IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 53264

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,

Appellant/Cross-Respondent

v.

GILBERT P. HYATT

Respondent/Cross-Appellant

APPEAL FROM JUDGMENT – EIGHTH JUDICAL DISTRICT COURT
STATE OF NEVADA, CLARK COUNTY
HONORABLE JESSIE WALSH, DISTRICT JUDGE

APPELLANT'S SUPPLEMENTAL APPENDIX IN SUPPORT OF SUPPLEMENTAL BRIEFS FOLLOWING MANDATE FROM THE SUPREME COURT OF THE UNITED STATES

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of McDonald Carano Wilson LLP and on the 2nd day of December, 2016, I certify that I electronically filed the foregoing with the Clerk of the Court by using the ECF system which served the following parties electronically:

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NO. 14-1175

In the
Supreme Court of the United States

FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT,
Respondent.

On Writ of Certiorari to the Supreme Court of Nevada

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether Nevada may refuse to extend to sister States haled into Nevada courts the same immunities Nevada enjoys in those courts.

2. Whether *Nevada v. Hall*, 440 U.S. 410 (1979), which permits a sovereign State to be haled into the courts of another State without its consent, should be overruled.

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INTRODUCTION

Over twenty years ago, petitioner Franchise Tax Board of the State of California (FTB) audited respondent Gilbert P. Hyatt and determined that he had misrepresented the date of his purported move to Nevada and owed substantial income taxes and penalties to California. Rather than simply exhaust California's administrative remedies or file suit in California state court, Hyatt sued FTB in Nevada state court, alleging that FTB committed various torts in conducting its audits and owed Hyatt hundreds of millions of dollars in damages.

The FTB's odyssey in Nevada lasted a decade—including an earlier trip to this Court—before the case even reached trial. Then, in a trial fraught with legal error, the Nevada jury returned a verdict that dramatically demonstrates the dangers of having a sovereign State haled into another State's courts against its will: The jury found for Hyatt on every one of his claims and awarded him nearly half a billion dollars in damages. It took another six years for the FTB to procure an appellate decision that, while trimming the award, still awarded a million dollars in damages while denying FTB the benefit of the damages cap Nevada extends to its own government entities.

The Nevada Supreme Court's decision cannot stand. Its refusal to afford a sister sovereign the same protections Nevada enjoys in its own courts is inconsistent with this Court's previous decision in this very case and basic principles of comity. But the proceedings here illustrate the far more profound difficulties of allowing one sovereign to be haled into

the courts of a sister sovereign at the behest of a private citizen. Such suits were unknown at the Framing and for nearly two centuries afterward. Although this Court permitted such a suit in *Nevada v. Hall*, 440 U.S. 410 (1979), that decision was incorrect when decided, is incompatible with subsequent decisions, and has proven unworkable in practice. There is no question that the States enjoyed sovereign immunity from suit in each others' courts at the Framing, and nothing in the structure of the Constitution remotely suggests that the States possess sovereign immunity in both their own courts and in federal court, but not in the courts of another State.

OPINIONS BELOW

The opinion of the Nevada Supreme Court is reported at 335 P.3d 125 and reproduced at Pet.App.1-73. The order of the Nevada Supreme Court denying rehearing is unreported and reproduced at Pet.App.74-75. The relevant orders of the state trial court are unreported but reproduced at Pet.App.78-81.

JURISDICTION

The Nevada Supreme Court issued its opinion on September 18, 2014, and denied rehearing on November 25, 2014. This Court has jurisdiction under 28 U.S.C. §1257(a). *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975).

CONSTITUTIONAL PROVISIONS INVOLVED

Articles III and IV of the United States Constitution and the Eleventh Amendment to the Constitution are reproduced in the appendix to this brief at 1a-5a.

STATEMENT OF THE CASE

A. Factual Background

Gilbert Hyatt was a longtime resident of California. Pet.App.4; *Franchise Tax Bd. of Cal. v. Hyatt* (*Hyatt I*), 538 U.S. 488, 490-91 (2003). In 1992, Hyatt filed a "part-year" resident income tax return in California for the year 1991, claiming that as of October 1, 1991, he had ceased to be a California resident and had moved to Nevada. *Hyatt I*, 538 U.S. at 490. Within days after that purported move, Hyatt received substantial income in connection with a patent he then owned. *Id.* at 490-91; Pet.App.4.[1] Hyatt did not report that significant income on his California return; indeed, he reported to California only 3.5% of his total taxable income for 1991 despite residing there for at least 75% of the calendar year.[2] And despite the conveniently-timed supposed change of residence, Hyatt claimed no moving expenses on his 1991 federal return. Pet.App.4.

Based on these discrepancies, in 1993, FTB opened an audit concerning Hyatt's 1991 California return to ascertain the legitimacy of Hyatt's asserted change of residence. FTB is a California agency with the statutory duty to administer and enforce

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[1] That patent's relevant claims were canceled in 1996 after another individual was determined to have priority of invention. *See Hyatt v. Boone*, 146 F.3d 1348, 1350-51 & n.1 (Fed. Cir. 1998); John Markoff, *For Texas Instruments, Some Bragging Rights*, N.Y. Times (June 20, 1996), http://perma.cc/55gz-kul8.

[2] Under California law, taxpayers are presumed to have lived in California for the full year—and all their income is taxable to California—if they lived in California for at least nine months. Cal. Rev. & Tax Code §17016.

California's personal income tax law. Cal. Rev. & Tax Code §19501. It has the authority to examine records, require attendance, take testimony, and issue subpoenas. *Id.* §19504. Exercising these sovereign powers, and following standard practice, FTB sent Hyatt a form requiring him to provide certain information concerning his connections to California and Nevada and the facts surrounding his claimed move to Nevada. Pet.App.4-5. Using that information, FTB sent letters and demands for information to third parties. Pet.App.5. FTB representatives also interviewed third parties and visited locations in California and Nevada. Pet.App.5-6.

As a result of its audit, FTB concluded that Hyatt did not move from California to Nevada by October 1, 1991, as he had claimed, but rather remained a California resident until April 3, 1992, and had filed a fraudulent 1991 California return. Pet.App.4-5; *Hyatt I*, 538 U.S. at 491. It determined that, "in an effort to avoid [California] state income tax liability on his patent licensing," Hyatt "had staged the earlier move to Nevada by renting an apartment, obtaining a driver's license, insurance, bank account, and registering to vote." Pet.App.6. It further determined that although Hyatt claimed he had sold his California home to his work assistant, the purported sale was a "sham." *Id.* FTB provided a "detailed explanation" supporting its conclusions. *Id.* It cited evidence regarding, among other things, Hyatt's "contacts between Nevada and California, banking activity in the two states, … location in the two states during the relevant period, and professionals whom he employed in the two states." *Id.*

FTB determined that Hyatt owed California approximately $1.8 million in unpaid state income taxes from 1991, plus an additional $2.6 million in penalties and interest. *Id.* Because it determined that Hyatt resided in California for part of 1992 yet paid no California taxes at all, FTB opened a second audit into Hyatt's state income tax liability for that year. Pet.App.7. It concluded that Hyatt owed an additional $6 million in taxes and interest for 1992, along with further penalties. *Id.*

Hyatt challenged the audits by filing protests with FTB. *Id.*; *see* Cal. Rev. & Tax Code §19041. Those protests initiated an administrative review process under which both audits were examined again to ensure their accuracy. FTB affirmed the audits after further administrative review. Pet.App.7. Hyatt is currently challenging that outcome in an administrative appeal to the California State Board of Equalization. *See* Cal. Rev. & Tax Code §§19045-19048.[3]

B. The Nevada Litigation

In January 1998, after filing his administrative protests to FTB's determinations, Hyatt filed suit against FTB in Nevada state court. He asserted a full range of tort claims based on FTB's alleged conduct during its audit—negligent misrepresentation, intentional infliction of emotional distress, fraud, invasion of privacy, abuse of process, and breach of a

[3] The decision below erroneously stated that Hyatt is challenging the audits' conclusions "in California courts." Pet.App.7 n.2. Hyatt will have an opportunity to file suit in California court if the State Board of Equalization upholds FTB's determinations. *See* Cal. Rev. & Tax Code §§19381-19382.

confidential relationship—and sought both compensatory and punitive damages. Pet.App.7-8, 11.

FTB moved for summary judgment, asserting its immunity from the entire lawsuit on several grounds. As relevant here, it argued that as an agency of the State of California, it was constitutionally immune from suit in the Nevada courts. It alternatively argued that it was entitled to the benefit of California law, which provided a complete immunity from the suit. Pet.App.10. In recognition of the need to protect the distinctly sovereign and inherently unpopular function of tax collection, California law prohibits "[i]nstituting any judicial or administrative proceeding or action for or incidental to the assessment or collection of a tax," and immunizes any "act or omission in the interpretation or application of any law relating to a tax." Cal. Gov't Code §860.2. FTB argued that the Full Faith and Credit Clause, along with principles of comity and sovereign immunity, required the Nevada courts to apply California law immunizing FTB's actions. *Hyatt I*, 538 U.S. at 491-92.

The trial court denied the motion, and the Nevada Supreme Court affirmed in part and denied in part a petition for mandamus. *Id.* at 492. It first held that, as a constitutional matter, "although California is immune from Hyatt's suit in federal courts, it is not immune in Nevada courts." J.A.167 (citing *Nevada v. Hall*, 440 U.S. 410 (1979)). Next, it refused to afford FTB the complete immunity granted to it by California law. It suggested instead that "FTB should be granted partial immunity equal to the immunity a Nevada government agency would receive" under

Nevada law, which meant immunity for negligence-based torts but not for intentional torts. Pet.App.10 The court therefore ordered the dismissal of Hyatt's claim for negligent misrepresentation but allowed his intentional tort claims to proceed.

C. *Hyatt I*

FTB filed a petition for certiorari, arguing that the Full Faith and Credit Clause required Nevada to apply the California statute granting FTB complete immunity. This Court granted certiorari. Hyatt defended the judgment by noting that the Nevada Supreme Court had "look[ed] at [Nevada's] own immunity" and granted California "that same" immunity. J.A.185. A State's "own immunity," Hyatt asserted, was the "baseline" for determining the immunity owed to sister States haled into its courts. J.A.186; *see also* J.A.189 ("We are treating the other sovereign the way we treat ourselves.").

The Court affirmed. It explained that the Full Faith and Credit Clause generally does not require one State to apply another State's law. *Hyatt I*, 538 U.S. at 496. Although it recognized that "the power to promulgate and enforce income tax laws is an essential attribute of sovereignty," it held that the Full Faith and Credit Clause did not require Nevada to respect that sovereign interest by giving FTB the complete immunity that it would have under California law. *Id.* at 498-99.

In reaching that conclusion, the Court acknowledged that "States' sovereignty interests are not foreign to the full faith and credit command." *Id.* at 499. But it observed that it was "not presented here with a case in which a State has exhibited a 'policy of

hostility to the public Acts' of a sister State." *Id.* (quoting *Carroll v. Lanza*, 349 U.S. 408, 413 (1955)). Reflecting Hyatt's repeated insistence that the Nevada Supreme Court had merely granted FTB the same immunity that a Nevada agency would enjoy under similar circumstances—thereby placing California on an equal footing with Nevada—the Court commented that the Nevada Supreme Court had "sensitively applied principles of comity" by "relying on the contours of Nevada's own sovereign immunity from suit" to determine what immunity FTB was entitled to claim. *Id.*

The Court also emphasized that its ruling did *not* address the broader issue of whether the Constitution incorporates a principle of State sovereign immunity that protects a State from being sued in the courts of a sister State without its consent. *Id.* at 497. In *Nevada v. Hall*, the Court had rejected that proposition, holding that the Constitution did not "require[] all of the States to adhere to the sovereign-immunity doctrine as it prevailed when the Constitution was adopted." 440 U.S. at 418. In *Hyatt I*, nineteen States and Puerto Rico filed an amicus brief that urged the Court to revisit and overrule *Hall*. *See* Br. of Florida et al. as Amici Curiae Supporting Pet'r, *Hyatt I*, 538 U.S. 488 (2003) (No. 02-42), 2002 WL 32134149. But because FTB itself did not seek to overrule *Hall* at that time, the Court declined to reach the issue. *Hyatt I*, 538 U.S. at 497.

D. Trial and Appeal

Following *Hyatt I*, the case returned to the Nevada state trial court. The parties then engaged in lengthy discovery and pretrial proceedings. Finally,

in 2008—over ten years after Hyatt filed suit—the case proceeded to a four-month jury trial. Pet.App.11. The Nevada jury found for Hyatt on all his claims, awarding him just over $1 million on his fraud claim, $52 million for invasion of privacy, $85 million for intentional infliction of emotional distress, and $250 million in punitive damages. *Id*.

Nevada has partially waived the sovereign immunity of Nevada government agencies for intentional torts. It allows such suits but imposes a statutory cap on tort damages. Nev. Rev. Stat. §41.035(1). For actions accruing before 2007 (like Hyatt's), that cap was set at $50,000—less than one one-thousandth of the compensatory damages awarded against FTB. *See* 1995 Nev. Stat. 1071, 1073.[4] The same Nevada law prohibits punitive damages against Nevada government agencies. Nev. Rev. Stat. §41.035(1). The state trial court, however, among its other errors, declined to apply those limits to FTB. Thus, by the time it added over $2.5 million in costs and $102 million in prejudgment interest to the jury verdict, the trial court entered a total judgment against FTB of over $490 million. Pet.App.11, 72.

FTB appealed the numerous errors made by the trial court. First, it argued that Nevada's discretionary-function immunity statute foreclosed liability given the inherently discretionary conduct underlying its audit of Hyatt's taxes. Second, it contended that Hyatt's state-law claims failed as a

[4] That cap increased to $75,000 for actions accruing between Oct. 1, 2007 and Oct. 1, 2011, and to $100,000 for actions accruing after the latter date. 2007 Nev. Stat. 3015, 3024-25, 3027.

matter of law. Third, it appealed the trial court's failure to afford California the same immunity that Nevada law grants to a Nevada government entity. Finally, FTB preserved its argument that *Nevada v. Hall* was wrongly decided and should be overruled, and that FTB could not be haled into the Nevada courts absent its consent. *See* J.A.203.

Six years after trial—over sixteen years after Hyatt filed suit—the Nevada Supreme Court finally issued its decision affirming in part and reversing in part. Pet.App.1-73. The court first held that Nevada's discretionary-function immunity statute did not preclude Hyatt's claims because, in its view, discretionary-function immunity categorically "does not apply to intentional and bad-faith tort claims." Pet.App.72. The Nevada Supreme Court then held that Hyatt's claims for invasion of privacy, abuse of process, and breach of a confidential relationship failed as a matter of law, Pet.App.25-38, but it affirmed the jury's verdict finding FTB liable for fraud and intentional infliction of emotional distress, Pet.App.38-41, 46-51.

The court affirmed the fraud verdict based on FTB's initial notice to Hyatt that he was being audited. That notice contained boilerplate statements that, during an audit, a taxpayer should expect "Courteous treatment by FTB employees," "Clear and concise requests for information from the auditor assigned to your case," "Confidential treatment of any personal and financial information that you provide to us," and "Completion of the audit within a reasonable amount of time." Pet.App.5. The Nevada Supreme Court held that a reasonable person could conclude

that these general statements were false representations, FTB knew they were false, FTB intended for Hyatt to rely on them, and Hyatt did in fact rely on them, sustaining damages. Pet.App.38-40.

The court affirmed the jury's finding of liability on the IIED claim despite acknowledging that Hyatt had presented no objectively verifiable medical evidence of emotional distress. Pet.App.46. Instead, the court pointed to evidence that FTB had disclosed Hyatt's name, address, and social security number in its third-party information requests (though the court acknowledged that Hyatt himself had already previously disclosed this information to the public), FTB had revealed to third parties that he was being audited (via those same standard information requests), and one of the auditors assigned to his case allegedly made an isolated remark regarding Hyatt's religion and was "intent on imposing an assessment" against Hyatt. Pet.App.27, 50.

The Nevada Supreme Court refused to apply to FTB the statutory damages cap applicable to Nevada government entities. It conceded that "[m]ost courts" in other States extend to sister States the same immunities the forum State enjoys. Pet.App.44. It nevertheless concluded that Nevada's "policy interest in providing adequate redress to Nevada citizens is paramount to providing FTB a statutory cap on damages," and that the extension of the cap to a California entity did not serve the countervailing interest in protecting Nevada taxpayers. Pet.App.45. Accordingly, it declined to give FTB the benefit of the statutory cap enjoyed by Nevada government entities. Pet.App.62. It did find the FTB immune from punitive

damages "[b]ecause punitive damages would not be available against a Nevada government entity." Pet.App.65. The court thus upheld the more than $1 million in damages against FTB for fraud (before prejudgment interest), and remanded for retrial on emotional distress damages due to evidentiary and jury-instruction errors. Pet.App.72.[5]

SUMMARY OF ARGUMENT

I. When a State is involuntarily haled into the courts of a sister State, it must be accorded at least the same sovereign immunity as the forum State accords itself. In *Hyatt I*, this Court explained that a forum State is not required to apply the sovereign immunity of another State or provide *greater* protection than that enjoyed by arms of the forum State. But the Court cautioned that, while a policy of equal treatment was permissible, principles of full faith and credit and comity prohibit a State from exhibiting a "policy of hostility" by departing from the "contours of [its] own sovereign immunity from suit." 538 U.S. at 499.

The Nevada Supreme Court blatantly transgressed these principles in the decision below when it refused to extend to FTB, a California agency, the *same* sovereign immunity Nevada provides its own agencies. Whereas compensatory damages against a Nevada state entity would be capped at $50,000 to

[5] Hyatt has also filed a federal lawsuit against FTB board members and other State officials alleging violations of his constitutional rights. *See Hyatt v. Chiang*, No. 14-849, 2015 WL 545993, at *6 (E.D. Cal. Feb. 10, 2015) (dismissing suit as barred by Tax Injunction Act), *appeal docketed*, No. 15-15296 (9th Cir. Feb. 19, 2015).

reflect the sovereign's distinct status and to protect Nevada taxpayers, the Court authorized unlimited compensatory damages against the FTB. That result cannot be reconciled with *Hyatt I* and the principles it reflects. It demonstrates a clear "policy of hostility" toward California by refusing to recognize California's sovereign immunity even to the extent consistent with Nevada law. It palpably fails to "rely[] on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis" by departing from that baseline and relying instead on a one-sided policy interest in compensating Nevada citizens at the expense of California taxpayers. It fails to "sensitively appl[y] principles of comity" by applying neither California nor Nevada law but a wholly different and legislatively-unauthorized third approach. And it reflects the opposite of a "healthy regard for California's sovereign status" by treating a California agency different from a Nevada agency and the same as a non-sovereign.

II. While the decision below is incompatible with *Hyatt I*, both the decision and the broader course of proceedings here demonstrate the more fundamental problems with failing to afford a State sovereign immunity when a private citizen hales it into court in another State. *Nevada v. Hall* is fundamentally inconsistent with the dignity and residual sovereignty of the States and conflicts with the most fundamental precepts of our constitutional system. The Framers "split the atom of sovereignty," *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring), but they did not obliterate the residual sovereignty of the States in the process. Before the Framing, Massachusetts could not be haled into the

New York courts by a New York citizen against its will, and nothing in the text or structure of the Constitution purported to change that. Indeed, the notion that a sovereign State enjoys less immunity to suits in sister State courts than in the courts of the newly created federal sovereign gets things backwards. The contrary rule of *Hall* should be overruled so that bedrock constitutional principles can be restored.

The historical record firmly establishes that before the Nation's independence, under the Articles of Confederation, and during and after ratification of the Constitution, it was universally understood that no State could be involuntarily sued in the courts of another State. Debates between proponents and opponents of the Constitution over Article III reflect a shared view that States possessed sovereign immunity in other States' courts. And the reaction to *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), underscores the absurdity of suggesting that a populace shocked by the notion of a State being haled into federal court by a citizen of another State would tolerate such suits in the considerably less neutral courts of that citizen's home State. This Court's decisions before *Hall*, furthermore, uniformly reflect the view that States cannot be involuntarily haled into other States' courts. *Hall* not only failed to explain its departure from these cases; it barely addressed them.

Decisions of this Court since *Hall*, moreover, have rejected almost every premise that underlies that decision. *Hall* casually departed from the Framing-era view of sovereign immunity; subsequent cases have consistently relied on that view and extended

sovereign immunity to proceedings against States that were unheard of when the Constitution was ratified. *Hall* refused to infer sovereign immunity from the constitutional structure; subsequent cases have repeatedly treated sovereign immunity as inherent in the constitutional design absent contrary evidence. *Hall* effectively limited sovereign immunity to the metes and bounds of the Eleventh Amendment's text; subsequent cases have treated the Eleventh Amendment as a recognition of broader sovereign immunity principles from which *Chisholm* deviated. *Hall* essentially dismissed the significance of State sovereignty at the Framing; subsequent cases have emphasized the retention of residual sovereignty unless necessarily sacrificed by the constitutional design. In short, every pillar that supported *Hall's* ahistorical and counterintuitive conclusion has been thoroughly undermined by subsequent and better reasoned decisions. There is simply no coherent jurisprudential support remaining to prevent *Hall's* demise.

Hall has also proved unworkable doctrinally and in practice, as this case amply confirms. In place of a bright-line and predictable constitutional rule of sovereign immunity that applies unless waived, *Hall* created a regime in which a State never knows the extent of its sovereign immunity. While a State controls the extent of its waiver of sovereign immunity in its own courts, and this Court's cases provide clear guidance about exposure in federal court, the extent of liability in the courts of sister sovereigns under *Hall* is a guessing game. In an increasingly mobile world, a State could be haled into state court in virtually any State. The contours of sovereign immunity of state

entities in those courts are a product of sovereign judgments wholly outside the control of the foreign/defendant State. And, as this case demonstrates, the foreign/defendant State is at the mercy of the forum State's courts as to whether it even gets the benefit of the sovereign immunity enjoyed by arms of the forum state.

This case also demonstrates the practical danger of allowing one State to be haled into the courts of a sister sovereign against its will. Although subsequently trimmed, the Nevada jury's initial half-a-billion-dollar award dramatically illustrates the dangers to sovereign dignity and fiscal interests inherent in the *Hall* regime. On top of its substantial remaining damages exposure, California has expended untold resources defending this suit, which is now in its seventeenth year. What is more, as the verdict demonstrates, a Nevada jury needs little incentive to side with a Nevada citizen against another State's government, especially when the latter is involved in an inherently sovereign and decidedly unpopular function like tax collection. The Nevada jury is not even constrained by the reality that the award will ultimately be paid by Nevada taxpayers. Rather than protect against that structural risk, the Nevada courts seized on it as a justification for not providing a California entity with the same protection as an arm of Nevada.

No other *stare decisis* consideration militates in favor of preserving *Hall*. It is a constitutional rather than statutory decision; it does not affect primary conduct; and it has created no reliance interests, much less the contractual or property interests that this

Court has emphasized. More to the point, *Hall* represents a fundamental error on an issue that is essential to the basic design of the Constitution and Our Federalism. The States yielded some sovereignty to the new national government, but only what was necessary to the creation of the new federal government. States retained their full sovereign immunity in their own courts and the vast majority of their sovereign immunity even in the newly-created federal courts. That they nonetheless possess no sovereign immunity against private suits in the courts of sister States is an anomaly too extravagant to maintain. *Hall* should be overruled.

ARGUMENT

I. A State May Not Refuse To Extend To Sister States Haled Into Its Courts The Same Immunities It Enjoys In Those Courts.

A. As *Hyatt I* Recognized, Full Faith and Credit and Comity Principles Require a Baseline of Equal Treatment When States Are Involuntarily Haled Into Sister States' Courts.

1. In *Hyatt I*, this Court held that the Full Faith and Credit Clause did not require Nevada to apply the terms of California's waiver of its own sovereign immunity under California law, which would have fully immunized FTB from Hyatt's claims. Instead, the Court held that Nevada could permissibly choose to provide an arm of California only the less protective terms of Nevada's waiver of its sovereign immunity under Nevada law, which affords state agencies protection from negligence-based torts but not intentional torts. 538 U.S. at 498-99. Thus, the Court

held, Nevada was not required to apply out-of-state law that would afford a sister State *greater* protections than its own law provides.

In reaching this conclusion, the Court relied on the critical premise—advanced by Hyatt himself—that Nevada evinced no hostility to a sister sovereign but sought only to treat California *equal* to itself. Hyatt argued that a State is "require[d]" to "look[] to its own immunity for similar torts in deciding whether to accord immunity to" a sister State. J.A.195. A State's "own immunity" is the "baseline" for determining the immunity owed to a sister State haled into its courts. J.A.186. By according FTB exactly the same sovereign immunity that Nevada law conferred upon a Nevada agency, the Nevada Supreme Court had given "full regard for the fact that California is a sovereign State." J.A.195; *see also* J.A.189 ("We are treating the other sovereign the way we treat ourselves."); p. 7, *supra*.

This Court embraced that equality premise. In holding that Nevada was not required to treat an out-of-state agency better than an in-state agency, the Court was careful to note that "States' sovereignty interests are not foreign to the full faith and credit command." 538 U.S. at 499. And it signaled a different result should a State "exhibit[] a 'policy of hostility to the public Acts' of a sister State." *Id.* (quoting *Carroll*, 349 U.S. at 413). But by according equal treatment to in-state and out-of-state government agencies, the Court concluded, the Nevada Supreme Court had "sensitively applied principles of comity with a healthy regard for California's sovereign status, relying on the contours

of Nevada's own sovereign immunity from suit as a benchmark for its analysis." *Id.*

2. The equal-treatment premise urged by Hyatt and accepted by this Court in *Hyatt I* derives from the Full Faith and Credit Clause and principles of comity and equal sovereignty rooted in the constitutional design. As this Court observed more than a century ago, "the constitutional equality of the states is essential to the harmonious operation of the scheme upon which the Republic was organized." *Coyle v. Smith*, 221 U.S. 559, 580 (1911). That principle likewise undergirds the frequently applied constitutional "equal footing" doctrine. *See*, *e.g.*, *PPL Mont., LLC v. Montana*, 132 S. Ct. 1215, 1227 (2012) (recognizing that "the States in the Union are coequal sovereigns under the Constitution"); *see also Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009).

This principle of equal sovereignty underlies *Hyatt I*'s admonishment that "States' sovereignty interests are not foreign to the full faith and credit command." 538 U.S. at 499. The "animating purpose of the full faith and credit command" was to make the States "'integral parts of a single nation.'" *Baker by Thomas v. Gen. Motors Corp.*, 522 U.S. 222, 232 (1998) (quoting *Milwaukee Cty. v. M.E. White Co.*, 296 U.S. 268, 277 (1935)). The Full Faith and Credit Clause was designed to "transform[] an aggregation of independent, sovereign States into a nation." *Sherrer v. Sherrer*, 334 U.S. 343, 355 (1948). While *Hyatt I* held that the Full Faith and Credit Clause does not entitle a State to have its own, more favorable sovereign immunity principles apply directly in the

courts of a sister State, refusing to extend a sister sovereign the same immunity enjoyed by the home sovereign offends equal sovereignty principles and the Full Faith and Credit Clause's intent to bind the independent and equal sovereigns together in a workable whole.

Equal sovereignty and equal treatment likewise inform *Hyatt I*'s observation that the Nevada Supreme Court had "sensitively applied principles of comity." The Court so held because the Nevada Supreme Court, by "relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis," had demonstrated "a healthy regard for California's sovereign status." 538 U.S. at 499. The Court quite naturally recognized that a State's departure from the "contours of [its] own sovereign immunity from suit" when determining the immunities of a sister sovereign would reflect an improper application of principles of comity. Comity principles allow states to honor a defendant State's request to apply its own sovereign immunity law (*i.e.*, what FTB unsuccessfully sought from the Nevada courts in the proceedings resulting in *Hyatt I*), *see, e.g.*, *Schoeberlein v. Purdue Univ.*, 544 N.E.2d 283, 288 (Ill. 1989) (honoring Indiana's "reservation of sovereign immunity"), or to grant the defendant State the protection afforded to arms of the forum State, *see, e.g., Sam v. Estate of Sam*, 134 P.3d 761 (N.M. 2006); *see generally* Ann Woolhandler, *Interstate Sovereign Immunity*, 2006 Sup. Ct. Rev. 249, 289-91 (2006). But comity does not allow a State to deny a sister sovereign both the benefits of the sister sovereign's own sovereign immunity and the benefits of an equal-treatment rule. Such treatment

reflects not comity, but the precise "policy of hostility" *Hyatt I* warned against.

B. The Nevada Supreme Court's Decision Violates the Principles of Full Faith and Credit, Comity, and Equal Treatment Recognized in *Hyatt I*.

The Nevada Supreme Court's refusal to accord California the same immunity that Nevada would receive under Nevada law marks a sharp break from the equal-treatment principles recognized in *Hyatt I*. By refusing to apply to FTB the compensatory damages cap that would apply to a Nevada agency, the Nevada Supreme Court did not simply decline to apply California's broader sovereign immunity law. It declined to apply even Nevada's narrower sovereign immunity law, and did so for the worst of reasons—namely, that application of the cap would disadvantage a Nevada plaintiff with no countervailing benefits to Nevada taxpayers. That a state court could embrace such cavalier treatment of a sister sovereign strongly suggests that the equality principles of *Hyatt I* are no substitute for recognizing the sovereign immunity improperly denied in *Nevada v. Hall*. But the decision is plainly incompatible with *Hyatt I* in at least four respects.

First, the decision plainly demonstrates a "'policy of hostility to the public Acts'" of California. *Hyatt I*, 538 U.S. at 499. California law provides FTB absolute immunity, Cal. Gov't Code §860.2, while Nevada law provides its entities a damages cap, Nev. Rev. Stat. §41.035(1). As *Hyatt I* establishes, it is one thing for Nevada to refuse to apply the absolute immunity that California law would give FTB. That is consistent

with equal treatment. But it is altogether different for Nevada to refuse to recognize the immunity granted by California *even to the extent consistent with Nevada law*. That kind of hostility is forbidden by *Hyatt I*.

Second, and relatedly, the Nevada Supreme Court plainly failed to "rely[] on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis." *Hyatt I*, 538 U.S. at 499. Hyatt himself advocated this principle in *Hyatt I*, *see* pp. 7, 18, *supra*, and the contours of that benchmark here were not difficult to discern. Nevada capped compensatory damages in suits against the sovereign at $50,000. Rather than apply that straightforward cap, the Nevada Supreme Court upheld a damages award 20 times as large on the fraud count and remanded for another trial and the potential imposition of additional damages on the emotional distress count.

Third, the decision below fails to "sensitively appl[y] principles of comity." *Id.* The Nevada Supreme Court applied neither California's sovereign immunity law nor Nevada's sovereign immunity law, but instead a wholly different, non-legislative, and overtly hostile third approach subjecting California to uncapped liability for compensatory damages. Both California and Nevada law reflect deliberate legislative judgments about the extent to which each State's sovereign immunity should be waived. Determining the metes and bounds of the State's sovereign immunity is a core component of sovereignty. *See, e.g.*, *Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 543 (2002). While comity may permit either full recognition of the sister sovereign's own waiver or the protection of the forum State's

waiver, providing neither based on an *ad hoc* judgment of the forum state court is a plain affront to both comity and sovereign immunity principles. *See Sossamon v. Texas*, 131 S. Ct. 1651, 1657-58 (2011) (noting that "[a] State's consent to suit must be 'unequivocally expressed' in the text of the relevant statute" (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984))).[6]

Fourth, the decision below clearly failed to display a "healthy regard for California's sovereign status." *Hyatt I*, 538 U.S. at 499. To the contrary, the decision below reflects an open disdain for California's sovereign status and the kind of protectionist tendencies that are the very antithesis of comity principles. The Nevada Supreme Court recognizes that a partial waiver of immunity allows for some compensation for injured citizens, while the damages cap plays an important role in protecting both sovereign authority and the public fisc. *See, e.g.*, *Cty. of Clark ex rel. Univ. Med. Ctr. v. Upchurch*, 961 P.2d 754, 759 (Nev. 1998) (acknowledging that caps "protect taxpayers and public funds from potentially devastating judgments"). Rather than giving the FTB and California's treasury the benefit of a comparable trade-off, the Nevada Supreme Court yielded to the temptation of open protectionism. As the court

[6] In explaining its decision, the Nevada Supreme Court relied on a single state-court decision, *Faulkner v. Univ. of Tenn.*, 627 So. 2d 362 (Ala. 1992)), *see* Pet.App.44-45, but that reliance only underscores its error. In *Faulkner*, the defendant State agency sought application of its own immunity law, rather than the forum State's immunity law. Consistent with *Hyatt I*, Alabama denied that request for especially favorable treatment. Nothing in *Faulkner* supports the denial of equal treatment.

explained, applying the damages cap here would disadvantage a Nevada citizen with no countervailing benefit to the Nevada treasury. Pet.App.45-46. A comparable judgment by the legislative branch—capping damages for Nevada entities but not out-of-state entities—would be a blatant constitutional violation. *See, e.g.*, *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 889, 894 (1988). The result should be no different when a court imposes the same discrimination through a profoundly misguided comity analysis.

Hyatt's own arguments only confirm the absence of a "healthy regard for California's sovereign status." In the Nevada Supreme Court, Hyatt argued that "limitless compensatory damages [were] necessary as a means to control non-Nevada government actions." Pet.App.42. But while Nevada courts may have an interest in ensuring the compensation of injured Nevadans up to the limits imposed by Nevada, exercising control over non-Nevada government actions is hardly a constitutionally valid objective. In his brief in opposition, Hyatt emphasized that the Nevada court refused to grant FTB the protections given a Nevada agency because California's officials are not "'subject to legislative control, administrative oversight, and public accountability' *in Nevada*." Br. in Opp.15 (emphasis added). Of course not; but California agencies are subject to all those checks *in California*. And if respect for a sister sovereign means anything, it means respecting the governmental processes of the sister State, not dismissing them because they occur in Sacramento rather than in Carson City.

The Nevada Supreme Court's abject failure to apply the comity and equality principles of *Hyatt I* is powerful evidence that those principles are no substitute for correctly deciding the sovereign immunity question addressed in *Hall*. But if States really can be haled into the courts of their sister States without consent, then it is imperative that this Court give the equality principle of *Hyatt I* real teeth. That equality principle cannot give States the predictability and control over their own immunity that sovereign immunity generally provides. But it does ensure that the States' sovereign status is not simply ignored and that they enjoy the benefits of the rules that the forum sovereign has imposed on itself. If enforceable principles of federal law do not guarantee that much, then the rule of *Hall* is not just erroneous, not just ripe for reconsideration, but utterly unsustainable.

II. *Nevada v. Hall* Was Wrongly Decided, And Its Holding That A Sovereign State Can Be Involuntarily Haled Into The Courts Of Another State Should Be Overruled.

In *Nevada v. Hall*, this Court held that the Constitution does not prohibit a sovereign State from being sued in the courts of another State without its consent. *Hall* creates a constitutional anomaly—States protected against suits in their own courts, and even in the newly created federal courts, can nonetheless be haled into the courts of another State against their will. That decision runs contrary to the intent of the Framers, the constitutional structure, pre-*Hall* sovereign immunity decisions, and the subsequent, better reasoned sovereign immunity jurisprudence of this Court. And, as the facts of this

case demonstrate, the suits that *Hall* allows demean the dignity of the States, threaten their treasuries, and disregard their residual sovereignty. The *Hall* regime has proven thoroughly unworkable. In short, *Hall* was wrong the day it was decided, is more obviously wrong in light of subsequent developments, and should be overruled.

A. *Hall* Was a Poorly Reasoned Departure From the Historical Understanding of Interstate Sovereign Immunity and the Court's Prior Decisions.

1. In *Hall*, California residents injured in an automobile collision with a University of Nevada employee filed suit in California against the State of Nevada. 440 U.S. at 411-12. A California jury found the state employee negligent and awarded over a million dollars in damages. *Id.* at 413. This Court granted certiorari and held that constitutional principles of sovereign immunity do not preclude one State from being haled into the courts of another State against its will. *See id.* at 426-27.

In so holding, the Court acknowledged that sovereign immunity "[u]nquestionably … was a matter of importance in the early days of independence." *Id.* at 418. It recognized that, at the Framing, one State would have possessed sovereign immunity in the courts of another. *Id.* at 417. And it observed that the debates over ratification of the Constitution, and later Supreme Court decisions, reflected "widespread acceptance of the view that a sovereign state is *never* amenable to suit without its consent." *Id.* at 419-20 & n.20 (emphasis added).

The Court nonetheless dismissed this "widespread" Framing-era view as irrelevant to the constitutional issue. In the Court's view, the "need for constitutional protection against" the "contingency" of a state defendant being sued in a court of a sister State was "not discussed" during the constitutional debates, so it "was apparently not a matter of concern when the new Constitution was being drafted and ratified." *Id.* at 418-19.

The Court then held, without further explanation, that nothing in the Constitution provides "any basis, explicit or implicit," for affording sovereign immunity to a State haled into another State's courts against its will. *Id.* at 421. Critically, it refused to "infer[] from the structure of our Constitution" any protection for sovereign immunity beyond the explicit limits on federal-court jurisdiction of Article III and the Eleventh Amendment. *Id.* at 421, 426. And it determined that no "federal rule of law implicit in the Constitution … requires all of the States to adhere to the sovereign-immunity doctrine as it prevailed when the Constitution was adopted." *Id.* at 418. Instead, a State must simply hope that, as "a matter of comity" and "wise policy," a sister State will make the "voluntary decision" to exempt it from suit. *Id.* at 416, 425-26.[7]

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[7] The Court also held that the Full Faith and Credit Clause does not require a forum State to apply a defendant State's sovereign immunity law. *See* 440 U.S. at 421-24. The Court reaffirmed that holding in *Hyatt I* but, as noted, did not revisit the question of whether the Constitution generally "confer[s] sovereign immunity on States in the courts of sister States." 538 U.S. at 497-99.

Justice Blackmun dissented, joined by Chief Justice Burger and Justice Rehnquist. Unlike the majority, Justice Blackmun would have held that the Constitution implicitly embodies a "doctrine of interstate sovereign immunity" that is "an essential component of federalism." *Id.* at 430 (Blackmun, J., dissenting). The dissenters drew a very different conclusion from the absence of more express discussion of this issue during the constitutional debates: The "only reason why this immunity did not receive specific mention" during ratification is that it was "too obvious to deserve mention." *Id.* at 431. Justice Blackmun also pointed to the Eleventh Amendment's swift passage following the Court's decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793): "If the Framers were indeed concerned lest the States be haled before the federal courts … how much more must they have reprehended the notion of a State's being haled before the courts of a sister State." *Hall*, 440 U.S. at 431 (Blackmun, J, dissenting). This "concept of sovereign immunity" that "prevailed at the time of the Constitutional Convention" was, in Justice Blackmun's view, "sufficiently fundamental to our federal structure to have implicit constitutional dimension." *Id.*

Justice Rehnquist also separately dissented, joined by Chief Justice Burger. He explained that the Court's decision "work[ed] a fundamental readjustment of interstate relationships which is impossible to reconcile … with express holdings of this Court and the logic of the constitutional plan itself." *Id.* at 432-33 (Rehnquist, J., dissenting). The "States that ratified the Eleventh Amendment thought that they were putting an end to the possibility of

individual States as unconsenting defendants in foreign jurisdictions." *Id.* at 437. Otherwise, they had "perversely foreclosed the neutral federal forums only to be left to defend suits in the courts of other States." *Id.* The Eleventh Amendment "is thus built on the postulate that States are not, absent their consent, amenable to suit in the courts of sister States." *Id.* Justice Rehnquist concluded that the Court's decision "destroys the logic of the Framers' careful allocation of responsibility among the state and federal judiciaries, and makes nonsense of the effort embodied in the Eleventh Amendment to preserve the doctrine of sovereign immunity." *Id.* at 441.

2. The *Hall* Court's dismissal of the Framing-era consensus, the Eleventh Amendment experience, and previous precedents is difficult to fathom. In light of this trifecta, *Hall* is far from a "'well reasoned'" decision meriting *stare decisis*. *Citizens United v. FEC*, 558 U.S. 310, 362-63 (2010) (quoting *Montejo v. Louisiana*, 556 U.S. 778, 793 (2009)).

a. The Framing-era consensus on sovereign immunity is clear: Both before independence and under the Articles of Confederation, the original States enjoyed sovereign immunity from suit in each others' courts. This immunity derived not just from "'the common-law immunity from suit traditionally enjoyed by sovereign powers,'" *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030-31 (2014), but also from the law of nations governing relations between separate sovereigns, *see* James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 Cal. L. Rev. 555, 582 (1994). Immunity under the law of nations "rested on the

theory that all sovereigns were equal and independent and that one sovereign was therefore not obliged to submit to the jurisdiction of another's courts." *Id.* at 583. During the pre-Constitution period, "the states regarded themselves and one another as sovereign states within the meaning of the law of nations, thereby possessing law-of-nations sovereign immunity." *Id.* at 584; *see also* Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 Harv. L. Rev. 1559, 1574-75 (2002).

Nathan v. Virginia, 1 U.S. (1 Dall.) 77 (1781), is instructive. There, a Pennsylvania citizen brought suit in the Pennsylvania courts in an effort to attach property belonging to the Commonwealth of Virginia. The case "raised such concerns throughout the States that the Virginia delegation to the Confederation Congress sought the suppression of the attachment order," *Hall*, 440 U.S. at 435 (Rehnquist, J., dissenting), claiming that it was "a violation of the laws of nations," *Nathan*, 1 U.S. at 77. Pennsylvania's attorney general, William Bradford, urged that the case be dismissed on the grounds that each State is a sovereign, and "every kind of process, issued against a sovereign, is a violation of the laws of nations; and is in itself null and void." *Id.* at 78. The Pennsylvania court agreed and dismissed the case. *Id.* at 80.

Nathan constitutes "a decisive rejection of state suability in the courts of other states." Pfander, *supra*, at 587. Other contemporaneous decisions likewise affirmed that one sovereign State could not be compelled to appear in another State's courts. *See, e.g.*, *Moitez v. The South Carolina*, 17 F. Cas. 574 (Adm. 1781) (No. 9697) (Pennsylvania court

dismissing action brought by South Carolinians because attached vessel was owned by "sovereign independent state" of South Carolina). The absence of additional reported cases is a testament to the obviousness of these outcomes: While it would have been tempting for a private citizen to try to redress his grievance with another colony or State in the citizen's own courts, the consensus view that such suits were barred by sovereign immunity deterred such efforts.

b. The consensus that the thirteen original States entered the Union immune from suit in each other's courts is so overwhelming that it can be disregarded only by dismissing its significance (as in *Hall*) or by deeming it superseded by the ratification of the Constitution. After all, if the unquestioned immunity flowed in part from the law of nations, then the partial sacrifice of the colonies' independent sovereignty could have compromised the immunity. But it is clear that ratification did not disturb the States' immunity from involuntary suit in the courts of other States. To the contrary, in debating Article III, the Framers repeatedly recognized that in the new Republic, as before, a State could not be involuntarily haled into another State's courts. Indeed, that was the shared premise for much of the debate concerning Article III.

While there was no obvious reason to think the new Constitution would undermine the States' immunity from suit in their own courts or each others' courts, the question of state sovereign immunity *in the new federal courts* was a central question during the debate over Article III's proposed extension of the "judicial Power" of the United States to cases "between a State and Citizens of another State." U.S. Const. art.

III, §2, cl.1. Antifederalists who assailed this provision premised their arguments on the fact that, up to that point, States had not been amenable to suit in *any* court without consent. For example, the Federal Farmer compared Article III's requirement that a State be "oblige[d] … to answer to an individual in a court of law" with the fact that "the states are now subject to *no such actions*." *Federal Farmer No. 3* (Oct. 10, 1787) in 4 The Founders' Constitution 227 (Philip B. Kurland & Ralph Lerner, eds., Chicago 1987) (emphasis added).[8] Similarly, the Antifederalist Brutus attacked Article III for requiring States to "answer in courts of law at the suit of an individual," noting that "[t]he states are now subject to *no such actions*." Brutus No. 13 (Feb. 21, 1788), in 4 *The Founders' Constitution* 237, 238 (emphasis added).

Ratification proponents offered two conflicting responses to these arguments, but neither camp took issue with the premise that suits by a citizen of one State against a different nonconsenting State were entirely unprecedented. In the first camp were Federalists whose views would be temporarily vindicated in *Chisholm v. Georgia.* They contended that Article III *did* abrogate State sovereign immunity in such suits and viewed the provision of a federal forum for suits that could not otherwise be brought as a virtue. They argued that Article III provided federal-court jurisdiction over suits by individuals

[8] And while the Federal Farmer criticized the balance of Article III as redundant, he pointedly excepted the suits against state defendants: "Actions in all these cases, *except against a state government*, are now brought and finally determined in the law courts of the states respectively." *Id.* (emphasis added).

against States precisely because of the "impossibility of calling a sovereign state before the jurisdiction of another sovereign state." Edmund Pendleton, *Speech to the Virginia Ratifying Convention* in 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 549 (Jonathan Elliot ed., 1836) (hereinafter *Elliot's Debates*). As another proponent of this view, Edmund Randolph, the Nation's first Attorney General, remarked in his 1790 Report on the Judiciary: "[A]s far as a particular state can be a party defendant, a sister state cannot be her judge." Edmund Randolph, *Report of the Attorney-General to the House of Representatives*, reprinted in 4 The Documentary History of the Supreme Court of the United States, *1789-1800* 130 (Maeva Marcus, ed., Columbia 1992). Significantly, Randolph added that the Constitution does not "narrow this exemption; but *confirms* it." *Id.* (emphasis added).

The second camp consisted of Federalists whose views would ultimately be vindicated in the Eleventh Amendment. They urged that the Antifederalists were misreading Article III, which they read as *not* abrogating State sovereign immunity in suits brought by individuals. But while these leading ratification proponents took issue with the Antifederalist view of what Article III accomplished, they fully embraced the premise that a suit by a private individual against a nonconsenting State was an unprecedented novelty. Indeed, they emphasized the absurdity of such suits as part and parcel of the reason that Article III did not authorize them in federal court. Alexander Hamilton wrote, "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent," an immunity "now enjoyed by the

government of every State in the Union." The Federalist No. 81, at 487 (Clinton Rossiter ed. 1961) (Hamilton). Hamilton added that this immunity would "remain with the States" absent a "surrender of this immunity" in the Constitution. *Id.* At the Virginia convention, James Madison similarly argued, "It is not in the power of individuals to call any state into court." 3 *Elliot's Debates* 533. John Marshall claimed, "It is not rational to suppose that the sovereign power should be dragged before a court." *Id.* at 555.[9]

In short, "Article III was enacted against a background assumption that the states could not entertain suits against one another." Woolhandler, *supra*, at 263. Interstate sovereign immunity was the "foundation on which all sides of the framing era debates" premised their arguments regarding the reach of Article III. *Id.* at 253.

c. This foundational premise was equally manifest in the adoption of the Eleventh Amendment.

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[9] Because these remarks arose in a debate over federal-court jurisdiction, they might conceivably be construed as narrowly addressing only the impossibility of federal-court jurisdiction over suits against nonconsenting States. But with their references to what is "inherent in the nature of sovereignty" and the relative powers of individuals and sovereigns, they "most plausibly included suits in the courts of another state" as well. Woolhandler, *supra*, at 256-57. Moreover, the Framers were well familiar with the *Nathan* case, which recognized States' immunity in other States' courts. Not only was the case well-publicized, but Madison was one of the Virginia delegates who sought the case's dismissal, while Marshall was later appointed to resolve the dispute. *See* Pfander, *supra*, at 586-87; 8 The Papers of James Madison 68 n.1 (Robert A. Rutland et al. eds., 1973).

In *Chisholm v. Georgia*, the Court sided with the first camp of Federalists, including Edmund Randolph (who argued the case for Chisholm), and held that federal-court jurisdiction under Article III did, in fact, extend to suits brought against one State by a citizen of another State. The decision was, to say the least, not popular. As Charles Warren has described it, the decision "fell upon the country with a profound shock." Charles Warren, 1 The Supreme Court in United States History 96 (rev. ed. 1926). While the Eleventh Amendment was the most concrete and enduring response to that decision, it was not the only one. The Massachusetts Legislature, for example, denounced the decision as "repugnant to the first principles of a federal government"; more dramatically, the House of Representatives in Georgia enacted a bill making any effort to enforce *Chisholm* a felony punishable by death "without benefit of clergy." *See Alden v. Maine*, 527 U.S. 706, 720-21 (1999). The notion that the Framing generation would condemn suits by private citizens against another State in the neutral federal courts this harshly and universally, but nonetheless tolerate such suits in the home state courts of such a citizen strains all credulity. And the strong affirmations of broad sovereign immunity following *Chisholm* confirm that such immunity was assumed in—and confirmed by—the Eleventh Amendment's passage.

For example, the Connecticut legislature pronounced that "no State can on any Construction of the Constitution be held liable ... to make answer *in any Court*, on the Suit, of any Individual or Individuals whatsoever." *Resolution of the Connecticut General Assembly* (Oct. 29, 1793) in 5

Documentary History of the Supreme Court 609 (emphasis added). The Virginia legislature declared that "a state cannot … be made a defendant at the suit of any individual or individuals." *Proceedings of the Virginia House of Delegates* (Nov. 28, 1793) in 5 Documentary History of the Supreme Court 338, 339 n.1. The South Carolina Senate stated that "the power of compelling a State to appear, and answer to the plea of an individual, is utterly subversive of the separate dignity and reserved independence of the respective States." *Proceedings of the South Carolina Senate* (Dec. 17, 1793) in 5 Documentary History of the Supreme Court 610-11. And in a speech to the Massachusetts General Court, John Hancock rejected the notion that "each State should be held liable to answer … to every individual resident in another State or in a foreign kingdom." *John Hancock's Address to the Massachusetts General Court* (Sept. 18, 1793) in 5 Documentary History of the Supreme Court 416.

As the *Hall* dissenters emphasized, these objectors to *Chisholm*, and indeed all those who sought and obtained the Eleventh Amendment's passage, were not embracing the illogical proposition that Georgia *could not* be sued by Chisholm in *federal* court, but *could* be sued by Chisholm in South Carolina *state* court. "If the Framers were indeed concerned lest the States be haled before the federal courts … how much more must they have reprehended the notion of a State's being haled before the courts of a sister State." *Hall*, 440 U.S. at 431 (Blackmun, J., dissenting) (citation omitted). After all, the federal courts were intended to be a neutral forum for interstate disputes. A State would surely *rather* be

tried in that neutral federal forum than before a partisan jury and judge in another State's courts. If the former was repugnant and profoundly shocking, the latter was wholly unthinkable. It would produce confrontations between States wholly incompatible with the basic design of the new Republic. The States that ratified the Eleventh Amendment would not have "perversely foreclosed the neutral federal forums only to be left to defend suits in the courts of other States." *Id.* at 437 (Rehnquist, J., dissenting). To conclude otherwise "makes nonsense of the effort embodied in the Eleventh Amendment." *Id.* at 441.[10]

d. This Court's decisions predating *Hall* uniformly reflect the Framers' view that nonconsenting States could not be subject to suit anywhere, including in other States' courts. In *Beers v. Arkansas*, the Court stated that it "is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, *or in any other*, without its consent and permission." 61 U.S. (20 How.) 527, 529 (1857) (emphasis added). In *Cunningham v. Macon & B. R. Co.*, 109 U.S. 446 (1883), the Court was equally clear: "[N]either a state nor the United States can be sued as defendant *in any court in this country* without their consent." *Id.* at 451 (emphasis added); *see also Hans v. Louisiana*, 134 U.S.

[10] It bears noting that this "nonsense" results under any reading of the Eleventh Amendment. Even under the narrowest view of the Amendment and the federal-court cases it eliminates—a view this Court has repeatedly rejected, *see*, *e.g.*, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54, 67-70 (1996)—it makes no sense to conclude that the Eleventh Amendment rendered Georgia immune from suit in this Court, but fully subject to Chisholm's action in South Carolina state court.

1, 16 (1890) (same). And in *Western Union Telegraph Co. v. Pennsylvania*, 368 U.S. 71 (1961), the Court held that because the State of New York was a necessary party to proceedings commenced in the Pennsylvania courts, those proceedings must be dismissed, since the Pennsylvania courts have "no power to bring other States before them." *Id.* at 80.

The States, too, recognized this same general principle. For example, in *Paulus v. South Dakota*, 227 N.W. 52 (1929), the North Dakota Supreme Court affirmed the dismissal of a citizen's suit against a sister State. It held that "so carefully have the sovereign prerogatives of a state been safeguarded in the Federal Constitution," that "no state could be brought into the courts of the United States at the suit of a citizen of another state." *Id.* at 54-55. It added that involuntarily haling one State into the courts of a sister State would be inconsistent "with any sound conception of sovereignty." *Id.* at 55. Similarly, when New Hampshire wanted to help its citizens recover debts owed by other States, it did not assert a power to simply entertain suits against sister States in its own courts. Instead, it enacted a statute permitting citizens to assign claims to it, which the State would then pursue in original actions before this Court. *See New Hampshire v. Louisiana*, 108 U.S. 76, 76-77 (1883).[11]

[11] New Hampshire's attempted original action highlights the connection between such State-versus-State actions and citizen-versus-State actions. The unamended Constitution provided a neutral federal forum for both on the assumption that sovereign immunity precluded any other forum for either type of suit. The Eleventh Amendment eliminated a federal forum for the latter suits and thus foreclosed any forum for such suits. But the notion

Indeed, shortly after *Hall* was decided, state supreme courts expressed surprise at the decision. Barely one year after *Hall*, the New York Court of Appeals remarked that it had been "long thought that a State could not be sued by the citizens of a sister State except in its own courts." *Ehrlich-Bober & Co. v. Univ. of Houston*, 404 N.E.2d 726, 729 (N.Y. 1980). The Iowa Supreme Court likewise observed, "For the first two hundred years of this nation's existence it was generally assumed that the United States Constitution would not allow one state to be sued in the courts of another state," based on the theory that "this immunity was an attribute of state sovereignty that was preserved in the Constitution." *Struebin v. State*, 322 N.W.2d 84, 85 (Iowa 1982); *see also Kent Cty. v. Shepherd*, 713 A.2d 290, 297 (Del. 1998) ("For almost two hundred years, it had been assumed that the United States Constitution implicitly prohibited one state from being sued in the courts of another state—just as the Eleventh Amendment explicitly prohibited states from being sued in federal courts.").[12]

3. *Hall* engaged with almost none of the foregoing history or precedent. *See* Gary J. Simson, *The Role of History in Constitutional Interpretation: A Case*

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that a South Carolina citizen could sue Georgia in South Carolina court was, for the Framing generation, equally as absurd as the notion that the State of South Carolina could sue Georgia in South Carolina court.

[12] Before *Hall*, suits against States in sister States' courts were very infrequently maintained, but these "few suits" were predicated on "extant federal-court exceptions to state and federal governmental immunities," not a rejection of the general principle of interstate sovereign immunity. *See* Woolhandler, *supra*, at 276-82.

Study, 70 Cornell L. Rev. 253, 270 (1985) ("[T]he Court in *Hall* gave history far less than its due."). Indeed, to the extent *Hall* addressed the historical record at all, it *conceded* that States could not be involuntarily haled into sister States' courts at the Framing. But the full historical record—which *Hall* ignored—establishes much more than that. It demonstrates the error of *Hall*'s casual premise that interstate sovereign immunity was "apparently not a matter of concern when the new Constitution was being drafted and ratified." 440 U.S. at 418-19. And it shows that even if the need for express "constitutional protection" against States' being haled into other States' courts "was not discussed" extensively, *id.* at 419, that relative silence reflects the absurdity of a private citizen suit haling a sovereign State into the citizen's home state courts, as well as the obviousness that immunity from such suits was preserved and reinforced by the Constitution. The States' continued immunity from such suits was "too obvious to deserve mention." *Id.* at 431 (Blackmun, J., dissenting).

Furthermore, *Hall* simply declared—without any meaningful analysis—that neither Article III nor the Eleventh Amendment provides "any basis, explicit or implicit," for recognizing a constitutional principle of interstate sovereign immunity. 440 U.S. at 421. But *Hall* was plainly wrong on both counts. The debates over Article III proceeded on the fundamental premise that States could not and would not otherwise be haled into *any court* by a private citizen. And as Edmund Randolph remarked, the Constitution did not "narrow" the Framers' clearly held understanding of interstate sovereign immunity; it "confirm[ed]" it. Moreover, any remaining doubt is erased by the

reaction to *Chisholm* and the Eleventh Amendment. The notion that the Eleventh Amendment simply cleared the way for Chisholm to sue Georgia in the South Carolina courts is risible. When both dissenting opinions in *Hall* emphasized as much, the majority did not even try to muster a response.

Hall also failed to acknowledge, much less explain its departure from, numerous earlier Court decisions reflecting the longstanding premise that States' sovereign immunity protected them from suit in the courts of their sister States. That alone is a basis for rejecting its novel holding. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 64 (1996); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 232 (1995); *United States v. Dixon*, 509 U.S. 688, 704, 712 (1993). And the only state-court decision regarding interstate sovereign immunity that it discussed was *Paulus*, which *affirmed* the federal constitutional dimension of interstate sovereign immunity. *See Hall*, 440 U.S. at 417 n.13.

In short, *Hall*'s reasoning lacks the "'careful analysis'" that warrants application of *stare decisis*. *Arizona v. Gant*, 556 U.S. 332, 348 (2009) (quoting *Lawrence v. Texas*, 539 U.S. 558, 577 (2003)). Its sudden, spurious rejection of the firmly entrenched principle of interstate sovereign immunity—recognized before the Nation's independence, under the Articles of Confederation, during and following the ratification of the Constitution, and for almost 200 years afterward—was "'unsound in principle,'" *Allied-Signal, Inc. v. Dir., Div. of Taxation*, 504 U.S. 768, 783 (1992) (quoting *Garcia v. San Antonio Metro. Transit*

Auth., 469 U.S. 528, 546 (1985)), and does not merit this Court's reaffirmation.[13]

B. *Hall* Is Inconsistent With the Court's More Recent and Better Reasoned Sovereign Immunity Jurisprudence.

Hall is not only unpersuasive on its own terms; it also conflicts with this Court's subsequent, and better reasoned, sovereign immunity precedents. Indeed, "[t]he reasoning of the Court's more recent jurisprudence has rejected" almost every rationale on which *Hall* was based, fatally "undermin[ing] [its] doctrinal underpinnings." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 887 (2007) (quotation marks omitted); *see also United States v. Gaudin,* 515 U.S. 506, 521 (1995); *South Carolina v. Baker*, 485 U.S. 505, 520 (1988); *United States v. Salvucci*, 448 U.S. 83, 88-89 (1980).

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[13] Several factors may have contributed to *Hall*'s less-than-robust reasoning. First, the California Supreme Court decision resulting in *Hall* rejected the State's claim of sovereign immunity on different grounds from those embraced in *Hall*. That court had relied on since-discarded waiver principles to conclude that Nevada had waived its sovereign immunity in California by "enter[ing] into activities in this state," and thus did not address the scope of the (waived) immunity. *Hall v. Univ. of Nevada*, 503 P.2d 1363, 1364 (Cal. 1972); n.15, *infra*. Second, before this Court, the *Hall* respondents largely advanced that same waiver argument and barely addressed the constitutional issues. *See* Br. of Resp'ts, *Hall*, 1978 WL 206995, at *15-16. The Court thus lacked the robust adversarial presentation that contributes to sound decisionmaking. *See Penson v. Ohio*, 488 U.S. 75, 84 (1988) ("[T]ruth … is best discovered by powerful statements on both sides of the question." (quotation marks omitted)).

To begin with, *Hall* casually dismissed the Framing-era view of interstate sovereign immunity. It acknowledged that the Framers would have viewed the sovereign as immune from suits in other States, but accorded that critical fact no constitutional significance. Subsequent decisions, however, have explained that in determining "the scope of the States' constitutional immunity from suit," the Court looks to "'history and experience, and the established order of things,'" which "reveal the original understanding of the States' constitutional immunity from suit." *Alden*, 527 U.S. at 726-727 (quoting *Hans v. Louisiana*, 134 U.S. 1, 14 (1890)). States enjoy the sovereign immunity that they "enjoyed before the ratification of the Constitution … except as altered by the plan of the Convention or certain constitutional Amendments." *Id.* at 713. And "the Constitution was not intended to 'rais[e] up' any proceedings against the States that were 'anomalous and unheard of when the Constitution was adopted.'" *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 755 (2002) (*FMC*); *see also N. Ins. Co. of N.Y. v. Chatham Cty.*, 547 U.S. 189, 193 (2006); *Seminole Tribe*, 517 U.S. 44, 70 & n.12 (1996); *Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 780-82 (1991).

These principles apply with full force here and underscore *Hall*'s error. The historical record clearly demonstrates that States were not subject to involuntary suit in other States' courts either "at the time of the founding or for many years thereafter." *FMC*, 535 U.S. at 755. Before ratification, the States enjoyed sovereign immunity in each others' courts, and nothing in the "plan of the Convention" or subsequent amendments was inconsistent with that

rule; to the contrary, the plan of the Convention and the Eleventh Amendment both confirmed it. *Alden*, 527 U.S. at 713. If an independent nation had purported to open its courts to allow one of its citizens to sue an unconsenting foreign sovereign, it would have violated the law of nations and been a serious affront to the foreign sovereign, prompting diplomatic (if not military) countermeasures. The plan of the convention was to knit the States together into a single Republic in which States treated each other with the dignity befitting co-equal States, but not the diplomacy that dictates relationships between unrelated sovereigns. Preserving the pre-existing immunity of the States from suits in each others' courts avoids serious affronts to each others' sovereignty and guarantees that no sovereign State can be haled into any courts in the United States other than as expressly provided for in the Constitution.

Moreover, the notion that an individual could hale an unconsenting sister State into his home State's courts was indisputably "anomalous and unheard of" at the Framing. *FMC*, 535 U.S. at 755. Indeed, "no one, not even the Constitution's most ardent opponents, suggested the document might strip the States of the immunity" they enjoyed in other States' courts. *Alden*, 527 U.S. at 741. To the contrary, proponents *and* opponents of the Constitution shared the contrary premise and disputed only whether such suits could proceed in the newly formed federal courts. And the Eleventh Amendment decisively answered that question and underscored that a private suit against an unconsenting State was an affront to state sovereignty *even if* the suit proceeded in a neutral federal forum. The States' immunity from suit in less

neutral courts of other sovereigns was "a principle so well established that no one conceived it would be altered by the new Constitution." *Id.* In short, history provides "no reason to believe" that the Framers "intended the Constitution to preserve a more restricted immunity" than that widely recognized before—and for almost 200 years after—the Constitution's ratification. *Id.* at 735.

Hall also refused to "infer[]" sovereign immunity "from the structure of our Constitution." 440 U.S. at 426. Subsequent decisions, by contrast, have repeatedly treated sovereign immunity as a "fundamental postulate[] implicit in the constitutional design," *Alden*, 527 U.S. at 729, and a "presupposition of our constitutional structure," *Blatchford*, 501 U.S. at 779; *see also, e.g.*, *Va. Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1637-38 (2011) (*VOPA*); *FMC*, 535 U.S. at 751-53; *Seminole Tribe*, 517 U.S. at 54. These decisions recognize "the structural understanding that States entered the Union with their sovereign immunity intact" and "retained their traditional immunity from suit, 'except as altered by the plan of the Convention or certain constitutional amendments.'" *VOPA*, 131 S. Ct. at 1637-38 (quoting *Alden*, 527 U.S. at 713). *Hall* applied the opposite presumption. Rather than respecting sovereign immunity unless altered by the plan of the Convention, *Hall* treated sovereign immunity as sacrificed unless expressly preserved by the Constitution.

Relatedly, *Hall* effectively limited sovereign immunity to the words of Article III and the Eleventh Amendment. *See* 440 U.S. at 421, 424-27. Subsequent

decisions, though, have recognized that the Constitution implicitly protects principles of sovereign immunity that go beyond the literal text. *See, e.g.*, *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 445 (2004); *FMC*, 535 U.S. at 753; *Alden*, 527 U.S. at 728-29; *Seminole Tribe*, 517 U.S. at 54; *Blatchford*, 501 U.S. at 779. And, as noted, those decisions observe that the Constitution itself protects that immunity to the extent it is not inconsistent with the plan of the Convention. Thus the absence of express constitutional language speaking directly to interstate sovereign immunity does not, as *Hall* indicated, undermine the proposition that the Constitution shields the States in this regard.

And while the Constitution's text does not expressly mention sovereign immunity for suits like Hyatt's, both Article III and the Eleventh Amendment presume it. Article III's provision of a federal forum for suits between States and between a citizen and another State were both premised on the understanding that in the absence of a federal forum, such disputes could not be resolved through litigation. Rather than allow such disputes to fester, Article III provided a federal forum premised on the inability of such disputes to be litigated in state court against an unconsenting State. *Cf. Chisholm*, 2 U.S. (2 Dall.) at 468 (opinion of Cushing, J.). When the Eleventh Amendment withdrew a federal forum for disputes between citizens and other States, it reinforced that such disputes could not proceed *in any court*, even a neutral federal forum, indeed even in this Court. To construe the Eleventh Amendment as anything other than a recognition that Chisholm could sue Georgia in neither South Carolina court nor a federal court is not

just ahistorical, but absurd. As the *Hall* dissenters observed (without rebuttal), it would be utterly illogical for the States to have swiftly, and indignantly, eliminated a neutral federal forum for hearing such suits against them, but to have intended to leave themselves open to the same suits in the less-impartial forum of another State's courts. *See Hall*, 440 U.S. at 431 (Blackmun, J., dissenting); *id.* at 437 (Rehnquist, J., dissenting).

Finally, *Hall* acknowledged but essentially dismissed the significance of State sovereignty at the Framing. *See* 440 U.S. at 416-17. Later decisions, however, have emphasized the critical role of that sovereignty in upholding sovereign immunity. "Upon ratification of the Constitution, the States entered the Union 'with their sovereignty intact.'" *Sossamon*, 131 S. Ct. at 1657 (quoting *FMC*, 535 U.S. at 751); *Blatchford*, 501 U.S. at 779. "Immunity from private suits has long been considered 'central to sovereign dignity.'" *Id.* (quoting *Alden*, 527 U.S. at 751); *see also Bay Mills*, 134 S. Ct. at 2039 ("Sovereignty implies immunity from lawsuits."). Sovereign immunity "is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution." *Alden*, 527 U.S. at 713. Given the States' indisputable sovereignty at the time of ratification, they continue to enjoy the sovereign immunity accorded to such sovereigns, which includes immunity from suit in other States' courts.[14]

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[14] At the Framing, the States "did surrender a portion of their inherent immunity" by consenting to a small class of suits, like suits brought by sister States in this Court or suits by the federal government in the federal courts. *FMC*, 535 U.S. at 752 (citing

Indeed, following *Hall*, the Court has held that Indian tribes are generally immune from suits by individuals in State courts. *See Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 760 (1998); *cf. Bay Mills*, 134 S. Ct. at 2036-39 (reaffirming *Kiowa*). Accordingly, if a State and a tribe are involuntarily haled into a State court—a foreign jurisdiction for either party—the tribe has sovereign immunity, but the State does not. That is so even though tribes arguably possess *less* sovereignty than States. *See Bay Mills*, 134 S. Ct. at 2030-31 (noting the "qualified nature of Indian sovereignty"). It is "strikingly anomalous" that Indian tribes have "broader immunity than the States." *Kiowa*, 523 U.S. at 765 (Stevens, J., dissenting). Yet that is the unavoidable result of *Hall*'s failure to recognize the significance of State sovereignty at the Framing when evaluating sovereign immunity, in contrast with later decisions of this Court.[15]

Alden, 527 U.S. at 755). But as explained, nothing in the "plan of the Convention" indicates consent to suits by individuals in other States' courts. *Alden*, 527 U.S. at 755.

[15] Notably, the California Supreme Court decision that led to *Hall* has also been overtaken by subsequent precedent. In rejecting Nevada's sovereign immunity in California courts, the California Supreme Court principally relied on *Parden v. Terminal Ry. of Ala. Docks Dep't*, 377 U.S. 184 (1964), and added that "in a society such as ours … the doctrine of sovereign immunity must be deemed suspect." *Hall*, 503 P.2d at 1364, 1366; *see also* n.13, *supra*. But this Court has since overruled *Parden*, *see College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680 (1999), and has repeatedly rejected the notion that sovereign immunity is a "suspect" doctrine.

In sum, while *Hall* was wrong the day it was decided, subsequent decisions have undermined every pillar on which the decision rested. *Hall* is simply incompatible with both the reasoning and results of this Court's later, sounder sovereign immunity decisions. Embodying "a significant change in, or subsequent development of, our constitutional law" respecting sovereign immunity, *Agostini v. Felton*, 521 U.S. 203, 235-36 (1997), those decisions have established that States possess sovereign immunity from individual suits in federal court, *see Seminole Tribe*, 517 U.S. at 54, 57-60, federal administrative adjudications, *see FMC*, 535 U.S. at 747, and their own courts, *see Alden*, 527 U.S. at 712; and that even Indian tribes are immune from suits in State courts, *see Kiowa*, 523 U.S. at 753.

The notion that a nonconsenting sovereign State is immune from suit in its own courts, is generally immune from suit in a neutral federal forum, but can nonetheless be haled into the potentially hostile courts of another State, is an anomaly too odd to sustain.[16] It is no accident that while the Court failed to reach the issue in its decision, numerous Justices in the *Hyatt I* oral argument rightly called the rule of *Hall* "very odd" (Justice Kennedy), a "tremendous anomaly" (Justice Breyer), and, most colorfully, "totally out of whack with our constitutional structure" (Justice O'Connor). *See* J.A.181, 183, 188. Commentators have likewise noted *Hall*'s incompatibility with subsequent

[16] The related "removal anomaly" is on full display here: FTB removed this case to federal court, which remanded after Hyatt argued (correctly) that "the Eleventh Amendment forecloses federal district court jurisdiction." J.A.289, 293.

precedent. *See* Richard H. Fallon, Jr., et al., *Hart & Wechsler's The Federal Courts & The Federal System* 937 n.2 (6th ed. 2009) (noting the "difficulty of reconciling Hall's rationale with that of Alden v. Maine"); Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 Notre Dame L. Rev. 1011, 1037-38 n.110 (2000).[17] Thus while *Hall* was a novel decision when it first appeared, it is now a jurisprudential outlier that can be overruled without threatening other precedents of this Court.

C. *Hall* Is Unworkable in Practice, Demeans States' Dignity, and Creates Interstate Friction.

Hall has also proven both doctrinally and practically "unworkable." *Montejo*, 556 U.S. at 792 (2009) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)); *see also Johnson v. United States*, 135 S. Ct. 2551, 2562-63 (2015); *Seminole Tribe*, 517 U.S. at 63; *Dixon*, 509 U.S. at 712. To begin with, *Hall* replaced the previous "rational jurisdictional structure," which recognized States' sovereign immunity from suit in other States' courts, with a doctrinal morass where "restraints on suits against states in other states' courts now largely depend on the forum state's decisions as to law and comity." Woolhandler, *supra*,

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[17] Hyatt has tepidly suggested that this Court reaffirmed *Hall* in *Alden*. Br. in Opp. 21-22. But *Alden* resolved a different issue and expressly distinguished *Hall* without suggesting that *Hall* was correctly decided. *Alden*'s reasoning, moreover, echoes the *Hall* dissents, is irreconcilable with the *Hall* majority's view of the constitutional structure and Eleventh Amendment, and underscores *Hall*'s incompatibility with a whole host of sovereign immunity decisions that followed it.

at 286. As a result, a State has no way of knowing whether, and to what extent, a particular forum State will confer any immunities upon it in any particular suit. And whatever immunities a State receives at one time says nothing about what immunities it may (or may not) receive on different claims, under different immunity provisions, or when different policies are invoked.

This case provides a perfect example. Here, the *same* Nevada statute both caps compensatory damages and prohibits punitive damages against state agencies. *See* Nev. Rev. Stat. §41.035(1). The Nevada Supreme Court applied the punitive damages prohibition to FTB—because "punitive damages would not be available against a Nevada government entity," Pet.App.65—but *refused* to apply the compensatory damages cap to FTB—because the State's "policy interest in providing adequate redress to Nevada citizens is paramount to providing FTB" that protection. Pet.App.45. The first explanation, of course, is fully applicable to the compensatory damages cap; and depending on one's justification for punitive damages, the second explanation could apply to the punitive damages prohibition. The Nevada legislature made no distinction between the two, and the California legislature categorically barred suits of this type, but *Hall* leaves the contours of California's sovereign immunity to the policy whims of the Nevada courts. And not just Nevada's courts, because under *Hall*, California can be haled into state courts in 48 other States, each with its own provisions and policies.

This Court also need look no further than this case to appreciate *Hall*'s practical unworkability.

From its filing to the first day of trial, Hyatt's suit dragged California through ten years of litigation—including a previous trip to this Court—and untold financial and administrative burdens.[18] Once the case finally reached trial, the Nevada jury below was happy to side with a fellow Nevadan against the California tax authorities and award him some $388 million in damages, which the Nevada trial court raised to over $490 million after costs and interest. Since trial, California has spent another seven years fighting that verdict, and it will face another trial on remand if this Court upholds *Hall*.

This suit has also encouraged others outside California to file similar complaints, raising the prospect of comparable litigation going forward. *See, e.g.*, Complaint, *Schroeder v. California*, No. 14-2613 (Dist. Ct. Nev. filed Dec. 18, 2014) (alleging "extreme and outrageously tortious conduct" by FTB); Complaint, *Satcher v. Cal. Franchise Tax Bd.*, No. 15-2-00390-1 (Wash. Super. Ct. filed June 17, 2015) (alleging fraud by FTB). These suits are highly regrettable yet, given *Hall*, entirely unsurprising. Sovereign governments undertake a number of sovereign responsibilities that are inherently unpopular. Taxation is near the top of that list, which is why California and other jurisdictions generally decline to waive their sovereign immunity over tax disputes. *See* Cal. Gov't Code §860.2; 28 U.S.C. §2860(c). To the extent a sovereign partially waives its sovereign immunity in its own courts, it can rely on the terms of its waiver and the jury's sense that a large

[18] The trial court docket alone contains almost *three thousand* entries.

verdict against the sovereign will ultimately be footed by members of the jury as taxpayers. But when a Nevada jury knows that California taxpayers will pay the tab, there is no obvious source of restraint, as the jury's verdict here attests. What is more, an increasingly mobile citizenry creates ample opportunities for suits like this one. Indeed, this case has already been used to encourage California residents to move to Nevada for tax-avoidance purposes, since it "should temper the FTB's aggressiveness in pursuing cases against those disclaiming California residency." David M. Grant, *Moving From Gold to Silver: Becoming a Nevada Resident*, Nev. Law., Jan. 2015, at 22, 25 n.9.

This case thus perfectly encapsulates the dangers of exposing States to unconsented suits in other States. Hyatt's seventeen-year (and counting) suit in the Nevada courts has manifestly demeaned California's "dignity and respect," which sovereign immunity is "designed to protect." *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 268 (1997). And it will almost certainly force California to alter "'the course of [its] public policy and the administration of [its] public affairs'" when it comes to taxation, *Alden*, 527 U.S. at 750 (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)), even though the "power to … enforce income tax laws" is an "essential attribute of sovereignty." *Hyatt I*, 538 U.S. at 498. After all, if California can be liable for fraud and intentional infliction of emotional distress for conduct arising out of tax audits, it will naturally scale back its auditing efforts in the future to avoid such liability, particularly for taxpayers who have purported to move to another jurisdiction whose courts will be open to suits against FTB. Moreover,

the constant threat of litigation and the inability to predict whether any particular sister State will confer immunities create an incentive for California to err on the side of underenforcement. In short, *Hall* imposes "substantial costs" on "the autonomy, the decisionmaking ability, and the sovereign capacity" of the State when it comes to this core sovereign function. *Alden*, 527 U.S. at 750.

This suit also "threaten[s] the financial integrity of" California. *Id.*; *see also FMC*, 535 U.S. at 765 (observing that "state sovereign immunity serves the important function of shielding state treasuries"). The State has spent untold amounts of taxpayer money defending against Hyatt's suit, and that is before accounting for the damages awarded below and potentially to come. While the Nevada Supreme Court trimmed the trial court's half-*billion* dollar judgment, the prospect of any damages award against California "place[s] unwarranted strain on [its] ability to govern in accordance with the will of [its] citizens." *Alden*, 527 U.S. at 750-51. And damages to the tune of $1 million and counting, which California must pay absent this Court's reversal, necessarily crowd out "other important needs and worthwhile ends" that California's public fisc must fund. *Id.* at 751.

In short, this case emphatically illustrates the "severe strains on our system of cooperative federalism" against which the *Hall* dissenters warned. *Hall*, 440 U.S. 429-30 (Blackmun, J., dissenting). If the Framers would have "reprehended the notion of a State's being haled before the courts of a sister State," *id.* at 431, a suit like this one would have left them aghast. This case firmly demonstrates the obvious

flaws of *Hall* and the virtues of applying the sovereign immunity principles this Court has repeatedly recognized both before and after *Hall*.

And while this egregious case has amply "'pointed up [*Hall*'s] shortcomings,'" *Citizens United*, 558 U.S. at 363 (quoting *Pearson v. Callahan*, 555 U.S. 223, 233 (2009)), those flaws arise in every case in which a nonconsenting State is haled into the courts of a sister State. Recently, for example, *Nevada* was involuntarily haled into the *California* courts against its will. *See* Petition for Writ of Certiorari, *Nevada v. City & Cty. of S.F.*, 2015 WL 981686 (U.S. Mar. 4, 2015) (No. 14-1073), *cert. denied*, 135 S. Ct. 2937 (U.S. June 30, 2015). In that case, the plaintiff, a California municipality, has demanded monetary and equitable relief based on Nevada's policy of providing vouchers to indigent medical patients discharged from a State-run facility, who occasionally use them to travel to California. A decision in favor of the plaintiff—or even a settlement—will almost certainly require Nevada to pay out of the public fisc and to alter its State policy, both of which sovereign immunity is designed to prevent. More generally, the spectacle of two States being sued in each other's courts confirms the *Hall* dissenters' prediction that discarding interstate sovereign immunity would supplant cooperative federalism with a race-to-the-bottom. *See* 440 U.S. at 429-30 (Blackmun, J.).

In his brief in opposition, Hyatt emphasized *Hall*'s belief that the "voluntary doctrine of comity" would prevent States from subjecting sister States to suit. Br. in Opp. 21-22 & n.7. But, as this case demonstrates, vague principles of comity are no

substitute for a simple rule that States are immune from suits in foreign jurisdictions unless and until the state legislature waives that immunity. That bright-line rules places responsibility for the metes and bounds of any waiver of sovereign immunity where it belongs—namely, in the same body that controls the public fisc—rather than in the hands of out-of-state judges wielding doctrines of comity.

D. No Other Interests Warrant *Hall*'s Preservation.

Stare decisis is "at its weakest" when the Court "interpret[s] the Constitution." *Agostini*, 521 U.S. at 235; *see also Seminole Tribe,* 517 U.S. at 63; *Gaudin*, 515 U.S. at 521; *Payne*, 501 U.S. at 828. And it has even further reduced force "'in the case of a procedural rule … which does not serve as a guide to lawful behavior,'" *Hohn v. United States*, 524 U.S. 236, 251-52 (1998) (quoting *Gaudin*, 515 U.S. at 521); *see also Payne*, 501 U.S. at 828; *Adarand*, 515 U.S. at 234, and where no "serious reliance interests are at stake," *Citizens United*, 558 U.S. at 365; *see also Johnson*, 135 S. Ct. at 2563; *Montejo*, 556 U.S. at 792.

These considerations all militate against preserving *Hall*, a constitutional decision regarding immunity, a matter that "does not alter primary conduct." *Hohn*, 524 U.S. at 252. And *Hall* has engendered no reliance interests, much less those the Court has deemed meaningful in this context. "Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved." *Payne*, 501 U.S. at 828; *see also State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). No such interests are implicated here; no

parties "have acted in conformance with existing legal rules in order to conduct transactions." *Citizens United*, 558 U.S. at 365. Nor does application of sovereign immunity leave *Hyatt* without a remedy to challenge the underlying tax assessment. To the extent that he would be left without a tort remedy, that is because a sovereign State declined to waive its immunity for such suits. And if Hyatt was relying on a continuing anomaly that allowed a suit in Nevada court that could not proceed in a California court or even in a neutral federal forum after the Eleventh Amendment, then his reliance was plainly unreasonable.

* * *

This case has dragged on for seventeen years, imposing untold costs upon California even before accounting for the damages awarded below. And there is no end in sight unless this Court reaffirms or reestablishes key principles of sovereign immunity. The Court should recognize that *Hall* was incorrect when decided, conflicts with this Court's subsequent precedents, has created an unworkable regime exemplified by this case, and should be overruled.

CONCLUSION

The Court should reverse the decision below.

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STATUTORY APPENDIX

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U.S. Const. art. III

Section 1.

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;— between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction,

both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3.

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

U.S. Const. art. IV

Section 1.

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2.

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section 3.

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more

States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section 4.

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence.

U.S. Const. amend. XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

No. 14-1175

IN THE
Supreme Court of the United States

FRANCHISE TAX BOARD
OF THE STATE OF CALIFORNIA,
Petitioner,
v.

GILBERT P. HYATT,
Respondent.

On Writ of Certiorari to the Supreme Court of Nevada

BRIEF FOR RESPONDENT

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October 23, 2015

QUESTIONS PRESENTED

1. Whether States have immunity as of right – rather than immunity as a matter of comity – in the courts of other States.

2. Whether petitioner has shown a "special justification" for setting aside principles of stare decisis and overruling *Nevada v. Hall*, 440 U.S. 410 (1979).

3. Whether the Full Faith and Credit Clause requires Nevada state courts to apply California's laws of sovereign immunity to a matter over which Nevada has legislative jurisdiction.

4. Whether the voluntary doctrine of comity requires Nevada state courts to apply California's laws of sovereign immunity when the Nevada courts have decided that it would be contrary to Nevada's sovereign interests to do so.

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INTRODUCTION

Now that this case has returned to the Court, the Board's principal argument turns out to be one that it did not even bother to make on the first go-round: that States have complete immunity as a matter of right in other States' courts. But the history of immunity among independent sovereigns – as the States once were and largely are today – flatly contradicts that theory. The relevant history shows unmistakably that, at the time of the Founding, sovereigns were not entitled to immunity as of right in other sovereigns' courts, but received immunity only as a matter of comity (i.e., with the consent of the home sovereign). *See Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). Nothing in the Constitution or plan of the Convention altered that preexisting balance between different sovereigns. Furthermore, the Court has already rejected the Board's immunity-as-of-right argument in *Nevada v. Hall*, 440 U.S. 410 (1979), relying on the careful analysis of competing sovereign interests set forth in *Schooner Exchange*, and the Board offers no "special justification" for suddenly dispensing with that established precedent. Thus, whether the Court now reexamines the States' immunity as an original matter or simply adheres to *Hall* under traditional principles of stare decisis, the result is the same: States do not have immunity as of right in other States' courts. The States are free to obtain that immunity through mutual agreement, but they have no right to insist upon immunity over the objection of the forum sovereign.

The Board's alternative argument, a convoluted attempt to exploit a Nevada law capping damages for Nevada officials, is similarly unavailing. Although

the Board has modified its previous position that Nevada courts must apply California law granting total immunity to the Board – limiting it now to awards above the amount of the Nevada cap – its new argument, like the old one, runs head-on into the controlling Full Faith and Credit Clause standard, which permits a State to apply its own law whenever it is "competent to legislate" about the subject matter of the suit. *See Franchise Tax Bd. of California v. Hyatt*, 538 U.S. 488, 494 (2003) ("*Hyatt I*") (internal quotations omitted). The Court has already found that Nevada satisfies that standard in this case, *see id*., and it is undisputed that Nevada law does not limit damages for out-of-state officials. Furthermore, the Board offers no authority for the illogical proposition that federal courts can *order* States to give "equal treatment" to other States as a matter of comity. It has been understood for centuries that granting comity is a voluntary act on a sovereign's part, and that doctrine thus provides no basis for the Board to forcibly elevate its own sovereignty over that of Nevada. The judgment below should be affirmed.

STATEMENT

1. The issues in this case arise out of a state-law tort suit, one of several disputes between respondent and petitioner California Franchise Tax Board. The original dispute stemmed from a residency tax audit initiated by the Board with respect to the 1991 and 1992 tax years. The principal issue in the tax matter involves the date that respondent, a former California resident, became a permanent resident of Nevada. Respondent contends that he became a Nevada resident in late September 1991, shortly before he received significant licensing income from

certain patented inventions. The Board has taken the position that respondent became a resident of Nevada in April 1992. The tax dispute remains the subject of ongoing proceedings in California.

The present suit concerns certain tortious acts committed by the Board against respondent. The evidence at trial showed that Board auditor Sheila Cox, as well as other employees of the Board, went well beyond legitimate bounds in their attempts to extract a tax settlement from Mr. Hyatt. Referring to respondent, the auditor declared that she was going to "get that Jew bastard." JA259, 265. According to testimony from a former Board employee, the auditor freely discussed personal information about respondent – much of it false – leading her former colleague to believe that the auditor had created a "fiction" about respondent. JA261, 263-65.

The auditor also sought out respondent's Nevada home, peering through his window and examining his mail and trash. JA267. After she had closed the audit, she boasted about having "convicted" respondent and returned to his Nevada home to take trophy-like pictures. JA253-55. The auditor's incessant discussion of the investigation conveyed the impression that she had become "obsessed" with the case. JA261, 267-68.

Within her department, Ms. Cox pressed for harsh action against respondent, including rarely issued fraud penalties. JA263. To bolster this effort, she enlisted respondent's ex-wife and estranged members of respondent's family. *E.g.*, JA208-09, 213-23. And she often spoke coarsely and disparagingly about respondent and his associates. JA259-61, 265-67.

The Board also repeatedly violated promises of confidentiality. Although Board auditors had agreed

to protect information submitted by respondent in confidence, the Board bombarded people with information "Demand[s]" about respondent and disclosed his address and social security number to third parties, including California and Nevada newspapers. *E.g.*, JA224-45, 263. Demands to furnish information, naming respondent as the subject, were sent to his places of worship. JA238-41, 243-45. The Board also disclosed its investigation to respondent's patent licensees in Japan. JA247-51.

The Board knew that respondent, like many inventors, had significant concerns about privacy and security. JA242. Rather than respecting those concerns, however, the Board sought to use them to pressure him into a settlement. One Board employee pointedly warned Eugene Cowan, an attorney representing respondent, about the necessity for "extensive letters in these high profile, large dollar, fact-intensive cases," while simultaneously raising the subject of "settlement possibilities." JA277-78. Both Cowan and respondent himself understood the employee to be pushing for tax payments as the price for maintaining respondent's privacy. JA272, 274-75.

2. Respondent brought suit against the Board in Nevada state court, alleging both negligent and intentional torts. In response, the Board asserted that it was entitled to absolute sovereign immunity. Although this Court had held that a sovereign has no inherent sovereign immunity in the courts of a co-equal sovereign, *see Nevada v. Hall*, 440 U.S. 410 (1979), the Board argued that the Full Faith and Credit Clause required Nevada to give effect to California's own immunity laws, which allegedly gave the Board full immunity against respondent's state-law claims.

The Nevada Supreme Court rejected the Board's argument that it was obligated to apply California's law of sovereign immunity. JA167-68. Nevertheless, the court extended significant immunity to the Board as a matter of comity. While the court found that "Nevada has not expressly granted its state agencies immunity for all negligent acts," JA168, it noted that "Nevada provides its agencies with immunity for the performance of a discretionary function even if the discretion is abused," JA169. It thus concluded that "affording Franchise Tax Board statutory immunity [under California law] for negligent acts does not contravene any Nevada interest in this case." JA168.

The Nevada Supreme Court declined, however, to apply California's immunity law to respondent's intentional tort claims. The court first observed that "the Full Faith and Credit Clause does not require Nevada to apply California's law in violation of its own legitimate public policy." JA167. It then determined that "affording Franchise Tax Board statutory immunity for intentional torts does contravene Nevada's policies and interests in this case." JA169. The court pointed out that "Nevada does not allow its agencies to claim immunity for discretionary acts taken in bad faith, or for intentional torts committed in the course and scope of employment." JA166 & n.10, 169, citing *Falline v. GNLV Corp.,* 823 P.2d 888 (Nev. 1991). Against this background, the court declared that "greater weight is to be accorded Nevada's interest in protecting its citizens from injurious intentional torts and bad faith acts committed by sister states' government employees, than California's policy favoring complete immunity for its taxation agency." JA169.

This Court, in a unanimous opinion, affirmed. *See Hyatt I*. Rejecting the Board's argument that the Full Faith and Credit Clause required Nevada courts to apply California's immunity laws, the Court reiterated the well-established principle that the Full Faith and Credit Clause does not compel "a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." 538 U.S. at 494 (internal quotations omitted). Applying that test, the Court found that Nevada was "undoubtedly 'competent to legislate' with respect to the subject matter of the alleged intentional torts here, which, it is claimed, have injured one of its citizens within its borders." *Id.*

The Court noted that it was "not presented here with a case in which a State has exhibited a 'policy of hostility to the public Acts' of a sister State." *Id.* at 499, quoting *Carroll v. Lanza*, 349 U.S. 408, 413 (1955). To the contrary, the Court noted, "[t]he Nevada Supreme Court sensitively applied principles of comity with a healthy regard for California's sovereign status, relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis." *Id.*

3. At trial, the jury found the Board liable for a variety of intentional torts, ranging from fraud to invasion of privacy. It awarded respondent a total of $139 million in compensatory damages and $250 million in punitive damages.

The Nevada Supreme Court, for the most part, reversed. In doing so, it reduced the Board's liability for compensatory damages to approximately $1 million (pending a retrial on damages with respect to one claim). And it held that, as a matter of comity,

the Board was immune from any award of punitive damages.

Reviewing the merits, the Nevada Supreme Court determined that respondent had not established necessary elements for various torts under Nevada law. *See* Pet. App. 25-38. The court, however, affirmed the portion of the judgment based on fraud. The court noted evidence that, despite its promises of confidentiality, the Board had "disclosed [respondent's] social security number and home address to numerous people and entities and that [the Board] revealed to third parties that Hyatt was being audited." *Id.* at 40. The court also pointed to evidence that "the main auditor on Hyatt's audit, Sheila Cox, . . . had made disparaging comments about Hyatt and his religion, that Cox essentially was intent on imposing an assessment against Hyatt, and that [the Board] promoted a culture in which tax assessments were the end goal whenever an audit was undertaken." *Id.* The court thus determined "that substantial evidence supports each of the fraud elements." *Id.* at 41.

Having upheld liability on the fraud claim, the Nevada Supreme Court next considered whether it should apply a statutory damages cap applicable to Nevada officials – a condition on Nevada's waiver of sovereign immunity – to the Board. *See* Nev. Rev. Stat. § 41.035(1). The court decided that "comity does not require this court to grant [the Board] such relief." Pet. App. 45-46. The court pointed out that officials from other States are not similarly situated to Nevada officials with respect to intentional torts because Nevada officials "'are subject to legislative control, administrative oversight, and public accountability in [Nevada].'" *Id.* at 45, quoting *Faulkner v. University of Tennessee*, 627 So. 2d 362, 366 (Ala.

1992). As a result, "'[a]ctions taken by an agency or instrumentality of this state are subject always to the will of the democratic process in [Nevada],'" while out-of-state agencies like the Board "'operate[] outside such controls in this State.'" *Id.*, quoting *Faulkner*, 627 So. 2d at 366. Considering this lack of authority over other States' agencies, the court concluded that "[t]his state's policy interest in providing adequate redress to Nevada citizens is paramount to providing [the Board] a statutory cap on damages under comity." *Id.*

With respect to respondent's intentional infliction of emotional distress claim, the Nevada Supreme Court affirmed the jury's finding of liability – noting that respondent had "suffered extreme treatment" at the hands of the Board (*id.* at 50) – but it reversed the award of damages. Finding errors with respect to the introduction of evidence and instructions to the jury, the court determined that the Board was entitled to a new trial to establish the proper level of damages. *Id.* at 51-62. It remanded the case to the trial court for that purpose.

Finally, as a matter of comity, the Nevada Supreme Court reversed the award of punitive damages. The court stated that, "under comity principles, we afford [the Board] the protections of California immunity to the same degree as we would provide immunity to a Nevada government entity as outlined in NRS 41.035(1)." *Id.* at 65. The court then added: "Because punitive damages would not be available against a Nevada government entity, we hold that under comity principles [the Board] is immune from punitive damages." *Id.*

SUMMARY OF ARGUMENT

I. The States do not have immunity as of right in the courts of other States. This Court so held in *Nevada v. Hall*, 440 U.S. 410 (1979), and the relevant historical evidence shows that its decision was correct.

A. This Court has given great weight to "history and experience, and the established order of things, . . . in determining the scope of the States' constitutional immunity from suit." *Alden v. Maine*, 527 U.S. 706, 727 (1999) (internal quotations omitted). Here, an examination of that "history and experience" reveals three critical facts: *first*, that, prior to formation of the Union, the States had the status of independent nations and thus had the same sovereign immunity in each others' courts as other nations had in the courts of foreign nations; *second*, that the immunity enjoyed by one nation in the courts of another nation was *not* an immunity as of right, but an immunity that depended on the express or implied consent of the home sovereign; and, *third*, that, insofar as sovereign immunity among the States was concerned, the Formation did not change either the scope or the nature of that preexisting immunity.

The idea that immunity between sovereigns depends on the consent of the home sovereign is anything but novel. To the contrary, it has been understood for centuries that immunity among different sovereigns is grounded in, and derived from, fundamental principles of sovereignty itself. *See Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). As Chief Justice Marshall explained in *Schooner Exchange*, "[t]he jurisdiction of [a] nation within its own territory is necessarily exclusive and absolute" and "is susceptible of no limitation not imposed by itself." *Id.*

at 136. It would be directly contrary to that understanding for a foreign sovereign to unilaterally grant itself immunity from the jurisdiction of the home sovereign and its tribunals. It follows, therefore, that "[a]ll exceptions . . . to the full and complete power of a nation within its own territories must be traced up to the consent of the nation itself." *Id.* And that consent, having been given, can be withdrawn, at least with suitable notice, at any point in the future. *See id.* at 146.

The Board repeatedly disregards this critical principle, failing even to mention *Schooner Exchange*. To make its argument, the Board first assumes that sovereigns had universal immunity as of right in pre-Formation times and then asserts that formation of the Union left that immunity unchanged. But that gets matters backwards. Because the States did not have immunity as of right during their time as independent sovereigns, the proper question is whether formation of the Union *granted* them such immunity, thereby diminishing the States' preexisting "exclusive and absolute" jurisdiction over their own territory.

The clear answer is that it did not. To begin with, it is well-recognized that formation of the Union did not strip the States of their sovereign status. Although the States necessarily ceded some of their powers to the federal government, they nevertheless "entered the federal system with their sovereignty intact." *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991). That residual sovereignty, in turn, left the States with broad powers to govern with respect to persons and events within their territory. Given how jealously the States guarded their sovereign powers, it is highly unlikely that the States would

have surrendered part of those powers – without saying a word about it – in favor of allowing other States to operate with impunity within their borders.

The Board does not, in fact, claim that the States engaged in any such surrender. Rather, having committed to its States-always-had-immunity-as-of-right theory, the Board tries to shore up that position by relying on general statements by various founding fathers and on dicta in 19th Century cases, all of which broadly declare that sovereigns are not amenable to suit even in courts of other sovereigns. But none of the Board's quoted material directly addresses the critical issue: whether immunity between sovereigns existed as of right or was dependent on consent of the home sovereign. Moreover, if the various statements are taken to mean that sovereigns have (and always have had) immunity as of right wherever they go, then those statements would be in direct conflict with the principles of sovereignty recognized in *Schooner Exchange*, one of this Court's seminal decisions. Despite its newfound willingness to urge overruling of cases, even the Board does not suggest that *Schooner Exchange* should be cast aside.

The Framers' remarks about sovereign immunity were also directed to a very different issue: whether the States would have immunity in the new federal courts. The States, of course, had good reason to be concerned about lack of such immunity. Not only did the language of Article III suggest that the States would be subject to suit, but, because the federal government was to be established as a *superior* sovereign, the States could not count on the mutuality of self-interest that was (and is) the bedrock of comity-based immunity among equal sovereigns. In setting up this new government, therefore, the States

wanted the same immunity that they enjoyed in their own courts – i.e., immunity as of right – and that is the subject the Framers were addressing. There is no comparable indication that the States were willing, or indeed felt any need, to trade part of their sovereignty for the same immunity in the courts of other States. That immunity remained a matter of comity on the part of the home State.

B. The historical evidence, properly understood, demonstrates that the States did not, and do not, have immunity as of right in each others' courts. But, even if the evidence were less certain, the Court should reach the same conclusion as a matter of stare decisis. The decision in *Hall* rejected the very same argument the Board makes here, and the Board has offered no "special justification" for overruling it. *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015) (internal quotations omitted).

The Board's attack on *Hall* – in addition to being wrong – is noticeably thin. First of all, it is remarkable that the Board makes no effort to confront the core principles set forth in *Schooner Exchange*, even though *Schooner Exchange* was the principal authority on which *Hall* rested. Furthermore, to the extent the Board questions the reasoning of *Hall*, it mostly walks in the tracks of Justice Rehnquist's dissent in that case, relying heavily on the same Framers' statements and case citations that Justice Rehnquist discussed. And, while the Board purports to find an inconsistency between *Hall* and this Court's post-*Hall* decisions, the notion that those cases undermined *Hall* founders on the fact that none of the decisions even discussed, let alone disavowed, the principles of *Schooner Exchange*. That is hardly surprising given that none of the cases required the

Court to assess the competing interests of two equal sovereigns.

The Board also offers little evidence that *Hall* has caused grave problems for the States. Although lawsuits against States in state courts arise occasionally, they remain infrequent and are often dismissed on the basis of comity between States. Indeed, as a telling sign that such cases are of minimal concern, the Board did not even bother to challenge *Hall* on its previous trip to this Court. There is little reason to think, therefore, that overruling *Hall* is critical, or even particularly important, to effective operation of state governments.

The need to overrule *Hall* is also diminished by the fact that the States have other, more effective ways to gain sovereign immunity in each others' courts. Unlike the typical "constitutional" decision, *Hall* leaves the States free to obtain expanded immunity through normal political channels. In particular, the States can enter into agreements to provide immunity on a reciprocal basis, as various *amicus* briefs indicate that States are willing to do. Because such voluntary agreements would not aggregate state power at the expense of the federal government, they would not require Congress's approval. *See Cuyler v. Adams*, 449 U.S. 433, 440 (1981). And the process of full discussion among the States would allow all branches of state governments to participate in the politically sensitive decision to surrender part of the States' sovereignty (and their citizens' right to secure relief) in exchange for guarantees of greater immunity in other States' courts.

Voluntary agreements among the States would also give the States an opportunity to define the scope of immunity they want to obtain and provide. Indeed,

one of the distinct oddities of the Board's position is that the immunity it seeks – total immunity for any and all actions, no matter what kind or how destructive – bears almost no resemblance to modern sovereign immunity. Thus, for example, the United States, which once granted other nations almost complete immunity for their actions in this country, now provides broad exceptions to that immunity for, among other things, commercial activities and certain torts. Agreements among the States would allow them to consider similar exceptions for state-to-state immunity, rather than accepting the across-the-board immunity that would result from overruling *Hall*. Thus, whether reaffirmed on its own terms or simply given respect as a matter of stare decisis, the decision in *Hall* should stand.

II. The Board's less sweeping submission – that Nevada should be ordered to apply its state-law damages cap to California officials – fails as well. Although the Board makes a roundabout argument that, under the Full Faith and Credit Clause, the Nevada courts had to apply *California's* law of total immunity to damages greater than *Nevada's* cap, this argument, apart from being a strange mishmash of California and Nevada law, is foreclosed by the governing Full Faith and Credit Clause standard. That standard provides, in simple terms, that a State may apply its own law to matters about which it is "competent to legislate." *Hyatt I*, 538 U.S. at 494 (internal quotations omitted). The Court has already found that the Nevada courts can apply Nevada law in this case, and it is undisputed that Nevada law does not provide a damages cap for out-of-state officials.

The Board tries to get around that problem by insisting that Nevada cannot exhibit "hostility" to California law. But that argument suffers from its own flaws. To begin with, it cannot be "hostile" as a constitutional matter for Nevada to do exactly what the Constitution permits it to do: apply its own law where it has legislative jurisdiction. Furthermore, the Board's attempt to add a "no hostility" test to the current Full Faith and Credit Clause standard would be a practical disaster, embroiling the Court in repeated, largely standardless inquiries into whether an otherwise constitutional choice-of-law decision crossed some unidentifiable "hostility" threshold. Finally, and in any event, it is pure hyperbole to say that the Nevada courts were hostile to California law (or even to California itself), when the Nevada Supreme Court granted the Board complete immunity for its negligent actions, prohibited any award of punitive damages against the Board, reversed the damages award on one tort claim because it rested on matters properly left to California's tax proceeding, and even carefully explained why it had decided not to limit compensatory damages for injuries caused by the Board's abusive actions. Far from showing hostility, the Nevada court took full and respectful account of the Board's sovereign status at every step.

The Board's attempt to create a federal doctrine of "mandatory state-to-state comity" is even less convincing. As has been true for centuries, comity is a *voluntary* doctrine, and the decision by one sovereign to grant comity to another sovereign ultimately lies within its discretion. It is thus entirely unsurprising that the Board cites no case – not one – saying that federal courts can tell state courts how to apply the doctrine of comity. Recognition of such a

power in the federal courts would, in fact, be a wholly inexplicable transfer of power from the States to the federal government.

Finally, the Board tries to fashion an equal-treatment argument out of principles of "equal sovereignty," suggesting that, by not applying the Nevada damages cap to California officials, Nevada somehow denied California its right to constitutionally based equality. In doing so, however, the Board has wrenched the "equal sovereignty" principle from its proper moorings. In its true form, the doctrine of equal sovereignty operates to assure that each State has the same powers within *its* territory as other States have within *their* territory. The doctrine does not mean – and could not mean without lapsing into incoherency – that every State has the same powers in *other* States as the home State does. The Board's continuing attempt to import its own sovereignty into Nevada thus falls of its own weight.

ARGUMENT

I. States Do Not Have Sovereign Immunity as of Right in the Courts of Other States.

A. The Historical Evidence Shows That Immunity Between Sovereigns Depends Upon Consent of the Home Sovereign.

This Court has traditionally looked to "'history and experience, and the established order of things,' . . . in determining the scope of the States' constitutional immunity from suit." *Alden v. Maine*, 527 U.S. 706, 727 (1999), quoting *Hans v. Louisiana*, 134 U.S. 1, 14 (1890). To undertake that inquiry properly, however, it is essential to identify the precise form of sovereign immunity at issue. As we discuss, the history underlying a sovereign's immunity in its own courts is different from, and grounded in less complex consider-

ations than, the history of a sovereign's immunity in the courts of another independent sovereign. It is the latter immunity, not the former, that is at issue here.

The history of immunity among independent sovereigns makes quite clear that States do not have immunity as of right in the courts of other States. That conclusion follows from three basic points: *first*, that, prior to formation of the Union, the States were independent sovereign nations and had the same immunity in each others' courts as other sovereign nations had in the courts of foreign nations; *second*, that, before the Formation (as now), sovereign nations could not assert immunity as of right in the courts of other nations, but enjoyed immunity only with the consent of the host nation; and, *third*, that nothing in the Constitution or formation of the Union altered that balance among the still-sovereign States, giving priority to the rights of visiting States at the expense of host States. As a result, the Board does not have sovereign immunity as of right in Nevada's courts.

1. Prior to Formation of the Union, the States Were Independent Sovereign Nations.

This Court has frequently recognized that, following the Declaration of Independence, the States had the status of independent sovereign nations. In *McIlvaine v. Coxe's Lessee*, 8 U.S. (4 Cranch) 209 (1808), for example, the Court observed that "the several states which composed this union, so far at least as regarded their municipal regulations *became entitled*, from the time when they declared themselves independent, *to all the rights and powers of sovereign states*." *Id.* at 212 (emphases added). Thus, "each of them was a sovereign and independent

state, that is, . . . each of them had a right to govern itself by its own authority, and its own laws, without any control from any other power on earth." *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 224 (1796). Many years later, the Court again confirmed that the States "were then sovereign states, possessing, unless thus restrained [i.e., by the Articles of Confederation], all the rights and powers of independent nations over the territory within their respective limits." *Wharton v. Wise*, 153 U.S. 155, 166 (1894).

Both the Declaration of Independence and the Articles of Confederation set forth the States' sovereignty in plain terms. For its part, the Declaration of Independence stated "[t]hat these United Colonies are, and of Right ought to be Free and Independent States." Declaration of Independence para. 4 (1776). Article II of the Articles of Confederation then provided that "[e]ach state retains its sovereignty, freedom, and independence, . . . which is not by this confederation expressly delegated to the United States." Art. of Confederation, art. II (1781). And, while the Articles of Confederation did "delegate[]" a portion of the States' newly asserted sovereignty to "the United States," the Articles did not address, and did nothing to alter, the nature of the immunity that the States, as independent nations, had in each others' courts.

The Board does not question the historical status of the States as independent nations. *See* FTB Br. 30 (acknowledging such independence). Nor does it argue that, during their existence as independent nations, the States were entitled to *greater* sovereign immunity than other nations. The Board's immunity claim depends entirely on the proposition that, during the period after the Declaration of Independence and before formation of the Union, independent

nations had immunity as of right in the courts of other nations. As we discuss next, that proposition is simply incorrect.

2. Independent Sovereigns Enjoy Immunity in Other Sovereigns' Courts Only with the Consent of the Home Sovereign.

In the late 18th Century, independent nations did not have immunity as of right in the courts of other sovereigns. To the contrary, they enjoyed immunity only with the consent of the host nation.

This Court set forth that fundamental principle in *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). In that case, two citizens of the United States filed an action against the Schooner Exchange – a French ship of war – claiming they were the rightful owners of the ship and demanding its return. At the time of the action, the warship was docked in the port of Philadelphia, having encountered severe weather and needing repairs. *See id.* at 118 (Statement). The plaintiffs' suit thus directly raised the question whether France, in order to protect its ship from seizure, was entitled to claim sovereign immunity in the courts of the United States.

Recognizing that the case raised a potential conflict between two sovereigns, Chief Justice Marshall carefully examined the authority of the United States as the host sovereign and of France as the visiting sovereign. Relying on "general principles" and "a train of reasoning," *id.* at 136, the Chief Justice explained how the competing sovereign interests were to be reconciled. Importantly for present purposes, he first set forth the guiding principle that "[t]he jurisdiction of [a] nation within its own territory is necessarily exclusive and absolute" and "is susceptible

of no limitation not imposed by itself." *Id.* Given that background understanding, it followed that a foreign nation could not unilaterally claim immunity from the home nation's jurisdiction, because that restriction, "deriving validity from an external source, would imply a diminution of [the home nation's] sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power [i.e., the foreign nation] which could impose such restriction." *Id.* In the Court's view, that proposition was incompatible with the inherent nature of sovereignty itself.

The Court then announced a second critical principle, one that proceeded from the first: that any immunity enjoyed by a foreign nation must stem from the consent of the home nation. As the Court stated, "[a]ll exceptions . . . to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself." *Id.* That consent could be either express or implied, and was presumed to be freely given, *id.*, but it remained the prerogative of the home sovereign to withdraw that consent – with suitable notice (*see id.* at 137) – if its own sovereign interests so dictated. *See id.* at 146.

The principles set forth in *Schooner Exchange* have long been the foundation of sovereign immunity among nations. Just a decade after that decision, this Court, speaking through Justice Story, emphasized its rejection of the "notion that a foreign sovereign had an absolute right, in virtue of his sovereignty, to an exemption of his property from the local jurisdiction of another sovereign, when it came within his territory; for that would be to give him sovereign power beyond the limits of his own empire." *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 352 (1822).

The Court reiterated that the immunity of a foreign sovereign, and of his property, within the territory of an independent sovereign "stands upon principles of public comity and convenience, and arises from the presumed consent or license of nations, that foreign public ships coming into their ports, and demeaning themselves according to law, and in a friendly manner, shall be exempt from the local jurisdiction." *Id.* at 353. And it made clear that, "as such consent and license is implied only from the general usage of nations, it may be withdrawn upon notice at any time, without just offence, and if afterwards such public ships come into our ports, they are amenable to our laws in the same manner as other vessels." *Id.*

In the ensuing centuries, this Court has repeatedly reaffirmed the basic principle that immunity in another sovereign's courts depends upon the latter's consent. In *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983), the Court stated plainly that "foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution." *Id.* at 486. Subsequently, in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), the Court, after noting that *Schooner Exchange* "is generally viewed as the source of our foreign sovereign immunity jurisprudence," *id.* at 688, confirmed that "the jurisdiction of the United States over persons and property within its territory 'is susceptible of no limitation not imposed by itself,' and thus foreign sovereigns have no right to immunity in our courts," *id.*, quoting *Schooner Exchange*, 11 U.S. (7 Cranch) at 136. Insofar as foreign sovereigns enjoy immunity in United States courts, therefore, they do so "as a matter of comity," *id.*, not

absolute entitlement. *See also Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2255 (2014).

Far from seeking to discredit or explain away the principles of *Schooner Exchange*, the Board does not even refer to that decision. For supporting case law, it relies instead on a pre-Formation Pennsylvania Court of Common Pleas decision declining to hear a suit against the Commonwealth of Virginia. *See Nathan v. Virginia*, 1 U.S. (1 Dall.) 77 (1781). But *Nathan* is entirely consistent with *Schooner Exchange*'s view that immunity among independent sovereigns is a matter of comity. There, Pennsylvania's Attorney General, acting at the direction of the Supreme Executive Council of Pennsylvania, urged the state court to accord immunity to Virginia, much as attorneys for the United States urged this Court to accord immunity to France in *Schooner Exchange*. *See* 11 U.S. (7 Cranch) at 120-26, 132-35 (Statement). That intercession not only preserved Virginia's dignity by removing the need for it to make an appearance but, importantly, expressly signified Pennsylvania's consent to Virginia's claim of immunity.

3. Formation of the Union Did Not Change the Nature of the States' Immunity in Each Others' Courts.

The historical evidence thus demonstrates that, prior to formation of the Union, the States did not have immunity as of right in the courts of other States. Like other independent nations, they were entitled to immunity only with the express or implied consent of the host sovereign. The remaining question, then, is whether the Formation altered that allocation of authority among sovereigns, stripping the host sovereign of its power to withhold consent if it deemed immunity to be incompatible with its own

sovereign interests. The short answer is that it did not.

The Board, in fact, does not even advance such an argument. Putting all its eggs in the States-already-had-immunity-as-of-right basket, the Board makes no attempt to show that, even if that hypothesis is wrong, the formation of the Union subsequently eliminated the need for the home sovereign's consent. That reticence is for good reason: there is no historical evidence to show that any such reduction in state sovereignty took place.

a. To begin with, formation of the United States did not extinguish the States' sovereign powers within their own borders. On the contrary, the States "entered the federal system with their sovereignty intact." *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991). Although the States necessarily subordinated some of their authority to the new federal government, they nonetheless retained "'a residuary and inviolable sovereignty.'" *Printz v. United States*, 521 U.S. 898, 918-19 (1997), quoting The Federalist No. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961). *See also Alden*, 527 U.S. at 713-14. As this Court has noted, "the founding document 'specifically recognizes the States as sovereign entities,'" *Alden*, 527 U.S. at 713, quoting *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 71 n.15 (1996), "reserv[ing] to them a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status," *id.* at 714.

The Tenth Amendment reflects that understanding, expressly declaring that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States

respectively, or to the people." U.S. Const. amend. X. The States' "reserved" powers thus are directly traceable to the powers that the States had originally possessed as independent sovereign nations. "'These powers . . . remain, after the adoption of the constitution, *what they were before*, except so far as they may be abridged by that instrument.'" *Cook v. Gralike*, 531 U.S. 510, 519 (2001), quoting *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 193 (1819) (emphasis added).

The States' residual sovereignty was not merely ceremonial: it left each State with broad authority over persons and events within its borders. As this Court long ago observed, "the jurisdiction of a state is coextensive with its territory, coextensive with its legislative power." *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 733 (1838) (internal quotations omitted). Thus, "[i]t is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority." *Printz*, 521 U.S. at 928. That sovereignty necessarily encompasses "the power to enforce laws against all who come within the sovereign's territory, whether citizens or aliens," *Duro v. Reina*, 495 U.S. 676, 685 (1990); *see Munaf v. Geren*, 553 U.S. 674, 694-95 (2008).

The right of a sovereign to govern within its own territory, in turn, has important consequences for the relations between States in our federal system. This Court has noted the general rule that "[e]very sovereign has the exclusive right to command within his territory." *Suydam v. Williamson*, 65 U.S. (24 How.) 427, 433 (1860). Conversely, it has acknowledged, again as a general rule, that "[n]o law has any effect, of its own force, beyond the limits of the sovereignty

from which its authority is derived." *Hilton v. Guyot*, 159 U.S. 113, 163 (1895). In light of these fundamental principles, it would be highly unusual for States to invert the traditional rules of sovereignty – surrendering authority over their own territory by allowing other States to disregard local laws – and courts should infer that kind of submissive intent only upon the most unambiguous evidence. As the Court recently observed, "States rarely relinquish their sovereign powers, so when they do we would expect a clear indication of such devolution, not inscrutable silence." *Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2133 (2013).

b. That clear indication is lacking here. The Board does not cite a single word showing that, at the time of the Formation, either the Framers or representatives of the States specifically addressed the States' immunity in one another's courts and declared that, contrary to the prevailing rule before the Formation, such immunity would henceforth exist as of right and not as a matter of comity.

The most the Board offers is a collection of broad, highly generalized statements to the effect that sovereigns are not amenable to suit by individuals in any court (with an occasional reference to other States' courts). *See* FTB Br. 31-36. But, despite the stature of speakers like Hamilton and Madison, there are serious problems with relying on such authority in this context. First of all, if those declarations are taken to establish that, in the late 18th Century, sovereigns enjoyed immunity as of right wherever they went, regardless of the home sovereign's consent, that view would mean that *Schooner Exchange*, one of this Court's historic decisions, was in error. Even the Board does not make *that*

argument.[1] Moreover, unlike Chief Justice Marshall's detailed reasoning in *Schooner Exchange*, none of the statements cited by the Board (including Marshall's own, *see* FTB Br. 34) actually discussed whether immunity in another sovereign's courts depended on the consent of the host sovereign. To the extent the Board's cited material fails to undertake the critical "dual sovereign" analysis of *Schooner Exchange*, therefore, the latter is more precise and more persuasive.

Furthermore, and relatedly, the Board does not distinguish between the historical *fact* of sovereign-to-sovereign immunity and the *basis* for that immunity. It is certainly correct that, at the time of the Formation, sovereign nations were expected to, and did, extend immunity to each other as a matter of custom. Thus, Hamilton could properly ground his view of universal sovereign immunity in "the general sense and the general practice of mankind." The Federalist No. 81, at 487. But neither a "general sense" nor a "general practice" of consent-based immunity covertly transforms a host sovereign's voluntary act into an indefeasible right, exercisable without regard to the home sovereign's consent. Custom notwithstanding, a sovereign retains the sovereign power to decide, based upon its own sovereign interests, not to grant further immunity in the future. *See Santissima Trinidad*, 20 U.S. (7 Wheat.) at 353.

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[1] The same problem arises with occasional dicta in decisions of this Court stating that a sovereign can never be sued in the courts of another sovereign. *See* FTB Br. 37-38 (citing cases). If those statements are read to say that sovereigns enjoy immunity as of right in other sovereigns' courts, they are directly at odds with the reasoning of *Schooner Exchange*.

In addition, the contemporary statements cited by the Board were addressed to a very different issue: whether the States would have immunity in the *federal* courts. The language of Article III suggested they might not, and the heavily indebted States, not surprisingly, wanted assurance they would. That question, however, had an unusual twist: although the new United States would be an independent sovereign – and thus traditionally would need to give its consent to any immunity sought by the States – it was a sovereign the States themselves were directly involved in forming. Consequently, the States were in unique position to decide at the time of creation whether they would have the same immunity in the federal courts that they enjoyed in their own courts. That is the question that Hamilton, Madison, and others were actually debating, not the States' immunity in each others' courts.

The Board seems to believe that, because the States sought immunity as of right in the federal courts, they would have demanded it in the courts of other States as well. But the two situations are not the same. The comity-based custom of immunity among independent nations was grounded in, and traditionally depended on, the equal stature of the various sovereigns. Although comity is ultimately a matter of grace and discretion, *see* pages 50-52, *infra*, it has proved effective over the centuries because it is backed by each sovereign's powerful regard for mutuality and "reciprocal self-interest." *National City Bank of New York v. Republic of China*, 348 U.S. 356, 362 (1955). In practical terms, each sovereign has a strong incentive to grant immunity to other similarly situated sovereigns in order to secure a corresponding grant of immunity when the roles are reversed. That do-unto-others principle governed the relations

among the States both as independent nations and, subsequently, as equal sovereigns within the newly formed United States.

That same state of equilibrium did not exist, however, between the States and the new federal government. Quite the opposite, in fact. Under traditional principles of sovereign immunity, the federal government (a superior sovereign) would be entitled to immunity as of right in the courts of the States (inferior sovereigns). Given that hierarchy, the United States had no reason to be concerned that, if it denied immunity to the States, they would respond by denying immunity in return, and the States could not readily assume that federal courts would follow the practice among equal sovereigns of granting immunity as a matter of comity. The States thus sought the same immunity – immunity as of right – that they had in their own courts.[2]

The Board tries to turn the Framers' silence regarding state-to-state immunity into a positive, suggesting that the right to immunity among sovereigns was "'too obvious to deserve mention.'" FTB Br. 40, quoting *Hall*, 440 U.S. at 431 (Blackmun, J., dissenting). That argument just ducks the pivotal question: whether nation-to-nation – and hence state-to-state – immunity was a matter of comity or of absolute privilege. Because it was the accepted custom that sovereigns would voluntarily extend immunity to one another under the doctrine of

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[2] Insofar as the *federal* government was concerned, moreover, a State did not have "exclusive and absolute" jurisdiction over its territory. *See Schooner Exchange*, 11 U.S. (7 Cranch) at 136. Thus, the usual rules of consent-based immunity – which depended on principles of territorial autonomy – would not naturally apply.

comity, it was undoubtedly the assumption, especially after the decision in *Nathan*, that the States would do so as well. It is one thing, however, for the States to expect immunity as a matter of comity, quite another for them to replace that voluntary practice with binding law. *See*, *e.g.*, *Altmann*, 541 U.S. at 694-95 (distinguishing "a justifiable expectation [of immunity] as a matter of comity" from a "'right' to such immunity").

To be sure, every sovereign *prefers* to have immunity in other sovereigns' courts, provided that the immunity comes without cost. But immunity between sovereigns is a two-way street. As the Court made clear in *Schooner Exchange*, the act of granting immunity to another sovereign inevitably means that the home sovereign is yielding control over persons and events within its territory. *See* 11 U.S. (7 Cranch) at 136 (discussing "diminution of [home nation's] sovereignty"). Thus, to gain immunity in other States, each State must give up sovereignty in return. That trade-off may or may not be one worth making, but the Board offers no historical evidence to demonstrate the States affirmatively chose to make it.

It has been argued (though not by the Board or its *amici*) that the grant of Judicial Power in Article III – extending jurisdiction over "Cases . . . between a State and Citizens of another State" – extinguished the States' preexisting power to deny immunity to other States. *See* Ann Woolhandler, *Interstate Sovereign Immunity*, 2006 Sup. Ct. Rev. 249 (2006). According to this theory, formation of the Union "meant that future development of interstate immunity law would occur in the Supreme Court and was no longer left primarily to state decision makers." *Id.*

at 262. But this explanation is based on just the kind of inference by "inscrutable silence" that the Court has warned against. *See Tarrant Reg'l Water Dist.*, 133 S. Ct. at 2133. Article III does not explicitly oust the state courts of jurisdiction over citizen-State cases, and implicit displacement of state jurisdiction would necessarily follow only if this Court's jurisdiction were *exclusive*. By its plain terms, however, Article III does not provide for exclusive jurisdiction in citizen-State cases.

The theory is also incomplete. The central question is not whether this Court could apply federal "interstate immunity law" requiring States to give each other immunity, but whether there *is* such federal law. The answer is no. Whether examined at the time of the Formation or in the years since, federal law has had nothing to say about the States' immunity in each others' courts. In particular, while the Eleventh Amendment confirmed that the States had immunity as of right in the federal courts, and left untouched the States' preexisting immunity in their own courts, *see Alden*, 527 U.S. at 712-30, it did not address, much less purport to overturn, the historical principle that immunity among equal sovereigns depends on consent of the home sovereign.

In short, the Board cannot show what it needs to show: that the States have immunity as of right in the courts of other States. At most, it has shown that, like sovereign nations in general, States have granted immunity to each other as a matter of custom. *See id.* at 749 (noting that "the immunity of one sovereign in the courts of another has often depended in part on comity or agreement"). That is not enough. Furthermore, assuming that a sovereign must give prior notice before departing from that custom – as

Schooner Exchange suggested, *see* 11 U.S. (7 Cranch) at 137 – the Board cannot show lack of notice either. Well before the events in this case, the Nevada Supreme Court made clear that other States could not expect to receive absolute sovereign immunity in Nevada's courts as a matter of comity. *See Mianecki v. Second Judicial Dist. Court*, 658 P.2d 422 (Nev. 1983).[3] Thus, the Board's attempt to claim immunity as of right in Nevada's courts falls short on all fronts.

B. This Court Should Adhere to the Holding of *Nevada v. Hall* as a Matter of Stare Decisis.

Even if the historical evidence were less compelling, principles of stare decisis should lead to the same conclusion: States do not have immunity as of right in the courts of other States. The Court said so in *Hall*, and the Board provides no good reason for overruling that decision now.

1. Respect for Precedent Is Central to the Rule of Law.

"Time and time again, this Court has recognized that 'the doctrine of *stare decisis* is of fundamental importance to the rule of law.'" *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991), quoting *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 494 (1987) (plurality). Indeed, just last Term, this Court reemphasized that "[o]verruling precedent is never a small matter. *Stare decisis* . . . is 'a foundation stone of the rule of law.'" *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409

[3] That view of immunity can hardly have surprised California agencies, given that the California Supreme Court had previously held that other States enjoyed no immunity as of right in the California courts. *See Hall v. University of Nevada*, 503 P.2d 1363 (Cal. 1972).

(2015), quoting *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014).

The principles of stare decisis are important as both an institutional and a practical matter. As the Court has noted, stare decisis "'promotes the even-handed, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" *Id.*, quoting *Payne v. Tennessee*, 501 U.S. 808, 827-28 (1991). *See also Hilton*, 502 U.S. at 202 ("Adherence to precedent promotes stability, predictability, and respect for judicial authority."). In particular, the doctrine "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986).

Stare decisis also allows the Court to develop a body of settled law without the need for perpetual reexamination. As Justice (then-Judge) Cardozo once noted, "[t]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him." Benjamin N. Cardozo, *The Nature of the Judicial Process* 149 (1921). Stare decisis provides an essential buffer against that prospect, "reduc[ing] incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation." *Kimble*, 135 S. Ct. at 2409.

The Court thus has set a demanding standard for overruling its prior decisions. "[A]n argument that

we got something wrong – even a good argument to that effect – cannot by itself justify scrapping settled precedent." *Id.* Rather, "[t]o reverse course, we require as well what we have termed a 'special justification' – over and above the belief 'that the precedent was wrongly decided.' *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2407 (2014)." *Id.* (parallel citation omitted). *See also Hilton*, 502 U.S. at 202. The Board has not come close to showing a "special justification" here.

2. The Board Has Failed To Show a "Special Justification" for Overruling *Nevada v. Hall*.

The Board's attack on *Hall* – and its corresponding plea to set aside stare decisis – suffers from numerous problems. We have already discussed the fact that the Board's analysis depends upon a false premise, i.e., that States had immunity as of right in courts of other States prior to formation of the Union. *See* pages 16-31, *supra*. The Court in *Hall* correctly recognized the fact that, as independent nations, States enjoyed immunity only as a matter of comity, basing its decision on Chief Justice Marshall's thoughtful analysis in *Schooner Exchange*. *See* 440 U.S. at 416-17. As a result, *Hall* was not "wrongly decided" at all.

The Board also fails to deal with *Hall* squarely. Given the importance of stare decisis to development of the law, it seems remarkable that a litigant would urge the overruling of a prior decision as "[p]oorly [r]easoned," FTB Br. 26, without attempting to rebut the principal authority on which that decision rested. But the Board accomplishes that feat, indeed goes it one better, by not even *mentioning* this Court's holding in *Schooner Exchange*. By neglecting to

address *Hall*'s reasoning on its own terms, the Board is hardly in good position to criticize the *Hall* opinion as "difficult to fathom." *Id.* at 29.[4]

In any case, the Board brings forth little that is new. Most of the Board's arguments – and the bulk of its historical material – were previously considered in *Hall*. Indeed, the Board's submission here bears a striking resemblance to Justice Rehnquist's dissent in *Hall*. Again and again, the Board puts emphasis on the same case citations and statements by the Framers – in particular, those of Hamilton, Madison, and Marshall – that Justice Rehnquist featured in his dissenting opinion. *Compare* FTB Br. 33-34 (Hamilton) and *Hall*, 440 U.S. at 436 (Rehnquist, J., dissenting) (same); FTB Br. 34 (Madison) and 440 U.S. at 436 n.3 (same); FTB Br. 34 (Marshall) and 440 U.S. at 436 n.3 (same); FTB Br. 30-31 (*Nathan v. Virginia*) and 440 U.S. at 435 (same); FTB Br. 37 (*Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1858)) and 440 U.S. at 437 (same); FTB Br. 37 (*Cunningham v. Macon & B.R.R. Co.*, 109 U.S. 446, 451 (1883)) and 440 U.S. at 437-38 (same); FTB Br. 38 (*Western Union Tel. Co. v. Pennsylvania*, 368 U.S. 71, 80 (1961)) and 440 U.S. at 438 (same); FTB Br. 37-38 (*Hans v. Louisiana*) and 440 U.S. at 439-40 (same). This Court already denied one petition for rehearing in *Hall*, *see* 441 U.S. 917 (1979), and, in its current filing, the Board is essentially asking the Court just to reshuffle the deck.

Apart from the repetitive historical material, the Board relies heavily on various sovereign immunity

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[4] Justice Blackmun, in his *Hall* dissent (joined by Chief Justice Burger and Justice Rehnquist), saw no such difficulty, calling the Court's work a "plausible opinion." 440 U.S. at 427 (Blackmun, J., dissenting).

decisions since *Hall*. *See* FTB Br. 42-50 (discussing cases). Contrary to the Board's apparent view, however, the lesson of those cases is not that States always have sovereign immunity everywhere but that the States' right to sovereign immunity derives from its historical origins. *See*, *e.g.*, *Alden*, 527 U.S. at 712-30; *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 751-61 (2002). Thus, in examining the States' immunity in each others' courts – a situation that "'necessarily implicates the power and authority of a second sovereign,'" *Alden*, 527 U.S. at 738, quoting *Hall*, 440 U.S. at 416 – it is critical to look at the specific history identifying, and properly explaining, how immunity among independent sovereigns was established. None of the post-*Hall* decisions explored that history, for the simple reason that the Court was addressing quite different questions about the States' immunity in federal tribunals and their own courts. Indeed, none of the decisions addressing the States' immunity so much as refers to *Schooner Exchange*, the landmark decision regarding one sovereign's immunity in an equal sovereign's courts.

The Board likewise fails to show that *Hall* has led to serious financial consequences for the States. Although Justice Blackmun feared that the Court's decision would "open[] the door to avenues of liability and interstate retaliation that will prove unsettling and upsetting for our federal system," 440 U.S. at 427 (Blackmun, J., dissenting), no such upheaval has taken place. Suits against States in state courts – rare before the decision in *Hall* – remain few and far between. Furthermore, in those infrequent instances when such suits have been filed, state courts have commonly relied on the doctrine of comity to extend broad protections to their sister States, as the Nevada

Supreme Court did here. *See*, *e.g.*, *Cox v. Roach*, 723 S.E.2d 340, 346 (N.C. Ct. App. 2012); *Greenwell v. Davis*, 180 S.W.3d 287, 297 (Tex. Ct. App. 2005).

There have been no dramatic political repercussions either. To state the obvious, the decision in *Hall* hardly provoked a *Chisholm*-like reaction.[5] *See Alden*, 527 U.S. at 720 (*Chisholm* "decision fell upon the country with a profound shock") (internal quotations omitted). Apart from filing a few *amicus* briefs saying that *Hall* should be overruled, the States have taken no active measures since *Hall* to obtain greater immunity in other States' courts. Indeed, the Board itself was so unconcerned about the *Hall* decision that it did not bother to challenge it on its first trip to this Court, *see Hyatt I*, 538 U.S. at 497, and then largely disclaimed opposition to it at oral argument, JA177-79. This steadfastly passive approach strongly suggests that immunity as of right in other States' courts is of little importance to effective operation of state governments.

The Board suggests that stare decisis should apply less vigorously because *Hall* was a "constitutional decision." FTB Br. 56. But that argument is conspicuously out of place in this context. The usual reason that constitutional decisions are subject to more liberal reexamination – that only this Court can undo the consequences of its prior decision (*see*, *e.g.*, *United States v. Scott*, 437 U.S. 82, 101 (1978)) – does not apply to a ruling that allows the political branches, both state and federal, to alter the decision at will. Here, that door is wide open. As we discuss next, nothing in *Hall* prevents the States from agreeing to provide immunity in each others' courts or from

[5] *See Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).

asking Congress to require such immunity. Although stare decisis is not an "inexorable command," *Payne*, 501 U.S. at 827-28, the States' own inertia is not a substantial reason for setting it aside.

3. States Can Achieve Their Objective of Reciprocal Immunity Through Voluntary Agreements and Other Political Means.

The Board rests much of its anti-stare decisis argument on dire speculation that, absent full immunity, state courts will subject their sister States to widespread, large-dollar judgments. The Board does not cite any real-life examples of such judgments – apart from the lower court decision here, which was almost totally reversed by the Nevada Supreme Court – so the Board is left to mount a generalized assault on the effectiveness of comity principles. *See* FTB Br. 55-56. Even on its own terms, that attack is open to considerable doubt: after all, civilized nations have relied on the doctrine of comity for hundreds of years. But, putting comity aside for the moment, it is clear that the States have other more expedient, and effective, ways to obtain the immunity they seek.

The most obvious solution to the States' claimed problem is for the States to enter into bilateral or multilateral agreements to provide immunity in each others' courts. For example, the only two state-to-state immunity cases reaching this Court have involved lawsuits in the neighboring States of California and Nevada, both of which now claim to support absolute immunity as of right in state courts. *See* West Virginia et al. Br. 2-32 (joined by Nevada). If that is what California and Nevada are truly seeking, it should be a relatively simple matter for the two States to achieve that end by mutual agreement.

The States need not, however, proceed two by two in order to gain greater immunity. The *amicus* briefs in this case indicate that as many as 45 States believe that States should have immunity as of right in each others' courts. *See id.*; South Carolina State Ports Authority Br. 2-21. That goal, however, lies entirely within their own reach. If the States are willing to exchange part of their sovereignty at home for broadened immunity in other States, they can enter into a single expansive agreement making mutually binding commitments to that effect. And, as a not insignificant side-benefit, that process of open give-and-take would allow all branches of state government (as well as affected citizens) to be involved in deciding whether States should part with a portion of their internal sovereignty in order to obtain greater immunity outside their borders.

Such voluntary agreements among the States are not only permitted but specifically contemplated. The Constitution, of course, expressly provides for compacts and agreements through which the States, with the approval of Congress, can advance their shared interests. *See* U.S. Const. art. I, § 10, cl. 3. But the States are also free to enter into agreements without congressional approval. As this Court has noted, "[w]here an agreement is not 'directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States,' it does not fall within the scope of the [Compact] Clause and will not be invalidated for lack of congressional consent." *Cuyler v. Adams*, 449 U.S. 433, 440 (1981), quoting *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 468 (1978).

Applying that standard, there is no reason that Congress would need to approve an agreement among the States granting themselves immunity in each others' courts. Agreements among States to provide reciprocal immunity would not "interfere with the just supremacy of the United States." *Id.* (internal quotations omitted). If anything, the effect would be the reverse. Rather than expanding the collective power of the States, the agreements would *reduce* each signatory State's sovereignty in return for expanded immunity. That is just the kind of state-to-state readjustment that can, and should, be left to the States themselves.

Equally important, discussions among the States would not be limited to addressing immunity on an all-or-nothing basis. In asking this Court to overrule *Hall*, the Board is seeking a ruling that would give every State total immunity as a matter of right, regardless of the nature of the defendant State's actions and regardless of the impact on the home State's sovereignty. That is an extraordinary proposal. By taking up the question themselves, however, the States could tailor the terms of voluntary agreements to extend as much or as little immunity as they deemed appropriate. For instance, the States could agree to grant immunity for all acts by other States – including commercial activities – or provide immunity just for certain kinds of governmental actions. Or the States could decide to allow specified suits against themselves but impose a ceiling on recoverable damages.

It is striking, in fact, that the Board is asking this Court to impose the kind of sweeping immunity that is all but obsolete among sovereigns in modern times. For example, the United States – which once extend-

ed almost complete immunity to foreign sovereigns – has substantially narrowed its grant of immunity to reflect current circumstances. In keeping with that revised approach, the Foreign Sovereign Immunities Act first sets forth a broad grant of immunity but then carves out significant exceptions for commercial activities and torts, as well as certain acts of terrorism. *See*, *e.g.*, 28 U.S.C. § 1605(a)(2) (commercial activities), (a)(5) (tortious acts and omissions); *id.* § 1605A(a)(1) (acts of terrorism).

The States, however, are asking this Court for much more: immunity that would allow them to enter another State and do as they please without being held to account under that State's laws. If that immunity had been in place years ago, it would have meant that the plaintiffs in *Hall* – who were severely injured by a Nevada official driving in California (440 U.S. at 411) – would have been left to bear their injuries without any redress at all, even though California law expressly entitled them to compensation. And, on a going-forward basis, state officials would apparently be free to target citizens in other States for physical assaults, to invade their privacy, or to destroy their property, without giving any regard to state laws providing relief for those destructive acts.

Given the potentially drastic consequences of total immunity, it seems far from certain that the States, if they entered into voluntary agreements, would actually abandon all their authority to accord relief to their citizens. Be that as it may, however, the process of negotiating voluntary agreements would at least allow the States to confront the question for themselves, rather than simply accept a one-size-fits-all solution handed down by this Court. That is a far better course than the overruling of a decision that

has led to little practical difficulty and that was, in fact, entirely correct.

4. Congress Can Legislate To Provide the States with Expanded Immunity.

The States have other means of gaining immunity as well. In particular, the second sentence of the Full Faith and Credit Clause contains an express grant of power to Congress to declare the "effect" of public acts in state courts. *See Sun Oil Co. v. Wortman*, 486 U.S. 717, 729 (1988). If the States elected to do so, therefore, they could seek federal legislation directing States to apply the immunity laws of their sister States, the ruling that the Board unsuccessfully sought, as a constitutional matter, in *Hyatt I*. As the national legislative body, Congress would be well-positioned to consider the competing interests of all States, including (but not limited to) the interest of defendant States in avoiding burdens on their government operations. *See generally Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). Moreover, unlike a constitutional holding that would freeze the rights of both forum and defendant States, any congressional legislation addressing inter-State immunity could thereafter be amended, if and when circumstances so dictated.

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In short, the States have shown no entitlement to immunity as of right in the courts of other States. The Board's claim is unsupported by history and blocked by the decision in *Hall*. The Court should again reject the Board's request to elevate its sovereignty over the sovereignty of its sister State.

II. Neither the Full Faith and Credit Clause nor Principles of Comity Require Nevada's Courts To Apply California Law, in Whole or in Part, to a Matter About Which Nevada Is Competent To Legislate.

The Board's alternative argument is that, by declining to apply Nevada's cap on compensatory damages in this case, the Nevada Supreme Court violated the Full Faith and Credit Clause and principles of comity. According to the Board, the Nevada courts were obliged to apply the damages cap to California officials as a matter of "equal treatment." FTB Br. 17-25. But, however useful the idea of equal treatment may be as a "benchmark" for dealing with other sovereigns, *Hyatt I*, 538 U.S. at 499, there is no provision of federal law requiring it. Indeed, the Board is unable to identify *any* recognized legal basis for its theory, relying almost entirely on an over-reading of two passing remarks by this Court in *Hyatt I* and a thoroughly inapt invocation of the term "equal sovereignty." That sparse authority is nowhere near enough to justify the unprecedented ruling that the Board seeks.

A. The Full Faith and Credit Clause Allows Nevada To Apply Its Own Law to This Suit.

1. States May Apply Their Own Law to Matters About Which They Are Competent To Legislate.

This Court has made clear that the Full Faith and Credit Clause places only modest restrictions on the States' authority to apply their own laws to lawsuits in their courts. "Whereas the full faith and credit command 'is exacting' with respect to '[a] final judgment . . . rendered by a court with adjudicatory authority over the subject matter and persons governed

by the judgment,' it is less demanding with respect to choice of laws." *Hyatt I*, 538 U.S. at 494, quoting *Baker ex rel. Thomas v. General Motors Corp.*, 522 U.S. 222, 233 (1998) (citation omitted; alterations in original). The Board's efforts to rewrite that principle were found wanting before, *see id.* at 495-99, and are no more impressive now.

The governing rule regarding choice of law under the Full Faith and Credit Clause is simple and straightforward: a State may apply its own laws to "'a subject matter concerning which it is competent to legislate.'" *Id.* at 494, quoting *Sun Oil*, 486 U.S. at 722; *Baker*, 522 U.S. at 232. Thus, to determine whether a state court applying its own law has acted within constitutional bounds, the Court need ask only whether the State had legislative jurisdiction over the subject matter of the lawsuit. The Court, of course, has already answered that question in this case. In *Hyatt I*, the Court specifically found that Nevada was "competent to legislate" with respect to the torts in question. *See* 538 U.S. at 494.

The Nevada courts were thus constitutionally entitled to apply Nevada law to this case. By its plain terms, Nevada law provides no immunity – total or partial – for a foreign sovereign, leaving such immunity to be decided on a case-by-case basis as a matter of comity. Nevada does impose a cap on damage awards against *Nevada* officials, *see* Nev. Rev. Stat. § 41.035(1), but that cap is a condition on Nevada's waiver of sovereign immunity in its own courts and clearly does not apply to officials of other States. Application of Nevada law thus provides no immunity to the Board.

Faced with this obstacle, the Board suggests that the Nevada damages cap is unconstitutional if it

applies to Nevada officials but not to officials of other States. *See* FTB Br. 44. But the Board offers no credible authority for that proposition. Its purported legal support consists of one Commerce Clause case, *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988), that, to say the least, has nothing to do with the scope of immunity among sovereigns. And, insofar as the Board is relying on the concept of "equal sovereignty," its argument runs directly counter to cases making clear that the States do not have "equal" sovereign powers in the territories of other States. *See* pages 52-54, *infra*.

2. The Board's Attempt To Add a "No Hostility" Requirement to the Constitutional Test Is Unsupported and Unwarranted.

The finding that Nevada has legislative jurisdiction should be the end of the constitutional inquiry under the Full Faith and Credit Clause. Although the Board advances a jerry-built argument based on a mixture of Nevada and California law – saying that Nevada had to apply *California's* law of absolute immunity above the amount of *Nevada's* cap on damages for *Nevada* officials – that argument falls at the first hurdle because it ignores the dispositive Full Faith and Credit Clause standard. Given that Nevada is "competent to legislate" with respect to the subject matter of this lawsuit, *Hyatt I*, 538 U.S. at 494, the Clause does not require its courts to apply California law at all, let alone a non-existent California law designed to mirror an inapplicable Nevada law.

The Board nonetheless argues that Nevada, in making its choice-of-law decision, cannot exhibit "hostility" to California law. FTB Br. 21-22. But this argument has its own defects. To start with, it

cannot be "hostile" for a State to do nothing more than apply its own law to a matter over which it has legislative jurisdiction: that is precisely what the Constitution allows it to do. As this Court has said, "the very nature of the federal union of states, to which are reserved some of the attributes of sovereignty, precludes resort to the full faith and credit clause as the means for compelling a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 501 (1939); *see Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 436 (1943) ("each of the states of the Union has constitutional authority to make its own law with respect to persons and events within its borders").

The Board's two-step inquiry would also entangle the Court in endless, time-consuming inquiries regarding application of a State's own law. Instead of just conducting the uncomplicated inquiry now required by the Full Faith and Credit Clause – i.e., "does the forum State have legislative jurisdiction?" – the Court would need to undertake a second constitutional inquiry to decide whether a state court's otherwise permissible decision to apply its law should be regarded as "hostile" to the law of another State (something that aggrieved litigants will routinely claim). In every case, therefore, the Court would have to examine the law of two or more States and try to determine whether the home forum had overstepped some unidentified bounds of "hostility" in choosing its own law. That inquiry, by its very nature, would be largely standardless and, even more important, untethered to any recognized principles of full faith and credit.

To make matters worse, it is all but certain that the end result of applying an expansive, ill-defined "hostility" test would be a return to the long-abandoned days of "weighing" competing state interests. After all, the underlying premise of the Board's proposal is that this Court should promote California's interest in claiming immunity over Nevada's interest in compensating its injured residents. There is no principled way to measure those kinds of competing state interests, and the Court sensibly ended its efforts to do so. *See Pacific Employers*, 306 U.S. at 501 (limiting *Bradford Electric Light Co. v. Clapper*, 286 U.S. 145 (1932), to its facts). As the Court observed in this very case, "the question of which sovereign interest should be deemed more weighty is not one that can be easily answered. Yet petitioner's rule would elevate California's sovereignty interests above those of Nevada." *Hyatt I*, 538 U.S. at 498.

To support its "no hostility" requirement, the Board relies on a single case, *Carroll v. Lanza*, 349 U.S. 408 (1955), cited (though not actually discussed) in *Hyatt I*. *Carroll* offers no help to the Board, however, because the Court in that case specifically found that "Arkansas, the State of the forum, [was] *not* adopting any policy of hostility to the public Acts of Missouri." *Id.* at 413 (emphasis added). Rather, as the Court observed, the State was simply "choosing to apply its own rule of law to give affirmative relief for an action arising within its borders." *Id.* That, of course, is exactly what happened in this case: Nevada, the forum State, "cho[se] to apply its own rule of law to give affirmative relief for an action arising within its borders." The holding of *Carroll* makes clear, therefore, that a forum's basic choice of

its own law is not a hostile action in any constitutionally meaningful sense.[6]

In any event, it goes well beyond exaggeration to say that the Nevada courts exhibited hostility to California law or, for that matter, to California as a sovereign. *See* FTB Br. 23 (decision below "clearly failed to display a 'healthy regard for California's sovereign status'"), quoting *Hyatt I*, 538 U.S. at 499. Although the Nevada Supreme Court did not grant every conceivable wish that the Board had, it still went to great lengths to respect the dignity of its neighboring State. Far from treating the Board "just as any other litigant," *Hall*, 440 U.S. at 427 (Blackmun, J., dissenting), the court applied traditional principles of comity to shield the Board from a wide range of liability that non-sovereign defendants would have faced for the same conduct. In particular, the court applied California law to give the Board absolute immunity for its negligent acts and to free it from any obligation to pay punitive damages – while also barring interference with the California tax proceedings – precisely because of its status as a co-equal sovereign. *See* JA168 (negligence); Pet. App. 65 (punitive damages); *id.* at 53-57 (non-interference).

Furthermore, in the one instance where the Nevada court departed from the "benchmark" of liability for

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[6] The Court in *Carroll* distinguished two earlier cases, neither of which involved the basic choice-of-law question, i.e., what substantive law should govern the rights of the respective parties. Rather, both decisions involved situations "where the State of the forum [sought] to exclude from its courts actions arising under a foreign statute." 349 U.S. at 413. As a result, the state courts were not simply applying their own "rule[s] of law" to the events at issue, but were closing their courthouses to foreign causes of action entirely. Nothing of the sort occurred here.

Nevada officials, it specifically explained why granting the immunity sought by the Board would undermine Nevada's interest in protecting its residents from deliberate attacks by other sovereigns. The court noted that, unlike officials from other States, Nevada officials "'are subject to legislative control, administrative oversight, and public accountability'" in Nevada. Pet. App. 45, quoting *Faulkner v. University of Tennessee*, 627 So. 2d 362, 366 (Ala. 1992). *See*, *e.g.*, Nev. Rev. Stat. § 284.385(1)(a) (authorizing dismissal or demotion of employees for "the good of the public service"); Nev. Admin. Code § 284.650(1), (4) (authorizing discipline for "[a]ctivity which is incompatible with an employee's conditions of employment" and for "[d]iscourteous treatment of the public . . . while on duty"). As a result, it noted, "'[a]ctions taken by an agency or instrumentality of this state are subject always to the will of the democratic process in [Nevada],'" while there is no comparable safeguard against state officials that "'operate[] outside such controls in this State.'" Pet. App. 45, quoting *Faulkner*, 627 So. 2d at 366.

The Board does not challenge this analysis as a factual matter, nor could it reasonably do so. Nevada obviously has no control over the hiring and training of California tax officials, and it had no ability to rein in those officials once they embarked upon an offensive, bias-tainted campaign to "get" a Nevada resident. And, while the Board claims that Nevada has no legitimate interest in deterring its misconduct – asserting that "exercising control over non-Nevada government actions is hardly a constitutionally valid objective" (FTB Br. 24) – that argument just reflects the Board's self-centered view of state sovereignty. What California does with respect to its own citizens

within its own territory is concededly not a matter of concern to Nevada, but the injuries in this case occurred precisely because California did *not* confine its unlawful acts to its own territory. Instead, it reached into Nevada in order to commit intentional torts against a Nevada citizen, actions that constituted a direct intrusion on Nevada's interests as an independent sovereign. [7]

Finally, we note the Alice-in-Wonderland quality of the Board's attempt to invoke Nevada's damages cap for Nevada officials. It may be recalled that, when the shoe was on the other foot in *Hall*, Nevada officials sought protection under the same Nevada law in the California courts, only to be told that California would not apply it. *See Hall*, 440 U.S. at 412-13 (discussing California proceedings). As a result, Nevada officials were exposed to unlimited damages in California for a claim of negligence. Here, of course, Nevada accorded the Board complete immunity against negligence claims as a matter of comity, and the Board finds itself liable for damages only because it went well beyond the bounds of simple negligence and undertook a calculated campaign aimed at harming a Nevada resident.

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[7] Although the Board complains that "the Nevada jury below was happy to side with a fellow Nevadan," FTB Br. 52, one hardly needs to be a Nevada citizen to be troubled by tax officials who announce an intent to "get that Jew bastard," become "obsessed" with that goal, create an entire "fiction" about the taxpayer, and try to use his legitimate concerns about privacy to force him into a settlement. *See* pages 3-4, *supra*. Of course, we cannot know how a California jury would feel about the same conduct – assuming that the Board would treat in-state taxpayers the same way – because the Board has absolute immunity in its home State.

Given these circumstances, the Board's demand for even greater immunity is particularly unjustified.

B. There Is No Federal Law Dictating What State Courts May Do as a Matter of Comity.

The Board also argues that the Nevada courts were required to apply California's law of immunity (above the amount of the Nevada damages cap) as a matter of comity. But the Board cites no case in which this Court has ordered a state court to grant comity to another State. That omission is hardly coincidental. As this Court has observed, "'[t]he comity . . . extended to other nations is no impeachment of sovereignty. It is the *voluntary act* of the nation by which it is offered, and is inadmissible when contrary to its policy, or prejudicial to its interests.'" *Hilton*, 159 U.S. at 165-66, quoting *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 589 (1839) (emphasis added). Given the voluntary nature of comity, it remains within the discretion of a forum sovereign to decide whether to grant comity to another sovereign and, if so, to what extent.

Disregarding this basic principle, the Board asks the Court to oversee state courts' application of comity to other States, in order to assure that the doctrine is being "'sensitively'" applied. FTB Br. 22, quoting *Hyatt I*, 538 U.S. at 499. This call for expanded *federal* supervision is an especially odd request from the Board, given that it purports to be trumpeting the cause of *state* sovereignty. Whatever the exact contours of state sovereignty may be, they are obviously diminished by transferring final decisionmaking authority from state courts to federal courts. In any event, however, the Board presents no legal basis for the notion that federal courts can tell

state courts how to make their comity decisions, presumably because no one has ever viewed the role of the federal courts as encompassing a power to mandate what States may do under the voluntary doctrine of state-to-state comity.[8]

That fundamental understanding was not altered by this Court's observation in *Hyatt I* that the Nevada Supreme Court had "sensitively" applied principles of comity to this case. 538 U.S. at 499. In *Hyatt I*, the Board had complained about the refusal of the Nevada Supreme Court to accord it full immunity, and this Court merely pointed out that the state court had gone out of its way to treat the Board as a true sovereign. That passing, and entirely correct, observation is hardly enough to launch a counter-intuitive "mandatory comity" doctrine that would override centuries of established law.

It is true, of course, that some provisions of the Constitution make mandatory what, prior to formation of the Union, was simply a matter of comity. For example, the Full Faith and Credit Clause unquestionably imposed enforceable obligations on the States, requiring them to honor the judgments of other States and, to a very limited extent, to apply other States' laws. *See Baker*, 522

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[8] The Board claims that respondent himself endorsed a link between comity and mandatory equal treatment. *See* FTB Br. 18. It is thus worth pointing out that, during oral argument in *Hyatt I*, counsel for respondent stated no fewer than *five* times that there are no enforceable principles of federal law requiring state courts to give equal treatment to other States. *See* JA180 ("I don't think there is a federally enforceable law of state comity"), 186 ("just a matter [of comity]"; "not federal [sic] enforceable"), 187 ("there's no federally enforceable state law of comity"; rejecting suggestion of "federal component" for state-to-state comity).

U.S. at 232 (noting that the "animating purpose of the full faith and credit command" was to make the States "integral parts of a single nation") (internal quotations omitted). As we have just discussed, however, the Full Faith and Credit Clause does not require Nevada to apply California's immunity laws here. *See* pages 42-50, *supra*. It would be highly anomalous, therefore, for this Court to impose a binding choice-of-law obligation under the doctrine of comity when a constitutional provision directly addressing that very question imposes no such duty.

The Privileges and Immunities Clause likewise places limits on the States' authority to act as independent sovereigns. But the plain language of that Clause rules out its application here. The Clause provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States," U.S. Const. art. IV, § 2, cl. 1, and the States themselves are not "Citizens" of a State. As the sovereigns they are, the States must rely on voluntary principles of comity instead.

C. The Board's "Equal Sovereignty" Argument Rests Upon a Misunderstanding of Equal Sovereignty.

Finally, the Board tries to support its claim to equal treatment by invoking the concept of "equal sovereignty." But its argument totally misconstrues the import of that term. The fact that the States are equal sovereigns does not mean that a State has the same sovereign authority within the territory of another State as the latter State does. Rather, it means that each State has the same sovereign powers within *its* borders as other States have within *their* borders. The States' sovereignty is equal, but it is not overlapping.

The cases cited by the Board make that distinction very clear. In *Coyle v. Smith*, 221 U.S. 559 (1911), the Court relied upon principles of equal sovereignty to hold that Oklahoma had the right to determine the location of its state capital. But no one would think that Oklahoma has a voice, let alone an equal voice, in choosing the state capital of Kansas or Arkansas. Similarly, in *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215 (2012), the Court recognized that, under the equal-footing doctrine, Montana owned title to the riverbeds within its territory. Again, however, it would make little sense – indeed would turn the reasoning of *PPL Montana* on its head – to conclude that Montana has an equal right to riverbeds in other States.[9]

Even as a matter of pure policy, a strict equal-treatment-from-equal-sovereignty theory would have notable shortcomings. In particular, it would often lead to very *unequal* treatment between different States. Thus, if State A extends no immunity to its officials, while State B grants its officials complete immunity, the Board's "equal treatment" theory would mean that State B's officials would face unlimited liability in State A, even though State A's officials would have no liability whatsoever in State B. That lopsided result hardly fits the picture of perfect equality that the Board claims to be advancing.

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[9] The primacy of each State's sovereignty within its territory is reflected in various longstanding state practices. To take one example, most States exempt income from their own bonds from taxation, while levying taxes on income from bonds issued by other States. *See Department of Revenue of Kentucky v. Davis*, 553 U.S. 328 (2008); *Bonaparte v. Tax Court*, 104 U.S. 592 (1882).

In sum, nothing in federal law provides a basis for recasting the traditional law of state-to-state comity. The Nevada Supreme Court gave full consideration to the Board's status as the agency of a separate sovereign, and it applied principles of comity to grant the Board extensive protection. The Board may be unhappy that it did not get even more, but that grievance is not one of constitutional dimension.

CONCLUSION

The judgment of the Nevada Supreme Court should be affirmed.

Respectfully submitted,

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