decision. The Galindo case involved a municipality, not a public charter school, and the court did not address the “sea change in sovereign immunity practice” brought about by Hyatt III. Galindo, 452 P.3d at 1187 n.2. The trial court therefore erred in failing to apply Hyatt III which clearly prevents the School

from being haled involuntarily into North Carolina courts, or, more broadly, any adjudicative forum other than those that have been expressly authorized by the General Assembly. The North Carolina arbitration proceeding and North Carolina judgment are void, and the trial court erred in denying the School's motions and enforcing the North Carolina judgment under the South Carolina Uniform Enforcement of Foreign Judgments Act, S.C. Code Ann. § 15-35-900 et seq.

**III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DETERMINING THAT THE SCHOOL WAIVED ITS SOVEREIGN IMMUNITY BY ENTERING INTO A CONTRACT WITH AN ARBITRATION CLAUSE.**

**A. Identification of the Portion of the Order at Issue**

In relevant part, the trial court held:

“Consent” as discussed by Hyatt refers to a state entity’s consent to be sued in general, not to its consent to a particular forum for suit.

This is consistent with South Carolina law and our court’s application of the doctrine of sovereign immunity. In Newberry, South Carolina’s Supreme Court considered the question: “Should the courts of this state exercise jurisdiction over a non-consenting sister state?” 336 S.E.2d at 464. The opinion explains that “[a] non-consenting state is one protected by sovereign immunity.” Id. at 465 fn. 2. The court answered the question as follows: “[W]e hold, as a matter of comity and public policy, a non-consenting sister state may not be sued in tort in South Carolina.” Id. at 465. The decision, therefore, prevents suit “against an agency of the State of Georgia in a South Carolina Court in a case that could not be brought in Georgia.” Id. at 464. “Consent,” therefore, refers to whether a state has waived or reserved sovereign immunity over the particular claim, not whether it has expressly consented to be sued in another forum. Melton v. Crowder, 373 S.C. 253, 254-56, 452 S.E.2d 834, 834-36 (1995).

Thus, the relevant question is whether South Carolina has consented to suit for the breach of contract claims brought by AT-NET. It has.

...

It is undisputed that NEXT contractually agreed to arbitrate any dispute with AT-NET and that it agreed to Charlotte as the forum for that arbitration.

NEXT cannot first agree to and demand arbitration and then complain that AT-NET complied with the Contract and its demand.

(Or. July 7, 2020.) The trial court further held in its March 25, 2021 Order:

In both Newberry and Franchise Tax Board, the dispositive consideration was whether the state was a “consenting” state. The answer to this question depends on whether or not the state has waived sovereign immunity for the types of claims brought in the foreign court. See Hyatt, 139 S. Ct. at 1496-1497; Newberry, 336 S.E.2d at 464; Melton, 452 S.E.2d at 835-836. If it has, it is a “consenting” state and a foreign state court may choose to exercise jurisdiction over it. South Carolina has unquestionably waived sovereign immunity with regard to breach of contract claims. It is therefore a consenting state as to the claims brought by AT-NET, and the North Carolina judgment based on these claims is valid.

(Or. Mar. 25, 2021.) The conclusion by the trial court that by entering into a contract, the School has granted a blanket waiver of its sovereign immunity in every other state’s courts, and consented to be sued in every other state or adjudicative forum—regardless of whether the General Assembly has established this type of sweeping waiver—constitutes legal error and must be reversed.

**B. The trial court committed reversible error by determining that the School, as a South Carolina state actor, grants—or is even capable of granting—a blanket waiver of immunity in every other adjudicative forum by entering into a contract.**

The trial court stated that “the relevant question is whether South Carolina has consented to suit for the breach of contract claims brought by AT-NET.” Respectfully, the School contends the relevant question is whether, by entering into a contract with ATNSC, the School, in addition to waiving its sovereign immunity in South Carolina state courts, also waived immunity for such suits in every other adjudicative forum, including the courts of the State of North Carolina. The answer to this question is no. See Housecalls Home Health Care v. U.S. Dep’t of Health & Human Servs., 515 F. Supp. 2d 616, 625 (M.D.N.C. 2007) (state’s waiver of sovereign immunity in its own courts is not waiver of Eleventh

Amendment immunity in federal court); Florida Dep't of Health v. Fla. Nursing Home Ass'n, 450 U.S. 147, 150 (when Florida contracted with Medicaid provider, issue is not just whether State waived immunity in its own courts, but whether it also waived immunity for such suits in federal court), *reh'g den'd*, 451 U.S. 933 (1981). By entering into a contract with ATNSC, and consistent with the legislative enactments of the General Assembly, the School has only waived its sovereign immunity to the extent it may be sued in South Carolina courts; North Carolina did not have jurisdiction in either the North Carolina arbitration or North Carolina court proceedings. Under the trial court's erroneous and expansive interpretation of the effect on interstate sovereign immunity when a State enters a contract, a South Carolina state actor, simply by entering into a contract, subjects itself to every other State's courts or any other adjudicative forum, regardless of the will of the General Assembly.

Waiver of sovereign immunity may not be implied. Sossaman v. Texas, 563 U.S. 277, 284-85 (2009); Farmer, 855 S.E.2d at 807. "[A] waiver of sovereign immunity 'will be strictly construed, in terms of its scope, in favor of the sovereign.'" Sossaman, 563 U.S. at 285 (quoting Lane v. Pena, 518 U.S. 187, 192 (1996)). "Courts indulge every reasonable presumption against waiver of fundamental constitutional rights." Coll. Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 682 (1999) (quoting Aetna Ins. Co. v. Kennedy ex rel. Bogash, 301 U.S. 389, 393 (1937)). "State sovereign immunity, no less than the right to trial by jury in criminal cases, is constitutionally protected." Id. Waivers are not implied in the context of federal sovereign immunity, and the Supreme Court sees "no reason why the rule should be different with respect to state sovereign immunity." Id.

“State sovereign immunity . . . is a jurisdictional doctrine, although a singular one that is somewhat of a hybrid between subject matter and personal jurisdiction.” Virginia Dep’t of Corr., 921 F.3d at 187. “[S]ubject matter jurisdiction refers to a court’s constitutional or statutory power to adjudicate a case.” Johnson v. South Carolina Dep’t of Probation, Parole & Pardon Servs., 372 S.C. 279, 284, 641 S.E.2d 895, 897 (2007). “[S]ubject matter of a proceeding is determined by the Constitution, the laws of the state, and is fundamental.” Tatnall v. Gardner, 350 S.C. 135, 137, 564 S.E.2d 377, 378 (Ct. App. 2002). Like other constitutional limitations on our subject matter jurisdiction, ‘the fundamental principle of sovereign immunity limits the grant of judicial authority,’ and is not forfeited by inattention at the trial level, meaning it can be raised for the first time on appeal.” Virginia Dep’t of Corr., 921 F.3d at 187 (citations omitted); Tatnall, 350 S.C. at 137, 564 S.E.2d at 378. Subject matter jurisdiction cannot be conferred by agreement of the parties, Houck v. Substitute Trustee Servs., 791 F.3d 473, 480 (4th Cir. 2015), and “may not be waived even with consent of the parties.” Tatnall, 350 S.C. at 137, 564 S.E.2d 377. Arbitration agreements and contracts are placed “upon the same footing,” Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991); therefore, the analysis of a state’s waiver of interstate sovereign immunity pursuant to a contract is the same whether the contract contains an arbitration agreement or not.

While the State may elect to waive sovereign immunity for state actors in connection with contractual obligations, each such contractual waiver must nonetheless be compliant with the limits on the State’s amenability to suit established by the General Assembly. A contractual waiver of sovereign immunity by a South Carolina state actor only means that the South Carolina state actor, by entering into a contract, consents to be

sued in South Carolina. All the cases cited by the trial court concerning the issue where a South Carolina state actor entered into a contract were brought in South Carolina's own state courts and not courts of another state. See Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000) (brought in South Carolina Supreme Court); Sloan Constr. Co. v. Southco Grassing, Inc., 377 S.C. 108, 659 S.E.2d 158 (2008) (appeal from Greenville County Circuit Court). Therefore, the cases cited by the trial court do not address the question whether a South Carolina state actor, by entering into a contract with an arbitration clause, grants—or is even capable of granting—a blanket waiver to be sued in another state's courts, or, more broadly, in any forum other than those permitted by the General Assembly. The answer to this question is no.

Although this case is a contract case, the State's limited waiver of sovereign immunity in tort cases is instructive. When granting a limited waiver of sovereign immunity for the purposes of tort liability, the South Carolina Legislature expressly provided that “[n]othing in this chapter is construed as a waiver of the state's or political subdivision's immunity from suit in federal court under the Eleventh Amendment to the Constitution of the United States nor as consent to be sued in any state court beyond the boundaries of the State of South Carolina.” S.C. Code Ann. § 15-78-20(e). Under § 15-78-20(e), “South Carolina has not waived its Eleventh Amendment immunity for lawsuits in federal court, **consenting to suit only in South Carolina state court** to the extent that it has waived tort claims against it.” Doe v. Coastal Carolina Univ., 359 F. Supp. 3d 367, 379 (D.S.C. 2019) (emphasis added); Newberry v. Georgia Dep't of Indus. & Trade, 286 S.C. 574, 575, 336 S.E.2d 464, 464 (1985) (South Carolina abrogated doctrine of sovereign

immunity only as it applies “to suits against agencies of the State of South Carolina in the courts of this State”).

Furthermore, S.C. Code Ann. § 15-77-50 supports the School’s contention that, in non-tort cases where the State has waived sovereign immunity, jurisdiction is exclusively in the circuit courts of South Carolina. Section 15-77-50, titled “Jurisdiction and venue of actions affecting State agencies and officials,” provides:

[t]he circuit courts of this State are hereby vested with jurisdiction to hear and determine all questions, actions and controversies, other than those involving rates of public service companies for which specific procedures for review are provided in Title 58, affecting boards, commissions and agencies of this State, and officials of the State in their official capacities in the circuit where such question, action or controversy shall arise.

S.C. Code Ann. § 15-77-50. Although the South Carolina courts have framed § 15-77-50 as essentially a venue statute governing instances where the State is subject to suit, the cases addressing § 15-77-50 involved actions against the State filed in a South Carolina court, not in another state’s courts, and presuppose that jurisdiction in an action against the State where sovereign immunity has been waived will be in the circuit courts of South Carolina. Unisys Corp., 346 S.C. 158, 551 S.E.2d 263 (appeal from Richland County); Whetstone v. South Carolina Dep’t of Hwys. & Pub. Transp., 272 S.C. 324, 252 S.E.2d 35 (1979) (appeal from Barnwell County); Harrison v. South Carolina Tax Comm’n, 261 S.C. 302, 199 S.E.2d 763 (1973), *overruled on other grounds by* McCall ex rel. Andrews v. Batson, 285 S.C. 243, 329 S.E.2d 741 (1985).

The Unisys Court reaffirmed Harrison’s conclusion that § 15-77-50 is essentially a venue statute which governs instances where the State is subject to suit in the circuit courts of South Carolina. Unisys, 346 S.C. at 167, 551 S.E.2d 263, 268-69. Harrison framed its

interpretation of § 15-77-50 as essentially a venue statute because the Court was concerned that the statute would be read as waiving sovereign immunity:

The circuit court held that this Act did not waive the State’s immunity from suit. Instead, it “only provides jurisdiction in those cases where there is a waiver,” or, in those cases to which the immunity doctrine is inapplicable.

We agree that the Act of 1954 was not intended as a blanket waiver of sovereign immunity. Clearly there was no express waiver, as is required in such cases. “[T]he Courts have refused to hold that the sovereign immunity has been abrogated, abridged, or surrendered, except under plain and positive provisions of the statute (citations omitted).”

Since the Court of Common Pleas has jurisdiction in all civil cases under Article V, Section 15 of the Constitution of 1895, the Act of 1954 could not have been intended to confer jurisdiction on it of this class of actions in the strict sense of that term. The intent of the legislature must have been to fix the venue of such actions “in the circuit where such question, action or controversy shall arise.” There is no doubt that this action against the Commission, to the extent that it seeks to recover taxes paid, is one against the State. The court correctly concluded that such action is not maintainable under Section 10-2605, which is essentially a venue statute rather than a waiver of the State’s immunity from suit.

Harrison, 261 S.C. at 305-06, 199 S.E.2d at 764, *overruled on other grounds by* McCall ex rel. Andrews v. Batson, 285 S.C. 243, 329 S.E.2d 741 (1985) (citations omitted).<sup>1</sup> The Unisys Court was similarly concerned that § 15-77-50 would be read as a blanket waiver of sovereign immunity and upheld Harrison’s decision that “15-77-50 is not a blanket waiver of sovereignty but is essentially a venue statute **governing instances where the State is subject to suit.**” Unisys, 346 S.C. at 167, 551 S.E.2d at 268 (emphasis added).

Since Unisys, the South Carolina Supreme Court has determined that under the SCTCA, language such as that used in § 15-77-50 establishes subject matter jurisdiction “in the circuit court **throughout the state**” and also establishes venue “in the county in

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<sup>1</sup> Harrison considered S.C. Code Ann. § 10-2065 (1962), currently codified at S.C. Code Ann. § 15-77-50.

which the act or omission occurred.” Jeter v. South Carolina Dep’t of Transp., 369 S.C. 433, 440, 633 S.E.2d 143, 147 (2006) (emphasis added). “Section 15-78-100(b) is similar to § 42-17-60 and former §10-2605 in that the statutory provision references subject matter jurisdiction and venue in one sentence.” Id. “Because there is but one circuit court in South Carolina, with uniform subject matter jurisdiction throughout the state, § 15-78-100(b) establishes subject matter jurisdiction for actions arising under the SCTCA in the circuit court throughout the state.” Id. Under Jeter, in non-tort cases, § 15-77-50 establishes subject matter jurisdiction for actions against agencies of the State in circuit courts throughout the state and also establishes venue “in the circuit where such question, action or controversy shall arise.” S.C. Code Ann. § 15-77-50; see also Hock RH, LLC v. South Carolina Dep’t of Revenue, 423 S.C. 208, 214, 813 S.E.2d 540, 543 (2018) (proper to consider title or caption of an act in aid of construction to show intent of legislature). Based on Hyatt III, S.C. Code Ann. § 15-77-50, and South Carolina case law, the School, by entering into the Agreement with ATNSC, did not waive its sovereign immunity and is only amenable to suit in South Carolina circuit courts. Nor could the School have done so. Only the General Assembly is capable of waiving sovereign immunity with regard to the State of South Carolina or its state actors.

Similar to South Carolina, North Carolina courts have recognized that the State of North Carolina may waive its sovereign immunity by entering into a valid contract, Smith v. North Carolina, 222 S.E.2d 412, 423-24 (1976), and has only “waived its sovereign immunity against breach of contract claims **brought in its own state courts.**” Walton v. Dep’t of Commerce, 2018 WL 1368364, at \*5 (W.D.N.C. March 16, 2018), *aff’d*, 732 Fed. App’x 239 (2018) (emphasis added); McCants v. NCAA, 251 F. Supp. 3d 952, 957

(M.D.N.C. 2017) (North Carolina has abrogated its sovereign immunity as to express and implied-in-fact contracts **in state court**).

North Carolina's waiver, however, "does not constitute a waiver of Eleventh Amendment immunity." Walton, 2018 WL 1368364, at \*5 (citations omitted). "Because North Carolina has not waived immunity to be sued in federal court for breach of contract, the Plaintiff's breach of contract claim must be dismissed." Id. The waiver of North Carolina's sovereign immunity "in contract actions only applies to actions proceeding in the North Carolina state courts, but not federal courts, even those sitting in North Carolina." Housecalls Home Health Care, 515 F. Supp. 2d at 626; In re Sec'y of Dep't of Crime Control, 7 F.3d 1140, 1147 (4th Cir. 1993); McCants, 251 F. Supp. 3d at 958; Sossaman, 563 U.S. at 285 (a State's consent to suit in its own courts is not a waiver of its immunity from suit in federal court). Thus, if North Carolina were in a similar situation as the School, North Carolina would correctly argue its contractual waiver of sovereign immunity applies only in North Carolina state courts.

Similar to North Carolina, South Carolina's waiver of sovereign immunity in contract actions applies only to actions proceeding in the South Carolina state courts. The School, at every step of the arbitration proceeding, protested the jurisdiction of the arbitration tribunal to hold the arbitration proceeding. In addition, even if the School had attempted to confer subject matter jurisdiction on an arbitration tribunal or contractually agree to proceeding in North Carolina, which the School did not, parties cannot confer subject matter jurisdiction by agreement or waive subject matter jurisdiction. Houck, 791 F.3d at 480; Tatnall, 350 S.C. at 137, 564 S.E.2d at 378. Particularly where the General Assembly's express authority is needed in order for a South Carolina state actor to become

amenable to suit in a particular forum. Neither the Agreement nor North Carolina could confer jurisdiction over a South Carolina state actor where none existed in the first place.

The trial court therefore committed reversible error in holding that the School waived its sovereign immunity by entering into a contract. Allowing a South Carolina state actor to engage in a blanket waiver of sovereign immunity simply by entering into a contract is directly contrary to the laws of the State of South Carolina, the long-standing appellate decisions of this State, and Hyatt III's prohibition of haling a state into another state's courts involuntarily.

**IV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY HOLDING A NORTH CAROLINA STATUTE CAN CONFER JURISDICTION OVER A SOUTH CAROLINA STATE ACTOR, AND CAN WAIVE ANOTHER STATE'S SOVEREIGN IMMUNITY, EVEN WHERE THE STATE HAS NOT EXPRESSLY WAIVED SOVEREIGN IMMUNITY.**

**A. Identification of the Portion of the Order at Issue**

The trial court held that the NC Arbitration Act conferred jurisdiction of the North Carolina court over the School: “[t]he North Carolina Superior Court had the power to hear and determine the confirmation of the arbitration award because it was statutorily empowered to do so. See N.C.G.S. § 1-569.22.” (Or. July 7, 2020.) The trial court further held “[t]he North Carolina Superior Court had subject matter jurisdiction to entertain confirmation of the arbitration award because it was statutorily empowered to do so.” (Or. Mar. 25, 2021.) The trial court’s determination that a North Carolina statute could confer jurisdiction over another State is contrary to “our constitutional design and the understanding of sovereign immunity shared by the States that ratified the Constitution.” Hyatt III, \_\_\_ U.S. \_\_\_, 139 S. Ct. at 1492.

**B. The trial court committed reversible error by determining that a North Carolina statute under the NC Arbitration Act confers jurisdiction over South Carolina state actors.**

The School cannot, by contract or otherwise, agree to subject matter jurisdiction where none exists and cannot waive subject matter jurisdiction. Houck, 791 F.3d at 480; Tatnall, 350 S.C. at 137, 564 S.E.2d at 378. By entering into a contract with an arbitration clause, the School does not waive sovereign immunity except in South Carolina, and the North Carolina arbitration award and subsequent judgment in the North Carolina court are void for lack of subject matter jurisdiction and sovereign immunity. See Virginia Dep't of Corr., 921 F.3d at 187 (sovereign immunity is hybrid of subject matter jurisdiction and personal jurisdiction); Farmer, 855 S.E.2d at 809 (sovereign immunity is a jurisdictional issue). “A universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a nullity.” Burgess v. Gibbs, 137 S.E.2d 806, 808 (1964); Katzburg v. Katzburg, 410 S.C. 184, 187, 764 S.E.2d 3, 5 (Ct. App. 2014); Universal Benefits, Inc. v. McKinney, 349 S.C. 179, 183, 561 S.E.2d 659, 661 (Ct. App. 2002) (term “void” encompasses judgments where court lacked subject matter or personal jurisdiction).

The trial court incorrectly determined that the North Carolina court had subject matter jurisdiction to confirm the arbitration award because it was statutorily empowered to do so under N.C. Gen. Stat. § 1-569.22. This section allows “the court” to confirm an arbitration award; however, “the court” must be “a court of **competent jurisdiction** in this State.” N.C. Gen. Stat. § 1-569.1(3) (emphasis added). As set forth in the preceding sections, the North Carolina court was not “a court of competent jurisdiction” under its own laws, the laws of South Carolina, and federal constitutional law, and wrongly assumed

jurisdiction in direct contradiction to Hyatt III. Subject matter jurisdiction over contract cases where South Carolina or a South Carolina state actor has waived sovereign immunity is in the circuit courts of the State of South Carolina exclusively. S.C. Code § 15-77-50; Jeter, 369 S.C. at 440, 633 S.E.2d at 146-47. The trial court committed reversible error by holding that the North Carolina court had subject matter jurisdiction over a South Carolina state actor by virtue of North Carolina's own laws.

The trial court's reliance on a North Carolina statute to waive South Carolina's sovereign immunity and confer jurisdiction over a South Carolina state actor is directly contrary to the United States Supreme Court's decision in Hyatt III: one State cannot "hale another into its courts without the latter's consent. The Constitution does not merely allow States to afford each other immunity as a matter of comity; it embeds interstate sovereign immunity within the constitutional design." Hyatt III, 139 S.Ct. at 1497.

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

Id. at 1498. Nothing in the Federal Arbitration Act, 9 U.S.C. § 1 et seq., the N.C. Arbitration Act, N.C. Gen. Stat. § 1.569.1 et seq., federal law, or state law supports the trial court's proposition that North Carolina, by its own statutes contained in the N.C. Arbitration Act, can create jurisdiction over another state and waive that state's sovereign immunity. Such a proposition has been rejected in the context of the Eleventh Amendment: Congress, by enacting the FAA, did not intend to abrogate traditional concepts of state immunity in the context of the Eleventh Amendment. Hughes-Bechtol, Inc. v. West Virginia Bd., 527 F. Supp. 1366, 1391 (S.D. Ohio 1981), *aff'd*, 737 F.2d 540 (6th Cir.),

*cert. den'd*, 469 U.S. 1018 (1984). “[T]he legislative history and explicit statutory language of the United States Arbitration Act do not evidence a Congressional intention to abrogate the States’ sovereign immunity,” and “Congress did not, in fact, abolish the States’ traditional immunity from suit by passage of the Arbitration Act.” Id. It follows that an individual state’s arbitration act cannot and does not abrogate interstate sovereign immunity. Here, North Carolina cannot and did not waive South Carolina’s interstate sovereign immunity by virtue of the N.C. Arbitration Act. South Carolina is the only state that can waive its own sovereign immunity and must do so explicitly. Sossamon, 563 U.S. at 284.

The trial court cites Trident Technical College v. Lucas & Stubbs, Ltd., 286 S.C. 98, 333 S.E.2d 781 (1985), for the proposition that South Carolina courts have previously compelled state entities to arbitrate where it has entered into a valid arbitration agreement. Trident, however, was brought in a South Carolina court—the Court of Common Pleas of Charleston County—and was decided before the United States Supreme Court decision in Hyatt III. Furthermore, the Court in Trident did not address jurisdiction, sovereign immunity, or whether a South Carolina state entity can be compelled to arbitrate or be sued in another state’s courts where the South Carolina state entity has not expressly waived sovereign immunity. The trial court further relied on Ashley River Properties I, LLC v. Ashley River Properties II, LLC, 374 S.C. 271, 648 S.E.2d 295 (Ct. App. 2007), to determine that requiring the School to contest the arbitration award in North Carolina is consistent with South Carolina’s well-established law that South Carolina courts do not have subject matter jurisdiction to adjudicate motions related to arbitration proceedings in other states. Ashley, however, did not involve a state actor. This case involves a state actor,

and the School's sovereign immunity has not been waived by the General Assembly. The trial court's reliance on Melton v. Crowder, 317 S.C. 253, 452 S.E.2d 834 (1995), is similarly misplaced. The Melton case was decided prior to the Hyatt III decision and involved a tort action under the North Carolina Tort Claims Act where the Legislature had created an exception to the requirement that the North Carolina Industrial Commission hear all tort claims against the state. Id. at 255, 452 S.E.2d at 835-36.

**C. The trial court committed reversible error in denying the School's motions and giving Full Faith and Credit to the North Carolina's Order where jurisdiction over the arbitration proceedings is only proper in South Carolina.**

It is irrelevant that the School, under protest, participated in the arbitration proceedings in North Carolina. See Chabek v. Nationwide Mut. Fire Ins. Co., 303 S.C. 26, 29, 397 S.E.2d 786 (Ct. App. 1990) (parties cannot confer subject matter jurisdiction by consent and participation in proceedings before master where master lacked subject matter jurisdiction); Rowe v. City of W. Columbia, 334 S.C. 400, 513 S.E.2d 379 (Ct. App. 1999). Objections to a court's jurisdiction can be raised at any time, even for the first time on appeal and by a court *sua sponte*. South Carolina Dep't of Soc. Servs. v. Tran, 418 S.C. 308, 314, 792 S.E.2d 254, 257 (Ct. App. 2016); Gonzalez v. Thaler, 565 U.S. 134, 141 (2012). "Subject matter jurisdiction can never be waived or forfeited," Gonzalez, 565 U.S. at 141, "and a court has inherent power to inquire into, and determine, whether it has jurisdiction and to dismiss an action *ex mero motu* when subject matter jurisdiction is lacking." Reece v. Forga, 531 S.E.2d 881, 882 (N.C. Ct. App. 2000). "[D]efects in subject matter jurisdiction require correction regardless of whether the error was raised" in the trial court. United States v. Cotton, 535 U.S. 625, 630 (2002). "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it

ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.” Steel Co. v. Citizens for Better Env’t, 523 U.S. 83, 94 (1998) (quoting Ex parte McCardle, 7 Wall 506, 514 (1869)). The North Carolina court, therefore, should have determined *sua sponte* that subject matter jurisdiction was lacking and dismissed the action as void and a nullity. Furthermore, if the North Carolina court had jurisdiction, which it did not, the arbitration award was subject to vacatur since the arbitrator evidenced a manifest disregard of the law as set forth in Hyatt III. See Long John Silver’s Rests., Inc. v. Cole, 514 F.3d 345, 349 (4th Cir.), *cert. den’d*, 555 U.S. 815 (2008) (arbitrator shows manifest disregard for law if legal principle is clearly denied, and arbitrator refuses to heed that principle); Mountaineer Gas Co. v. Oil, Chem. & Atomic Worker’s Int’l Union, 76 F.3d 606, 608 (4th Cir.) (court can vacate arbitration award if violates public policy), *cert. den’d*, 519 U.S. 822 (1996).

The School, however, could be compelled to arbitrate the underlying contractual dispute in South Carolina. See Hughes-Bechtol, 527 F. Supp. at 1391 (although the Board, as arm of West Virginia, is immune from suit under both State and federal law, and suit is barred in federal court, “Plaintiff does have a viable remedy against the Board in the West Virginia Court of Claims.”), *aff’d*, 737 F.2d 540 (6th Cir.), *cert. den’d*, 469 U.S. 1018 (1984). Under the FAA, the NC Arbitration Act, the South Carolina Arbitration Act, Hyatt III, and S.C. Code Ann. § 15-77-50, the proper procedure for compelling the School to submit to arbitration pursuant to the terms of the Agreement is to file a motion to compel arbitration in the South Carolina circuit courts, which, according to the General Assembly, is the exclusive forum where South Carolina state actors are amenable to suit.

The FAA applies to the review of arbitration disputes involving interstate commerce and maritime matters. 9 U.S.C. §§ 1-2; Advantage Assets, Inc. II v. Howell, 663 S.E.2d 8, 10 (N.C. Ct. App. 2008). The FAA preempts conflicting state law, including state law addressing the role of courts in reviewing arbitration awards. Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 272 (1995); Advantage Assets, 663 S.E.2d at 10. If the FAA applies, “courts must apply it, even in the face of contractual provisions calling for the application of state law.” King v. Bryant, 737 S.E.2d 802, 806 (N.C. Ct. App. 2013). Although the FAA applies to arbitration clauses affecting interstate commerce, 9 U.S.C. §§ 1-2, the federal district courts do not have subject matter jurisdiction over the controversy between ATNSC and the School. While the FAA creates a body of federal substantive law regulating arbitration agreements, it does not create any independent federal question; therefore, there must be diversity of citizenship or some other independent basis for federal jurisdiction. Choice Hotels Int’l, Inc. v. Shiv Hospitality, LLC, 491 F.3d 171, 175 (4th Cir. 2007).

“To satisfy the requirements of federal diversity jurisdiction under 28 U.S.C. § 1332(a)(1), there must be a civil action between ‘citizens of different States.’ It is settled that a State is not a citizen for purposes of diversity jurisdiction, and that 28 U.S.C. § 1332 does not deal with cases in which a State is a party.” Wisconsin v. Md. Nat’l Bank, 734 F.2d 1015, 1016 (4th Cir. 1984) (citing Postal Tel. Cable Co. v. Alabama, 155 U.S. 482, 487 (1894)). Because there is no diversity of citizenship and no other basis for jurisdiction in the federal district courts, the federal district courts do not have subject matter jurisdiction over the arbitration of the contract dispute between the School and ATNSC. See also Hughes-Bechtol, 527 F. Supp. at 1391 (State would also have to waive Eleventh

Amendment immunity to be amenable to suit in federal district court), *aff'd*, 737 F.2d 540 (6th Cir.), *cert. den'd*, 469 U.S. 1018 (1984).

A motion to compel the School to arbitrate is also not proper in the North Carolina courts. Under N.C. Gen. Stat. § 1.569.7(a), a person may move to compel arbitration “showing an agreement to arbitrate and alleging another person’s refusal to arbitrate pursuant to the agreement.” N.C. Gen. Stat. § 1.569.7(a). The “court” may then order arbitration or decide the issue of whether there is an agreement to arbitrate. N.C. Gen. Stat. § 1.569.7(a). The “court” must be a “court of competent jurisdiction in this State,” N.C. Gen. Stat. § 1.569.1(3), and under N.C. Gen. Stat. § 1-569.26(a), only “[a] court of this State **having jurisdiction over the controversy and the parties to an agreement to arbitrate** may enforce the agreement to arbitrate.” N.C. Gen. Stat. § 156.29(a) (emphasis added). As set forth above, a North Carolina court does not have jurisdiction over the contractual dispute between the School, a South Carolina state actor, and ATNSC, and is not a court of competent jurisdiction as required under the N.C. Arbitration Act. Hyatt III, \_\_\_ U.S. \_\_\_, 139 S. Ct. at 1491 (States retain their sovereign immunity from private suits brought in the courts of other States); S.C. Code Ann. § 15-77-50; Jeter, 369 S.C. at 440, 633 S.E.2d at 146-47. Therefore, the only proper mechanism for ATNSC to compel the School to arbitrate under the Agreement is to file an application in the South Carolina circuit courts under S.C. Code Ann. § 15-48-20 “in the circuit where such question, action or controversy shall arise.” S.C. Code Ann. § 15-77-50. ATNSC failed to follow this procedure, and the trial court erred in denying the School’s motions and affording the North Carolina Order full faith and credit.

In summary, the trial court committed reversible error in: (1) determining the School, as a public charter school, is not a state actor; (2) determining the School is not entitled to sovereign immunity; (3) determining the School waived its sovereign immunity in North Carolina by entering into a contract with an arbitration clause; (4) determining the North Carolina court had subject matter jurisdiction by virtue of North Carolina's own statutes; and, (5) determining the North Carolina Order is entitled to Full Faith and Credit where the arbitrator and the North Carolina court lacked jurisdiction, the North Carolina court should have dismissed the action, and only the South Carolina circuit courts have jurisdiction over the arbitration proceeding.

#### **CONCLUDING STATEMENT**

Consistent with the foregoing discussion, and for any other reason that may appear in the record presented, Appellant respectfully requests a decision from the Court which reverses the entirety of the Orders at issue in these proceedings, remands the matter to the trial court for further proceedings consistent with the decision of this Court, and for such other and further relief as the Court deems just and proper.

Respectfully submitted,

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