THE STATE OF SOUTH CAROLINA
In the 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.

INITIAL REPLY BRIEF OF APPELLANT

Steven Edward Buckingham (S.C. Bar No. 0075089)
The Law Office of Steven Edward Buckingham
16 Wellington Avenue
Greenville, South Carolina 29609
(o) 864.735.0832
(e) seb@buckingham.legal

Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

South Carolina Constitutional Provisions

South Carolina Statutes

South Carolina Appellate Cases

Cases from other States

United State Supreme Court Decisions

Federal Appellate Decisions

Federal District Decisions

ARGUMENT

I. THE TRIAL COURT IMPROPERLY HELD THAT THE SCHOOL WAIVED SOVEREIGN IMMUNITY WHERE A SOUTH CAROLINA STATE ACTOR'S CONSENT TO BE SUED ON CONTRACTUAL OBLIGATIONS ONLY MEANS CONSENT TO BE SUED IN SOUTH CAROLINA AND SOVEREIGN IMMUNITY HAD NOT BEEN EXPRESSLY WAIVED.

Appellant, the Next School, Inc. ("**the School**"), respectfully contends that Respondent, AT-Net Services–Charlotte, Inc. ("**ATNSC**"), and the trial court misconstrue the United States Supreme Court decision in Franchise Tax Bd. v. Hyatt, 587 U.S. ___, 139 S. Ct. 1485 (2019) (Hyatt III), and fail to recognize that **interstate** sovereign immunity requires examining two elements: (1) the claims a state has consented to be sued for; and (2) the appropriate forum for such suits. The School consistently objected to the validity of the arbitration proceedings in North Carolina on the basis of sovereign immunity and lack of jurisdiction, and renewed these objections after the Supreme Court decided Hyatt III. (School's Arb. Ans., pp. 5-6; School's Arb. Mot. Dismiss & Memo. Supp.; School's Renewed Arb. Mot. Dismiss; School's Arb. Not. of Protest; School's Arb. Renewed Objection.) Because the General Assembly has not explicitly authorized suits against state actors in any forum other than the courts of the State of South Carolina, the trial court committed reversible error in denying the School's motions and determining the North Carolina court's decision affirming the arbitration award is valid and enforceable against the School.

A. Unless expressly waived, South Carolina, by entering into a contract, only consents to suit in South Carolina state courts.

Respondent argues "whether a state has consented to suit in a sister state is determined by its consent to the type of suit, not the forum." This argument oversimplifies

the interstate sovereign immunity analysis and fails to recognize the United States Supreme Court's ruling in Hyatt III, which expressly overruled Nevada v. Hall, 440 U.S. 410 (1979), holding 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." Hyatt III, 587 U.S. at ___, 139 S. Ct. at 1490. "Hyatt altered sovereign immunity jurisprudence with respect to a state's exposure to suit in another state's courts." Belfand v. Petosa, 196 A.D.3d 60, 72-73 (2021); see also Farmer v. Troy Univ., 855 S.E.2d 801, 805 (N.C. Ct. App. 2021) (after Hyatt III, for purposes of interstate sovereign immunity, dispositive issue is whether one state has been hailed involuntarily into the courts of another state), disc. rev. allowed in part, denied in part, 2021 WL 5119777 (2021). After the alteration in interstate sovereign immunity jurisprudence articulated by the United States Supreme Court in Hyatt III, the New York courts have explained the difference in consent to be sued and where such suits are to be heard:

> Plaintiff's argument overlooks two inextricably intertwined principles of the sovereign immunity doctrine–the claims a state has consented to be sued for and the forum where the suits are to be heard. Intra-state consent to suits cannot be deemed consent to inter-state suits. If a state's consent to be sued in its own courts were deemed consent to be sued in sister states' courts, then consent, imbued with significant constitutional consequences, would be universal. States with Tort Claims Acts would be subject to suits in a sister court, with liability limited to whatever their respective statutes provided for. Hyatt's clear pronouncement that a state must provide express consent to suit in a sister state would be rendered meaningless.

Belfand, 196 A.D.3d at 69.

"The Hyatt Court dramatically altered sovereign immunity analysis: the decision as to whether sovereign immunity should be honored was moved from the forum state, guided by the principles of comity, to the sister state, vesting it with sole discretion as to whether to consent to the forum state's jurisdiction." Id. "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" and "fundamentally adjusts the States' relationship with each other and curtails their ability, as sovereigns, to decline to recognize each other's immunity." Hyatt III, 857 U.S. at ___, 139 S. Ct. at 1492, 1497. Based on interstate sovereign immunity as articulated in Hyatt III, South Carolina's consent to be sued on contractual obligations does not mean that this type of suit–contract–can be filed in any sister state, as Respondent contends, or any other adjudicative forum for that matter, unless expressly authorized by the General Assembly.

The South Carolina cases cited by Respondent in support of its argument were all decided prior to Hyatt III, and none of these cases afforded South Carolina courts the opportunity to address the issue whether a South Carolina state actor, by entering into a contract, agrees to be sued in any other sister state's courts. As previously set forth in the School's initial brief, the federal district courts in North Carolina have addressed this issue and determined that when a North Carolina state actor enters a valid contract, it has only "waived its sovereign immunity against breach of contract claims **brought in its own state courts**." Walton v. North Carolina Dep't of Com., 2018 WL 1368364, at *5 (W.D.N.C. Mar. 16, 2018) (emphasis added), aff'd, 732 Fed. App'x 239 (2018); McCants v. NCAA, 251 F. Supp. 3d 952, 957-58 (M.D.N.C. 2017) (holding that when a North Carolina state actor enters a valid contract, it is deemed to waive sovereign immunity in North Carolina state courts, but that does not mean immunity in federal court is automatically waived); see also Florida Dep't of Health v. Fla. Nursing Home Ass'n, 450 U.S. 147, 150 (1981) (holding that a state's waiver in its own courts is not waiver of immunity in federal court), reh'g denied, 451 U.S. 933 (1981). Thus, when a state actor, such as the School, enters into a contract, it does not waive sovereign immunity in another state's courts unless such

waiver is expressly authorized by the state's legislature. If a state has not waived its interstate sovereign immunity in another state's courts, the action must be dismissed for lack of subject matter jurisdiction. See Cunningham v. Gen. Dynamics Info., Inc., 888 F.3d 640, 649 (4th Cir. 2018) ("[S]overeign immunity deprives federal courts of jurisdiction to hear claims, and a court finding that a party is entitled to sovereign immunity must dismiss the action for lack of subject-matter jurisdiction."), cert. denied, 139 S. Ct. 417 (2018); Brownback v. King, 141 S. Ct. 740, 749 (2021) (sovereign immunity deprives the court of subject-matter jurisdiction). A South Carolina state actor, by entering into a contract with a private party, only waives sovereign immunity in South Carolina's state courts, precisely because that is the scope of the waiver established by the General Assembly.

Respondent argues that the School consented to arbitration in Charlotte, North Carolina, and thereby waived any claim to sovereign immunity. The School, however, explained in its initial brief and before the trial court that the American Arbitration Association would not entertain any of the School's jurisdictional arguments until an arbitrator was assigned, and no arbitrator would be assigned until there was a forum. (Hr'g Tr., May 26, 2020, p. 14). The School appeared, under protest, and 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 South Carolina. (School's Arb. Ans., pp. 5-6). The School also filed a Motion to Dismiss on sovereign immunity grounds, and, after Hyatt III was decided, a renewed motion to dismiss. (School's Arb. Mot. Dismiss & Memo. Supp.; School's Renewed Arb. Mot. Dismiss). The School consistently protested that it did not waive its sovereign immunity in North Carolina, and the arbitrator disregarded the School's

jurisdictional arguments. The General Assembly has not expressly authorized any state actor, including the School, to be sued for breach of contract in any adjudicative forum other than the courts of the State of South Carolina. The North Carolina arbitration proceedings and North Carolina judgment are therefore void, and the trial court erred in denying the School's motions and enforcing the North Carolina judgment.

B. A choice of law provision contained in a contract between the State and a private actor does not expressly waive sovereign immunity.

Respondent relies on case law decided before Hyatt III and which address arbitration clauses in the context of tribal sovereign immunity or Eleventh Amendment immunity for its incorrect contention that the School has expressly waived its sovereign immunity in North Carolina by agreeing to arbitration and by agreeing to a choice of law provision. Hyatt III and South Carolina contract law compel the conclusion that the School did not expressly waive its interstate sovereign immunity in North Carolina by including a choice of law provision in the Agreement or by agreeing to arbitration.

Article 13 of the Master Services Agreement ("the Agreement") between the School and ATNSC provides that "[t]he Agreement and subsequent Amendments shall be governed by the laws of the State of North Carolina." In a completely different section addressing arbitration, the Agreement provides:

> 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.

(Article 18, the Agreement.)

There is no express provision in the Agreement providing that the School agrees to submit to arbitration or suit in North Carolina or that the North Carolina Revised Uniform Arbitration Act applies.

Respondent relies on the Agreement's choice of law provision and CL Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 532 U.S. 411(2001), for its argument that the Agreement's provision stating North Carolina law applies means the School agreed to be governed by North Carolina's Revised Uniform Arbitration Act and expressly waived sovereign immunity. Respondent's argument is contrary to South Carolina contract law, North Carolina contract law, and Hyatt III.

The South Carolina Supreme Court has determined that where an arbitration clause affects interstate commerce implicating federal arbitration rules and the contract contains a choice of law provision separate from the arbitration provision, the choice of law provision only "indicates the parties' agreement to have the validity and construction of the contract determined by the arbitrators according to the substantive law." Osteen v. Cuttino Constr. Co., 315 S.C. 422, 428, 434 S.E.2d 281, 284 (1993). Under Osteen, the choice of law provision in the parties' Agreement only means that the parties agreed to apply North Carolina law to the validity and construction of the Agreement and not that the parties agreed to submit to North Carolina arbitration law or the North Carolina courts. The North Carolina Supreme Court has similarly determined that a choice of law provision in an arbitration contract merely "names a particular state and provides that the substantive laws of that jurisdiction will be used to determine the validity and construction of the contract." Johnston County v. R.N. Rouse Co., 414 S.E.2d 30 (N.C. 1992). A choice of law provision in a contract is not submission by a party to the named state nor does it

designate "a particular state or court as the jurisdiction in which the parties will litigate disputes arising out of the contract and their contractual relationship." Id. Therefore, the choice of law provision in the Agreement is not grounds for asserting that the School, as a South Carolina state actor, has consented to suit in North Carolina or agreed that the North Carolina Revised Uniform Arbitration Act applies.

To read the choice of law provision to mean that South Carolina waives its sovereign immunity in North Carolina is directly contrary to the requirement that a waiver of sovereign immunity be explicit. "[T]he United States Supreme Court has previously made clear that a state's waiver of its sovereign immunity must be explicit . . . states cannot implicitly waive sovereign immunity." Farmer, 855 S.E.2d at 806-07 (citing Sossamon v. Texas, 563 U.S. 277, 284 (2011); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 682 (1999)). A waiver of sovereign immunity "will be strictly construed, in terms of its scope, in favor of the sovereign." Sossamon, 563 U.S. at 284; accord Unisys Corp. v. South Carolina Budget & Control Bd. Div. of Gen. Servs., 346 S.C. 158, 167, 551 S.E.2d 263 (2001) ("[A] statute waiving the State's immunity from suit, being in derogation of sovereignty, must be strictly construed[.]"), cert. denied, 552 U.S. 990 (2007).

> The classic description of an effective waiver of a constitutional right is the intentional relinquishment or abandonment of a known right or privilege. Courts indulge every reasonable presumption against waiver of fundamental constitutional rights. State sovereign immunity . . . is constitutionally protected. And in the context of federal sovereign immunity . . . it is well established that waivers are not implied. We see no reason why the rule should be different with respect to state sovereign immunity.

Belfand, 196 A.D.3d at 69 (quoting College Sav. Bank, 527 U.S. at 682 (internal quotation marks, citation, and emphasis omitted)).

Therefore, the inclusion of the choice of law provision only constitutes an agreement to apply North Carolina law to the validity and construction of the Agreement and does not constitute an express waiver of interstate sovereign immunity.

Furthermore, Respondent's reliance on CL Enterprises is misplaced. CL Enterprises was decided before Hyatt III, involved tribal sovereign immunity, not interstate sovereign immunity, and the tribe in CL Enterprises argued it was not amenable to arbitration in any forum–federal, state, or tribal. CL Enters., 532 U.S. at 422 n.4; see Kiowa Tribe of Okla. v. Manuf. Tech., Inc., 523 U.S. 751, 756 (1998) (tribal sovereign immunity is a matter of federal law, is not coextensive with that of the States, and developed almost by accident in the Court's opinion in Turner v. United States, 248 U.S. 354 (1919)); Hyatt III, 587 U.S. ___, 139 S. Ct. at 1497 (State sovereign immunity originates from the Constitution itself). In contrast, this case involves interstate sovereign immunity, which originates from the Constitution, and the School contends it is amenable to suit only on such claims and in such forums expressly authorized by the clear, unambiguous legislative pronouncements of the General Assembly, whose will on such matters is supreme. To conclude that the Agreement's choice of law provision explicitly waives the School's interstate sovereign immunity would be directly contrary to state law, the will of the General Assembly, and Hyatt III.

The "inclusion of the phrase 'any court of competent jurisdiction' in a sue or be sued clause has been interpreted by the United States Supreme Court to merely permit suit in any state or federal court **already endowed with subject matter jurisdiction**." Riggs v. Baca, 2019 WL 1316464 (D.N.M. Mar. 22, 2019) (emphasis added) (citing Lightfoot v. Cendant Mortg. Corp., 137 S. Ct. 553, 560-61, 196 L. Ed. 2d 493 (2017)). Thus, while a

state statute authorizing suit in any court of competent jurisdiction "undoubtedly provided for suit against the [state] in its own courts . . . the statute fell short of the required 'clear declaration by a State of its consent to be sued in the *federal* courts.'" Kimel v. Bd. of Regents, 528 U.S. 62, 75 (2000) (citing Kennecott Copper Corp. v State Tax Comm'n, 327 U.S. 573, 578-79 (1946)); Florida Dep't of Health, 450 U.S. at 149 (state law providing state entity has capacity "to sue and be sued" does not amount to express consent to be sued in another state). Hyatt III makes clear that consent to suit in a sister state exists only where stated by the most express language. Where the General Assembly has not expressly authorized the State to be sued on any contractual obligations in a forum other than the courts of the State of South Carolina, the arbitrator and the North Carolina court lacked jurisdiction.

II. THE TRIAL COURT INCORRECTLY DETERMINED THAT THE NORTH CAROLINA TRIAL COURT HAD SUBJECT MATTER JURISDICTION.

Respondent's arguments concerning jurisdiction misconstrue interstate sovereign immunity and subject matter jurisdiction. As set forth in the School's initial brief, the trial court erred in concluding that the North Carolina court had subject matter jurisdiction to confirm the arbitrator's award where the School, as a state actor, was entitled to interstate sovereign immunity in North Carolina and that immunity has not been expressly waived. "Sovereign immunity is jurisdictional in nature." FDIC v. Meyer, 510 U.S. 471, 475 (1994). The United States Supreme Court recently reiterated that sovereign immunity deprives a court of subject matter jurisdiction. Brownback, ___ U.S. ___, 141 S. Ct. at 749 ("[T]he United States necessarily retained sovereign immunity, also depriving the court of subject-matter jurisdiction."). If a party is entitled to sovereign immunity, and sovereign

immunity has not been expressly waived, the court must dismiss the action for lack of subject matter jurisdiction. Cunningham, 888 F.3d at 649 (holding that sovereign immunity deprives federal courts of jurisdiction to hear claims, and if a party is entitled to sovereign immunity, the court must dismiss the action for lack of subject matter jurisdiction); McCombs v. State, 2018 WL 5650025 (D.S.C. Sept. 25, 2018) (given State of South Carolina's entitlement to sovereign immunity, dismissal without prejudice for lack of subject matter jurisdiction is appropriate); Rutland v. Dugas, 2016 WL 3436422, *3 (W.D.N.C. June 17, 2016) (because claims "are subject to dismissal on the ground of sovereign immunity[,] the Court has no subject matter jurisdiction over this case"). Regardless of what the North Carolina statutes provide or what the North Carolina Revised Arbitration Act provides, whether a South Carolina state actor is entitled to sovereign immunity in North Carolina courts on a contract action is determined by South Carolina, not North Carolina. Hyatt III, 587 U.S. at ___, 139 S. Ct. at 1498; Belfand, 196 A.D.3d at 72-73. The North Carolina court should have therefore determined that the court and arbitrator lacked subject matter jurisdiction due to the School's retention of interstate sovereign immunity. The North Carolina's judgment confirming the arbitration award was not entitled to full faith and credit, and the trial court erred in ruling otherwise. Widenhouse v. Colson, 405 S.C. 55, 59, 747 S.E.2d 188, 190 n.2 (2013) (judgment rendered without subject matter jurisdiction is not entitled to full faith and credit); Underwriters Nat'l Assurance Co. v. N.C. Life & Acc. & Health Ins. Guar. Ass'n, 455 U.S. 691, 704 (1982) (judgment of court in one State is conclusive upon merits in another State only if court in first State had jurisdiction to render the judgment).

III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DETERMINING THAT THE SCHOOL, A PUBLIC CHARTER SCHOOL, WAS A POLITCAL SUBDIVISION, AND NOT A STATE ACTOR, AND THEREFORE WAS NOT ENTITLED TO SOVEREIGN IMMUNITY IN NORTH CAROLINA.

Respondent argues that the School has failed to present any South Carolina cases showing a charter school is protected by South Carolina's state sovereign immunity. That contention makes Appellant wonder whether Respondent actually read the School's brief. In its initial brief, the School quoted the South Carolina Supreme Court directly, which specifically held that a charter school is "considered a public school," "is considered a state entity," and "is a state actor." McNaughton v. Charleston Charter Sch. for Math & Sci., Inc., 411 S.C. 249, 266, 768 S.E.2d 389, 398 (2015). 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. The decision by the South Carolina Supreme Court in McNaughton clearly holds that the School is a state actor as a matter of law.

The trial court and Respondent erroneously rely on an Eleventh Amendment analysis to determine whether the School is a state actor where this case involves interstate sovereign immunity, not Eleventh Amendment immunity, and the South Carolina Supreme Court has already determined public charter schools are state actors. Even if, however, this Court were to engage in an Eleventh Amendment analysis, the School would still be classified as an arm of the State entitled to interstate sovereign immunity. Respondent cites Ram Ditta v. Md. Nat'l Capital Park & Planning Comm'n, 822 F.2d 456 (4th Cir. 1987),

to support its argument that the School is a political subdivision and not a state actor. Ram Ditta, however, involved the Maryland-National Capital Park and Planning Commission, not a South Carolina public charter school. Id. at 457. Since Ram Ditta was decided, the Supreme Court decided Hyatt III and Federal Maritime Commission v. South Carolina State Ports Authority, 535 U.S. 743 (2002). The Court made clear in Federal Maritime that "[s]overeign immunity does not merely constitute a defense to monetary liability or even to all types of liability. Rather, it provides an immunity from suit." Id. at 766. The central purpose of the doctrine of state sovereign immunity "is to 'accord the States the respect owed them as' joint sovereigns." Id. (citing Puerto Rico Aqueduct & Sewer Auth. v. Metcalf Eddy, Inc., 506 U.S. 139, 146 (1993)). "Accordingly, even if a judgment will not affect the treasury of the State, the court must decide if the relationship between the entity and the State is sufficiently close to render the entity an arm of the state." Eldeco, Inc. v. Skanska USA Bldg., Inc., 447 F. Supp. 2d 521, 524 (D.S.C. 2006). "[T]he court is to weigh such considerations as (1) the extent of control that the state exerts over the entity or the degree of autonomy that the entity enjoys from the state, (2) the range of the entity's concerns, and (3) the manner in which the laws of the state treat the entity." Id. The court must therefore make an "individualized inquiry into each state's legislative authority to control the entity in question." Id.

The South Carolina Legislature has the constitutional duty to "provide for the maintenance and support of a system of free public schools open to all children in the State. . . . " S.C. Const. art. XI, § 3. In 1996, in furtherance of this constitutional mandate, the legislature adopted the South Carolina Charter Schools Act of 1996 (the "SCCSA"). The SCCSA was created, in part, to "assist South Carolina in reaching academic excellence,"

and to "create new, innovative, and more flexible ways of educating children **within the public school system**." S.C. Code Ann. § 59-40-20(6),(7) (emphasis added). The General Assembly specifically authorized charter schools "to create a legitimate avenue for parents, teachers, and community members to take responsible risks and create new, innovative, and more flexible ways of educating all children within the public school system." S.C. Code Ann. § 59-40-30(A). The SCCSA was created in part "to advance a renewed commitment by the State of South Carolina to the mission, goals, and diversity of public education." S.C. Code Ann. § 59-40-30(B). A charter school "is, for purposes of state law and the state constitution, considered a public school." S.C. Code Ann. § 59-40-40(1). South Carolina charter schools perform the same government tasks as traditional public schools and operate as part of South Carolina's public education system. The School is considered a public school established under South Carolina's constitutional mandate to provide its citizens with a free public education, and its "range" of concerns is public education in South Carolina.

A charter school must also adhere to state law and the Department of Education's regulations governing public charter schools or risk revocation of its charter. The legislature "provided rules governing all aspects of the organization, approval, and operation of charter schools in South Carolina, as well as the obligations of each sponsoring school district." Charleston County Sch. Dist. v. Harrell, 393 S.C. 552, 554, 713 S.E.2d 604 (2011). A South Carolina public charter school must enter into a contract with a sponsor which is reviewed annually and may be revoked. S.C. Code Ann. § 59-40-110. A charter school is subject to "all federal and state laws and constitutional provisions prohibiting discrimination," may not charge tuition or other charges "except as allowed by

the sponsor and is comparable to the charges of the local school district in which the charter school is located," and "is subject to the same fixed asset inventory requirements as are traditional public schools." S.C. Code Ann. § 59-40-40. Section 59-40-140 sets forth a formula by which public charter schools established under the SCCSA receive state, county, and school district funds. The amounts distributed "must be verified by the State Department of Education before the first disbursement of funds," and are distributed by the local school district. S.C. Code Ann. § 59-40-140. "The South Carolina Public Charter School District or public or independent institution of higher learning sponsor shall receive and distribute state funds to the charter school as provided by the General Assembly." S.C. Code Ann. § 59-40-140(B). A charter school must report to its sponsor and the Department of Education any change to information on its application and submit annual reports to its sponsor which are then submitted to the Department of Education. S.C. Code Ann. § 59-40-140(H). This annual report must include information on number of enrolled students, success in achieving academic goals for the which the school was established, achievement gap analysis, certification status of the teaching staff, financial performance and sustainability, and board performance. Id. In light of the structure of charter schools established by the General Assembly, the factor considering the extent to which the State controls public charter schools weighs in favor of considering charter schools state actors for purposes of interstate sovereign immunity.

Finally, public charter schools in South Carolina are viewed as state entities. McNaughton, 411 S.C. at 266, 768 S.E.2d at 398. An individualized inquiry into the public charter school system established by the South Carolina legislature in accordance with its constitutional mandate to provide a free, public education to its citizens establishes that the

School, as a public charter school, is a state actor entitled to interstate sovereign immunity. Other jurisdictions have reached the same conclusion. See, e.g., North Carolina v. Kinston Charter Acad., 836 S.E.2d 330 (N.C. Ct. App. 2019) (public charter schools are public schools in North Carolina, exercise power of the State, are an extension of the State and are entitled to exercise State's sovereign immunity), disc. rev. allowed, 847 S.E.2d 421 (2020); El Paso Educ. Initiative, Inc. v. Amex Props., LLC, 602 S.W.3d 521, 529 (Tex. 2020) (open-enrollment charter schools are subject to oversight through their charters, receive substantial public funding and operate as part of State's public education system, and are thus arms of the State); Campbell v. Cirrus Educ., Inc., 845 S.E.2d 384 (Ga. Ct. App. 2020) (purpose, function, and management of charter school is indelibly intertwined with the State, qualifying the charter school for protection of sovereign immunity as a State instrumentality); Moore v. Life for Life Acad., Inc., 489 S.W.3d 843, 846 (Mo. Ct. App. 2016) (charter schools are public schools for purposes of sovereign immunity).

The federal district court of South Carolina has similarly determined that the South Carolina Public Charter School District is an agency or arm of the state of South Carolina for purposes of Eleventh Amendment Immunity. Dinkins–Robinson v. South Carolina Pub. Charter Sch. Dist., 2017 WL 10222138, at *2 (D.S.C. Oct. 25, 2017); see also Eldeco, 447 F. Supp. 2d at 527 (finding the relationship between South Carolina school districts and the state "is so close and the laws of [South Carolina] are such as to render those [] school districts as arms of the state for purposes of Eleventh Amendment sovereign immunity"). Although the School contends it is unnecessary to undertake an Eleventh Amendment analysis where this case involves interstate sovereign immunity and the South Carolina Supreme Court has already determined a public charter school in South Carolina is a "state

actor," an Eleventh Amendment analysis would produce the same conclusion that the School, as a public charter school, is a state entity entitled to interstate sovereign immunity. The trial court therefore erred in finding that the School, a public charter school, is a political subdivision not entitled to interstate sovereign immunity.

CONCLUDING STATEMENT

Consistent with the foregoing discussion and the discussion set forth in the School's initial brief, 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,

s/ Steven Edward Buckingham

Steven Edward Buckingham (S.C. Bar No. 0075089)
The Law Office of Steven Edward Buckingham
16 Wellington Avenue
Greenville, South Carolina 29609
(o) 864.735.0832
(e) seb@buckingham.legal

Attorney for Appellant

November 22, 2021

RECEIVED
Nov 22 2021
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the 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.

PROOF OF SERVICE

The undersigned counsel for Appellant hereby certifies, subject to penalty of perjury, that the following document(s) was/were served upon the following counsel of record by the following means as of the date identified below.

Document(s): Appellant's Initial Reply Brief

Counsel Served: For Respondent AT-NET Services—Charlotte, Inc.
Adam C. Bach (S.C. Bar No. 0074885)
Emily R. Godwin (S.C. Bar No. 103708)
Eller Tonnsen Bach, LLC
1306 S. Church Street

Greenville, SC 29605
(o) 864.236.5013
(e) abach@etblawfirm.com
egodwin@etblawfirm.com

Means of Delivery: *Via Email Only*

Courts Served: Office of the Clerk of the Court of Appeals

Means of Delivery: *Via email to ctappfilings@sccourts.org*

Date: November 22, 2021

Respectfully submitted,

s/ Steven Edward Buckingham

Steven Edward Buckingham (S.C. Bar No. 0075089)
The Law Office of Steven Edward Buckingham
16 Wellington Avenue
Greenville, South Carolina 29609
(o) 864.735.0832
(e) seb@buckingham.legal

Attorney for Appellant