IN THE SUPREME COURT OF THE STATE OF NEVADA
Case No. 80884

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA

Appellant

v.

GILBERT P. HYATT

Respondent

On Appeal from the Eighth Judicial District Court, Clark County
Case No. A382999
THE HONORABLE TIERRA JONES, District Judge, Department X

APPENDIX TO RESPONDENT'S BRIEF ON BEHALF OF GILBERT P. HYATT - VOLUME 17 OF 17

MARK A. HUTCHISON, Nev. Bar No. 4639
MICHAEL K. WALL, Nevada Bar No. 2098
HUTCHISON & STEFFEN, LLC.
10080 Alta Drive, Suite 200
Las Vegas, NV 89145
Telephone: (702) 385-2500
Facsimile: (702) 385-2086

PETER C. BERNHARD, Nev. Bar No. 734
KAEMPFER CROWELL
1980 Festival Plaza Drive, Suite 650
Las Vegas, NV 89135-2958
Telephone: (702) 792-7000
Facsimile: (702) 796-7181

DONALD J. KULA, Cal. Bar No. 144342
PERKINS COIE LLP
1888 Century Park East, Suite 1700
Los Angeles, CA 90067-1721
Telephone: (310) 788-9900
Facsimile: (310) 788-3399
Attorneys for Respondent Gilbert P. Hyatt

Chronological Index

Doc No.	Description	Vol.	Bates Nos.
1	Court Minutes re: case remanded, dated September 3, 2019	1	RA000001
2	Plaintiff Gilbert P. Hyatt's Brief in Support of Proposed Form of Judgment That Finds No Prevailing Party in the Litigation and No Award of Attorneys' Fees or Costs, filed October 15, 2019	1, 2, 3, 4	RA000002-RA000846
3	Exhibits 14-34 to Plaintiff Gilbert P. Hyatt's Brief in Support of Proposed Form of Judgment That Finds No Prevailing Party in the Litigation and No Award of Attorneys' Fees or Costs to Either Party, filed October 15, 2019	4, 5, 6, 7, 8	RA000847-RA001732
4	Exhibits 35-66 to Plaintiff Gilbert P. Hyatt's Brief in Support of Proposed Form of Judgment That Finds No Prevailing Party in the Litigation and No Award of Attorneys' Fees or Costs to Either Party, filed October 15, 2019	8, 9, 10, 11, 12	RA001733-RA002724
5	Exhibits 67-82 to Plaintiff Gilbert P. Hyatt's Brief in Support of Proposed Form of Judgment That Finds No Prevailing Party in the Litigation and No Award of Attorneys' Fees or Costs to Either Party, filed October 15, 2019	12, 13, 14, 15, 16	RA002725-RA003697
6	Exhibits 83-94 to Plaintiff Gilbert P. Hyatt's Brief in Support of Proposed Form of Judgment That Finds No Prevailing Party in the Litigation and No Award of Attorneys' Fees or Costs to Either Party, filed October 15, 2019	16, 17	RA003698-RA004027

7	Correspondence re: 1991 state income tax balance, dated December 23, 2019	17	RA004028-RA004032
8	Court Minutes re: motion for attorney fees and costs, dated April 23, 2020	17	RA004033-RA004034

Alphabetical Index

Doc No.	Description	Vol.	Bates Nos.
7	Correspondence re: 1991 state income tax balance, dated December 23, 2019	17	RA004028-RA004032
1	Court Minutes re: case remanded, dated September 3, 2019	1	RA000001
8	Court Minutes re: motion for attorney fees and costs, dated April 23, 2020	17	RA004033-RA004034
3	Exhibits 14-34 to Plaintiff Gilbert P. Hyatt's Brief in Support of Proposed Form of Judgment That Finds No Prevailing Party in the Litigation and No Award of Attorneys' Fees or Costs to Either Party, filed October 15, 2019	4, 5, 6, 7, 8	RA000847-RA001732
4	Exhibits 35-66 to Plaintiff Gilbert P. Hyatt's Brief in Support of Proposed Form of Judgment That Finds No Prevailing Party in the Litigation and No Award of Attorneys' Fees or Costs to Either Party, filed October 15, 2019	8, 9, 10, 11, 12	RA001733-RA002724
5	Exhibits 67-82 to Plaintiff Gilbert P. Hyatt's Brief in Support of Proposed Form of Judgment That Finds No Prevailing Party in the Litigation and No Award of Attorneys' Fees or Costs to Either Party, filed October 15, 2019	12, 13, 14, 15, 16	RA002725-RA003697
6	Exhibits 83-94 to Plaintiff Gilbert P. Hyatt's Brief in Support of Proposed Form of	16, 17	RA003698-RA004027

	Judgment That Finds No Prevailing Party in the Litigation and No Award of Attorneys' Fees or Costs to Either Party, filed October 15, 2019		
2	Plaintiff Gilbert P. Hyatt's Brief in Support of Proposed Form of Judgment That Finds No Prevailing Party in the Litigation and No Award of Attorneys' Fees or Costs, filed October 15, 2019	1, 2, 3, 4	RA000002-RA000846

CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of HUTCHISON & STEFFEN, PLLC, and that on this 1st day of October, 2020, I caused the above and foregoing document entitled **APPENDIX TO RESPONDENT'S BRIEF ON BEHALF OF GILBERT P. HYATT - VOLUME 17 OF 17** to be served by the method(s) indicated below:

_____ via U.S. mail, postage prepaid;

_____X_____ via Federal Express;

_____ via hand-delivery;

_____ via Facsimile;

upon the following person(s):

James A. Bradshaw, Esq.
MCDONALD CARANO WILSON LLP
100 West Liberty Street, 10th Floor
Reno, NV 89501

Attorneys for Appellant Franchise Tax Board of the State of California

Patricia K. Lundvall, Esq.
MCDONALD CARANO WILSON LLP
2300 West Sahara Avenue, Suite 1000
Las Vegas, NV 89102

Attorneys for Appellant Franchise Tax Board of the State of California

Robert L. Eisenberg, Esq.
LEMONS, GRUNDY & EISENBERG
6005 Plumas Street, Suite 300
Reno, NV 89519

Attorneys for Appellant Franchise Tax Board of the State of California

/s/ Kaylee Conradi
An employee of HUTCHISON & STEFFEN, PLLC

reargument instead of deciding it. Neither of these actions would have produced a decision on the merits. But instead this Court expressly chose to "affirm the Nevada courts' exercise of jurisdiction over California." *Hyatt II*, 136 S.Ct. at 1279. Having reaffirmed that principle of law, this Court went on to address the question of whether the Full Faith and Credit Clause required the Nevada court to reduce damages to the amount that could be awarded against Nevada agencies under these circumstances, an issue necessarily dependent on its affirmation of *Nevada v. Hall*. The parties and the Nevada Supreme Court then relied on this ruling, exactly as the law of the case doctrine is meant to facilitate. As this Court explained, the law of the case doctrine "promotes the finality and efficiency of the judicial process by 'protecting against the agitation of settled issues.'" *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988).

If the Board did not want this Court's decision to be the law of the case in this litigation, the Board could have moved this Court for rehearing after its decision in *Hyatt II*. *See* Rule 44, Rules of the Supreme Court of the United States ("Any petition for the rehearing of any judgment or decision of the Court on the merits shall be filed within 25 days after entry of the judgment or decision, unless the Court or a Justice shortens or extends the time."). It did not do so. It is therefore bound by the Court's decision in *Hyatt II* as the law of the case for this litigation.

3. The application of the law of the case doctrine is particularly important in this lengthy and complex litigation

Although the law of the case doctrine is discretionary, this Court has been clear that "*as a rule courts should be loath* [to depart from it] . . . *in the absence of extraordinary circumstances* such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'" *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. at 817-818 (1988) (emphasis added) (quoting *Arizona v. California*, 460 U.S. at 618 n.8); *see also Agostini v. Felton*, 521 U.S. 203, 236 (1997) (internal quotation marks omitted) ("The [law of the case] doctrine does not apply if the court is convinced that [its prior decision] is clearly erroneous and would work a manifest injustice.").

But whatever the Court ultimately decides concerning whether to overrule *Nevada v. Hall*, it cannot be asserted that it was "clearly erroneous" or that following it would "work a manifest injustice." Overruling *Nevada v. Hall* in *this litigation* would be a manifest injustice to Gilbert Hyatt. This litigation has gone on for over 20 years. Both sides have spent an enormous amount of time and money litigating the issues. The costs, even apart from attorney's fees, have been huge. Hyatt has undertaken this litigation in full reliance on the decisions of this Court. The Board did not challenge *Nevada v. Hall* in the first phase of litigation, expressly telling this Court it was not doing so. Hyatt relied on this, and that the viability of *Nevada v. Hall* was not at

issue, in taking this case to trial and in defending the appeals.

After this Court's decision in *Hyatt II*, Hyatt continued to litigate the matter in the Nevada Supreme Court in reliance on this Court's ruling in his case to reaffirm *Nevada v. Hall* and affirm the Nevada court's jurisdiction over this issue. It would be unjust to change the law in this case and expose Hyatt to the potential of having to bear the costs that the Board has incurred in this litigation, as well as the costs Hyatt incurred in reliance on this Court's affirmation of Nevada's jurisdiction. Hyatt properly and justifiably relied on this Court's decisions as to the law in his case, which were binding on the Nevada courts, and the law of the case doctrine protects his reliance. If litigants are to count on prior rulings to mean anything in their case, that must start with respect for decisions by this Court. And this is especially true here, where this Court, despite two opportunities to do so, did not disturb its holding in *Nevada v. Hall*.

Of course, this Court might reconsider *Nevada v. Hall* in other cases presenting that issue.[3] But in this litigation, this Court affirmed the Nevada courts' exercise of jurisdiction over the Board, reaffirmed *Nevada v. Hall*, and remanded for further proceedings. *Hyatt*

---

[3] In fact, there is a petition for a writ of certiorari now pending in another case posing the same issue. Petition for Writ of Certiorari, *Nevada Department of Wildlife v. Smith*, No. 17-1348 (U.S. March 21, 2018).

II, 136 S.Ct. at 1279, 1283. That should be regarded as the law of the case deciding the matter.

B. The Board Waived the Ability to Challenge *Nevada v. Hall*

As explained above, the Board had the opportunity to ask this Court to reconsider *Nevada v. Hall* when this case was before it in 2003. Although the Board had asserted sovereign immunity from the outset of this litigation, the Board made the express decision to not ask this Court to overrule *Nevada v. Hall*. As the Court explained in its unanimous ruling: "Petitioner does not ask us to reexamine that ruling [*Nevada v. Hall*], and we therefore decline the invitation of petitioner's *amici* States . . . to do so." *Hyatt I*, 538 U.S. at 497.

The law is clear that if an argument is not raised in a petition for certiorari, it is deemed waived. *See, e.g.*, *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 75 n.13 (1996); *see also Tennessee Student Ass'n Corp. v. Hood*, 541 U.S. 440, 456 (2004) (Thomas, J., dissenting). This is in accord with the general rule that a party waives an argument by choosing not to raise it. *See, e.g.*, *Granite Rock Corp. v. International Bhd. of Teamsters*, 561 U.S. 287, 306 (2010) (argument not raised in the Supreme Court is "deemed waived" (quoting this Court's Rule 15.2) ("briefs in opposition")); *Stop the Beach Renourishment v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 729 (2010) (arguments not raised in the Supreme Court are deemed waived).

The Board decided to challenge *Nevada v. Hall* only after lengthy proceedings in state court, including a jury trial, and after aspects of the jury's verdict were affirmed by the Nevada Supreme Court. *Franchise Tax Bd. v. Hyatt*, 335 P.3d 125, 130-131 (Nev. 2014). As explained above, Hyatt participated in this protracted litigation in reliance on *Nevada v. Hall* and his knowledge that the Board was not asking it to be overruled.

The Board may argue that it can raise sovereign immunity at any time in the proceedings and that should include the ability to argue for the overruling of *Nevada v. Hall*. But this Court long has been clear that a state may waive its sovereign immunity. *See Clark v. Barnard*, 108 U.S. 436, 447 (1883) (observing that sovereign immunity "is a personal privilege [that the state] may waive at pleasure"); *see also Raygor v. Regents of the Univ.*, 534 U.S. 533, 547 (2002); *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304 (1990). Moreover, this Court, and Courts of Appeals across the country, have held that a state can be deemed to waive its sovereign immunity by its choices during litigation. *See, e.g., Wisconsin Dep't of Corr. v. Schacht*, 524 U.S. 381, 388-390 (1998); *Rhode Island Dep't of Envtl. Mgmt. v. United States*, 304 F.3d 31, 50 (1st Cir. 2002) ("Claims of waiver of immunity are like any other legal argument and may themselves be waived or forfeited if not seasonably asserted."); *Hill v. Blind Indus. & Servs. of Md.*, 179 F.3d 754, 760 (9th Cir. 1999) (waiver found based on participating in litigation). As Justice Kennedy observed, "[i]n certain

respects, the [sovereign] immunity bears substantial similarity to personal jurisdiction requirements, since it can be waived and courts need not raise the issue *sua sponte*." *Schacht*, 524 U.S. at 394 (Kennedy, J., concurring).

When this case was first here, the Board tried to have the case against it dismissed, but without asking this Court to reconsider *Nevada v. Hall*. *See Hyatt I*, 538 U.S. at 491-492. It could have done so, but expressly said it was not asking for reconsideration of this precedent. Thus, it should be seen as waiving this argument in litigation before this Court.

II. *Nevada v. Hall* Should Not Be Overruled

A. The Strong Presumption Against Overruling Precedent

On the merits, the sole issue presented in this case is whether this Court should overrule its almost 40-year-old precedent in *Nevada v. Hall*. "The Court has said often and with great emphasis that 'the doctrine of *stare decisis* is of fundamental importance to the rule of law.'" *Patterson v. McLean Credit Union*, 491 U.S.164, 172 (1989) (citations omitted). That is because "*stare decisis* 'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process'. . . . *Stare decisis* thereby avoids the instability and unfairness that accompany disruption of settled legal expectations." *Randall v. Sorrell*, 548 U.S. 230, 248 (2006)

(quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). Stare decisis "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, 265-266 (1986).

Because "[a]dherence to precedent promotes stability, predictability, and respect for judicial authority," this Court has emphasized that it "will not depart from the doctrine of stare decisis without some compelling justification." *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991). The Board, though, offers no compelling reason why *Nevada v. Hall* should be overruled.

B. *Nevada v. Hall* Safeguards a State's Sovereign Power Under the Tenth Amendment in Protecting Its Own Citizens From Harm

The Board and its *amici* stress a state's sovereign interest in not being sued. But they ignore another very important sovereign interest of states: providing a forum for their citizens when they are injured and providing a remedy for them, especially when none other exists. This Court repeatedly has recognized "the legitimate and substantial interest of the State in protecting its citizens." *Farmer v. United Bhd. of Carpenters & Joiners*, 430 U.S. 290, 302-304 (1977); *see also Watson v. Employers Liability Assurance Corp.*, 348

U.S. 66, 72-73 (1954) (interest of state in protecting its citizens when they are injured). The "States have a perfectly legitimate interest, exercised in a variety of ways, in redressing and preventing careless conduct, no matter who is responsible for it, that inflicts actual, measurable injury upon individual citizens." *Rosenbloom v. Metromedia*, 403 U.S. 29, 64 (1971) (Harlan, J., dissenting).

Nevada v. Hall was expressly based on this interest of a sovereign state in being able to protect its citizens. As this Court explained, history "supports the conclusion that no sovereign may be sued in its own courts without its consent, but it affords no support for a claim of immunity in another sovereign's courts. Such a claim necessarily implicates the power and authority of a second sovereign[.]" *Nevada v. Hall*, 440 U.S. at 416.

The Board speaks of the "dignity" interest of states in not being sued, Brief for Petitioner at 38, but fails to recognize the dignity interest of a state in being able as a sovereign to determine the jurisdiction of its own courts and to protect its own citizens from harm. In this case it is the interest of Nevada in protecting its citizens from egregious intentional torts, behavior sufficiently outrageous that it caused the jury to award $389 million in damages against the Board, including $250 million in punitive damages. As this Court approvingly quoted in *Hyatt I*: "'Few matters could be deemed more appropriately the concern of the state in which [an] injury occurs or more completely within its power.'" 538 U.S. at 495 (quoting *Pacific Employers Ins.*

Co. v. Industrial Accident Comm'n, 306 U.S. 493, 503 (1939)). As Chief Justice Roberts explained in *Hyatt II*: "[T]here is no doubt that Nevada has a 'sufficient' policy interest in protecting Nevada residents from such injuries." *Hyatt II*, 136 S.Ct. at 1287 (Roberts, C.J., dissenting).

Since early in American history, the Court has recognized the limits of the political process when a state harms those in other states. In *McCulloch v. Maryland*, Chief Justice John Marshall explained that one reason Maryland could not tax the Bank of the United States was because Maryland then effectively would be taxing those in other states who do not have representation in the Maryland political process. 17 U.S. (4 Wheat.) 316, 435 (1819). Likewise, the Court has "a virtually per se rule" against laws discriminating against out-of-staters when such laws burden interstate commerce because a state is inflicting harms on others who are not able to protect themselves in the state's political process. *Granholm v. Heald*, 544 U.S. 460, 476 (2005) (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)). As the Court explained in *South Carolina Highway Dept. v. Barnwell Bros., Inc.*, 303 U.S. 177, 185 n.2 (1938), "when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state."

Similarly, a Nevada resident who is injured by the State of California has no possible remedy except in

the Nevada courts. As Chief Justice Roberts explained, "Nevada is not, however, required to treat its sister State as equally committed to protection of Nevada citizens." *Hyatt II*, 136 S.Ct. at 1287 (Roberts, C.J., dissenting). Nevada, as a sovereign state has a crucial interest in ensuring the protection of its citizens. The Nevada Supreme Court said this explicitly in this case, declaring: "This state's policy interest in providing adequate redress to Nevada citizens is paramount." 335 P.3d at 147.

The Board posits that sovereign immunity serves the "constitutional values" of protecting the dignity of states and promoting self-government. Brief for Petitioner at 36-37. Both of these constitutional values, though, are directly served by allowing a state to provide a forum for their citizens when they are injured. *See Hyatt I*, 538 U.S. at 494 (The State of Nevada "is undoubtedly competent to legislate" concerning "intentional torts . . . which . . . have injured one of its citizens within its borders."). It affirms the dignity and autonomy of a state to be able to determine the jurisdiction of its courts and to provide a remedy for its citizens when they are hurt, especially within their own state. As Professor Weinberg explains, "[w]ithout *Nevada v. Hall*, a state's own residents cannot obtain justice for injuries received at the hands of a different state intruding on the home state's own territory." Weinberg, *Saving* Nevada v. Hall (November 12, 2018 draft), Social Science Research Network, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3254349 (providing Abstract, View, and Download), at 19.

Additionally, citizens' interest in self-government is harmed when a state loses its ability to determine the jurisdiction of its courts and to provide its own citizens a remedy.

The Board focuses on the ability of a state to avoid being sued, but the flip side presents an even more important self-governance issue: the ability of citizens, through their representatives and judges, to protect the interests of those injured within the state by providing them a forum for redress. This case illustrates the importance of Nevada's interest. Agents from another state entered Nevada, spied on Hyatt in his home and searched his trash bins. They called him filthy names and tried to extort money from him by threatening to reveal private information. Without *Nevada v. Hall*, a state would have no way of protecting its residents who are harassed by employees of another state.

The Board and its *amici* fail to recognize this interest. They stress the harms to states of being sued. Although *Nevada v. Hall* is almost four decades old, they can point to only a relative handful of suits against state governments pursuant to it. Brief for Petitioner at 46-47; Brief of Indiana and 43 Other States as *Amici Curiae* in Support of Petitioners at 13-14; Brief of *Amici Curiae* Multistate Tax Commission, National Governors Association, and National Conference of State Legislatures in Support of Petitioners at 17-18. Suits against states in state court—rare before the decision in *Nevada v. Hall*—are still rare today. *See* Jeffrey W. Stempel, Hyatt v. Franchise Tax Board of

California: *Perils of Undue Disputing Zeal and Undue Immunity for Government Inflicted Injury*, 18 Nev. L.J. 61, 83 (2018) ("According to the *Nevada v. Hall* critics, states have sometimes been sued for conduct causing injury in other states, placing legal and financial pressure on the states. But the empirical burden of such litigation is far from clear and hardly seems oppressive.").

Moreover, *Nevada v. Hall* does not mean that states are without protection from suit in other states' courts. As this Court held when this case was last before it, the Full Faith and Credit Clause means that a state court cannot hold another state liable for more than the liability that would be allowed for the forum state in its own courts. *Hyatt II*, 136 S.Ct. at 1281. This matters greatly in protecting state governments. In this case, the jury's award of $139 million in compensatory damages and $250 million in punitive damages now has been reduced to $100,000. *Franchise Tax Bd. v. Hyatt*, 407 P.3d 717, 725 (Nev. 2017). States thus have ample means of "avoiding [the] burdens" of being haled into another state's court, Brief for Petitioner at 35, without abrogating their ability to protect their own citizens and contradicting fundamental principles of sovereignty.

Also, state courts can and do accord comity to other states. In this case, the Nevada Supreme Court ruled that negligent claims could not go forward and also that punitive damages are not available against the Board because of considerations of comity. *Id.* Furthermore, in those relatively infrequent instances

when such suits have been filed, state courts have typically relied on the voluntary 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, 344-347 (N.C. Ct. App. 2012); *Sam v. Sam*, 134 P.3d 761, 762-763 (N.M. 2006).

Moreover, the states need not rely exclusively on the doctrine of comity in their quest for greater immunity in other states' courts. If both California and Nevada believe that expanded immunity is appropriate, the two states are free to enter into an agreement to provide immunity in each other's courts, *see Nevada v. Hall*, 440 U.S. at 416, or to join in a broader agreement with all states sharing similar views. 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) ("Congressional consent is not required for interstate agreements that fall outside the scope of the Compact Clause.").[4]

---

[4] The Brief of the *Amici Curiae* Multistate Tax Commission, et al., also argues that *Nevada v. Hall* should be overturned because it subjects states to erroneous choice-of-law decisions of other state courts and risks disruption of states' tax enforcement systems. Brief of *Amici Curiae* Multistate Tax Commission, National Governors Association, and National Conference of State Legislatures in Support of Petitioner at 5-11. But states are not left without recourse if they feel the judgment of a sister-state court has been made in error. This Court has recognized that "[o]rders commanding action or inaction have been denied enforcement in a sister State when they purported to accomplish an official act within the exclusive province of that other State or interfered with litigation over which the ordering State had no

C. *Nevada v. Hall* Reflects the Original Understanding that a Sovereign Could Be Sued in Another Sovereign's Courts

The core of the arguments from the Board and its *amici*—besides that state governments don't want to be sued—is that *Nevada v. Hall* was wrong. There is no new historical evidence that suggests that the Court erred. The Board and its *amici* present the same historical arguments that were made in 1977 when the Court decided *Nevada v. Hall*.

This Court has been clear that "an argument that we got something wrong—even a good argument to that effect—cannot by itself justify scrapping settled precedent." *Kimble v. Marvel Entm't, LLC*, 135 S.Ct. 2401, 2409 (2015). 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.'" *Id.* (citations omitted). But no such special justification exists here. *Nevada v. Hall* was based on careful historical analysis. *See Nevada v. Hall*, 440 U.S. at 414-417.

---

authority." *Baker v. GMC*, 522 U.S. 222, 235 (1997). Additionally, the defendant state may be able to reject the judgment for lack of subject matter jurisdiction, lack of personal jurisdiction, or other invalidating grounds such as fraud, as long as those issues were not litigated in the original forum state. *See* James P. George, *Enforcing Judgments Across State and National Boundaries: Inbound Foreign Judgments and Outbound Texas Judgments*, 50 S. Tex. L. Rev. 400, 407 (2009). And if states wish, they can enter into agreements limiting their ability to be sued in each other's courts.

The primary argument advanced by the Board and its *amici* is that *Nevada v. Hall* is inconsistent with principles of sovereign immunity. *See* Brief for Petitioner at 14-30. But Petitioner ignores the key distinction that has been drawn from the earliest days of American history and that underlies *Nevada v. Hall*: the difference between a state's sovereignty in its own courts and its immunity in the courts of another sovereign. To reach the conclusion that *Nevada v. Hall* was wrongly decided, this Court would not only have to eliminate this distinction, but it would have to revisit the myriad precedents that depend upon it.

Nevada v. Hall was the mirror image of this case. California plaintiffs sued the State of Nevada in California state court on a claim that could not have been brought in Nevada. *Nevada v. Hall*, 440 U.S. at 411. The plaintiffs had been seriously injured in a car accident caused by an employee of the University of Nevada. *Id.*

This Court expressly rejected Nevada's claim that sovereign immunity protected it from suit in California state court. *Id.* at 426-427. The Court reviewed the history of sovereign immunity and concluded that it protects a state from being sued in its own courts without its consent. *Id.* at 414-417. The Court explained that sovereign immunity means that

> no sovereign may be sued in its own courts without its consent, but it affords no support for a claim of immunity in another sovereign's courts. Such a claim necessarily implicates the power and authority of a second sovereign;

> its source must be found either in an agreement, express or implied, between the two sovereigns, or in the voluntary decision of the second to respect the dignity of the first as a matter of comity.

Id. at 416.

Relying on precedent from the earliest days of American history—Chief Justice John Marshall's decision in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812)—this Court in *Nevada v. Hall* concluded that sovereign immunity never was meant to protect a state from suits in another state's court. *Nevada v. Hall*, 440 U.S. at 416. *The Schooner Exchange* has been seen as establishing the principle throughout American history that a sovereign is under no legal obligation to grant immunity to other sovereigns in its own courts. Simply put, a state's sovereign immunity in its own courts is a function of its sovereignty there; but that does not give it sovereign immunity when it is sued in the courts of another sovereign. *See*, *e.g.*, *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 352 (1822); *see also* William Baude, "Sovereign Immunity and the Constitutional Text," 103 Virginia L. Rev. 1, 23-24 (2017) ("Immunity in one's own courts, the Court wrote, 'has been enjoyed as a matter of absolute right for centuries,' while immunity in another sovereign's courts was a matter of mutual agreement or comity." (quoting *Nevada v. Hall*, 440 U.S. at 414)).

The Board argues that this Court got it wrong in *Nevada v. Hall* in relying on *The Schooner Exchange v.*

McFaddon because that case involved the immunity of nations and not of states. Brief for Petitioner at 33. For many reasons this Court's invocation of *The Schooner Exchange* in *Nevada v. Hall* was apt. To begin with, *The Schooner Exchange* established the power of a state to define the jurisdiction of its courts and to provide a remedy to its injured citizens against out-of-staters. *See* 11 U.S. (7 Cranch) at 144. That, of course, is exactly why *Nevada v. Hall* invoked *The Schooner Exchange* as precedent.

The Schooner Exchange also established the lack of immunity that a sovereign has when it is sued in the courts of another sovereign. *See id.* 146-147. As Justice Thomas stated: "[I]mmunity does not apply of its own force in the courts of another sovereign." *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 815 (2014) (Thomas, J., dissenting).

Moreover, the crucial fact that the Board points to—"the absence of an enforcement mechanism"—also is true if this Court were to overrule *Nevada v. Hall*. There would be no enforcement mechanism of any kind for those like Gilbert Hyatt who have been injured by another state government. The "neutral tribunal" of this Court that the Board asserts to be the "judicial enforcement mechanism" that compensated the states for depriving them of "the ability to refuse to recognize the judgment of another state," Brief for Petitioner at 32, applies only to cases between state governments. Hyatt cannot sue the Board in this Court, nor in any other forum apart from Nevada.

Nevada v. Hall was based on three basic and unassailable premises. First, prior to formation of the Union, the states were independent sovereign nations and had the same immunity in each other's courts as other sovereign nations had in the courts of foreign nations. *See Nevada v. Hall*, 440 U.S. at 417. Second, before the founding of the United States, 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. *See id.* at 416. Third, 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. *See id.* at 421. As Professors Stephen E. Sachs and William Baude observe: "The Constitution left sister-state immunity alone, neither abrogating it nor transforming it into a rule of constitutional law." Brief of Professors William Baude and Stephen E. Sachs as *Amicus Curiae* in Support of Neither Party, at 6. As Professor Louise Weinberg explained: "[B]oth in history and law, *Nevada v. Hall* is in accord with general understandings and cannot be disturbed without damage to the 'seamless web' of established legal understandings." Louise Weinberg, at 3-4.

The Board asserts that "[b]efore the ratification of the Constitution, it was widely accepted that the States enjoyed sovereign immunity from suit in each other's courts." Brief for Petitioner at 21; Brief of Law Professors as *Amici Curiae* in Support of Petitioners at 9-10. But this is not correct and the Board itself admits this later in its brief when it states: "In the pre-ratification era, the relationship among States

was similar to that among independent nations. *No state could be required to respect another's sovereign immunity in its courts.*" Brief for Petitioner at 31-32 (emphasis added).

The Board's initial conclusion, which it later rightly contradicts, was based on generalizing from two cases from Pennsylvania in the unique context of admiralty law—*Nathan v. Virginia*, 1 U.S. (1 Dall.) 77 (Pa. Ct. Com. Pl. 1781); *Moitez v. South Carolina*, 17 F. Cas. 574, Pa. Adm. 1781 (No. 9,767). *See also* Brief of Law Professors as *Amici Curiae in Support of Petitioner* at 10-11 (relying on these cases as the basis for its analysis). Under the Articles of Confederation, however, there was no limit on the ability of a state to be sued. In *Chisholm v. Georgia*, Justice Cushing explained that *before* the ratification of the Constitution, states were subject to suit in the courts of other states. 2 U.S. (2 Dall.) 419, 474 (1793). He observed that "[e]ach State was obliged to acquiesce in the measure of justice which another State might yield *to her, or to her citizens*[.]" *Id.* (emphasis added). In fact, out of the original thirteen colonies, only two directly opposed jurisdiction over state governments. Susan Randall, *Sovereign Immunity and the Uses of History*, 81 Neb. L. Rev. 1, 55 (2002).

Nathan v. Virginia, invoked by the Board, reflected a common law immunity. 1 U.S. (1 Dall.) 77 (Pa. Ct. Com. Pl. 1781). But the Board and its *amici* offer no evidence that the framers meant to turn this common law immunity against a state being sued in another state into a constitutional rule. As Professors Sachs

and Baude point out: "The Board repeatedly confuses the Founders' choice *not to abrogate* sovereign immunity with a decision *to entrench it*, transforming the traditional common-law immunities into new rules of constitutional law." Amicus Brief of Professors William Baude and Stephen Sachs, at 11.

This is why the Board is wrong in its assertion that *Alden v. Maine*, 527 U.S. 706 (1999) is inconsistent with *Nevada v. Hall*. Brief for Petitioner at 36-37. *Alden v. Maine* is about the ability of a state to choose to not be sued in its own state courts, a choice that this Court said was protected by an immunity that has existed throughout American history. *Alden*, 527 U.S. at 738. But a state's sovereignty in its own courts tells nothing about its immunity in the courts of another state. In fact, as this Court noted in *Alden v. Maine*, "*the Constitution did not reflect an agreement between the States to respect the sovereign immunity of one another*[.]" 527 U.S. at 738 (emphasis added).

In *Alden v. Maine*, the Court reaffirmed the basic distinction between suing a state in its own state courts and suing a state in the courts of another state. The Court stated:

> In fact, the distinction drawn between a sovereign's immunity in its own courts and its immunity in the courts of another sovereign, as well as the reasoning on which this distinction was based, are consistent with, and even support, the proposition urged by respondent here—that the Constitution reserves to the States a constitutional immunity from private

> suits in their own courts which cannot be abrogated by Congress.

Id. at 739-740. There is an enormous difference in terms of the intrusion on state sovereignty between forcing a state court to hear a case against its state government, what *Alden* protects state courts from having to do, and precluding a state court from hearing a suit to protect its citizens against another state. The Board relies heavily on *Alden* as the reason why *Nevada v. Hall* should be overruled, but then ignores the reasoning in *Alden* and this fundamental distinction which *Alden* expressly recognizes.

The Board and its *amici* stress state sovereignty, but keeping a state from hearing suits is itself a significant limit on state prerogatives. In *Nevada v. Hall*, this Court stressed that preventing a state court from hearing suits against other states would be inconsistent with a concern for state sovereignty. *Nevada v. Hall*, 440 U.S. at 426-427. The Court declared:

> It may be wise policy, as a matter of harmonious interstate relations, for States to accord each other immunity or to respect any established limits on liability. They are free to do so. But if a federal court were to hold, by inference from the structure of our Constitution and nothing else, that California is not free in this case to enforce its policy of full compensation, that holding would constitute the real intrusion on the sovereignty of the States—and the power of the people—in our Union.

Id.

The Tenth Amendment is crucial in explaining the distinction between *Alden v. Maine* and *Nevada v. Hall*. Because the Constitution is silent about the power of state courts to hear suits against state governments, *see Nevada v. Hall*, 440 U.S. at 421, a state may make the choice—as Maine did in *Alden v. Maine*—to not allow itself to be sued in its state courts. But a state also may choose, as Nevada did here and as California did in *Nevada v. Hall*, to provide a forum for its citizens when they are injured by another state. As this Court recently noted in discussing the Tenth Amendment, "[t]he Constitution limited but did not abolish the sovereign powers of the States, which retained 'a residuary and inviolable sovereignty.'" *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S.Ct. 1461, 1475 (2018) (citations omitted). An aspect of that sovereignty is being able to determine the jurisdiction of its courts and to choose to allow its courts to hear claims by its citizens who have been injured, including by other states. *See Nevada v. Hall*, 440 U.S. at 426-427.

The Tenth Amendment means that a state has the power to act unless prohibited by the Constitution. There is nothing in the Constitution that forbids a state from providing a forum for its citizens when they are injured by another state. *See id.* at 426-427. Nor is there anything in the framers' intent or original understanding at the time the Constitution was adopted that indicates that such a prohibition on state prerogatives was intended. As this Court explained in *Nevada v. Hall*, "the question whether one State might be subject to suit in the courts of another State was apparently

not a matter of concern when the new Constitution was being drafted and ratified." 440 U.S. at 418-419. To be sure, there are many declarations about the immunity of a state government from suit, but none said that this includes *constitutional* protection from suit in the courts of another state or a *constitutional* limit on the ability of a state to choose to provide a forum for its citizens when they are injured by another state.

The Board asserts that decisions about sovereign immunity since *Nevada v. Hall* undermine its reasoning. Brief for Petitioner at 40-43. But this Court's decisions about sovereign immunity in federal courts are about the scope of a constitutional limit on federal court jurisdiction: the Eleventh Amendment. *See, e.g.*, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996) (discussing the meaning of the Eleventh Amendment as a limit on federal judicial power and on congressional authority to abrogate sovereign immunity in federal court). Unlike the limits the Constitution places on Congress's powers, including its power to abrogate state sovereign immunity, the Constitution places no similar limits on the ability of states to create a forum for their citizens when they are injured in the state. *See Nevada v. Hall*, 440 U.S. at 426-427. Moreover, as discussed above, *Alden v. Maine* is about whether a state court is constitutionally required to hear suits against that state government. *Alden*, 527 U.S. at 738. The issue in this case is very different; it is about whether there is a *constitutional prohibition* on a state court choosing to provide a forum for its citizens when they are injured by another state. *Nevada v. Hall*

resolves this question and no subsequent case addresses it.[5]

The Board suggests that it "strains credulity" to believe that the framers would have allowed a state to be sued in another state's courts. Brief for Petitioner at 27. It does not strain credulity at all to believe that the framers assumed and even wanted to protect the sovereign prerogative of states to define the jurisdiction of their own courts, including by continuing to provide a forum for their citizens when injured.

The Board seeks to turn a power of a state to choose not to hear cases against itself as recognized in *Alden v. Maine*, 527 U.S. at 739-740, into a constitutional prohibition against states choosing to make their courts available to protect their residents when they have been injured. Nothing in the Constitution or

---

[5] The Board raises the sovereign immunity of Indian tribes as a basis for finding that states have sovereign immunity and cannot be sued in the courts of other states. Brief for Petitioner at 14, 41-42. But this Court has long recognized that "the immunity possessed by Indian tribes is not coextensive with that of the States." *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 756 (1998). Unlike the Board's characterization of tribal immunity, this Court said that "it developed almost by accident." *Kiowa*, *Id.* at 756. In fact, this Court noted that "[t]here are reasons to doubt the wisdom of perpetuating the doctrine." *Id.* at 758. Also, the scope of tribal immunity remains uncertain. In *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 799 n.8 (2014), the Court specifically declined to consider (and stated that it had never previously addressed) "whether immunity should apply in the ordinary way if a tort victim, or other plaintiff who has not chosen to deal with a tribe, has no alternative way to obtain relief for off-reservation commercial conduct."

the framers' intent—and nothing cited by the Board or its *amici*—supports the conclusion that such a constitutional limit exists on state power.

In *Hyatt II*, this Court reiterated that

> 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.

136 S.Ct. at 1285-1286 (citation omitted). That is why in *Hyatt I*, this Court held that the Nevada court was not required to extend full faith and credit to California's statute conferring complete immunity on California agencies. 538 U.S. at 494. But the Board's sovereign immunity argument here would allow California to substitute its legislative judgment for the judgment of other states in the same way that this Court held that the Full Faith and Credit clause does not permit. Essentially, the Board is arguing that the California legislature was entitled to waive immunity or not, but whichever way it decided, its judgment is binding on other states. That result would indeed disrupt "the very nature of the federal union of states."

The Board argues that *Nevada v. Hall* was a significant departure from precedent. Brief for Petitioner at 28-29. But notably it did not overrule a single decision of this Court and saw itself as following

the long-standing understanding that a state court can choose to hear suits against another state government.

D. There Is No Compelling Reason for Overruling *Nevada v. Hall*

The sole issue in this case is whether there is a "compelling justification" for overruling *Nevada v. Hall*. *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991) ("[W]e will not depart from the doctrine of stare decisis without some compelling justification."). In terms of reconsidering precedent, this Court has explained:

> [W]hen this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask whether the rule has proven to be intolerable simply in defying practical workability; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or whether facts have so changed, or come to be seen so differently, as to have

> robbed the old rule of significant application or justification.

Planned Parenthood v. Casey, 505 U.S. 833, 854-855 (1992) (citations omitted).

Under each of these criteria, there is no justification for overruling *Nevada v. Hall*. First, *Nevada v. Hall* has not proven "intolerable simply in defying practical workability." The Board says that the impracticality of *Nevada v. Hall* is reflected in the jury's large verdict against it and the length of this litigation. Brief for Petitioner at 44. But the large jury verdict reflects the egregious conduct of the Board and the length of the litigation is a result of the choices of the Board, including choosing to make three trips to this Court as Petitioner. Furthermore, the jury verdict has been reduced to $100,000, showing the protections for state governments that the Board seeks. *Franchise Tax Bd. v. Hyatt*, 407 P.3d 717, 725 (Nev. 2017).

The Board and its *amici* point to a handful of cases brought against state governments. Brief for the Petitioner at 46-47; Brief of Indiana and 43 Other States as *Amici Curiae* in Support of Petitioners at 13-14. But the fact that states are occasionally sued does not show that *Nevada v. Hall* defies practical workability. Quite the contrary, it shows that *Nevada v. Hall* is working exactly as it should: allowing states to provide a forum when their citizens are injured by other states. Neither the Board nor its *amici* ever show that these are non-meritorious suits or that if they were, they could not be dismissed like any other non-meritorious litigation.

Admittedly, states do not like to be sued; no one does. But as noted above, states that conclude that litigation against each other is problematic have a fix: they can enter into a mutual agreement to not allow such litigation in their courts. When there is a solution to a problem that is readily available by action by elected officials, this Court should resist intervention in what is fundamentally a political decision. That states have not yet chosen to do so is certainly not reason to overrule *Nevada v. Hall*. The failure of states to enter into such compacts precluding litigation perhaps reflects that such suits are relatively rare and the judgment of the states that it is important to have their courts available to provide redress for their citizens when injured by agents of another state.

Second, the Board is wrong in its assertions that rules governing sovereign immunity do not engender reliance interests and that there has been no reliance on *Nevada v. Hall*. Brief for Petitioner at 43. Gilbert Hyatt has relied, at enormous cost, on *Nevada v. Hall* in litigating this matter for 20 years. Nor is he alone. The Board and its *amici* point to other cases that have been brought in reliance on *Nevada v. Hall*. *Id.* at 46-47; Brief of Indiana and 43 Other States as *Amici Curiae* in Support of Petitioners at 13-14. The Board and its *amici* cannot have it both ways: they cannot simultaneously claim that there are a number of lawsuits based on *Nevada v. Hall* and assert that no one has relied on *Nevada v. Hall*. The plaintiffs in all of the suits identified by the Board and its *amici* have incurred great costs in litigation in reliance on this

Court's decision—and they would be potentially liable for having to pay the other sides' litigation costs if this Court were to hold that *Nevada v. Hall* is overruled.[6]

Third, there has been no change in the law that "has left the old rule no more than a remnant of

---

[6] It is for this reason that there is a strong argument that if this Court were to overrule *Nevada v. Hall*, it should do so prospectively only. Those, like Hyatt, who have relied on this Court's decision in *Nevada v. Hall*, should not be penalized for doing so. This Court has recognized that the Constitution neither compels nor prohibits the retroactive application of its newly announced rules. *See, e.g.*, *Johnson v. New Jersey*, 384 U.S. 719, 728 (1966) (holding that "the choice between retroactivity and nonretroactivity in no way turns on the value of the constitutional guarantee involved."). In *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971), this Court indicated that a decision should not be applied retroactively when it establishes a "new principle of law," including by "overruling clear past precedent" on which litigants relied, when applying a decision only prospectively would not lessen its impact in the future, and when there has been great reliance on a Court's prior decision.

All three of these factors counsel against a retroactive change in the law. Overturning *Nevada v. Hall* would clearly establish a new principle of law because it would overturn long-standing past precedent. As for the second factor, overruling *Nevada v. Hall* only prospectively will not lessen the impact of the Court's decision in the future. Finally, as to the third factor, Hyatt relied upon *Hyatt I*, in which the Court ruled to continue the litigation in Nevada state courts. In reliance on this Court's ruling and *Nevada v. Hall*, there was a jury trial and an appeal by the Franchise Tax Board from the verdict in favor of Hyatt. Hyatt relied on this Court's decision in *Hyatt II*, in which the Court directed the Nevada courts on how to address the tort damages issue. Hyatt has engaged in extremely lengthy and highly costly proceedings, as the plaintiffs did in *Chevron*. *Id.* at 108. Although the presumption is in favor of retrospective application, in this instance any decision to overrule *Nevada v. Hall* should only be prospective.

abandoned doctrine." The Board argues that this Court has significantly changed the law of sovereign immunity and especially points to *Alden v. Maine*. Brief for Petitioner at 17, 23, 36-37. But again, no decision of this Court has questioned the distinction explicitly drawn in *Alden v. Maine* between a state being sued in its own state courts and a state being sued in another state's courts. 527 U.S. at 739-740. As explained above, there is a crucial difference between forcing a state court to hear a suit against its state government and precluding a state court from choosing to hear a suit to protect its citizens. This Court's Eleventh Amendment decisions address a constitutional limit on federal court power. They do not address, explicitly or implicitly, whether there is a constitutional prohibition on a state's choice to provide a forum for its citizens when they are injured by another state. Most of all, they do not establish a limit on a state's power under the Tenth Amendment to define the jurisdiction of its courts and to provide a remedy to its citizens when they are injured by agents of another state.

Finally, the facts have not "so changed . . . as to have robbed the old rule of significant application or justification[.]" *Casey*, 505 U.S. at 855. There has been no change in facts since *Nevada v. Hall* was decided almost four decades ago. Every argument made by the Board and its *amici* against the conclusion of *Nevada v. Hall* could have been made then. *Nevada v. Hall* was based on the text and history of the Constitution and its protection of the ability of sovereign states to allow jurisdiction in their courts to protect their citizens.

Nothing has changed since then to undermine this basic power of states that is protected by the Tenth Amendment.

CONCLUSION

For all of these reasons, the judgment of the Supreme Court of Nevada should be affirmed.

Respectfully submitted,

ERWIN CHEMERINSKY
Counsel of Record
UNIVERSITY OF CALIFORNIA, BERKELEY SCHOOL OF LAW
215 Boalt Hall
Berkeley, California 94720
(510) 642-6483
echemerinsky@law.berkeley.edu

MARK D. ROSENBAUM
ALISA HARTZ
PUBLIC COUNSEL
610 South Ardmore Avenue
Los Angeles, California 90005
(213) 385-2977

PAUL HOFFMAN
SCHONBRUN SEPLOW HARRIS & HOFFMAN LLP
200 Pier Avenue #226
Hermosa Beach, California 90254
(310) 396-0731

DONALD J. KULA
PERKINS COIE LLP
1888 Century Park East, Suite 1700
Los Angeles, California 90067
(310) 788-3212

JOEL W. NOMKIN
PERKINS COIE LLP
2901 North Central Avenue, Suite 2000
Phoenix, Arizona 85012
(602) 351-8185

EXHIBIT 90

No. 17-1299

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

REPLY BRIEF FOR PETITIONER

WILLIAM C. HILSON, JR.
SCOTT W. DEPEEL
ANN HODGES
FRANCHISE TAX BOARD
OF THE STATE OF
CALIFORNIA
9646 Butterfield Way
Sacramento, CA 95827

JAMES W. BRADSHAW
PAT LUNDVALL
DEBBIE LEONARD
MCDONALD CARANO LLP
2300 West Sahara Ave.
Las Vegas, NV 89102

SETH P. WAXMAN
Counsel of Record
PAUL R.Q. WOLFSON
DANIEL WINIK
JOSHUA M. KOPPEL
JAMES BARTON
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

DOCKETED CASES

STATUTES AND RULES

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

No. 17-1299

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEVADA

REPLY BRIEF FOR PETITIONER

The difficulty of defending *Nevada* v. *Hall*, 440 U.S. 410 (1979), is evident from Hyatt's efforts to avoid a ruling on the question presented. He devotes pages to urging the Court to dismiss the writ of certiorari as improvidently granted, on the basis of supposed vehicle problems. But Hyatt waived those arguments by not raising them in his brief in opposition, and they are meritless.

When Hyatt finally reaches the question presented, he has no meaningful response to the FTB's brief. He claims the FTB ignores the States' interest in adjudicating disputes within their territories. But the FTB's brief recognizes that interest and explains (at 34-35) why it is outweighed by the States' interest in not being haled into other States' courts, as it was in the

Founding era. Hyatt also argues that the Framers did not intend to give interstate sovereign immunity constitutional (as opposed to common-law) protection. But he cannot account for this Court's repeated holdings that state sovereign immunity derives from the federal nature of the union established by the Constitution. Finally, Hyatt invokes *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116 (1812). Yet he cannot explain why *The Schooner Exchange* is relevant to interstate sovereign immunity, since the Court's holding in that case reflected the absence of a supranational tribunal that could enforce one nation's immunity against another—a defect the Constitution remedied in the interstate context by creating this Court.

Hyatt concludes by arguing that *Hall* should be preserved even if it is incorrect. But considerations favoring stare decisis are at their weakest here. *Hall*'s reasoning has been undermined by later decisions; *Hall* impairs the States' dignity and self-government interests; and *Hall* has engendered no meaningful reliance. There is every reason to overrule *Hall* and no reason to preserve it merely for the sake of consistency.

ARGUMENT

I. THERE IS NO REASON TO DISMISS THE WRIT OF CERTIORARI

Hyatt argues (at 18-28) that law of the case and waiver make this case a poor vehicle to resolve the question presented. But Hyatt waived those arguments by not raising them in his brief in opposition, and

they are meritless. And precedent forecloses amici's arguments that the Court lacks jurisdiction.[1]

A. This Court's Rule 15.2 provides that any non-jurisdictional "objection to consideration of a question presented … may be deemed waived unless called to the Court's attention in the brief in opposition." The Court routinely enforces that rule. *See, e.g.*, *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 564 U.S. 915, 930-931 (2011); *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 17 (2011). And although an issue not raised in the brief in opposition may be addressed if it is a "predicate to an intelligent resolution of the question presented," *Caterpillar Inc.* v. *Lewis*, 519 U.S. 61, 75 n.13 (1996) (internal quotation marks omitted), that is not true here: The question presented is independent of Hyatt's law-of-the-case and waiver arguments and can be decided without addressing them. Hyatt's arguments are thus "properly 'deemed waived.'" *Granite Rock Co.* v. *International Bhd. of Teamsters*, 561 U.S. 287, 306 (2010).

Furthermore, Hyatt presents no information of which the Court was unaware. The petition explained (at 24-26) that the Court's equal division in *Franchise Tax Board of California* v. *Hyatt* (*Hyatt II*), 136 S. Ct. 1277 (2016), on whether *Hall* should be overruled did not create law of the case. The petition also noted (at 5)

---

[1] Hyatt also presents a misleading account of the facts in an effort to dissuade the Court from resolving this case. For example, he accuses an FTB employee of anti-Semitism (at 2), but his witness for that point was a former FTB employee who had charged the FTB with wrongful termination, provided "consultant services" to Hyatt, and eventually claimed Hyatt "misrepresented" her testimony; other witnesses denied hearing the alleged anti-Semitic remarks. JA265, 268-270, 283-288, *Franchise Tax Bd. of Cal.* v. *Hyatt*, No. 14-1175 (U.S. Sept. 3, 2015).

that the FTB "had not asked for *Hall* to be overruled" in *Franchise Tax Board of California* v. *Hyatt* (*Hyatt I*), 538 U.S. 488 (2003). The Court granted review even though it was aware of both potential concerns; there is no reason to revisit those issues now. *See United States* v. *Williams*, 504 U.S. 36, 40 (1992).

B. In any event, neither contention is meritorious.

1. The Court's equal division in *Hyatt II* does not prevent the Court from reconsidering *Hall* now. Although affirmance of a lower court's final judgment by an equally divided Court is "conclusive and binding upon the parties," *United States* v. *Pink*, 315 U.S. 203, 216 (1942), that merely means the judgment has res judicata effect in subsequent litigation between the parties, *see, e.g.*, *Durant* v. *Essex Co.*, 74 U.S. (7 Wall.) 107, 113 (1869). The Court has never held that its equal division on an issue at an interlocutory stage of a case prevents it from revisiting that issue later in the same case. To the contrary, the law-of-the-case doctrine applies only "when a court decides upon a rule of law," *Arizona* v. *California*, 460 U.S. 605, 618 (1983), and an equally divided Court does *not* decide on a rule of law, *see Neil* v. *Biggers*, 409 U.S. 188, 192 (1972).

Moreover, the law-of-the-case doctrine "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power." *Messenger* v. *Anderson*, 225 U.S. 436, 444 (1912). "A court has the power to revisit prior decisions of its own … in any circumstance[.]" *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988). Questions bearing on a court's authority to decide a case (like the question here) are more "likely to be reconsidered" than others, "because of their conceptual importance" and the degree to which they are "affected with a pub-

lic interest." 18B Wright et al., *Federal Practice & Procedure* § 4478.5 (2d ed. 2017 Supp.). And law of the case does not prevent a court from "depart[ing] from a prior holding" that "is clearly erroneous and would work a manifest injustice," *Arizona*, 460 U.S. at 618 n.8, including where a controlling precedent "would be decided differently under [the Court's] current" jurisprudence, *Agostini* v. *Felton*, 521 U.S. 203, 236 (1997).

Finally, by deciding the question presented, the Court would not be upsetting *Hyatt II* in any but the most formalistic sense; it would be rendering a decision where it previously could not. That would hardly offend the finality and judicial economy considerations animating law-of-the-case doctrine.

2. Hyatt's argument that the FTB waived its challenge to *Hall* fares no better. Hyatt does not argue the FTB failed to preserve its challenge in the Nevada courts. He recognizes (at 26)—and the petition demonstrates (at 22-23)—that the FTB "asserted sovereign immunity from the outset." Rather, Hyatt faults the FTB for not asking this Court to reconsider *Hall* in *Hyatt I*. That argument fails for three reasons.

First, the FTB had good reason not to ask the Court to overrule *Hall* in *Hyatt I*. *Hall* had reserved the question whether "a different analysis or a different result" might obtain in a case involving core "sovereign responsibilities" or a "substantial threat to our constitutional system of cooperative federalism," 440 U.S. at 424 n.24, and in *Hyatt I* the FTB argued that this is exactly such a case, *see* Pet'r Br. 14-31, *Hyatt I*, No. 02-42 (U.S. Dec. 9, 2002). Only once the Court rejected that argument, *Hyatt I*, 538 U.S. at 498, did the FTB have no choice but to ask that *Hall* be overruled. It did so at the next available opportunity.

Second, no rule requires a party to present arguments to this Court in an interlocutory posture, so long as the party preserves those arguments for later review. This Court has repeatedly held that "[a] petition for writ of certiorari can expose the entire case to review." *Christianson*, 486 U.S. at 817 (citing *Panama R. Co.* v. *Napier Shipping Co.*, 166 U.S. 280, 284 (1897)); *see also, e.g.*, *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258-259 (1916). Hyatt's cases (at 26) are not to the contrary. They hold only that an argument not presented at the certiorari stage cannot be raised at the merits stage—exactly the rule that prevents Hyatt from raising his current vehicle concerns.

Third, even if the FTB had not diligently preserved its sovereign immunity argument, this Court has never held that sovereign immunity can be lost by a State's mere "'failure to raise the objection at the outset of the proceedings.'" *Raygor* v. *Regents of Univ. of Minn.*, 534 U.S. 533, 547 (2002). To the contrary, sovereign immunity may be raised on appeal even if not raised below. *Edelman* v. *Jordan*, 415 U.S. 651, 677-678 (1974). Hyatt argues (at 27-28) that sovereign immunity is *waivable*. But a State *waives* sovereign immunity when it "voluntarily invokes" the jurisdiction of a court in which it is allegedly immune or makes a "'clear declaration'" of intent to submit to jurisdiction, *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675-676 (1999), neither of which Hyatt claims the FTB did in the Nevada courts.

C. Professors Baude and Sachs offer two arguments that this Court lacks jurisdiction. Those arguments are unconvincing.

1. Amici argue (at 25) that the Court lacks statutory jurisdiction because this case involves no "title,

right, privilege, or immunity … specially set up or claimed under the Constitution," 28 U.S.C. § 1257(a). But the FTB *has* "claimed" an "immunity" under the Constitution; it claims the Constitution renders it immune from this suit. Amici argue that a State has no constitutionally protected immunity in another State's courts, but that improperly assumes a negative answer to the question presented and conflates the jurisdictional inquiry with the merits.

In the analogous context of district courts' federal-question jurisdiction, "[j]urisdiction … is not defeated … by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover." *Bell* v. *Hood*, 327 U.S. 678, 682 (1946). Rather, jurisdiction lies if "the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another." *Id.* at 685; *see also Steel Co.* v. *Citizens for Better Env't*, 523 U.S. 83, 89 (1998). The same is true of § 1257, *see* 16B Wright et al., *Federal Practice & Procedure* § 4017 (3d ed.); the Court routinely addresses constitutional claims even if it rejects them on the merits. This Court therefore has statutory jurisdiction.

2. Amici also argue (at 27-34) that the Eleventh Amendment bars jurisdiction because this is a case by a citizen of one State against another State. But as amici acknowledge (at 32), that argument is foreclosed by two lines of precedent. The Court has "repeatedly" and "uniformly" held that "[t]he Eleventh Amendment does not constrain the appellate jurisdiction of the Supreme Court over cases arising from state courts." *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 26-31 & n.9 (1990). Nor does it bar a federal court from proceeding where a State has invoked the

court's jurisdiction. *Lapides* v. *Board of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 618-619 (2002). Those were reasoned, conscious decisions—not the sort of "drive-by jurisdictional rulings" that "have no precedential effect," *Steel Co.*, 523 U.S. at 91—and the Court has declined prior invitations to overrule them, *see, e.g.*, *Lapides*, 535 U.S. at 620; *South Cent. Bell Tel. Co.* v. *Alabama*, 526 U.S. 160, 166 (1999). It should do so again.

II. STATES ARE CONSTITUTIONALLY IMMUNE FROM SUIT IN EACH OTHER'S COURTS

On the merits, Hyatt offers no persuasive response to the FTB's arguments.

A. The *Hall* majority refused to "infer[] from the structure of our Constitution" any protection for sovereign immunity beyond the explicit terms of Article III and the Eleventh Amendment. 440 U.S. at 421, 426. But the Court has since repudiated the majority's mode of interpretation and endorsed the dissenters', *see id.* at 430 (Blackmun, J., dissenting); *id.* at 433 (Rehnquist, J., dissenting). It has held that state sovereign immunity is *not* limited to the explicit terms of the constitutional text; rather, States "retain" their pre-ratification immunity "except as altered by the plan of the Convention." *Alden* v. *Maine*, 527 U.S. 706, 713 (1999); *see also, e.g.*, *Federal Mar. Comm'n* v. *South Carolina State Ports Auth.*, 535 U.S. 743, 753-755 (2002).

The historical record leaves little doubt that, before ratification, States were understood to be immune from suit in each other's courts. FTB Br. 21-22. And the participants in the ratification debates, who disagreed on much else, agreed that the Constitution would not render States more vulnerable to suit than they were

before. *Id.* at 23-25. That consensus was confirmed by the backlash to *Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419 (1793); the States that ratified the Eleventh Amendment surely did not mean to "foreclose[] the neutral federal forums only to be left to defend suits in the courts of other States." *Hall*, 440 U.S. at 437 (Rehnquist, J., dissenting); *see also id.* at 431 (Blackmun, J. dissenting); FTB Br. 26-28. And it is further confirmed by pre-*Hall* decisions. FTB Br. 28-30. Because the Convention did not "alter[]" States' pre-ratification immunity in other States' courts, States "retain" that immunity today. *Alden*, 527 U.S. at 713.

B. Hyatt's responses mischaracterize the FTB's brief and the relevant precedents.

1. Hyatt attempts (at 41) to cast doubt on the historical consensus that, before ratification, States were immune from suit in other States' courts. As the FTB's brief explains (at 21-22), that immunity is evident from such cases as *Nathan* v. *Virginia*, 1 U.S. (1 Dall.) 77 (Pa. Ct. Com. Pl. 1781), and *Moitez* v. *The South Carolina*, 17 F. Cas. 574 (Pa. Adm. 1781) (No. 9,697). Hyatt suggests (at 41) that those cases reflected "the unique context of admiralty law." But *Nathan* was not an admiralty case; it was brought in Pennsylvania's Court of Common Pleas rather than its Admiralty Court, and the property at issue was "a quantity of cloathing" rather than a ship. 1 U.S. at 77. And although both cases were in rem proceedings, neither this Court nor scholars have understood them as limited to that context. *See, e.g.*, *National City Bank of N.Y.* v. *Republic of China*, 348 U.S. 356, 358 (1955) (*Moitez* recognized "[t]he freedom of a foreign sovereign from being haled into court as a defendant"); Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 Calif. L. Rev. 555, 585 (1994) (*Nathan* marked

"a decisive rejection of state suability in the courts of other states").[2]

Hyatt misreads the authorities on which he relies in disputing this historical consensus. He first quotes language (at 41) from what he says is Justice Cushing's opinion in *Chisholm*. The language is from Chief Justice Jay's opinion, not Justice Cushing's. More importantly, Chief Justice Jay did *not* suggest (as Hyatt claims) that before ratification States could be sued in other States' courts. To the contrary, his statement that "[e]ach State was obliged to acquiesce in the measure of justice which another State might yield to her, or to her citizens," 2 U.S. at 474, is more naturally read to mean that a State and its citizens—lacking access to a neutral federal forum—could sue another State only in the defendant State's *own* courts. *Id.* That is clear from the opinion's account of why the Framers extended federal jurisdiction "[t]o controversies between a State and citizens of another State"—namely to give States or their citizens a neutral forum in which to sue a different State, rather than limiting them to suit in the defendant State's courts. *See id.* at 475-476.

Hyatt next relies on an article for the proposition that, "out of the original thirteen colonies, only two directly opposed jurisdiction over state governments."

---

[2] The context of *Nathan* and *Moitez* only strengthens their implication that States were regarded as immune from suit in other States' courts. A court's exercise of in rem jurisdiction over property owned by a State offends the State's dignity less than the exercise of in personam jurisdiction over the State or its officials. This Court has held, for example, that States cannot assert sovereign immunity in certain admiralty actions against vessels they claim to own. *California* v. *Deep Sea Research, Inc.*, 523 U.S. 491, 501-508 (1998).

Br. 41 (citing Randall, *Sovereign Immunity and the Uses of History*, 81 Neb. L. Rev. 1, 55 (2002)). But the article claims only that by ratifying the Constitution, the States conceded they could be sued in *federal* court—not in another State's courts. *See* 81 Neb. L. Rev. at 54 ("The ratification documents of the majority of the states permit or compel the inference that the states understood that … they … were subject to suit by the terms of Article III, Section 2.").

2. Hyatt argues at length that even if States have a sovereignty interest in not being sued in other States' courts, they also have a sovereignty interest in adjudicating disputes that arise within their borders. He accuses the FTB (at 29, 33) of "ignor[ing]" or "fail[ing] to recognize" that interest. In fact, the FTB's brief recognizes (at 34) "that States have a sovereignty interest in hearing disputes that arise within their borders."

The brief goes on, however, to explain (at 34-36) that that interest must be reconciled with the States' countervailing interest in not being haled into other States' courts—and that when the two interests clash, the latter carries greater weight. That was true in the Founding era, when no one suggested that Pennsylvania's interest in adjudicating the ownership of property within its borders (in *Nathan* and *Moitez*) should trump Virginia's or South Carolina's right not to be haled into Pennsylvania's courts. *See* FTB Br. 21-22, 34. And it is true today, as demonstrated by the overwhelming number of States and state organizations that support overruling *Hall*. *See* Br. of Indiana and 43 Other States; Br. of Multistate Tax Comm'n, Nat'l Governors Ass'n, and Nat'l Conf. of State Legislatures.

Hyatt never explains why the States' interest in adjudicating disputes within their borders should pre-

vail when it clashes, as here, with the States' countervailing interest in not being haled into the courts of other States.[3]

3. Hyatt's next argument (at 41-42)—also articulated by Professors Baude and Sachs (at 8-11)—is that, by leaving untouched the States' pre-ratification immunity in the courts of other States, the Framers did not transform that immunity into a constitutional rule. Under that theory, interstate sovereign immunity remains a common-law rule that States may choose to abrogate. And, Hyatt argues (at 15-18, 44-45), because the Constitution does not forbid States from hearing suits against their counterparts, the Tenth Amendment preserves the power to do so.

But the Court has repeatedly described state sovereign immunity as constitutionally protected—including where it flows from structural principles rather than explicit constitutional text. *Alden*, for example, refers to the States' "constitutional immunity from suit," 527 U.S. at 727, and explains that "[a]lthough the sovereign immunity of the States derives at least in part from the common-law tradition, the structure and history of the Constitution make clear that the immunity exists today by constitutional design," *id.* at 733. In *Federal Maritime Commission*, the Court likewise explained that by choosing not to "disturb States' immunity from private suits," the Framers "firmly enshrin[ed] this principle in our constitutional framework." 535 U.S. at 752. And other decisions describe state sover-

[3] Nor does Hyatt explain why, if the States' power to adjudicate all suits within their borders is so important, this Court has repeatedly held that power must yield to the common-law immunity possessed by Indian Tribes, *see* FTB Br. 41-42. He simply criticizes the Court's tribal sovereign immunity jurisprudence (at 46 n.5).

eign immunity in similar terms. *See, e.g.*, *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267-268 (1997) (immunity is "implicit in the Constitution"); *Monaco* v. *Mississippi*, 292 U.S. 313, 322-323 (1934) (recognizing that "[b]ehind the words of the constitutional provisions are postulates which limit and control," including "that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of the convention'" (footnote omitted)).

Hyatt and his amici claim that *Alden* held "'the Constitution did not reflect an agreement between the States to respect the sovereign immunity of one another[.]'" Hyatt Br. 42 (quoting 527 U.S. at 738) (emphasis omitted); *see* Br. of Professors of Federal Jurisdiction 11. But *Alden* held no such thing; that is simply *Alden*'s description of *Hall*'s holding. Nor does it help Hyatt that the *Alden* Court regarded *Hall* as "consistent with" its holding, 527 U.S. at 739; for the reasons discussed above, overruling *Hall* would be far more "consistent with" *Alden*.

In short, this Court's prior decisions make clear that the Constitution protects the immunities States previously enjoyed as a matter of common law.

4. Hyatt invokes *The Schooner Exchange* (at 38-39) for the proposition that sovereigns may choose whether or not to respect other sovereigns' immunity in their courts. But as the FTB's brief explains (at 30-33), the Court's holding in that case simply reflects the absence of a supranational tribunal that could require one nation's courts to respect the immunity of another. *The Schooner Exchange* has no bearing on *interstate*

sovereign immunity, which is why no court cited it as relevant to that issue in the 167 years before *Hall*.

Hyatt claims (at 17, 40-41) that, by recognizing the lack of a judicial enforcement mechanism for interstate sovereign immunity in the pre-ratification era, the FTB contradicts its argument that States were immune from suit in other States' courts during that era. But the two points are consistent. Before the Constitution, the relationship among States was like that among nations; no State could be ordered to respect another's immunity in its courts. But that did not mean States lacked immunity in other States' courts, only that they lacked a judicial means to enforce that immunity if the forum State's courts refused to respect it.[4] *See* FTB Br. 31-32. Indeed, "[t]reatises on the law of nations"—including Vattel's canonical work—"widely recognized sovereign immunity as a limit on the power of one sovereign to adjudicate claims against another." Pfander, 82 Calif. L. Rev. at 583-584 (citing Vattel). The fact that nations could elect to disregard that limit, and bear the diplomatic or martial consequences, did not mean the limit was illusory. *See, e.g.*, Bellia & Clark, *The Political Branches and the Law of Nations*, 85 Notre Dame L. Rev. 1795, 1804-1805 (2010) (*The Schooner Exchange* "insisted that the political branches—rather than the courts—make the decision to override the immunity").

Contrary to Hyatt's amici, Br. of Professors of Federal Jurisdiction 9, no one contends that creation of this Court *expanded* state sovereign immunity; it mere-

[4] By the same token, constitutional rights are still rights even when they are not judicially enforceable. *See, e.g.*, Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv. L. Rev. 1212 (1978).

ly allowed judicial enforcement of the immunity States already possessed. Nor did it "displace pre-existing *state* authority over suits against other sovereigns," *id.* at 10, because—for the reasons discussed above and in the FTB's brief (at 21-22)—the States were understood to possess no such authority.[5]

Hyatt acknowledges (at 39) the FTB's argument that *The Schooner Exchange* reflects "'the absence of an enforcement mechanism'" among nations. But his response—that under the FTB's position, "[t]here would be no enforcement mechanism … for those like Gilbert Hyatt who have been injured by another state government"—misses the point. The "enforcement mechanism" in question is a means for sovereigns to enforce their immunity against other sovereigns, not for a plaintiff to sue a sovereign.

Hyatt's references (at 17, 39) to a dissenting opinion in *Michigan* v. *Bay Mills Indian Community*, 572 U.S. 782 (2014), are equally unavailing. In the context of tribal sovereign immunity, that opinion recognized that "[s]overeign immunity is not a freestanding 'right' that applies of its own force when a sovereign faces suit in the courts of another." *Id.* at 816 (Thomas, J., dissenting). Here, however, the FTB does not invoke sov-

[5] Amici are wrong in other respects as well. They suggest (at 12-16) that the only way in which this Court can vindicate one State's immunity in another's courts is by entertaining a State-vs.-State suit in its original jurisdiction. In fact, this Court can do so by reviewing state-court decisions, as in this case. And although amici claim (at 6-7) that overruling *Hall* would call into question the Court's foreign-sovereign-immunity precedents, that is incorrect; one nation's sovereign immunity in the courts of another would remain a matter of comity even if the Court were to recognize the irrelevance of *The Schooner Exchange* in the interstate context.

ereign immunity as "a freestanding 'right'" or argue that it "applies of its own force," *id.*; rather, the FTB argues that by ratifying the Constitution, the States agreed to let this Court enforce their sovereign immunity in each other's courts. The dissent's skepticism about the existence of a rule of "federal or state law" extending tribal sovereign immunity to federal or state courts, *id.* at 816-817, thus has no bearing here.

C. Hyatt also offers a handful of policy arguments. They are unpersuasive, and in any event of course would not justify disregarding the constitutional plan.

1. Hyatt's principal argument (at 31-32) is that, if *Hall* were overruled, a citizen of one State could not obtain relief when injured by another State. But anyone injured by a State may sue the State in its *own* courts. *Cf.* Woolhandler, *Interstate Sovereign Immunity*, 2006 Sup. Ct. Rev. 249, 290 ("refiling in the home state [is] a possibility in many cases" where one State refuses to entertain suit against another). States may choose not to waive their sovereign immunity against such suits, but that is equally true of suits brought by a State's own citizens. If *Hall* is overruled, the availability of suit against a State will be dictated by the State's *own* choices about waiving its sovereign immunity, rather than the choices of a *different* State.

Here, as the FTB's brief explains (at 39, 46), California has not generally waived sovereign immunity against claims "for or incidental to the assessment or collection of a tax," Cal. Gov't Code § 860.2. But it does allow two types of claims Hyatt could have pursued. Hyatt could have claimed the FTB had "recklessly disregard[ed]" its "published procedures," Cal. Rev. & Tax. Code § 21021(a), (b)(1), or violated the state informational privacy law, Cal. Civ. Code § 1798.45(c); *see*

Bates v. *Franchise Tax Bd.*, 21 Cal. Rptr. 3d 285, 295 (Ct. App. 2004) (§ 1798.45 allows suit notwithstanding § 860.2).

2. Relatedly, Hyatt argues (at 31) that the "political process" has "limits … when a state harms those in other states." It is true that States lack the same political incentives to remedy harms against other States' citizens that they have to remedy harms against their own citizens. But the Constitution likely would not permit a State to allow its own citizens to sue for harms caused by the State while barring such suits by other States' citizens. *See, e.g.*, *McBurney* v. *Young*, 569 U.S. 221, 231 (2013) ("[T]he Privileges and Immunities Clause 'secures citizens of one State the right to resort to the courts of another, equally with the citizens of the latter State.'").

As the FTB's brief explains (at 37-39, 44-45), it is *Hall* that creates perverse incentives and undermines the proper operation of the political process. *Hall* allows a State's sovereign conduct and public policy to be called into question by a different State's judges and juries—who may have quite different policy preferences, and who certainly have no incentive to consider the burden a financial sanction would impose on the defendant State's taxpayers.

3. Hyatt further argues (at 34-35) that States can protect themselves notwithstanding *Hall*. Those protections are illusory, however, for the reasons explained in the FTB's brief (at 48-49). Although the FTB eventually benefited from the Nevada Supreme Court's exercise of comity and from this Court's holding in *Hyatt II*, those decisions came only after the FTB was dragged through years' worth of litigation in

the Nevada courts, at extraordinary monetary and dignitary costs.

Sovereign immunity is an immunity *from suit*, not just a defense to liability; it cannot be vindicated by uncertain protections that may require years of litigation to invoke. *See, e.g.*, *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (immunity serves "'to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties'"). Nor should States have to attempt the complex process of negotiating an interstate compact, when the Constitution—the original interstate compact—grants them the protection they need.

4. Finally, Professors Baude and Sachs hypothesize (at 19-22) that a judgment rendered by one State against another might not be enforceable in the defendant State. But as *Hall* recognized, it is black-letter law that "[a] judgment entered in one State must be respected in another provided that the first State had jurisdiction over the parties and the subject matter." 440 U.S. at 421.

Amici do not argue that one State's disregard for another's sovereign immunity would constitute a defect in personal or subject-matter jurisdiction. They instead suggest (at 19-21) that this portion of *Hall* "could be revisited in an appropriate case," and that the validity of one State's judgment against another could be measured under a line of early-nineteenth-century cases in which courts applied principles "of common law and the law of nations" to determine the validity of other courts' judgments. Amici recognize that line of cases was superseded a century and a half ago by the Due Process Clause, *see* Br. 21 (citing *Pennoyer* v. *Neff*, 95

U.S. 714, 732-733 (1878)), but argue that it could be resurrected for States, which lack due process rights.

It is hard to imagine a better illustration of the need to overrule *Hall*. The notion that this Court should not worry about depriving States of a straightforward immunity in other States' courts—on the theory that they could seek to resurrect an archaic and amorphous common-law standard, which would provide at best uncertain protection and require years of litigation to define its contours—proves the need to restore the clear rule the Framers intended to preserve.

III. STARE DECISIS DOES NOT JUSTIFY MAINTAINING *HALL*

As the FTB's brief explains (at 39-49), stare decisis poses no barrier to overruling *Hall*.

A. Hyatt relies (at 36) on *Kimble* v. *Marvel Entertainment, LLC*, 135 S. Ct. 2401 (2015), for the proposition that this Court does not "scrap[] settled precedent" simply because it "got something wrong," *id.* at 2409. But *Kimble*, like several other cases Hyatt invokes, involved the interpretation of a statute—and Hyatt fails to recognize that stare decisis has "special force in the area of statutory interpretation" because, "unlike in the context of constitutional interpretation, … Congress remains free to alter" this Court's rulings. *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-173 (1989); *see also Kimble*, 135 S. Ct. at 2409.

In contrast, stare decisis "is at its weakest" for constitutional precedents, because—outside the possibility of a constitutional amendment—this Court alone can correct its prior errors. *Agostini*, 521 U.S. at 235. The Court "ha[s] held in several cases that *stare decisis* does not prevent [it] from overruling a previous deci-

sion where there has been a significant change in, or subsequent development of, [its] constitutional law" precedents. *Id.* at 235-236. And as the FTB's brief explains (at 40-43), this Court's later sovereign-immunity precedents have left *Hall* "behind as a mere survivor of obsolete constitutional thinking," *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 857 (1992).

B. Hyatt argues (at 50-51) that litigants have made choices and incurred costs in reliance on *Hall*, but those are not relevant reliance interests. The precedents the Court is loath to overrule are those that have led people to alter their "primary conduct," *Hohn* v. *United States*, 524 U.S. 236, 252 (1998)—*i.e.*, those that "serve as a guide to lawful behavior," *United States* v. *Gaudin*, 515 U.S. 506, 521 (1995). Rules that affect only "the bringing of lawsuits" or other litigation behavior do not affect "the sort of primary conduct that is relevant." *Vieth* v. *Jubelirer*, 541 U.S. 267, 306 (2004) (plurality opinion).

Under Hyatt's theory, reliance interests would always preclude the Court from overruling a precedent, because by the time a case arrives at this Court the parties will always have expended time and money litigating it under existing precedent. That is not the law.

C. Hyatt's attempts (at 49-50) to diminish the harms associated with suits under *Hall* are unpersuasive. As the FTB's brief (at 44-45) and the States' amicus brief (at 12-19) explain, *Hall* exposes States to exactly the kinds of monetary and dignitary burdens that sovereign immunity is intended to avoid. *See Alden*, 527 U.S. at 750; *Puerto Rico Aqueduct*, 506 U.S. at 146. Hyatt argues (at 49) that the large judgment in this case was reduced after multiple appeals and that some of the litigation costs arose from the FTB's choices, "in-

cluding … three trips to this Court." But California should never have had to choose between paying a nearly half-billion-dollar judgment and incurring the enormous costs necessary to defend itself.[6]

Hyatt also has no response to the harms *Hall* poses to States' dignity interests when they are haled into another State's courts against their will, or to their self-government interests when another State's courts pass judgment on their public policy. *See* FTB Br. 45-48. The fact that courts regularly exercise jurisdiction over such cases undermines any suggestion that comity can mitigate *Hall*'s threat to state sovereignty.

D. Finally, Hyatt makes a last-ditch suggestion (at 51 n.6) that, if *Hall* is overruled, it should be overruled only prospectively. But the Court's "general practice is to apply the rule of law [it] announce[s] in a case to the parties before [it]," "even when [the Court] overrule[s] a case," *Agostini*, 521 U.S. at 237, and Hyatt presents no reason to depart from that practice.

Hyatt's reliance on *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), is unavailing, as that case was overruled (as relevant) by *Harper* v. *Virginia Department of Taxation*, 509 U.S. 86, 97 (1993). *Harper* confirms that a new rule of federal law "must be given full retroactive effect in all cases still open on direct review." *Id.* Although Hyatt argues that his reliance on *Hall* warrants prospective-only application of any new rule announced here, the Court explained in *Harper* that it "can scarce-

[6] As at the certiorari stage, Hyatt cites an article (at 33-34) for the proposition that litigation under *Hall* does not significantly burden States—and, again, he fails to disclose that the author was his retained expert. *See* Stempel, Hyatt v. Franchise Tax Board of California*: Perils of Undue Disputing Zeal and Undue Immunity for Government-Inflicted Injury*, 18 Nev. L.J. 61, 61 n.* (2017).

ly permit the substantive law to shift and spring according to the particular equities of individual parties' claims of actual reliance on an old rule and of harm from a retroactive application of the new rule." *Id.* (quotation marks and brackets omitted). There is no more reason to exempt Hyatt from a decision overruling *Hall* than in any case where the Court overturns precedent on which the litigants previously relied. Hyatt offers no basis to deny the FTB the protection of sovereign immunity.

CONCLUSION

The judgment of the Supreme Court of Nevada should be reversed.

Respectfully submitted.

WILLIAM C. HILSON, JR.
SCOTT W. DEPEEL
ANN HODGES
FRANCHISE TAX BOARD
OF THE STATE OF
CALIFORNIA
9646 Butterfield Way
Sacramento, CA 95827

JAMES W. BRADSHAW
PAT LUNDVALL
DEBBIE LEONARD
MCDONALD CARANO LLP
2300 West Sahara Ave.
Las Vegas, NV 89102

SETH P. WAXMAN
Counsel of Record
PAUL R.Q. WOLFSON
DANIEL WINIK
JOSHUA M. KOPPEL
JAMES BARTON
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

DECEMBER 2018

EXHIBIT 91

OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	)	OTA Case No. 18010244
	)	
GILBERT P. HYATT	)	Date Issued: January 15, 2019
	)	
	)	
	)	

OPINION ON PETITION FOR REHEARING[1]

Representing the Parties:

For Appellant: Edwin P. Antolin, Antolin Agarwal, LLP

For Respondent: William C. Hilson, Jr., Deputy Chief Counsel

For Office of Tax Appeals: Josh Lambert, Tax Counsel

K. GAST, Administrative Law Judge: On August 29, 2017, the BOE held an oral hearing on this matter. For the 1991 tax year, the BOE considered four issues and made the following determinations: (1) Gilbert P. Hyatt (appellant) established he was a California nonresident from October 20, 1991, to December 31, 1991; (2) appellant's licensing income received between October 20, 1991, and December 31, 1991, was derived from a California source and therefore constituted California taxable income; (3) appellant was not subject to the fraud penalty; and (4) appellant did not demonstrate a basis for abatement of interest.

Because the BOE had ruled against it on issues (1) and (3) above, on September 28, 2017, the Franchise Tax Board (FTB or respondent) filed a timely petition for rehearing[2] under

[1] We have also issued an Opinion on Petition for Rehearing for Office of Tax Appeals (OTA) Case Number 18010245, which deals with the 1992 tax year. The factual and legal issues in that case are related to this one, which deals with the 1991 tax year, but the two tax years were heard as separate appeals by the Board of Equalization (BOE). Consequently, respondent filed two separate petitions for rehearing for the two tax years in dispute. Accordingly, we have issued two separate opinions on respondent's petitions for rehearing.

[2] On September 28, 2017, appellant also timely filed a petition for rehearing because the BOE held his licensing income was properly sourced to California during the disputed period. However, he withdrew his petition on November 5, 2017, to expedite the BOE's consideration and decision on respondent's petition. Therefore, we do not consider appellant's petition herein.

California Revenue and Taxation Code section 19048.[3] Upon consideration of respondent's petition for rehearing, we conclude its proffered grounds for a rehearing do not meet the requirements under Regulation section 30604.[4] (See also *Appeal of Sjofinar Masri Do*, 2018-OTA-002P, Mar. 22, 2018,[5] and *Appeal of Wilson Development, Inc.*, 94-SBE-007, Oct. 5, 1994.)[6]

Background

Prior to September 26, 1991, appellant was a California resident and domiciliary living in La Palma, California. During 1991, appellant earned a substantial amount of income from the licensing of his patents. Appellant filed a California Part-Year Resident Income Tax Return for the 1991 tax year. On that return, he took the position that, on October 1, 1991, he became a California nonresident because, among other alleged facts, he sold his La Palma, California residence on that date.[7] In addition, he claimed that most of his licensing income was earned after October 1, 1991, and, therefore, as an asserted nonresident, California could not tax the income because it was not derived from sources within the state.

In 1993, respondent initiated an audit of appellant's residency status for the 1991 tax year. Three years later, in 1996, respondent issued a Notice of Proposed Assessment (NPA), concluding that appellant was a California resident for the entire 1991 tax year. The NPA, thus, assessed additional tax of $1,876,471 and a fraud penalty of $1,407,353.25, plus interest. Appellant timely protested the NPA.

Almost a decade later, in 2007, respondent issued a Notice of Action (NOA), affirming the NPA.[8] The NOA concluded appellant was a California resident through April 2, 1992, and,

[3] Unless otherwise indicated, all "section" or "§" references are to sections of the California Revenue and Taxation Code, and all regulation references are to the California Code of Regulations, title 18, for the tax year at issue.

[4] OTA has jurisdiction to decide this matter under Regulation section 30106.

[5] OTA opinions are generally available for viewing on its website: <http://www.ota.ca.gov/opinions/>.

[6] BOE opinions are generally available for viewing on its website: <http://www.boe.ca.gov/legal/legalopcont.htm#boeopinion>.

[7] However, on appeal, appellant took the position that he became a California nonresident on September 26, 1991.

[8] One of the primary reasons for this long lapse in time between the issuance of the NPA and NOA was that appellant sued respondent in the Nevada courts in 1998 for tortious acts respondent allegedly committed during the audit.

as such, subject to tax on his income from all sources through that date, which included his 1991 licensing income. The assessment was alternatively sustained on the basis that appellant's intellectual property (i.e., patents) had acquired a business situs in California for the entire taxable year, and, therefore, his licensing income therefrom constituted taxable income because it was derived from sources within the state. Appellant timely filed an appeal with the BOE, contesting the residency, sourcing, and fraud penalty issues, as well as requesting abatement of interest.

As part of the appeal, the BOE considered substantial amounts of evidence provided by both parties, including declarations and affidavits from appellant, his friends, and associates, documents relating to the sale of his California home, appellant's rental agreement for a Nevada apartment, various documents related to appellant's licensing activities, travel documents, cancelled checks, invoices, and receipts. After considering this evidence and the extensive arguments presented at the oral hearing,[9] the BOE concluded that appellant became a California nonresident on October 20, 1991, his licensing income received in 1991 after he became a California nonresident was subject to tax as California source income, the fraud penalty was inapplicable, and interest may not be abated. The BOE issued official notice of its action in a Notice of Board Determination, dated August 31, 2017.

Standard of Review

A rehearing may be granted where one of the following grounds exists, and the substantial rights of the complaining party are materially affected: (1) an irregularity in the appeal proceedings which occurred prior to the issuance of the written opinion and prevented fair consideration of the appeal; (2) an accident or surprise which occurred during the appeal proceedings and prior to the issuance of the written opinion, which ordinary caution could not have prevented; (3) newly discovered, relevant evidence, which the party could not have reasonably discovered and provided prior to the issuance of the written opinion; (4) insufficient evidence to justify the written opinion or the opinion is contrary to law; or (5) an error in law. (Regulation § 30604(a)-(e).)

In its petition, respondent requests a rehearing on the issues of residency and the fraud penalty. Respondent asserts that (1) the BOE's determinations were unjustified due to

[9] The BOE heard the appeals for the 1991 and 1992 tax years on the same day, with this appeal heard first, which lasted nearly 10 hours, and the 1992 appeal heard second, which lasted nearly 3 hours.

insufficient evidence or factual support, (2) the BOE's determinations were contrary to law, and (3) there were irregularities in the BOE's proceedings by which respondent was prevented from having a fair consideration of its case. We consider each argument in turn as it applies in the context of the residency and fraud penalty issues.

Residency

Before addressing the merits of respondent's petition, we first briefly set forth the applicable law on residency. California residents are subject to tax on their entire taxable income, regardless of where that income is earned or sourced. (§ 17041(a)(1).) However, nonresidents—including part-year residents during the period they are nonresidents—are taxed only on income "derived from sources within" California. (§ 17041(b) & (i)(1)(B).)

California defines a "resident" as including (1) every individual who is in California for other than a temporary or transitory purpose, or (2) every individual domiciled in California who is outside California for a temporary or transitory purpose. (§ 17014(a)(1)-(2); see also Regulation § 17014.) In contrast, California defines a "nonresident" in the negative as "every individual other than a resident." (§ 17015.) California also defines a "part-year resident" as a taxpayer who meets both of the following conditions during the same taxable year: (1) is a California resident during a portion of the taxable year; and (2) is a California nonresident during a portion of the taxable year. (§ 17015.5.) Further, taxpayers who spend an aggregate of more than nine months in California during a taxable year are presumed to be a California resident for the year, but the presumption "may be overcome by satisfactory evidence that the individual is in [California] for a temporary or transitory purpose." (§ 17016.)

In *Appeals of Stephen D. Bragg*, 2003-SBE-002, May 28, 2003 (*Bragg*), the BOE listed nonexclusive factors to aid in the residency determination. The *Bragg* factors can generally be grouped into three categories: (1) where did the taxpayer register and file certain items, such as tax returns, licenses, vehicles, and voter documents; (2) where did the taxpayer maintain his day-to-day contacts in both his occupational life as well as in his personal life; and (3) where was the taxpayer and his property physically located during the time in question. In *Bragg*, the BOE noted that the weight given to any particular factor depends upon the totality of the circumstances unique to each taxpayer for each tax year. The determination cannot be based solely on the individual's subjective intent, but must instead be based on objective facts. (*Appeal of Anthony V. and Beverly Zupanovich*, 76-SBE-002, Jan. 6, 1976.)

1) There Was Sufficient Evidence to Justify the BOE's Decision

At the trial court level, the equivalent of a petition for rehearing is a motion for a new trial. Code of Civil Procedure section 657 sets forth the grounds for granting a new trial, which has been codified in OTA's Rules for Tax Appeals. (See Regulation § 30604(a)-(e); see also *Appeal of Sjofinar Masri Do*, *supra* and *Appeal of Wilson Development, Inc.*, *supra*.) As applicable to administrative bodies, such as this one, a rehearing should not be granted on the grounds of insufficiency of the evidence unless, after weighing the evidence, we are convinced from the entire record, including reasonable inferences therefrom, that the BOE clearly should have reached a different decision. (Code Civ. Proc., § 657.) In addition, insufficiency of the evidence as a ground for a rehearing means "the insufficiency that arises in the mind[s] of the [administrative law judges] when [they] weigh[] the conflicting evidence and find[] that which supports the [decision] weighs, in [their] opinion, less than that which is opposed to it." (*Bray v. Rosen* (1959) 167 Cal.App.2d 680, 683.)

In its petition, respondent contends the BOE's conclusion that appellant established a Nevada residency as of October 20, 1991, is devoid of factual and legal support, and contrary to the more reliable voluminous and contemporary documentation it provided. Respondent argues that its evidence irrefutably shows that appellant could not have been a California nonresident for any part of the 1991 tax year. As support, respondent points to numerous facts it asserts are true and that contradict the evidence appellant produced.

After weighing the evidence, however, we are not convinced from the entire record, including reasonable inferences therefrom, that the BOE clearly should have reached a different decision. Instead, we believe the BOE relied on sufficient evidence to reach its conclusion that appellant was a California nonresident towards the end of the 1991 tax year.

Specifically, by majority vote, the BOE found that October 20, 1991, was the date appellant became a California nonresident. Based on the BOE members' statements made in the oral hearing transcript, it appears the BOE also found appellant became a California nondomiciliary on October 20, 1991. It, therefore, further appears the BOE analyzed the residency issue under section 17014(a)(1), which, as mentioned above, asks whether appellant, a California nondomiciliary, was in California for other than a temporary or transitory purpose from October 20, 1991, to December 31, 1991. In any event, the primary consideration under either section 17014(a) or 17014(b) is whether the individual is present in California or absent

from California for a temporary or transitory purpose. (*Appeal of Anthony V. and Beverly Zupanovich, supra*.)

Thus, according to the oral hearing transcript, the BOE majority, being cognizant of the *Bragg* factors, noted the following facts, among others, supported its California non-residency determination: (1) on October 20, 1991, appellant moved from the Continental Hotel in Las Vegas, Nevada—where he initially resided after his alleged sale of his La Palma, California home on October 1, 1991—to the Wagon Trails apartment building, also in Las Vegas; (2) shortly after leasing the Wagon Trails apartment, appellant opened utility and telephone services and issued checks to the companies providing those services; (3) appellant obtained a Nevada driver's license; (4) appellant registered his vehicles in Nevada; (5) appellant registered to vote in Nevada; and (6) although appellant engaged in a unique sale of his La Palma, California home, his assertion that the home was sold on October 1, 1991, was credible, based on corroborating affidavits and the fact that the transaction was not unusual in the real estate industry. We conclude these facts, in addition to the many others in the record, were sufficient to support the BOE's conclusion that appellant was not in California for other than a transitory or temporary purpose during the disputed period.

Respondent complains that the BOE majority incorrectly found appellant's hundreds of affidavits and declarations to be credible, even though they were submitted 20 years after 1991 and allegedly contradicted the contemporaneous documentary evidence respondent submitted. However, it appears the BOE debated at length and therefore considered the credibility of the affidavits. It also appears the BOE determined appellant's testimony was persuasive on this issue.[10] Based on our review, we conclude the BOE's finding was supported by the evidence. Therefore, we will not disturb it.

Moreover, respondent's own regulation unequivocally provides that affidavits or testimonies from an individual's friends, family, and business associates stating that the individual was in California for temporary or transitory purposes are ordinarily sufficient to overcome a presumption of residency. (See Regulation § 17014(d)(1).) That regulation also encourages the submission of affidavits of friends and business associates as to the reasons the individual is outside California for other than temporary or transitory purposes. (*Ibid.*) Further,

[10] For example, in his testimony, appellant explained that he produced the affidavits decades after 1991 because it was only then that respondent created a daily calendar in an attempt to contradict his stated whereabouts during the disputed period.

in *Appeal of Raymond H. and Margaret R. Berner*, 2001-SBE-006-A, Aug. 1, 2002, the BOE found, on the record before it, that the Berners established through affidavits and declarations from friends, family, and professionals that they were domiciled in and resided in Nevada. Therefore, affidavits and declarations, when found to be sufficiently credible, can be instrumental in the residency analysis, as the BOE apparently found in the present case.[11]

To be sure, respondent submitted compelling evidence of its own that could have arguably established appellant was still a California resident as of April 2, 1992. However, we are not convinced the BOE *clearly* should have reached this result. Rather, the BOE made reasonable inferences and drew well-reasoned, informed conclusions to reach a different, equally plausible result.

In sum, we believe the BOE reasonably considered the probative value of the voluminous evidence submitted by both parties, which included thousands of pages of documents, as well as hundreds of affidavits and declarations produced by appellant in support of his position. Although respondent may disagree with the BOE's weighing of appellant's evidence, that evidence, along with the extensive oral hearing that included the BOE's lengthy questioning of the parties, was sufficient to justify the BOE's decision.

2) The BOE's Decision Was Not Contrary to Law

The question of whether a decision is contrary to law (or against the law) is not one which involves a fact-finder weighing the evidence and finding a balance against the decision, as it does in considering the ground of insufficiency of the evidence, discussed above. (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 906 (*Sanchez-Corea*).) Rather, what is required is a finding that the decision was unsupported by any substantial evidence. (*Ibid*.) This requires a review of the decision that "indulg[es] in all legitimate and reasonable inferences" to uphold it. (*Id.* at p. 907.) Thus, the relevant question here does not involve the quality or nature of the reasoning behind the decision, but whether the decision is or is not supportable by substantial evidence in the record. (*Appeal of NASSCO Holdings, Inc.*, 2010-SBE-001, Nov. 17, 2010.) In

[11] The BOE was also well within its authority and discretion to consider such evidence. Its Rules for Tax Appeals, similar to respondent's own regulation, in general, broadly provided that "[a]ny relevant evidence, *including affidavits, declarations under penalty of perjury, and hearsay evidence*, may be presented at a [BOE] hearing. Each party will be permitted to comment on or respond to any affidavits, declarations, or other evidence." (Regulation § 5523.6(a), italics added.)

our review, we consider the evidence in the light most favorable to the prevailing party (here, appellant). (*Sanchez-Corea*, 38 Cal.3d at p. 907.)

On this ground, and similar to what was discussed above, respondent contends that the BOE's determination was contrary to law because respondent's contemporaneous documentary evidence was more reliable than appellant's evidence. Respondent asserts that its evidence establishes that appellant did not terminate his California domicile and residence on October 20, 1991. We disagree. As previously noted, appellant provided voluminous documentary evidence, declarations, and affidavits to demonstrate he was no longer a California resident during the latter part of 1991. The BOE found this date to be October 20, 1991. When viewing appellant's extensive documentary evidence, affidavits, and declarations in the light most favorable to him, we find there was substantial evidence to support that the BOE's determination was not contrary to law.

3) There Were No Irregularities in the BOE's Proceedings that Prevented Respondent from Having a Fair Consideration of its Case[12]

Regulation section 30604(a) provides that a rehearing may be granted when an irregularity in the appeal proceedings occurred prior to the issuance of the written opinion that prevented fair consideration of the appeal. This regulatory provision is patterned after Code of Civil Procedure section 657(1), which has been interpreted as sufficiently broad to include any departure by the court (or, here, the BOE) from the due and orderly method of disposition of an action by which the substantial rights of a party have been materially affected. (*Jacoby v. Feldman* (1978) 81 Cal.App.3d 432, 446.)

On this ground, respondent first contends that the BOE made an erroneous motion that caused an irregularity in the proceedings. Specifically, respondent notes that the BOE passed a motion that appellant became a *resident of Nevada* on October 20, 1991. Respondent asserts that, instead, the BOE should have passed a motion that appellant became a *nonresident of California* on October 20, 1991. Therefore, respondent maintains, the BOE did not determine appellant was a California nonresident, and, as such, he should still be considered a California

[12] Appellant argues that respondent waived its objections and arguments with respect to irregularities in the proceedings in its petition for rehearing because it could have raised these same objections and arguments during the hearing. We are not aware of any authority, however, that supports a contention that any party's failure to raise an objection or argument at a BOE hearing with respect to claims of irregularities will prevent consideration of such objections or arguments in a petition for rehearing. (See Regulation § 30604.)

resident for the entirety of 1991, since a taxpayer may be a resident of two states during the same period for tax purposes.

We disagree with respondent's contention on this point. Neither party argued or presented evidence to the BOE on the issue of whether appellant was a resident of two states simultaneously. Rather, the issue presented to the BOE was whether appellant was a resident or nonresident of California in 1991. The California residency issue was discussed at length over the course of many years during the audit and protest, and the appeals process before the BOE. Even the hearing summary clearly stated that the residency issue was whether appellant was taxable as a resident of California on all his income from September 26, 1991, to December 31, 1991. Moreover, the Notice of Board Determination unequivocally concluded that appellant established he was a *nonresident of California* from October 20, 1991, to December 31, 1991.

Respondent next contends that an irregularity in proceedings occurred when the BOE determined that business-related correspondence to and from appellant could not be considered evidence of his place of residence. Relying on specific statements made by two BOE members at the hearing, respondent argues that the BOE considered business-related correspondence only with respect to the issue of whether appellant's income was sourced to California.

Respondent's contention on this point, however, is also incorrect. The BOE did not make any determination or pass any motion at the hearing indicating that business-related correspondence may not be considered in the residency determination. A discussion by two BOE members as to why they believed certain evidence should be given more or less weight on a particular issue does not constitute the adoption of a new standard of review by the BOE. Instead, it is just an example of Board members, as fact-finders, exercising their discretion in considering the relative weight of the evidence presented by the parties. Furthermore, the BOE had access to and reviewed all the parties' evidence, including the business-related correspondence, and examined all the arguments prior to the hearing. We, therefore, reject respondent's contention that there was an irregularity in the proceeding due to the BOE's alleged failure to take business correspondence into consideration in evaluating any issue.

Respondent further contends that the standard by which the BOE chose to measure the credibility of affidavits submitted on behalf of appellant constitutes an irregularity in the proceedings highly prejudicial to respondent. Respondent alleges that the BOE adopted a rule compelling the unequivocal acceptance of hearsay affidavits for all purposes unless respondent

could elicit testimony from the affiant or a subsequently signed document in which the affiant admits that the statements made were false.

While respondent relies on excerpts from the hearing transcript in which two BOE members discussed why they believed appellant's affidavits may be relied upon as truthful, we fail to see how such a discussion constitutes an adoption or application of a new standard of review. The BOE did not make any motion with respect to the standard of review for affidavits or declarations. Furthermore, the BOE members were advised of the proper evidentiary standard in the hearing summary provided to them prior to the oral hearing. They were, thus, aware that affidavits and declarations could be relied upon to establish a determination of residency. (See Regulation § 17014(d)(1); see also *Appeal of Raymond H. and Margaret R. Berner, supra*; *Appeals of Stephen D. Bragg, supra.*) Accordingly, respondent's argument that the BOE employed an improper standard of weighing the credibility of appellant's affidavits and declarations is without merit.

Finally, the written record is clearly replete with facts supporting the BOE's California non-residency conclusion. Accordingly, respondent has also failed to show how its substantial rights were materially affected and that it was prevented from having a fair consideration of its case.

Fraud Penalty

Respondent next contends that because the BOE made the fraud penalty determination prior to its determination of the other issues in the appeal, there was an irregularity in the proceedings that caused it to not impose the penalty under section 19164(c). Respondent argues that this was improper because the resolution of the fraud penalty was dependent on the resolution of the residency, sourcing, and interest abatement issues.

While the BOE did make a finding on the fraud penalty issue before the substantive issues in the case (see Hearing Transcript at pp. 236-240), we are aware of no procedural requirement that it must decide issues in any particular order. Indeed, the parties had presented all their arguments and evidence on the fraud penalty issue at the oral hearing prior to the BOE's determination of whether that penalty was properly imposed. In addition, both parties discussed the penalty extensively in their briefs. Prior to the oral hearing, the BOE reviewed all the arguments and evidence in the record, including those related to the fraud penalty. For example, Chair Harkey stated the following: "Members, there's a lot of documentation here. I've gone

through reams, and I'm not sure where the Members will fall. But I do wish to state -- I do not believe there was fraud here. I think there's enough back and forth, and I don't think that the FTB has proven fraud." (Hearing Transcript at p. 236, lines 5-10.) Therefore, because the record reflects the BOE considered extensive documentary evidence, oral presentations, and arguments presented by both parties on all the issues prior to concluding on the fraud issue, we find no irregularity in the proceedings.

Finally, the written record contains ample facts supporting the BOE's conclusion that appellant did not commit fraud. For these additional reasons, respondent has failed to show how its substantial rights were materially affected and that it was prevented from having a fair consideration of its case.

Based on the foregoing, respondent has not satisfied the requirements for obtaining a rehearing. Accordingly, respondent's request for a rehearing is denied.

DocuSigned by:
Kenneth Gast
FD75A3136CB34C2...
Kenneth Gast
Administrative Law Judge

We concur:

DocuSigned by:
CA2E033C0906484...
Douglas Bramhall
Administrative Law Judge

DocuSigned by:
0D390BC3CCB14A9...
Jeffrey G. Angeja
Administrative Law Judge

EXHIBIT 92

OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	)	OTA Case No. 18010245
	)	
GILBERT P. HYATT	)	Date Issued: January 15, 2019
	)	
	)	
	)	

OPINION ON PETITION FOR REHEARING[1]

Representing the Parties:

For Appellant:	Edwin P. Antolin, Antolin Agarwal, LLP
For Respondent:	William C. Hilson, Jr., Deputy Chief Counsel
For Office of Tax Appeals:	Josh Lambert, Tax Counsel

K. GAST, Administrative Law Judge: On August 29, 2017, the BOE held an oral hearing on this matter. For the 1992 tax year, the BOE considered three issues and made the following determinations: (1) Gilbert P. Hyatt (appellant) established he was a California nonresident for the entire tax year; (2) appellant's licensing income was not subject to California tax because it was not derived from a California source; and (3) appellant was not subject to the fraudulent failure-to-file penalty. Because the BOE determined that appellant owed no taxes or penalty, no interest was due and therefore, unlike the appeal for the 1991 tax year, the issue of whether he demonstrated a basis for abatement of interest was moot.

Because the BOE had ruled against it on all three issues, on September 28, 2017, the Franchise Tax Board (FTB or respondent) filed a timely petition for rehearing under California

[1] We have also issued an Opinion on Petition for Rehearing for Office of Tax Appeals (OTA) Case Number 18010244, which deals with the 1991 tax year. The factual and legal issues in that case are related to this one, which deals with the 1992 tax year, but the two tax years were heard as separate appeals by the Board of Equalization (BOE). Consequently, respondent filed two separate petitions for rehearing for the two tax years in dispute. Accordingly, we have issued two separate opinions on respondent's petitions for rehearing.

Revenue and Taxation Code section 19048.[2] Upon consideration of respondent's petition for rehearing, we conclude its proffered grounds for a rehearing do not meet the requirements under Regulation section 30604.[3] (See also *Appeal of Sjofinar Masri Do*, 2018-OTA-002P, Mar. 22, 2018,[4] and *Appeal of Wilson Development, Inc.*, 94-SBE-007, Oct. 5, 1994.[5])

Background

During 1992, appellant earned a substantial amount of income from the licensing of his patents. Appellant did not file a California tax return for the 1992 tax year, because he took the position he was a nonresident for the entire year, and, on appeal, argued that his licensing income was not derived from sources within California.

In 1993, respondent initiated an audit of appellant's residency status for the 1992 tax year. Four years later, in 1997, respondent issued a Notice of Proposed Assessment (NPA), concluding that appellant was a California resident through April 2, 1992, and, as such, taxable on income from all sources through that date. The NPA, thus, assessed additional tax of $5,669,021, and a fraudulent failure-to-file penalty of $4,251,765.75, plus interest. Appellant timely protested the NPA.

A decade later, in 2007, respondent issued a Notice of Action (NOA), affirming the NPA.[6] The NOA also concluded appellant was a California resident through April 2, 1992, and, as such, subject to tax on his income from all sources through that date, which included his 1992 licensing income. The assessment was alternatively sustained on the basis that appellant's intellectual property (i.e., patents) had acquired a business situs in California for the entire taxable year, and, therefore, his licensing income therefrom constituted taxable income because it was derived from sources within the state. Appellant timely filed an appeal with the BOE,

[2] Unless otherwise indicated, all "section" or "§" references are to sections of the California Revenue and Taxation Code, and all regulation references are to the California Code of Regulations, title 18, for the tax year at issue.

[3] OTA has jurisdiction to decide this matter under Regulation section 30106.

[4] OTA opinions are generally available for viewing on its website: <http://www.ota.ca.gov/opinions/>.

[5] BOE opinions are generally available for viewing on its website: <http://www.boe.ca.gov/legal/legalopcont.htm#boeopinion>.

[6] One of the primary reasons for this long lapse in time between the issuance of the NPA and NOA was that appellant sued respondent in the Nevada courts in 1998 for tortious acts respondent allegedly committed during the audit.

contesting the residency, sourcing, and fraud penalty issues, as well as requesting abatement of interest.

For the 1992 tax year, the BOE considered substantial amounts of evidence provided by both parties, including declarations and affidavits from appellant, his friends, associates, and various contracts, documents, and testimony related to appellant's licensing activities. The BOE concluded that appellant was a California nonresident for the entire 1992 tax year, his licensing income received in 1992 was not derived from California sources and therefore not subject to California tax on that basis, and the fraudulent failure-to-file penalty was inapplicable.[7] In addition, because the BOE determined that appellant owed no taxes or penalty, no interest was due. The BOE issued official notice of its action in a Notice of Board Determination, dated August 31, 2017.

Standard of Review

A rehearing may be granted where one of the following grounds exists, and the substantial rights of the complaining party are materially affected: (1) an irregularity in the appeal proceedings which occurred prior to the issuance of the written opinion and prevented fair consideration of the appeal; (2) an accident or surprise which occurred during the appeal proceedings and prior to the issuance of the written opinion, which ordinary caution could not have prevented; (3) newly discovered, relevant evidence, which the party could not have reasonably discovered and provided prior to the issuance of the written opinion; (4) insufficient evidence to justify the written opinion or the opinion is contrary to law; or (5) an error in law. (Regulation § 30604(a)-(e).)

In its petition, respondent requests a rehearing on the issues of residency, sourcing of the licensing income, and the fraudulent failure-to-file penalty. Respondent primarily asserts there were irregularities in the BOE's proceedings by which respondent was prevented from having a fair consideration of its case and in violation of its due process rights. Respondent also appears to assert the BOE's determinations were unjustified due to insufficient evidence or factual support and were contrary to law. We consider each argument in turn as it applies in the context of the residency, income sourcing, and fraud penalty issues.

[7] The BOE heard the appeals for the 1991 and 1992 tax years on the same day, with the 1991 appeal heard first, which lasted nearly 10 hours, and this appeal heard second, which lasted nearly 3 hours.

Residency

Regulation section 30604(a) provides that a rehearing may be granted when an irregularity in the appeal proceedings occurred prior to the issuance of the written opinion that prevented fair consideration of the appeal. This regulatory provision is patterned after Code of Civil Procedure section 657(1), which has been interpreted as sufficiently broad to include any departure by the court (or, here, the BOE) from the due and orderly method of disposition of an action by which the substantial rights of a party have been materially affected. (*Jacoby v. Feldman* (1978) 81 Cal.App.3d 432, 446.)

On this ground, respondent contends that the BOE failed to allow it to present evidence on the issue of whether appellant was a California resident from January 1, 1992, through April 2, 1992. Respondent argues that after the BOE determined appellant received California source income during the portion of the hearing addressing the 1991 tax year, the BOE would not entertain presentations from either party on the residency issue for the 1992 tax year. Instead, respondent asserts, the BOE initiated, renewed, and approved its motion to limit the issues for the 1992 appeal, after it swiftly determined, by majority vote, that appellant was not a California resident for the 1992 tax year. Respondent further contends that since the inception of the appeal, appellant has continually asserted that the 1991 and 1992 tax years were entirely separate cases that had to be treated independently of each other, which the BOE agreed to.

Respondent's contentions are unconvincing. In essence, respondent alleges the BOE never heard evidence or oral arguments on the 1992 residency issue. However, this allegation is not true. The hearing transcript for the 1991 tax year shows the parties and the BOE discussed and considered 1992 facts related to the residency issue when the BOE concluded on that issue for the 1991 tax year. When faced with that same issue for the 1992 tax year, the BOE apparently believed no material facts had changed that would have established appellant as a full or part-year resident during that year. Thus, for the 1992 appeal year, the BOE reaffirmed its conclusion reached during the 1991 appeal year hearing that appellant became a California nonresident and nondomiciliary on October 20, 1991.

To be sure, it is a well-settled principle in tax law that each tax year stands on its own and must be reviewed separately. (See *Burnett v. Sanford & Brooks Co.* (1931) 282 U.S. 359, 365-366.) In addition, it appears the BOE did take a holistic approach by considering the residency facts for both the 1991 and 1992 tax years together, even though those years were the subject of

two separate appeals. However, the BOE majority, as a fact-finder, was still well within its authority and discretion when determining it would have been "redundant in this process" to reconsider the residency facts again for the 1992 tax year, when it had already reviewed all the facts in the record for both tax years in dispute for the 1991 appeal. (See Regulation § 5523.6(b) ["The [BOE] may refuse to allow the presentation of evidence that it considers irrelevant . . . or unduly repetitious"].) We, therefore, find no irregularity in the BOE's proceeding.

As noted above, the BOE considered substantial amounts of evidence provided by both parties. This voluminous evidence was *not* solely related to the 1991 tax year. Rather, the thousands of pages of evidence also undisputedly related to the 1992 tax year, which had similar, if not identical, factual and legal issues to those in the 1991 tax year. Thus, the written record, which the BOE fully reviewed and considered, was replete with facts supporting its California non-residency conclusion in both tax years. Therefore, respondent has also failed to show how its substantial rights were materially affected and that it was prevented from having a fair consideration of its case.

Finally, based on the foregoing reasons, we also reject respondent's contention that the BOE violated its due process rights. On this point, however, we note that OTA is generally prohibited from considering such (state and/or federal) constitutional arguments. (See Regulation § 30104.) Accordingly, we conclude there was no irregularity in the BOE's proceedings that prevented respondent from having a fair consideration of its case or that was in violation of its due process rights.[8]

Sourcing of Licensing Income

In the context of this issue, we initially note that because the BOE had first determined appellant was a California nonresident for the entire 1992 tax year, this meant respondent was precluded from taxing all his patent licensing income, without regard to the geographical source of that income. Thus, the BOE had to next address whether appellant's 1992 licensing income could be taxed in California on a source—as opposed to a residence—basis, which the BOE

[8] Appellant argues, as he does for the 1991 appeal, that respondent waived its objections and arguments with respect to irregularities in the proceedings in its petition for rehearing because it could have raised these same objections and arguments during the hearing. We are not aware of any authority, however, that supports a contention that any party's failure to raise an objection or argument at a BOE hearing with respect to claims of irregularities will prevent consideration of such objections or arguments in a petition for rehearing. (See Regulation § 30604.)

ultimately concluded it could not. Before addressing the merits of respondent's contentions for a rehearing on this issue, we first briefly set forth the applicable law on the nonresident sourcing of income from intangible personal property.

California residents are subject to tax on their entire taxable income, regardless of where that income is earned or sourced. (§ 17041(a)(1).) However, nonresidents, such as appellant, are taxed only on income "derived from sources within" California. (§ 17041(b) & (i)(1)(B).)

As relevant here, the general rule is that income of nonresidents from intangible personal property, such as the licensing of patents, is not income from sources within California. (§ 17952; see also Regulation § 17952(a).) Thus, the fiction sometimes referred to as *mobilia sequuntur personam* (i.e., movables follow the person) controls, which means the taxable situs of the income from intangible personal property is the domicile of the owner (here, Nevada). (See *Miller v. McColgan* (1941) 17 Cal.2d 432, 443.)

However, the exception to this general rule is where the intangible personal property has acquired a business situs in California. (§ 17952.) This occurs if the property is employed as capital in California or the possession and control of the property has been localized in connection with a business, trade or profession in California so that its substantial use and value attach to and become an asset of the business, trade, or profession in California. (Regulation § 17952(c).) If intangible personal property has acquired a business situs in California, the entire income from that property, regardless of where the sale is consummated, is income from sources within California. (*Ibid.*)

Another way a nonresident's income, such as income from intangible personal property, can be sourced to California is if the nonresident sole proprietor is operating a unitary business, trade, or profession within and without the state. (Regulation § 17951-4(c).) These rules employ allocation and apportionment sourcing provisions that are applicable to business entities operating a multistate business. (Regulation § 17951-4(c)(2); see also § 25120 et seq. [where California's version of the Uniform Division of Income for Tax Purposes Act is codified].)

1) There Were No Irregularities in the BOE's Proceedings that Prevented Respondent from Having a Fair Consideration of its Case.

Here, respondent contends that the subject patent licensing income appellant received from various foreign (non-U.S.) third-parties—i.e., Sony Corporation, NEC Corporation, Sharp Corporation, Oki Electric Industry Co., Ltd.—should have been sourced to California for the

1992 tax year. Essentially, respondent appears to be arguing that appellant had earned (and therefore had constructive receipt of) this income towards the end of 1991, even though he did not physically receive the monies until 1992. Respondent appears to be further asserting that the BOE should have looked to these 1991 facts when analyzing and concluding on the sourcing issue for 1992, and that the 1991 facts would have established, like they did for the 1991 appeal year, that appellant was operating a licensing business in California for the 1992 tax year.

As specific factual support for this contention, respondent maintains that, pursuant to a tax planning strategy, appellant's licensing proceeds were in the physical possession of U.S. Philips Corporation (Philips)—a New York-based, third-party exclusive licensor of appellant's patents—during 1991, and that Philips did not pay these monies to appellant until January 1992. Respondent argues this caused the monies to not be reported on appellant's 1991 California return. Further, with respect to the payment from another foreign, third-party company called Hitachi Ltd., respondent contends the BOE's conclusion that it was not California source income was devoid of and contrary to the objective, contemporaneous evidence it presented. All of this, according to respondent, constituted an irregularity in the BOE's proceedings.

None of respondent's arguments, however, persuade us that this constituted an irregularity in the BOE's proceedings. Rather, they simply represent respondent's disagreement with the BOE's factual findings and legal conclusions. In addition, the written record, as it was for the non-residency issue, and the 1992 oral hearing transcript, were replete with facts and testimony supporting the BOE's non-California source income conclusion. Accordingly, respondent has also failed to show how its substantial rights were materially affected and that it was prevented from having a fair consideration of its case.

2) There Was Sufficient Evidence to Justify the BOE's Decision.

At the trial court level, the equivalent of a petition for rehearing is a motion for a new trial. Code of Civil Procedure section 657 sets forth the grounds for granting a new trial, which has been codified in OTA's Rules for Tax Appeals. (See Regulation § 30604(a)-(e); see also *Appeal of Sjofinar Masri Do*, *supra* and *Appeal of Wilson Development, Inc.*, *supra*.) As applicable to administrative bodies, such as this one, a rehearing should not be granted on the grounds of insufficiency of the evidence unless, after weighing the evidence, we are convinced from the entire record, including reasonable inferences therefrom, that the BOE clearly should have reached a different decision. (Code Civ. Proc., § 657.) In addition, insufficiency of the

evidence as ground for a rehearing means "the insufficiency that arises in the mind[s] of the [administrative law judges] when [they] weigh[] the conflicting evidence and find[] that which supports the [decision] weighs, in [their] opinion, less than that which is opposed to it." (*Bray v. Rosen* (1959) 167 Cal.App.2d 680, 683.)

After weighing the evidence, however, we are not convinced from the entire record, including reasonable inferences therefrom, that the BOE clearly should have reached a different decision. Instead, we believe the BOE relied on sufficient evidence to reach its conclusion that appellant did not derive California source income for the 1992 tax year.

Specifically, by majority vote, the BOE majority noted that the following facts, among others, were unlike the facts found applicable in the 1991 tax year, and therefore supported its sourcing determination for the 1992 tax year: (1) appellant was not in the business of licensing his patents because he had contracted out that activity to Philips when he changed his domicile and residency to Nevada during the end of 1991; (2) Philips handled most of the licensing contract negotiations; (3) simply having an attorney based in Los Angeles, California, who helps with, e.g., the execution of the licensing contracts, does not, without more, establish a business in the state; and (4) the licensing contracts were negotiated outside of California. In short, the BOE majority appeared to find that, unlike the 1991 tax year, appellant, a Nevada resident, was simply a passive holder of his patents, collecting royalty income.

We conclude these facts, in addition to the many others in the record, were sufficient to support the BOE's determination that neither appellant's patents had acquired a California business situs under section 17952 nor was appellant operating a licensing business in the state under Regulation section 17951-4. While respondent did present compelling evidence of its own, we do not believe the BOE, as a fact-finder, *clearly* should have reached a different conclusion.

3) The BOE's Decision Was Not Contrary to Law.

The question of whether a decision is contrary to law (or against the law) is not one which involves a fact-finder weighing the evidence and finding a balance against the decision, as it does in considering the ground of insufficiency of the evidence, discussed above. (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 906 (*Sanchez-Corea*).) Rather, what is required is a finding that the decision was unsupported by any substantial evidence. (*Ibid.*) This requires a review of the decision that "indulg[es] in all legitimate and reasonable inferences" to uphold it.

(*Id.* at p. 907.) Thus, the relevant question here does not involve the quality or nature of the reasoning behind the decision, but whether the decision is or is not supportable by substantial evidence in the record. (*Appeal of NASSCO Holdings, Inc*., 2010-SBE-001, Nov. 17, 2010.) In our review, we consider the evidence in the light most favorable to the prevailing party (here, appellant). (*Sanchez-Corea*, 38 Cal.3d at p. 907.)

Here, respondent essentially presents the same evidence and arguments made prior to the BOE's determination. As noted above, a petition for rehearing is not an opportunity to reargue the underlying appeal. Appellant provided voluminous documentary evidence, affidavits, and testimony to establish his licensing income at issue was not California source income for the 1992 tax year. When viewing appellant's extensive evidence in the light most favorable to him, we find there was substantial evidence to support the BOE's determination was not contrary to law.

Fraudulent Failure-to-File Penalty

As with the residency issue, respondent contends that there was an irregularity in the BOE's proceedings that prevented respondent from having a fair consideration of its case and that was in violation of its due process rights. Respondent asserts that the BOE deprived it of the opportunity to present evidence demonstrating that its assessment of the fraudulent failure-to-file a tax return penalty under section 19131(d) was appropriate. According to respondent, if the BOE had afforded it the opportunity to fully and fairly present its case, the fraud penalty would have been considered in the context of all the evidence pertaining to 1992, including respondent's evidence and arguments regarding appellant's residence and the sources of his income during 1992.

Here, too, respondent's contentions are without merit for many of the same reasons we expressed above related to the 1992 residency issue. Specifically, it appears, based on the hearing transcript, the BOE's conclusion to not impose the fraud penalty was not only the result of its determination that appellant was a California nonresident for the 1992 tax year, but also its consideration of all the evidence before it, including those from the 1991 tax year and the fact that the BOE did not find fraud on similar facts for the 1991 appeal. Therefore, we find no irregularity in the BOE's proceedings.

In addition, the parties discussed the fraudulent failure-to-file penalty extensively in their briefs, and, prior to the oral hearing, the BOE reviewed all the arguments and evidence in the

record, including those related to the penalty. Thus, the written record contained ample facts supporting the BOE's conclusion that appellant did not commit fraud. For these reasons, respondent has also failed to show how its substantial rights were materially affected and that it was prevented from having a fair consideration of its case.

Based on the foregoing, respondent has not satisfied the requirements for obtaining a rehearing.[9] Accordingly, respondent's request for a rehearing is denied.

DocuSigned by:
Kenneth Gast
FD75A3136CB34C2...
Kenneth Gast
Administrative Law Judge

We concur:

DocuSigned by:
CA2E033C0906484...
Douglas Bramhall
Administrative Law Judge

DocuSigned by:
Jeff Angeja
0D390BC3CCB14A9...
Jeffrey G. Angeja
Administrative Law Judge

[9] We, therefore, do not need to address respondent's petition for a rehearing on the interest abatement issue, which it conceded was dependent on the granting of a rehearing for the other three issues.

EXHIBIT 93

139 S.Ct. 1485
Supreme Court of the United States.

FRANCHISE TAX BOARD
OF CALIFORNIA, Petitioner
v.
Gilbert P. HYATT

No. 17-1299.
|
Argued January 9, 2019
|
Decided May 13, 2019

Synopsis

Background: Nevada taxpayer brought action against Franchise Tax Board of California, alleging intentional torts and bad-faith conduct during audits. The Nevada Supreme Court denied in part Board's petition for writ of mandamus, ordering the trial court to dismiss the taxpayer's negligence claim for lack of jurisdiction but finding that his intentional tort claims could proceed to trial. Certiorari was granted. The United States Supreme Court, 538 U.S. 488, 123 S.Ct. 1683, 155 L.Ed.2d 702, affirmed. Following remand, and a jury trial on the remaining claims, the District Court, Clark County, Jessie Elizabeth Walsh, J., entered judgment in favor of taxpayer and awarded damages, and the Board appealed. The Supreme Court of Nevada, Hardesty, J., 130 Nev. 662, 335 P.3d 125, affirmed in part, reversed in part, and remanded. Certiorari was granted. The Supreme Court, Justice Breyer, 136 S.Ct. 1277, 194 L.Ed.2d 431, vacated and remanded. On remand, the Supreme Court of Nevada, Hardesty, J., 407 P.3d 717, affirmed in part, reversed in part, and remanded. Certiorari was again granted.

Holdings: The Supreme Court, Justice Thomas, held that:

[1] the Board did not waive its sovereign immunity;

[2] States retain their sovereign immunity from private suits brought in the courts of other States, overruling *Nevada v. Hall*, 440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed.2d 416; and

[3] stare decisis did not warrant upholding Supreme Court's decision in *Nevada v. Hall*.

Reversed and remanded.

Justice Breyer filed a dissenting opinion, in which Justice Ginsburg, Justice Sotomayor, and Justice Kagan joined.

West Headnotes (27)

[1] Federal Courts
Failure to mention or inadequacy of treatment of error in appellate briefs

170B Federal Courts
170BXVII Courts of Appeals
170BXVII(K) Scope and Extent of Review
170BXVII(K)5 Waiver of Error in Appellate Court
170Bk3733 Failure to mention or inadequacy of treatment of error in appellate briefs

Nevada taxpayer waived his nonjurisdictional argument before the Supreme Court, that the law-of-the-case doctrine precluded the Court's review of the question whether to overrule *Nevada v. Hall*, 440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed.2d 416, which held that the Constitution did not bar private suits against a State in the courts of another State, where taxpayer failed to raise the argument in his brief in opposition, in his suit against the Franchise Tax Board of California, alleging abusive audit and investigation practices.

Cases that cite this headnote

[2] States
Tax matters

360 States
360VI Actions
360k191 Liability and Consent of State to Be Sued in General
360k191.9 Particular Actions
360k191.9(6) Tax matters

The Franchise Tax Board of California did not waive its sovereign immunity in a Nevada taxpayer's suit against the Board alleging abusive audit and investigation practices, where the Board raised an immunity-based argument from the suit's inception, though it was initially based

on the Constitution's Full Faith and Credit Clause. U.S.C.A. Const. Art. 4, § 1.

Cases that cite this headnote

[3] States

Liability and Consent of State to Be Sued in General

360 States
360VI Actions
360k191 Liability and Consent of State to Be Sued in General
360k191.1 In general

States retain their sovereign immunity from private suits brought in the courts of other States; overruling *Nevada v. Hall*, 440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed.2d 416.

3 Cases that cite this headnote

[4] States

Liability and Consent of State to Be Sued in General

360 States
360VI Actions
360k191 Liability and Consent of State to Be Sued in General
360k191.1 In general

Although the Constitution assumes that the States retain their sovereign immunity except as otherwise provided, it also fundamentally adjusts the States' relationship with each other and curtails their ability, as sovereigns, to decline to recognize each other's immunity.

Cases that cite this headnote

[5] States

Liability and Consent of State to Be Sued in General

360 States
360VI Actions
360k191 Liability and Consent of State to Be Sued in General
360k191.1 In general

The States retained the aspects of sovereignty granting them immunity under both the common law and the law of nations, except as altered by the plan of the Constitutional Convention or certain constitutional Amendments.

Cases that cite this headnote

[6] States

Liability and Consent of State to Be Sued in General

360 States
360VI Actions
360k191 Liability and Consent of State to Be Sued in General
360k191.1 In general

Article III of the Constitution, which provided a neutral federal forum in which the States agreed to be amenable to suits brought by other States, abrogated certain aspects of the States' traditional immunity. U.S. Const. art. 3, § 2.

Cases that cite this headnote

[7] States

Mode and Sufficiency of Consent

360 States
360VI Actions
360k191 Liability and Consent of State to Be Sued in General
360k191.6 Mode and Sufficiency of Consent
360k191.6(1) In general

The States, in ratifying the Constitution, surrendered a portion of their immunity by consenting to suits brought against them by the United States in federal courts; while that jurisdiction is not conferred by the Constitution in express words, it is inherent in the constitutional plan.

Cases that cite this headnote

[8] Federal Courts

Waiver by State; Consent

170B Federal Courts
170BV Suits Against States; Eleventh Amendment and Sovereign Immunity
170Bk2372 Exceptions to Immunity
170Bk2375 Waiver by State; Consent
170Bk2375(1) In general

Given that all jurisdiction implies superiority of power, the only forums in which the States have

consented to suits by one another and by the Federal Government are Article III courts. U.S. Const. art. 3, § 1 et seq.

1 Cases that cite this headnote

[9] Federal Courts

Suits Against States; Eleventh Amendment and Sovereign Immunity

170B Federal Courts
170BV Suits Against States; Eleventh Amendment and Sovereign Immunity
170Bk2371 In general

The Eleventh Amendment confirmed that the Constitution was not meant to raise up any suits against the States that were anomalous and unheard of when the Constitution was adopted. U.S. Const. Amend. 11.

Cases that cite this headnote

[10] Federal Courts

Suits Against States; Eleventh Amendment and Sovereign Immunity

170B Federal Courts
170BV Suits Against States; Eleventh Amendment and Sovereign Immunity
170Bk2371 In general

Although the terms of the Eleventh Amendment address only the specific provisions of the Constitution that had raised concerns during the ratification debates and formed the basis of the Supreme Court's decision in *Chisholm v. Georgia*, 2 U.S. 419, 2 Dall. 419, 1793 WL 685, 1 L.Ed. 440, the natural inference from its speedy adoption is that the Constitution was understood, in light of its history and structure, to preserve the States' traditional immunity from private suits. U.S. Const. Amend. 11.

Cases that cite this headnote

[11] Federal Courts

Suits Against States; Eleventh Amendment and Sovereign Immunity

170B Federal Courts
170BV Suits Against States; Eleventh Amendment and Sovereign Immunity
170Bk2371 In general

The Eleventh Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity. U.S. Const. Amend. 11.

1 Cases that cite this headnote

[12] Federal Courts

Suits Against States; Eleventh Amendment and Sovereign Immunity

170B Federal Courts
170BV Suits Against States; Eleventh Amendment and Sovereign Immunity
170Bk2371 In general

The sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. U.S. Const. Amend. 11.

2 Cases that cite this headnote

[13] States

Powers Reserved to States

360 States
360I Political Status and Relations
360I(A) In General
360k4.4 Powers Reserved to States
360k4.4(1) In general

The Constitution affirmatively altered the relationships between the States, so that they no longer relate to each other solely as foreign sovereigns, and each State's equal dignity and sovereignty under the Constitution implies certain constitutional limitations on the sovereignty of all of its sister States.

2 Cases that cite this headnote

[14] States

Foreign states

360 States
360VI Actions
360k191 Liability and Consent of State to Be Sued in General
360k191.4 Necessity of Consent
360k191.4(3) Foreign states

One constitutional limitation on the sovereignty of the States is the inability of one State to

hale another into its courts without the latter's consent.

3 Cases that cite this headnote

[15] States
Relations Among States Under Constitution of United States

States
Foreign states

360 States
360I Political Status and Relations
360I(A) In General
360k5 Relations Among States Under Constitution of United States
360k5(1) In general
360 States
360VI Actions
360k191 Liability and Consent of State to Be Sued in General
360k191.4 Necessity of Consent
360k191.4(3) Foreign states

The Constitution does not merely allow States to afford each other immunity as a matter of comity; it embeds interstate sovereign immunity within the constitutional design.

1 Cases that cite this headnote

[16] States
Status under Constitution of United States, and relations to United States in general

360 States
360I Political Status and Relations
360I(A) In General
360k4 Status under Constitution of United States, and relations to United States in general

Article I of the Constitution divests the States of the traditional diplomatic and military tools that foreign sovereigns possess. U.S. Const. art. 1, § 1 et seq.

Cases that cite this headnote

[17] States
Full faith and credit in each state to the public acts, records, etc. of other states

360 States
360I Political Status and Relations
360I(A) In General
360k5 Relations Among States Under Constitution of United States
360k5(2) Full faith and credit in each state to the public acts, records, etc. of other states

The Full Faith and Credit Clause demands that state-court judgments be accorded full effect in other States and precludes States from adopting any policy of hostility to the public Acts of other States. U.S. Const. art. 4, § 1.

Cases that cite this headnote

[18] States
Relations Among States Under Constitution of United States

360 States
360I Political Status and Relations
360I(A) In General
360k5 Relations Among States Under Constitution of United States
360k5(1) In general

The Constitution reflects implicit alterations to the States' relationships with each other, confirming that they are no longer fully independent nations.

Cases that cite this headnote

[19] Federal Courts
Water

Federal Courts
Government and Political Subdivisions

170B Federal Courts
170BXV State or Federal Laws as Rules of Decision; Erie Doctrine
170BXV(B) Application to Particular Matters
170Bk3063 Substantive Matters
170Bk3070 Water
170B Federal Courts
170BXV State or Federal Laws as Rules of Decision; Erie Doctrine
170BXV(B) Application to Particular Matters
170Bk3063 Substantive Matters
170Bk3071 Government and Political Subdivisions
170Bk3071(1) In general

States may not supply rules of decision governing disputes implicating their conflicting rights, and thus, no State can apply its own law

to interstate disputes over borders, water rights, or the interpretation of interstate compacts.

Cases that cite this headnote

[20] States

Liability and Consent of State to Be Sued in General

360 States
360VI Actions
360k191 Liability and Consent of State to Be Sued in General
360k191.1 In general

The Constitution implicitly strips States of any power they once had to refuse each other sovereign immunity, just as it denies them the power to resolve border disputes by political means.

Cases that cite this headnote

[21] States

Status under Constitution of United States, and relations to United States in general

States

Foreign states

360 States
360I Political Status and Relations
360I(A) In General
360k4 Status under Constitution of United States, and relations to United States in general
360 States
360VI Actions
360k191 Liability and Consent of State to Be Sued in General
360k191.4 Necessity of Consent
360k191.4(3) Foreign states

Interstate immunity is implied as an essential component of federalism.

Cases that cite this headnote

[22] States

Liability and Consent of State to Be Sued in General

360 States
360VI Actions
360k191 Liability and Consent of State to Be Sued in General
360k191.1 In general

A State has sovereign immunity in another State's courts, even though no constitutional provision explicitly grants that immunity, since the States' sovereign immunity is a historically rooted principle embedded in the text and structure of the Constitution.

4 Cases that cite this headnote

[23] Constitutional Law

General Rules of Construction

92 Constitutional Law
92V Construction and Operation of Constitutional Provisions
92V(A) General Rules of Construction
92k580 In general

There are many constitutional doctrines that are not spelled out in the Constitution but are nevertheless implicit in its structure and supported by historical practice, including, for example, judicial review, intergovernmental tax immunity, executive privilege, executive immunity, and the President's removal power.

Cases that cite this headnote

[24] Courts

Particular questions or subject matter

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k88 Previous Decisions as Controlling or as Precedents
106k96 Decisions of United States Courts as Authority in Other United States Courts
106k96(7) Particular questions or subject matter

Stare decisis did not warrant upholding Supreme Court's decision in *Nevada v. Hall*, 440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed.2d 416, which held that the Constitution did not bar private suits against a State in the courts of another State; although some plaintiffs have relied on *Hall* by suing sovereign States, *Hall* failed to account for the historical understanding of state sovereign immunity, namely that States retained immunity from private suits, both in their own courts and in other courts, *Hall* also failed to consider how the deprivation of traditional diplomatic

tools reordered the States' relationships with one another, and it stood as an outlier in the Supreme Court's sovereign-immunity jurisprudence.

1 Cases that cite this headnote

[25] Courts
Previous Decisions as Controlling or as Precedents
106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k88 Previous Decisions as Controlling or as Precedents
106k89 In general

Stare decisis is not an inexorable command.

Cases that cite this headnote

[26] Courts
Previous Decisions as Controlling or as Precedents
106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k88 Previous Decisions as Controlling or as Precedents
106k89 In general

There are a number of factors to consider when deciding whether to uphold a decision on the basis of stare decisis, including: the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision.

2 Cases that cite this headnote

[27] Courts
Particular questions or subject matter
106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k88 Previous Decisions as Controlling or as Precedents
106k96 Decisions of United States Courts as Authority in Other United States Courts
106k96(7) Particular questions or subject matter

In virtually every case that overrules a controlling precedent, the party relying on that precedent will incur the loss of litigation expenses and a favorable decision below, and those case-specific costs are not among the reliance interests that would persuade the Supreme Court to adhere to an incorrect resolution of an important constitutional question.

Cases that cite this headnote

Syllabus [*]

[*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Respondent Hyatt sued petitioner Franchise Tax Board of California (Board) in Nevada state court for alleged torts committed during a tax audit. The Nevada Supreme Court rejected the Board's argument that the Full Faith and Credit Clause required Nevada courts to apply California law and immunize the Board from liability. The court held instead that general principles of comity entitled the Board only to the same immunity that Nevada law afforded Nevada agencies. This Court affirmed, holding that the Full Faith and Credit Clause did not prohibit Nevada from applying its own immunity law. On remand, the Nevada Supreme Court declined to apply a cap on tort liability applicable to Nevada state agencies. This Court reversed, holding that the Full Faith and Credit Clause required Nevada courts to grant the Board the same immunity that Nevada agencies enjoy. The Court was equally divided, however, on whether to overrule *Nevada v. Hall*, 440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed.2d 416, which held that the Constitution does not bar suits brought by an individual against a State in the courts of another State. On remand, the Nevada Supreme Court instructed the trial court to enter damages in accordance with Nevada's statutory cap. The Board sought certiorari a third time, raising only the question whether *Nevada v. Hall* should be overruled.

Held: *Nevada v. Hall* is overruled; States retain their sovereign immunity from private suits brought in courts of other States. Pp. 1492 – 1499.

(a) The *Hall* majority held that nothing "implicit in the Constitution" requires States to adhere to the sovereign

immunity that prevailed at the time of the founding. 440 U.S. at 417–418, 424–427, 99 S.Ct. 1182. The Court concluded that the Founders assumed that "prevailing notions of comity would provide adequate protection against the unlikely prospect of an attempt by the courts of one State to assert jurisdiction over another." *Id.*, at 419, 99 S.Ct. 1182. The Court's view rested primarily on the idea that the States maintained sovereign immunity vis-à-vis each other in the same way that foreign nations do. Pp. 1492 – 1493.

(b) *Hall*'s determination misreads the historical record and misapprehends the constitutional design created by the Framers. Although the Constitution assumes that the States retain their sovereign immunity except as otherwise provided, it also fundamentally adjusts the States' relationship with each other and curtails the States' ability, as sovereigns, to decline to recognize each other's immunity in their own courts. Pp. 1492 – 1499.

(1) At the time of the founding, it was well settled that States were immune from suit both under the common law and under the law of nations. The States retained these aspects of sovereignty, "except as altered by the plan of the Convention or certain constitutional Amendments." *Alden v. Maine*, 527 U.S. 706, 713, 119 S.Ct. 2240, 144 L.Ed.2d 636. Pp. 1493 – 1494.

(2) Article III abrogated certain aspects of the States' traditional immunity by providing a neutral federal forum in which the States agreed to be amenable to suits brought by other States. And in ratifying the Constitution, the States similarly surrendered a portion of their immunity by consenting to suits brought against them by the United States in federal courts. When this Court held in *Chisholm v. Georgia*, 2 Dall. 419, 1 L.Ed. 440, that Article III extended the federal judicial power over controversies between a State and citizens of another State, Congress and the States acted swiftly to draft and ratify the Eleventh Amendment, which confirms that the Constitution was not meant to "rais[e] up" any suits against the States that were "anomalous and unheard of when the Constitution was adopted," *Hans v. Louisiana*, 134 U.S. 1, 18, 10 S.Ct. 504, 33 L.Ed. 842. The "natural inference" from the Amendment's speedy adoption is that "the Constitution was understood, in light of its history and structure, to preserve the States' traditional immunity from private suits." *Alden, supra*, at 723–724, 119 S.Ct. 2240. This view of the States' sovereign immunity accorded with the understanding of the Constitution by its leading advocates, including Hamilton, Madison, and Marshall, when it was ratified. Pp. 1494 – 1496.

(3) State sovereign immunity in another State's courts is integral to the structure of the Constitution. The problem with Hyatt's argument—that interstate sovereign immunity exists only as a matter of comity and can be disregarded by the forum State—is that the Constitution affirmatively altered the relationships between the States so that they no longer relate to each other as true foreign sovereigns. Numerous provisions reflect this reality. Article I divests the States of the traditional diplomatic and military tools that foreign sovereigns possess. And Article IV imposes duties on the States not required by international law. The Constitution also reflects alterations to the States' relationships with each other, confirming that they are no longer fully independent nations free to disregard each other's sovereignty. See *New Hampshire v. Louisiana*, 108 U.S. 76, 90, 2 S.Ct. 176, 27 L.Ed. 656. Hyatt's argument is precisely the type of "ahistorical literalism" this Court has rejected when "interpreting the scope of the States' sovereign immunity since the discredited decision in *Chisholm*." *Alden, supra*, at 730, 119 S.Ct. 2240. Moreover, his argument proves too much. Many constitutional doctrines not spelled out in the Constitution are nevertheless implicit in its structure and supported by historical practice, *e.g.*, judicial review, *Marbury v. Madison*, 1 Cranch 137, 176–180, 2 L.Ed. 60. Pp. 1496 – 1499.

(c) *Stare decisis* is " 'not an inexorable command,' " *Pearson v. Callahan*, 555 U.S. 223, 233, 129 S.Ct. 808, 172 L.Ed.2d 565, and is "at its weakest" when interpreting the Constitution, *Agostini v. Felton*, 521 U.S. 203, 235, 117 S.Ct. 1997, 138 L.Ed.2d 391. The Court's precedents identify, as relevant here, four factors to consider: the quality of the decision's reasoning, its consistency with related decisions, legal developments since the decision, and reliance on the decision. See *Janus v. State, County, and Municipal Employees*, 585 U.S. ——, —— – ——, 138 S.Ct. 2448, 201 L.Ed.2d 924. The first three factors support overruling *Hall*. As to the fourth, case-specific reliance interests are not sufficient to persuade this Court to adhere to an incorrect resolution of an important constitutional question. Pp. 1498 – 1499.

133 Nev. ——, 407 P. 3d 717, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C.J., and ALITO, GORSUCH, and KAVANAUGH, JJ., joined. BREYER, J., filed a dissenting

opinion, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined.

Attorneys and Law Firms

***1488** Seth P. Waxman, Washington, DC, for the petitioner.

Erwin Chemerinsky, Berkeley, CA, for the respondent.

William C. Hilson, Jr., Scott W. DePeel, Ann Hodges, Franchise Tax Board of the State of California, Sacramento, CA, James W. Bradshaw, Pat Lundvall, Debbie Leonard, McDonald Carano LLP, Las Vegas, NV, Seth P. Waxman, Paul R.Q. Wolfson, Daniel Winik, Joshua M. Koppel, James Barton, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC, for petitioner.

Erwin Chemerinsky, University of California, Berkeley School of Law, Berkeley, CA, Mark D. Rosenbaum, Alisa Hartz, Public Counsel, Donald J. Kula, Perkins Coie LLP, Los Angeles, CA, Paul Hoffman, Schonbrun Seplow Harris & Hoffman LLP, Hermosa Beach, CA, Joel W. Nomkin, Perkins Coie LLP, Phoenix, AZ, for respondent Gilbert P. Hyatt.

Opinion

Justice THOMAS delivered the opinion of the Court.

***1490** This case, now before us for the third time, requires us to decide whether the Constitution permits a State to be sued by a private party without its consent in the courts of a different State. We hold that it does not and overrule our decision to the contrary in *Nevada v. Hall*, 440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed.2d 416 (1979).

I

In the early 1990s, respondent Gilbert Hyatt earned substantial income from a technology patent for a computer formed on a single integrated circuit chip. Although Hyatt's claim was later canceled, see *Hyatt v. Boone*, 146 F. 3d 1348 (C.A. Fed. 1998), his royalties in the interim totaled millions of dollars. Prior to receiving the patent, Hyatt had been a long-time resident of California. But in 1991, Hyatt sold his house in California and rented an apartment, registered to vote, obtained insurance, opened a bank account, and acquired a driver's license in Nevada. When he filed his 1991 and 1992 tax returns, he claimed Nevada—which collects no personal income tax, see Nev. Const., Art. 10, § 1(9)—as his primary place of residence.

Petitioner Franchise Tax Board of California (Board), the state agency responsible for assessing personal income tax, suspected that Hyatt's move was a sham. Thus, in 1993, the Board launched an audit ***1491** to determine whether Hyatt underpaid his 1991 and 1992 state income taxes by misrepresenting his residency. In the course of the audit, employees of the Board traveled to Nevada to conduct interviews with Hyatt's estranged family members and shared his personal information with business contacts. In total, the Board sent more than 100 letters and demands for information to third parties. The Board ultimately concluded that Hyatt had not moved to Nevada until April 1992 and owed California more than $ 10 million in back taxes, interest, and penalties. Hyatt protested the audit before the Board, which upheld the audit after an 11-year administrative proceeding. The appeal of that decision remains pending before the California Office of Tax Appeals.

In 1998, Hyatt sued the Board in Nevada state court for torts he alleged the agency committed during the audit. After the trial court denied in part the Board's motion for summary judgment, the Board petitioned the Nevada Supreme Court for a writ of mandamus ordering dismissal on the ground that the State of California was immune from suit. The Board argued that, under the Full Faith and Credit Clause, Nevada courts must apply California's statute immunizing the Board from liability for all injuries caused by its tax collection. See U.S. Const., Art. IV, § 1; Cal. Govt. Code Ann. § 860.2 (West 1995). The Nevada Supreme Court rejected that argument and held that, under general principles of comity, the Board was entitled to the same immunity that Nevada law afforded Nevada agencies—that is, immunity for negligent but not intentional torts. We granted certiorari and unanimously affirmed, holding that the Full Faith and Credit Clause did not prohibit Nevada from applying its own immunity law to the case. *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488, 498–499, 123 S.Ct. 1683, 155 L.Ed.2d 702 (2003) (*Hyatt I*). Because the Board did not ask us to overrule *Nevada v. Hall*, *supra*, we did not revisit that decision. *Hyatt I, supra,* at 497, 123 S.Ct. 1683.

On remand, the trial court conducted a 4-month jury trial that culminated in a verdict for Hyatt that, with prejudgment interest and costs, exceeded $ 490 million. On appeal, the Nevada Supreme Court rejected most of the damages awarded by the lower court, upholding only a $ 1 million judgment on

one of Hyatt's claims and remanding for a new damages trial on another. Although the court recognized that tort liability for Nevada state agencies was capped at $ 50,000 under state law, it nonetheless held that Nevada public policy precluded it from applying that limitation to the California agency in this case. We again granted certiorari and this time reversed, holding that the Full Faith and Credit Clause required Nevada courts to grant the Board the same immunity that Nevada agencies enjoy. *Franchise Tax Bd. of Cal. v. Hyatt,* 578 U.S. ——, —— – ——, 136 S.Ct. 1277, 1280–1283, 194 L.Ed.2d 431 (2016) (*Hyatt II*). Although the question was briefed and argued, the Court was equally divided on whether to overrule *Hall* and thus affirmed the jurisdiction of the Nevada Supreme Court. *Hyatt II, supra,* at ——, 136 S.Ct. at 1278. On remand, the Nevada Supreme Court instructed the trial court to enter damages in accordance with the statutory cap for Nevada agencies. 133 Nev. ——, 407 P. 3d 717 (2017).

[1] **[2]** We granted, for a third time, the Board's petition for certiorari, 585 U.S. ——, 138 S.Ct. 2710, 201 L.Ed.2d 1095 (2018). The sole question presented is whether *Nevada v. Hall* should be overruled. [1]

[1] Hyatt argues that the law-of-the-case doctrine precludes our review of this question, but he failed to raise that nonjurisdictional issue in his brief in opposition. We therefore deem this argument waived. See this Court's Rule 15.2; *Arizona v. California*, 460 U.S. 605, 618, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983) ("Law of the case directs a court's discretion, it does not limit the tribunal's power"). We also reject Hyatt's argument that the Board waived its immunity. The Board has raised an immunity-based argument from this suit's inception, though it was initially based on the Full Faith and Credit Clause.

***1492** II

[3] *Nevada v. Hall* is contrary to our constitutional design and the understanding of sovereign immunity shared by the States that ratified the Constitution. *Stare decisis* does not compel continued adherence to this erroneous precedent. We therefore overrule *Hall* and hold that States retain their sovereign immunity from private suits brought in the courts of other States.

A

Hall held that the Constitution does not bar private suits against a State in the courts of another State. 440 U.S. at 416–421, 99 S.Ct. 1182. The opinion conceded that States were immune from such actions at the time of the founding, but it nonetheless concluded that nothing "implicit in the Constitution" requires States "to adhere to the sovereign-immunity doctrine as it prevailed when the Constitution was adopted." *Id.,* at 417–418, 424–427, 99 S.Ct. 1182. Instead, the Court concluded that the Founders assumed that "prevailing notions of comity would provide adequate protection against the unlikely prospect of an attempt by the courts of one State to assert jurisdiction over another." *Id.,* at 419, 99 S.Ct. 1182. The Court's view rested primarily on the idea that the States maintained sovereign immunity vis-à-vis each other in the same way that foreign nations do, meaning that immunity is available only if the forum State "voluntar[ily]" decides "to respect the dignity of the [defendant State] as a matter of comity." *Id.,* at 416, 99 S.Ct. 1182; see also *id.,* at 424–427, 99 S.Ct. 1182.

The *Hall* majority was unpersuaded that the Constitution implicitly altered the relationship between the States. In the Court's view, the ratification debates, the Eleventh Amendment, and our sovereign-immunity precedents did not bear on the question because they "concerned questions of federal-court jurisdiction." *Id.*, at 420, 99 S.Ct. 1182. The Court also found unpersuasive the fact that the Constitution delineates several limitations on States' authority, such as Article I powers granted exclusively to Congress and Article IV requirements imposed on States. *Id.,* at 425, 99 S.Ct. 1182. Despite acknowledging "that ours is not a union of 50 wholly independent sovereigns," *Hall* inferred from the lack of an express sovereign immunity granted to the States and from the Tenth Amendment that the States retained the power in their own courts to deny immunity to other States. *Ibid.*

Chief Justice Burger, Justice Blackmun, and Justice Rehnquist dissented.

B

[4] *Hall*'s determination that the Constitution does not contemplate sovereign immunity for each State in a sister State's courts misreads the historical record and misapprehends the "implicit ordering of relationships within the federal system necessary to make the Constitution a workable governing charter and to give each provision within that document the full effect intended by the Framers."

Id., at 433, 99 S.Ct. 1182 (Rehnquist, J., dissenting). As Chief Justice Marshall explained, the Founders did not state every postulate on which they formed our Republic—"we must never forget, that it is *a* ***1493** *constitution* we are expounding." *McCulloch v. Maryland*, 4 Wheat. 316, 407, 4 L.Ed. 579 (1819). And although the Constitution assumes that the States retain their sovereign immunity except as otherwise provided, it also fundamentally adjusts the States' relationship with each other and curtails their ability, as sovereigns, to decline to recognize each other's immunity.

1

After independence, the States considered themselves fully sovereign nations. As the Colonies proclaimed in 1776, they were "Free and Independent States" with "full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do." Declaration of Independence ¶4. Under international law, then, independence "entitled" the Colonies "to all the rights and powers of sovereign states." *McIlvaine v. Coxe's Lessee*, 4 Cranch 209, 212, 2 L.Ed. 598 (1808).

"An integral component" of the States' sovereignty was "their immunity from private suits." *Federal Maritime Comm'n v. South Carolina Ports Authority*, 535 U.S. 743, 751–752, 122 S.Ct. 1864, 152 L.Ed.2d 962 (2002); see *Alden v. Maine*, 527 U.S. 706, 713, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999) ("[A]s the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today ..."). This fundamental aspect of the States' "inviolable sovereignty" was well established and widely accepted at the founding. The Federalist No. 39, p. 245 (C. Rossiter ed. 1961) (J. Madison); see *Alden*, *supra*, at 715–716, 119 S.Ct. 2240 ("[T]he doctrine that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified"). As Alexander Hamilton explained:

> "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union." The Federalist No. 81, at 487 (emphasis deleted).

The Founders believed that both "common law sovereign immunity" and "law-of-nations sovereign immunity" prevented States from being amenable to process in any court without their consent. See Pfander, Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases, 82 Cal. L. Rev. 555, 581–588 (1994); see also Nelson, Sovereign Immunity as a Doctrine of Personal Jurisdiction, 115 Harv. L. Rev. 1559, 1574–1579 (2002). The common-law rule was that "no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him." 1 W. Blackstone, Commentaries on the Laws of England 235 (1765) (Blackstone). The law-of-nations rule followed from the "perfect equality and absolute independence of sovereigns" under that body of international law. *Schooner Exchange v. McFaddon*, 7 Cranch 116, 137, 3 L.Ed. 287 (1812); see C. Phillipson, Wheaton's Elements of International Law 261 (5th ed. 1916) (recognizing that sovereigns "enjoy equality before international law"); 1 J. Kent, Commentaries on American Law 20 (G. Comstock ed. 1867). According to the founding era's foremost expert on the law of nations, "[i]t does not ... belong to any foreign power to take cognisance of the administration of [another] sovereign, to set himself up for a judge of his conduct, and to oblige him to alter it." 2 E. de Vattel, The Law of Nations § 55, ***1494** p. 155 (J. Chitty ed. 1883). The sovereign is "exemp[t] ... from all [foreign] jurisdiction." 4 *id.*, § 108, at 486.

The founding generation thus took as given that States could not be haled involuntarily before each other's courts. See Woolhandler, Interstate Sovereign Immunity, 2006 S. Ct. Rev. 249, 254–259. This understanding is perhaps best illustrated by preratification examples. In 1781, a creditor named Simon Nathan tried to recover a debt that Virginia allegedly owed him by attaching some of its property in Philadelphia. James Madison and other Virginia delegates to the Confederation Congress responded by sending a communique to Pennsylvania requesting that its executive branch have the action dismissed. See Letter from Virginia Delegates to Supreme Executive Council of Pennsylvania (July 9, 1781), in 3 The Papers of James Madison, 184–185 (W. Hutchinson & W. Rachal eds. 1963). As Madison framed it, the Commonwealth's property could not be attached by process issuing from a court of "any other State in the Union." *Id.,* at 184. To permit otherwise would require Virginia to "abandon its Sovereignty by descending to answer before the Tribunal of another Power." *Ibid.* Pennsylvania Attorney

General William Bradford intervened, urging the Court of Common Pleas to dismiss the action. See *Nathan v. Virginia*, 1 Dall. 77, 78, 1 L.Ed. 44 (C. P. Phila. Cty. 1781). According to Bradford, the suit violated international law because "all sovereigns are in a state of equality and independence, exempt from each other's jurisdiction." *Ibid.* "[A]ll jurisdiction implies superiority over the party," Bradford argued, "but there could be no superiority" between the States, and thus no jurisdiction, because the States were "perfect[ly] equa[l]" and "entire[ly] independen[t]." *Ibid.* The court agreed and refused to grant Nathan the writ of attachment. *Id.,* at 80.

Similarly, a Pennsylvania Admiralty Court that very same year dismissed a libel action against a South Carolina warship, brought by its crew to recover unpaid wages. The court reasoned that the vessel was owned by a "sovereign independent state." *Moitez v. The South Carolina*, 17 F. Cas. 574 (No. 9697) (1781).

The Founders were well aware of the international-law immunity principles behind these cases. Federalists and Antifederalists alike agreed in their preratification debates that States could not be sued in the courts of other States. One Federalist, who argued that Article III would waive the States' immunity in federal court, admitted that the waiver was desirable because of the "impossibility of calling a sovereign state before the jurisdiction of another sovereign state." 3 Debates on the Constitution 549 (J. Elliot ed. 1876) (Pendleton) (Elliot's Debates). Two of the most prominent Antifederalists—Federal Farmer and Brutus—disagreed with the Federalists about the desirability of a federal forum in which States could be sued, but did so for the very reason that the States had previously been "subject to no such actions" in any court and were not "oblige[d]" "to answer to an individual in a court of law." Federal Farmer No. 3 (Oct. 10, 1787), in 4 The Founders' Constitution 227 (P. Kurland & R. Lerner eds. 1987). They found it "humiliating and degrading" that a State might have to answer "the suit of an individual." Brutus No. 13 (Feb. 21, 1788), in *id.,* at 238.

[5] In short, at the time of the founding, it was well settled that States were immune under both the common law and the law of nations. The Constitution's use of the term "States" reflects both of these kinds of traditional immunity. And the States retained these aspects of sovereignty, ***1495** "except as altered by the plan of the Convention or certain constitutional Amendments." *Alden*, 527 U.S. at 713, 119 S.Ct. 2240.

2

[6] One constitutional provision that abrogated certain aspects of this traditional immunity was Article III, which provided a neutral federal forum in which the States agreed to be amenable to suits brought by other States. Art. III, § 2; see *Alden*, *supra*, at 755, 119 S.Ct. 2240. "The establishment of a permanent tribunal with adequate authority to determine controversies between the States, in place of an inadequate scheme of arbitration, was essential to the peace of the Union." *Principality of Monaco v. Mississippi*, 292 U.S. 313, 328, 54 S.Ct. 745, 78 L.Ed. 1282 (1934). As James Madison explained during the Convention debates, "there can be no impropriety in referring such disputes" between coequal sovereigns to a superior tribunal. Elliot's Debates 532.

[7] **[8]** The States, in ratifying the Constitution, similarly surrendered a portion of their immunity by consenting to suits brought against them by the United States in federal courts. See *Monaco*, *supra,* at 328, 54 S.Ct. 745; *Federal Maritime Comm'n*, 535 U.S. at 752, 122 S.Ct. 1864. "While that jurisdiction is not conferred by the Constitution in express words, it is inherent in the constitutional plan." *Monaco*, *supra*, at 329, 54 S.Ct. 745. Given that "all jurisdiction implies superiority of power," Blackstone 235, the only forums in which the States have consented to suits by one another and by the Federal Government are Article III courts. See *Federal Maritime Comm'n*, *supra*, at 752, 122 S.Ct. 1864.

The Antifederalists worried that Article III went even further by extending the federal judicial power over controversies "between a State and Citizens of another State." They suggested that this provision implicitly waived the States' sovereign immunity against *private* suits in federal courts. But "[t]he leading advocates of the Constitution assured the people in no uncertain terms" that this reading was incorrect. *Alden*, 527 U.S. at 716, 119 S.Ct. 2240; see *id.,* at 716–718, 119 S.Ct. 2240 (citing arguments by Hamilton, Madison, and John Marshall). According to Madison:

> "[A federal court's] jurisdiction in controversies between a state and citizens of another state is much objected to, and perhaps without reason. It is not in the power of individuals to call any state into court. The only operation it can have, is that, if a state should wish to bring a suit against a citizen, it must be brought before the federal court. This will give satisfaction to individuals, as it will prevent citizens, on

> whom a state may have a claim, being dissatisfied with the state courts." Elliot's Debates 533.

John Marshall echoed these sentiments:

> "With respect to disputes between *a state and the citizens of another state*, its jurisdiction has been decried with unusual vehemence. I hope no gentleman will think that a state will be called at the bar of the federal court.... The intent is, to enable states to recover claims of individuals residing in other states. I contend this construction is warranted by the words." *Id.,* at 555 (emphasis in original).

Not long after the founding, however, the Antifederalists' fears were realized. In *Chisholm v. Georgia*, 2 Dall. 419, 1 L.Ed. 440 (1793), the Court held that Article III allowed the very suits that the "Madison-Marshall-Hamilton triumvirate" insisted it did not. *Hall*, 440 U.S. at 437, 99 S.Ct. 1182 (Rehnquist, J., dissenting). That decision precipitated an immediate "furor" and "uproar" across the country. 1 ***1496** J. Goebel, Antecedents and Beginnings to 1801, History of the Supreme Court of the United States 734, 737 (1971); see *id.,* at 734–741. Congress and the States accordingly acted swiftly to remedy the Court's blunder by drafting and ratifying the Eleventh Amendment. [2] See *Edelman v. Jordan*, 415 U.S. 651, 660–662, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); see also *Federal Maritime Comm'n*, *supra*, at 753, 122 S.Ct. 1864 (acknowledging that *Chisholm* was incorrect); *Alden*, *supra*, at 721–722, 119 S.Ct. 2240 (same).

2 The Eleventh Amendment provides: "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."

[9] **[10]** **[11]** **[12]** The Eleventh Amendment confirmed that the Constitution was not meant to "rais[e] up" any suits against the States that were "anomalous and unheard of when the Constitution was adopted." *Hans v. Louisiana*, 134 U.S. 1, 18, 10 S.Ct. 504, 33 L.Ed. 842 (1890). Although the terms of that Amendment address only "the specific provisions of the Constitution that had raised concerns during the ratification debates and formed the basis of the *Chisholm* decision," the "natural inference" from its speedy adoption is that "the Constitution was understood, in light of its history and structure, to preserve the States' traditional immunity from private suits." *Alden*, *supra*, at 723–724, 119 S.Ct. 2240. We have often emphasized that "[t]he Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity." *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993). In proposing the Amendment, "Congress acted not to change but to restore the original constitutional design." *Alden*, 527 U.S. at 722, 119 S.Ct. 2240. The "sovereign immunity of the States," we have said, "neither derives from, nor is limited by, the terms of the Eleventh Amendment." *Id.,* at 713, 119 S.Ct. 2240.

Consistent with this understanding of state sovereign immunity, this Court has held that the Constitution bars suits against nonconsenting States in a wide range of cases. See, *e.g., Federal Maritime Comm'n*, *supra* (actions by private parties before federal administrative agencies); *Alden*, *supra* (suits by private parties against a State in its own courts); *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991) (suits by Indian tribes in federal court); *Monaco*, 292 U.S. 313, 54 S.Ct. 745 (suits by foreign states in federal court); *Ex parte New York*, 256 U.S. 490, 41 S.Ct. 588, 65 L.Ed. 1057 (1921) (admiralty suits by private parties in federal court); *Smith v. Reeves*, 178 U.S. 436, 20 S.Ct. 919, 44 L.Ed. 1140 (1900) (suits by federal corporations in federal court).

3

Despite this historical evidence that interstate sovereign immunity is preserved in the constitutional design, Hyatt insists that such immunity exists only as a "matter of comity" and can be disregarded by the forum State. *Hall*, *supra,* at 416, 99 S.Ct. 1182. He reasons that, before the Constitution was ratified, the States had the power of fully independent nations to deny immunity to fellow sovereigns; thus, the States must retain that power today with respect to each other because "nothing in the Constitution or formation of the Union altered that balance among the still-sovereign states." Brief for Respondent 14. Like the majority in *Hall*, he relies primarily ***1497** on our early foreign immunity decisions. For instance, he cites *Schooner Exchange v. McFaddon*, in which the Court dismissed a libel action against a French warship docked in Philadelphia because, under the law of nations, a sovereign's warships entering the ports of a friendly nation are exempt from the jurisdiction of its courts. 7 Cranch at 145–146. But whether the host nation respects that sovereign immunity, Chief Justice Marshall noted, is for the host nation to decide, for "[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. Similar reasoning is found in *The Santissima Trinidad*, 7 Wheat. 283, 353, 5 L.Ed. 454 (1822), where Justice Story noted that the host nation's consent to provide immunity "may be withdrawn upon notice at any time, without just offence."

[13] **[14]** **[15]** The problem with Hyatt's argument is that the Constitution affirmatively altered the relationships between the States, so that they no longer relate to each other solely as foreign sovereigns. Each State's equal dignity and sovereignty under the Constitution implies certain constitutional "limitation[s] on the sovereignty of all of its sister States." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293, 100 S.Ct. 580, 62 L.Ed.2d 490 (1980). One such limitation is the inability of one State to hale another into its courts without the latter's consent. The Constitution does not merely allow States to afford each other immunity as a matter of comity; it embeds interstate sovereign immunity within the constitutional design. Numerous provisions reflect this reality.

[16] To begin, Article I divests the States of the traditional diplomatic and military tools that foreign sovereigns possess. Specifically, the States can no longer prevent or remedy departures from customary international law because the Constitution deprives them of the independent power to lay imposts or duties on imports and exports, to enter into treaties or compacts, and to wage war. Compare Art. I, § 10, with Declaration of Independence ¶4 (asserting the power to "levy War, conclude Peace, contract Alliances, [and] establish Commerce"); see *Kansas v. Colorado*, 185 U.S. 125, 143, 22 S.Ct. 552, 46 L.Ed. 838 (1902).

[17] Article IV also imposes duties on the States not required by international law. The Court's Full Faith and Credit Clause precedents, for example, demand that state-court judgments be accorded full effect in other States and preclude States from "adopt[ing] any policy of hostility to the public Acts" of other States. *Hyatt II*, 578 U.S., at ——, 136 S.Ct., at 1281 (internal quotation marks omitted); see Art. IV, § 1. States must also afford citizens of each State "all Privileges and Immunities of Citizens in the several States" and honor extradition requests upon "Demand of the executive Authority of the State" from which the fugitive fled. Art. IV, § 2. Foreign sovereigns cannot demand these kinds of reciprocal responsibilities absent consent or compact. But the Constitution imposes them as part of its transformation of the States from a loose league of friendship into a perpetual Union based on the "fundamental principle of *equal* sovereignty among the States." *Shelby County v. Holder*, 570 U.S. 529, 544, 133 S.Ct. 2612, 186 L.Ed.2d 651 (2013) (emphasis in original and internal quotation marks omitted).

[18] **[19]** The Constitution also reflects implicit alterations to the States' relationships with each other, confirming that they are no longer fully independent nations. See *New Hampshire v. Louisiana*, 108 U.S. 76, 90, 2 S.Ct. 176, 27 L.Ed. 656 (1883). For example, States may not supply ***1498** rules of decision governing "disputes implicating the[ir] conflicting rights." *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641, 101 S.Ct. 2061, 68 L.Ed.2d 500 (1981). Thus, no State can apply its own law to interstate disputes over borders, *Cissna v. Tennessee*, 246 U.S. 289, 295, 38 S.Ct. 306, 62 L.Ed. 720 (1918), water rights, *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110, 58 S.Ct. 803, 82 L.Ed. 1202 (1938), or the interpretation of interstate compacts, *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 278–279, 79 S.Ct. 785, 3 L.Ed.2d 804 (1959). The States would have had the raw power to apply their own law to such matters before they entered the Union, but the Constitution implicitly forbids that exercise of power because the "interstate ... nature of the controversy makes it inappropriate for state law to control." *Texas Industries*, *supra*, at 641, 101 S.Ct. 2061. Some subjects that were decided by pure "political power" before ratification now turn on federal "rules of law." *Rhode Island v. Massachusetts*, 12 Pet. 657, 737, 9 L.Ed. 1233 (1838). See Clark, Federal Common Law: A Structural Reinterpretation, 144 U. Pa. L. Rev. 1245, 1322–1331 (1996).

[20] **[21]** Interstate sovereign immunity is similarly integral to the structure of the Constitution. Like a dispute over borders or water rights, a State's assertion of compulsory judicial process over another State involves a direct conflict between sovereigns. The Constitution implicitly strips States of any power they once had to refuse each other sovereign immunity, just as it denies them the power to resolve border disputes by political means. Interstate immunity, in other words, is "implied as an essential component of federalism." *Hall*, 440 U.S. at 430–431, 99 S.Ct. 1182 (Blackmun, J., dissenting).

[22] Hyatt argues that we should find no right to sovereign immunity in another State's courts because no constitutional provision explicitly grants that immunity. But this is precisely the type of "ahistorical literalism" that we have rejected when "interpreting the scope of the States' sovereign immunity since the discredited decision in *Chisholm*." *Alden*, 527 U.S.

at 730, 119 S.Ct. 2240; see *id.*, at 736, 119 S.Ct. 2240 ("[T]he bare text of the Amendment is not an exhaustive description of the States' constitutional immunity from suit"). In light of our constitutional structure, the historical understanding of state immunity, and the swift enactment of the Eleventh Amendment after the Court departed from this understanding in *Chisholm*, "[i]t is not rational to suppose that the sovereign power should be dragged before a court." Elliot's Debates 555 (Marshall). Indeed, the spirited historical debate over Article III courts and the immediate reaction to *Chisholm* make little sense if the Eleventh Amendment were the only source of sovereign immunity and private suits against the States could already be brought in "partial, local tribunals." Elliot's Debates 532 (Madison). Nor would the Founders have objected so strenuously to a neutral federal forum for private suits against States if they were open to a State being sued in a different State's courts. Hyatt's view thus inverts the Founders' concerns about state-court parochialism. *Hall*, *supra*, at 439, 99 S.Ct. 1182 (Rehnquist, J., dissenting).

[23] Moreover, Hyatt's ahistorical literalism proves too much. There are many other constitutional doctrines that are not spelled out in the Constitution but are nevertheless implicit in its structure and supported by historical practice—including, for example, judicial review, *Marbury v. Madison*, 1 Cranch 137, 176–180, 2 L.Ed. 60 (1803); intergovernmental tax immunity, ***1499** *McCulloch*, 4 Wheat. at 435–436; executive privilege, *United States v. Nixon*, 418 U.S. 683, 705–706, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974); executive immunity, *Nixon v. Fitzgerald*, 457 U.S. 731, 755–758, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982); and the President's removal power, *Myers v. United States*, 272 U.S. 52, 163–164, 47 S.Ct. 21, 71 L.Ed. 160 (1926). Like these doctrines, the States' sovereign immunity is a historically rooted principle embedded in the text and structure of the Constitution.

C

[24] **[25]** **[26]** With the historical record and precedent against him, Hyatt defends *Hall* on the basis of *stare decisis*. But *stare decisis* is " 'not an inexorable command,' " *Pearson v. Callahan*, 555 U.S. 223, 233, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009), and we have held that it is "at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment," *Agostini v. Felton*, 521 U.S. 203, 235, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997). The Court's precedents identify a number of factors to consider, four of which warrant mention here: the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision. See *Janus v. State, County, and Municipal Employees*, 585 U.S. ——, —— – ——, 138 S.Ct. 2448, 2478–2479, 201 L.Ed.2d 924 (2018); *United States v. Gaudin*, 515 U.S. 506, 521, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995).

The first three factors support our decision to overrule *Hall*. We have already explained that *Hall* failed to account for the historical understanding of state sovereign immunity and that it failed to consider how the deprivation of traditional diplomatic tools reordered the States' relationships with one another. We have also demonstrated that *Hall* stands as an outlier in our sovereign-immunity jurisprudence, particularly when compared to more recent decisions.

[27] As to the fourth factor, we acknowledge that some plaintiffs, such as Hyatt, have relied on *Hall* by suing sovereign States. Because of our decision to overrule *Hall*, Hyatt unfortunately will suffer the loss of two decades of litigation expenses and a final judgment against the Board for its egregious conduct. But in virtually every case that overrules a controlling precedent, the party relying on that precedent will incur the loss of litigation expenses and a favorable decision below. Those case-specific costs are not among the reliance interests that would persuade us to adhere to an incorrect resolution of an important constitutional question.

* * *

Nevada v. Hall is irreconcilable with our constitutional structure and with the historical evidence showing a widespread preratification understanding that States retained immunity from private suits, both in their own courts and in other courts. We therefore overrule that decision. Because the Board is thus immune from Hyatt's suit in Nevada's courts, the judgment of the Nevada Supreme Court is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

It is so ordered.

Justice BREYER, with whom Justice GINSBURG, Justice SOTOMAYOR, and Justice KAGAN join, dissenting.

Can a private citizen sue one State in the courts of another? Normally the answer to this question is no, because the

State where the suit is brought will choose to grant its sister States immunity. But the question here is whether the Federal ***1500** Constitution *requires* each State to grant its sister States immunity, or whether the Constitution instead *permits* a State to grant or deny its sister States immunity as it chooses.

We answered that question 40 years ago in *Nevada v. Hall*, 440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed.2d 416 (1979). The Court in *Hall* held that the Constitution took the permissive approach, leaving it up to each State to decide whether to grant or deny its sister States sovereign immunity. Today, the majority takes the contrary approach—the absolute approach—and overrules *Hall*. I can find no good reason to overrule *Hall*, however, and I consequently dissent.

I

Hall involved a suit brought by a California resident against the State of Nevada in the California courts. We rejected the claim that the Constitution entitled Nevada to absolute immunity. We first considered the immunity that States possessed as independent sovereigns before the Constitution was ratified. And we then asked whether ratification of the Constitution altered the principles of state sovereign immunity in any relevant respect. At both steps, we concluded, the relevant history and precedent refuted the claim that States are entitled to absolute immunity in each other's courts.

A

Hall first considered the immunity that States possessed before ratification. "States considered themselves fully sovereign nations" during this period, *ante*, at 1493, and the Court in *Hall* therefore asked whether sovereign nations would have enjoyed absolute immunity in each other's courts at the time of our founding.

The answer was no. At the time of the founding, nations granted other nations sovereign immunity in their courts not as a matter of legal obligation but as a matter of choice, *i.e.*, of comity or grace or consent. Foreign sovereign immunity was a doctrine "of implied consent by the territorial sovereign ... deriving from standards of public morality, fair dealing, reciprocal self-interest, and respect." *National City Bank of N. Y. v. Republic of China*, 348 U.S. 356, 362, 75 S.Ct. 423, 99 L.Ed. 389 (1955). Since customary international law made the matter one of choice, a nation could withdraw that sovereign immunity if it so chose.

This Court took that view of foreign sovereign immunity in two founding-era decisions that forecast the result in *Hall*. In *Schooner Exchange v. McFaddon*, 7 Cranch 116, 3 L.Ed. 287 (1812), when considering whether an American citizen could impose a lien upon a French warship, Chief Justice John Marshall wrote for the Court that international law did not *require* the United States to grant France sovereign immunity. Any such requirement, he reasoned, "would imply a diminution" of American "sovereignty." *Id.*, at 136. Instead, Chief Justice Marshall observed that any "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*" and "can flow from no other legitimate source." *Ibid.* (emphasis added).

The Court ultimately held in *Schooner Exchange* that the United States had consented implicitly to give immunity to the French warship. See *id.*, at 147. But that was because "national ships of war, entering the port of a friendly power open for their reception, [we]re to be considered as exempted by the consent of that power from its jurisdiction." *Id.*, at 145–146. And the Chief Justice was careful to note that this implication of consent could be "destroy[ed]" in various ways, including by ***1501** subjecting the foreign nation "to the ordinary tribunals." *Id.*, at 146.

Ten years later, in *The Santissima Trinidad*, 7 Wheat. 283, 5 L.Ed. 454 (1822), this Court unanimously reaffirmed *Schooner Exchange*'s conclusion that foreign sovereign immunity was not an absolute right. The Court in *Santissima Trinidad* was called upon to determine whether the cargo of an Argentine ship, found in Baltimore Harbor, was immune from seizure. The ship's commander asserted that Argentina had an absolute right to immunity from suit, claiming that "no sovereign is answerable for his acts to the tribunals of any foreign sovereign." *Id.*, at 352. But Justice Joseph Story, writing for the Court, squarely rejected 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." *Ibid.* Rather, any exception to jurisdiction, including sovereign immunity, "stands upon principles of public comity and convenience, and arises from the presumed consent or license of nations." *Id.*, at 353. Accordingly, Justice Story explained, the right to assert sovereign immunity "*may be withdrawn upon notice at any time, without just*

offence." *Ibid.* (emphasis added). Justice Story then held that the Argentine ship's cargo was not immune from seizure. *Id.,* at 354.

The Court in *Hall* relied on this reasoning. See 440 U.S. at 416–417, 99 S.Ct. 1182. Drawing on the comparison to foreign nations, the Court in *Hall* emphasized that California had made a sovereign decision not to "exten[d] immunity to Nevada as a matter of comity." *Id.,* at 418, 99 S.Ct. 1182. Unless some constitutional rule required California to grant immunity that it had chosen to withhold, the Court "ha[d] no power to disturb the judgment of the California courts." *Ibid.*

B

The Court in *Hall* next held that ratification of the Constitution did not alter principles of state sovereign immunity in any relevant respect. The Court concluded that express provisions of the Constitution—such as the Eleventh Amendment and the Full Faith and Credit Clause of Article IV—did not require States to accord each other sovereign immunity. See *id.*, at 418–424, 99 S.Ct. 1182. And the Court held that nothing "implicit in the Constitution" treats States differently in respect to immunity than international law treats sovereign nations. *Id.,* at 418, 99 S.Ct. 1182; see also *id.,* at 424–427, 99 S.Ct. 1182.

To the contrary, the Court in *Hall* observed that an express provision of the Constitution undermined the assertion that States were absolutely immune in each other's courts. Unlike suits brought against a State in the State's own courts, *Hall* noted, a suit against a State in the courts of a different State "necessarily implicates the power and authority of" both States. *Id.*, at 416, 99 S.Ct. 1182. The defendant State has a sovereign interest in immunity from suit, while the forum State has a sovereign interest in defining the jurisdiction of its own courts. The Court in *Hall* therefore justified its decision in part by reference to "the Tenth Amendment's reminder that powers not delegated to the Federal Government nor prohibited to the States are reserved to the States or to the people." *Id.*, at 425, 99 S.Ct. 1182. Compelling States to grant immunity to their sister States would risk interfering with sovereign rights that the Tenth Amendment leaves to the States.

To illustrate that principle, *Hall* cited *Georgia v. Chattanooga*, 264 U.S. 472, 44 S.Ct. 369, 68 L.Ed. 796 (1924), which concerned condemnation proceedings brought ***1502** by a municipality against property owned by a neighboring State. See *Hall*, 440 U.S. at 426, n. 29, 99 S.Ct. 1182. The Court in *Chattanooga* held that one State (Georgia) that had purchased property for a railroad in a neighboring State (Tennessee) could not exempt itself from the eminent domain power of the Tennessee city in which the property was located. 264 U.S. at 480, 44 S.Ct. 369. The reason was obvious: "The power of eminent domain is an attribute of sovereignty," and Tennessee did not surrender that sovereign power simply by selling land to Georgia. *Ibid.* In light of the competing sovereignty interests on both sides of the matter, the Court in *Chattanooga* found no basis to interpose a federally mandated resolution.

Similar reasoning applied in *Hall*. Mandating absolute interstate immunity "by inference from the structure of our Constitution and nothing else" would "intru[de] on the sovereignty of the States—and the power of the people—in our Union." 440 U.S. at 426–427, 99 S.Ct. 1182.

II

The majority disputes both *Hall*'s historical conclusion regarding state immunity before ratification and its conclusion that the Constitution did not alter that immunity. But I do not find the majority's arguments convincing.

A

The majority asserts that before ratification "it was well settled that States were immune under both the common law and the law of nations." *Ante*, at 1494. The majority thus maintains that States were exempt from suit in each other's courts.

But the question in *Hall* concerned the *basis* for that exemption. Did one sovereign have an absolute right to an exemption from the jurisdiction of the courts of another, or was that exemption a customary matter, a matter of consent that a sovereign might withdraw? As to that question, nothing in the majority's opinion casts doubt on *Hall*'s conclusion that States—like foreign nations—were accorded immunity as a matter of consent rather than absolute right.

The majority refers to "the founding era's foremost expert on the law of nations," Emer de Vattel, who stated that a "sovereign is 'exempt from all foreign jurisdiction.' " *Ante*, at 1493 (quoting 4 E. de Vattel, The Law of Nations

486 (J. Chitty ed. 1883) (Vattel); alterations omitted). But Vattel made clear that the source of a sovereign's immunity in a foreign sovereign's courts is the " 'consen[t]' " of the foreign sovereign, which, he added, reflects a " 'tacit convention' " among nations. *Schooner Exchange*, 7 Cranch at 143 (quoting 4 Vattel 472). And *Schooner Exchange* and *Santissima Trinidad* underscore that such a tacit convention can be rejected, and that consent can be "withdrawn upon notice at any time." *Santissima Trinidad*, 7 Wheat. at 353.

The majority also draws on statements of the Founders concerning the importance of sovereign immunity generally. But, as *Hall* noted, those statements concerned matters entirely distinct from the question of state immunity at issue here. Those statements instead "concerned questions of *federal-court* jurisdiction and the extent to which the States, by ratifying the Constitution and creating federal courts, had authorized suits against themselves in those courts." 440 U.S. at 420–421, 99 S.Ct. 1182 (emphasis added). That issue was "a matter of importance in the early days of independence," for it concerned the ability of holders of Revolutionary War debt owed by States to collect that debt in a federal forum. *Id.*, at 418, 99 S.Ct. 1182. There is no evidence that the Founders who made those statements intended ***1503** to express views on the question before us. And it seems particularly unlikely that John Marshall, one of those to whom the Court refers, see *ante*, at 1495 – 1496, would have held views of the law in respect to States that he later repudiated in respect to sovereign nations.

The majority cites *Nathan v. Virginia*, 1 Dall. 77, n., 1 L.Ed. 44 (C. P. Phila. Cty. 1781). As the majority points out, that case involved a Pennsylvania citizen who filed a suit in Pennsylvania's courts seeking to attach property belonging to Virginia. The Pennsylvania Court of Common Pleas accepted Virginia's claim of sovereign immunity and dismissed the suit. But it did so only after "delegates in Congress from Virginia ... applied to the supreme executive council of Pennsylvania" for immunity, and Pennsylvania's Attorney General, representing its Executive, asked the court to dismiss the case. *Id.*, at 78, n. The Pennsylvania court thus granted immunity only after Virginia "followed the usual diplomatic course." Pfander, Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases, 82 Cal. L. Rev. 555, 585 (1994). Given the participation of Pennsylvania's Executive in this diplomatic matter, the case likely involved Pennsylvania's consent to a claim of sovereign immunity, rather than a view that Virginia had an absolute right to immunity.

B

The majority next argues that "the Constitution affirmatively altered the relationships between the States" by giving them immunity that they did not possess when they were fully independent. *Ante*, at 1497. The majority thus maintains that, whatever the nature of state immunity before ratification, the Constitution accorded States an absolute immunity that they did not previously possess.

The most obvious problem with this argument is that no provision of the Constitution gives States absolute immunity in each other's courts. The majority does not attempt to situate its newfound constitutional immunity in any provision of the Constitution itself. Instead, the majority maintains that a State's immunity in other States' courts is "implicit" in the Constitution, *ante*, at 1498 - 1499, "embed[ded] ... within the constitutional design," *ante*, at 1496 - 1497, and reflected in " 'the plan of the Convention,' " *ante*, at 1494 - 1495. See also *Hall*, 440 U.S. at 430, 99 S.Ct. 1182 (Blackmun, J., dissenting) (arguing that immunity in this context is found "not in an express provision of the Constitution but in a guarantee that is implied as an essential component of federalism").

I agree with today's majority and the dissenters in *Hall* that the Constitution contains implicit guarantees as well as explicit ones. But, as I have previously noted, concepts like the "constitutional design" and "plan of the Convention" are "highly abstract, making them difficult to apply"—at least absent support in "considerations of history, of constitutional purpose, or of related consequence." *Federal Maritime Comm'n v. South Carolina Ports Authority*, 535 U.S. 743, 778, 122 S.Ct. 1864, 152 L.Ed.2d 962 (2002) (BREYER, J., dissenting). Such concepts "invite differing interpretations at least as much as do the Constitution's own broad liberty-protecting phrases" such as " 'due process' " and " 'liberty,' " and "they suffer the additional disadvantage that they do not actually appear anywhere in the Constitution." *Ibid.*

At any rate, I can find nothing in the "plan of the Convention" or elsewhere to suggest that the Constitution converted what had been the customary practice of extending immunity by consent into an absolute federal requirement that no State could withdraw. None of the majority's ***1504** arguments indicates that the Constitution accomplished any such transformation.

The majority argues that the Constitution sought to preserve States' "equal dignity and sovereignty." *Ante*, at 1497. That is true, but tells us nothing useful here. When a citizen brings suit against one State in the courts of another, both States have strong sovereignty-based interests. In contrast to a State's power to assert sovereign immunity in its own courts, sovereignty interests here lie on both sides of the constitutional equation.

The majority also says—also correctly—that the Constitution demanded that States give up certain sovereign rights that they would have retained had they remained independent nations. From there the majority infers that the Constitution must have implicitly given States immunity in each other's courts to provide protection that they gave up when they entered the Federal Union.

But where the Constitution alters the authority of States vis-à-vis other States, it tends to do so explicitly. The Import-Export Clause cited by the majority, for example, creates "harmony among the States" by preventing them from "burden[ing] commerce ... among themselves." *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 283, 285, 96 S.Ct. 535, 46 L.Ed.2d 495 (1976). The Full Faith and Credit Clause, also invoked by the majority, prohibits States from adopting a "policy of hostility to the public Acts" of another State. *Franchise Tax Bd. of Cal. v. Hyatt*, 578 U.S. ——, ——, 136 S.Ct. 1277, 1279–1280, 194 L.Ed.2d 431 (2016). By contrast, the Constitution says nothing explicit about interstate sovereign immunity.

Nor does there seem to be any need to create implicit constitutional protections for States. As the history of this case shows, the Constitution's express provisions seem adequate to prohibit one State from treating its sister States unfairly —even if the State permits suits against its sister States in its courts. See *id.*, at ——, 136 S.Ct. at 1280–1281 (holding that the Full Faith and Credit Clause prohibits Nevada from subjecting the Board to greater liability than Nevada would impose upon its own agency in similar circumstances).

The majority may believe that the distinction between permissive and absolute immunity was too nuanced for the Framers. The Framers might have understood that most nations did in fact allow other nations to assert sovereign immunity in their courts. And they might have stopped there, ignoring the fact that, under international law, a nation had the sovereign power to change its mind.

But there is simply nothing in the Constitution or its history to suggest that anyone reasoned in that way. No constitutional language supports that view. Chief Justice Marshall, Justice Story, and the Court itself took a somewhat contrary view without mentioning the matter. And there is no strong reason for treating States differently than foreign nations in this context. Why would the Framers, silently and without any evident reason, have transformed sovereign immunity from a permissive immunity predicated on comity and consent into an absolute immunity that States must accord one another? The Court in *Hall* could identify no such reason. Nor can I.

III

In any event, *stare decisis* requires us to follow *Hall*, not overrule it. See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 854–855, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992); see also *Kimble v. Marvel Entertainment, LLC*, 576 U.S. ——, —— – ——, 135 S.Ct. 2401, 2408–2409, 192 L.Ed.2d 463 (2015). Overruling a ***1505** case always requires " 'special justification.' " *Kimble*, 576 U.S., at ——, 135 S.Ct., at 2409–2410. What could that justification be in this case? The majority does not find one.

The majority believes that *Hall* was wrongly decided. But "an argument that we got something wrong—even a good argument to that effect—cannot by itself justify scrapping settled precedent." *Kimble*, 576 U.S., at ——, 135 S.Ct., at 2409–2410. Three dissenters in *Hall* also believed that *Hall* was wrong, but they recognized that the Court's opinion was "plausible." 440 U.S. at 427, 99 S.Ct. 1182 (opinion of Blackmun, J.). While reasonable jurists might disagree about whether *Hall* was correct, that very fact—that *Hall* is not obviously wrong—shows that today's majority is obviously wrong to overrule it.

The law has not changed significantly since this Court decided *Hall*, and has not left *Hall* a relic of an abandoned doctrine. To the contrary, *Hall* relied on this Court's precedent in reaching its conclusion, and this Court's subsequent cases are consistent with *Hall*. As noted earlier, *Hall* drew its historical analysis from earlier decisions such as *Schooner Exchange,* written by Chief Justice Marshall. And our post-*Hall* decisions regarding the immunity of foreign nations are consistent with those earlier decisions. The Court has recently reaffirmed "Chief Justice Marshall's observation that foreign sovereign immunity is a matter of grace and comity rather than a constitutional requirement." *Republic of Austria*

v. Altmann, 541 U.S. 677, 689, 124 S.Ct. 2240, 159 L.Ed.2d 1 (2004). And the Court has reiterated that a nation may decline to grant other nations sovereign immunity in its courts. *Verlinden B. V. v. Central Bank of Nigeria*, 461 U.S. 480, 486, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983).

Nor has our understanding of state sovereign immunity evolved to undermine *Hall*. The Court has decided several state sovereign immunity cases since *Hall,* but these cases have all involved a State's immunity in a federal forum or in the State's own courts. Compare *Federal Maritime Comm'n*, 535 U.S. at 769, 122 S.Ct. 1864 (state immunity in a federal forum); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996) (same); *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991) (same), with *Alden v. Maine*, 527 U.S. 706, 715, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999) (state immunity in a State's "own courts"); *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 67, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989) (same). None involved immunity asserted by one State in the courts of another. And our most recent case to address *Hall* in any detail endorses it. See *Alden*, 527 U.S. at 739–740, 119 S.Ct. 2240 (noting that *Hall*'s distinction "between a sovereign's immunity in its own courts and its immunity in the courts of another sovereign" is "consistent with, and even support[s]," modern cases).

The dissenters in *Hall* feared its "practical implications." 440 U.S. at 443, 99 S.Ct. 1182 (opinion of Rehnquist, J.). But I can find nothing in the intervening 40 years to suggest that this fear was well founded. The Board and its *amici* have, by my count, identified only 14 cases in 40 years in which one State has entertained a private citizen's suit against another State in its courts. See Brief for Petitioner 46–47; Brief for State of Indiana et al. as *Amici Curiae* 13–14. In at least one of those 14 cases, moreover, the state court eventually agreed to dismiss the suit against its sister State as a matter of comity. See *Montaño v. Frezza*, 2017-NMSC-015, 393 P. 3d 700, 710. How can it be that these cases, decided ***1506** over a period of four decades, show *Hall* to be unworkable?

The *Hall* issue so rarely arises because most States, like most sovereign nations, are reluctant to deny a sister State the immunity that they would prefer to enjoy reciprocally. Thus, even in the absence of constitutionally mandated immunity, States normally grant sovereign immunity voluntarily. States that fear that this practice will be insufficiently protective are free to enter into an interstate compact to guarantee that the normal practice of granting immunity will continue. See *Cuyler v. Adams*, 449 U.S. 433, 440, 101 S.Ct. 703, 66 L.Ed.2d 641 (1981).

Although many States have filed an *amicus* brief in this case asking us to overturn *Hall,* I can find nothing in the brief that indicates that reaffirming *Hall* would affront "the dignity and respect due sovereign entities." *Federal Maritime Comm'n*, 535 U.S. at 769, 122 S.Ct. 1864. As already explained, sovereign interests fall on both sides of this question. While reaffirming *Hall* might harm States seeking sovereign immunity, overruling *Hall* would harm States seeking to control their own courts.

Perhaps the majority believes that there has been insufficient reliance on *Hall* to justify preserving it. But any such belief would ignore an important feature of reliance. The people of this Nation rely upon stability in the law. Legal stability allows lawyers to give clients sound advice and allows ordinary citizens to plan their lives. Each time the Court overrules a case, the Court produces increased uncertainty. To overrule a sound decision like *Hall* is to encourage litigants to seek to overrule other cases; it is to make it more difficult for lawyers to refrain from challenging settled law; and it is to cause the public to become increasingly uncertain about which cases the Court will overrule and which cases are here to stay.

I understand that judges, including Justices of this Court, may decide cases wrongly. I also understand that later-appointed judges may come to believe that earlier-appointed judges made just such an error. And I understand that, because opportunities to correct old errors are rare, judges may be tempted to seize every opportunity to overrule cases they believe to have been wrongly decided. But the law can retain the necessary stability only if this Court resists that temptation, overruling prior precedent only when the circumstances demand it.

* * *

It is one thing to overrule a case when it "def[ies] practical workability," when "related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine," or when "facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." *Casey*, 505 U.S. at 854–855, 112 S.Ct. 2791. It is far more dangerous to overrule a decision only because five Members of a later Court come to agree with earlier dissenters on a difficult

legal question. The majority has surrendered to the temptation to overrule *Hall* even though it is a well-reasoned decision that has caused no serious practical problems in the four decades since we decided it. Today's decision can only cause one to wonder which cases the Court will overrule next. I respectfully dissent.

All Citations

139 S.Ct. 1485, 203 L.Ed.2d 768, 19 Cal. Daily Op. Serv. 4309, 2019 Daily Journal D.A.R. 3960, 27 Fla. L. Weekly Fed. S 789

End of Document

EXHIBIT 94

445 P.3d 1250 (Table)
Unpublished Disposition
This is an unpublished disposition. See Nevada Rules of Appellate Procedure, Rule 36(c) before citing.
Supreme Court of Nevada.

FRANCHISE TAX BOARD OF the STATE OF CALIFORNIA, Appellant/Cross-Respondent,
v.
Gilbert P. HYATT, Respondent/Cross-Appellant.

No. 53264
|
FILED AUGUST 5, 2019

Attorneys and Law Firms

Eighth Judicial District Court, Dept. 10

McDonald Carano LLP/Reno

Lewis Roca Rothgerber Christie LLP/Las Vegas

ORDER OF REMAND

***1** This case comes to us on remand from the United States Supreme Court. In *Franchise Tax Bd. of California v. Hyatt*, 587 U.S. ——, ——, 139 S. Ct. 1485, 1499 (2019), the Court concluded that states retain sovereign immunity from private suits in other courts, overruling *Nevada v. Hall*, 440 U.S. 410 (1979), and reversed our December 26, 2017, opinion affirming in part and reversing in part the district court's judgment in favor of respondent/cross-appellant Gilbert Hyatt. Therefore, we remand this matter to the district court with instructions that the court vacate its judgment in favor of Hyatt and take any further necessary action consistent with this order and *Hyatt*, 587 U.S. ——, 139 S. Ct. 1485. Accordingly, we

ORDER this matter REMANDED to the district court for proceedings consistent with this order.

All Citations

445 P.3d 1250 (Table), 2019 WL 3562646

End of Document

P B T K
PIERCY BOWLER
TAYLOR & KERN
Certified Public Accountants
Business Advisors

Writers Direct Contact
(702) 878-5703(fax)
mkern@pbtk.com

December 23, 2019

Federal Express

State of California
Franchise Tax Board
Sacramento, California 95827-1500

Taxpayer:	Gilbert P. Hyatt
Tax Year:	1991
Social Security Number:	069-30-9999
Franchise Tax Board Account Number:	120-04834-82

On behalf of Gilbert P. Hyatt (069-30-9999) enclosed is his 1991 State Income Tax Balance Due Notice (Account 120-04834-82) and his check payable to the Franchise Tax Board in the amount of $11,372,224.06 in payment of his 1991 state income tax balance due.

If you have any questions, please do not hesitate to contact me.

Yours truly,

PIERCY, BOWLER, TAYLOR & KERN

Michael W. Kern

MWK:
Enclosures

cc: Gilbert P. Hyatt (w/enclosure)

STATE OF CALIFORNIA
FRANCHISE TAX BOARD
PO BOX 942867
SACRAMENTO CA 94267-0011

496300061981

12/11/2019

Pay-By-Mail Voucher

☐ Address Change? Mark box and write new address on reverse.

120-04834-82

1991

GILBERT P HYATT
C/O MICHAEL KERN
6100 ELTON AVE 1000
LAS VEGAS NV 89107-0123

$11,372,224.06
12/26/2019

If you meet the requirements for mandatory e-pay, you must pay electronically. Penalties apply if you pay by any other means.

Enjoy the convenience of online bill payment with **Web Pay**. Pay the amount you owe using our secure online payment service. Go to **ftb.ca.gov/webpay** to make your payment.

Pay-By-Mail Voucher

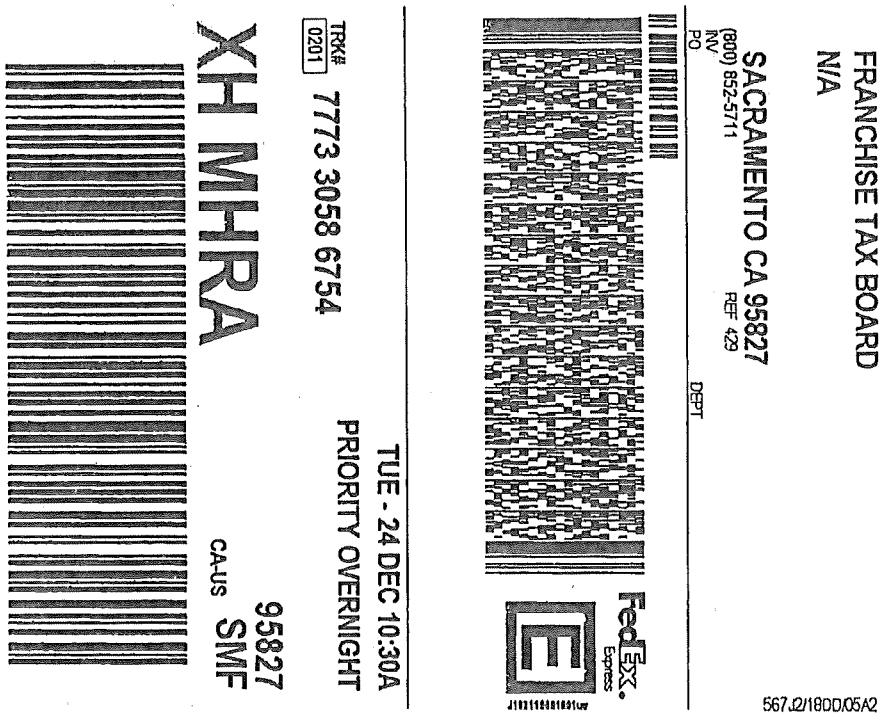
If you choose to pay by mail, return this entire voucher with your payment.

- Make check or money order payable to **Franchise Tax Board**. Do **not** send cash.
- Write your full name and account number on your payment.
- Mail payment (avoid staples or tape) and this entire voucher in the enclosed envelope to:

STATE OF CALIFORNIA
FRANCHISE TAX BOARD
PO BOX 942867
SACRAMENTO CA 94267-0011

12111991++++++++++++1200483482000000000000000000113722240695

FTB 7250A ENS (REV 06-2019) 725001081681



After printing this label:
1. Use the 'Print' button on this page to print your label to your laser or inkjet printer.
2. Fold the printed page along the horizontal line.
3. Place label in shipping pouch and affix it to your shipment so that the barcode portion of the label can be read and scanned.

Warning: Use only the printed original label for shipping. Using a photocopy of this label for shipping purposes is fraudulent and could result in additional billing charges, along with the cancellation of your FedEx account number.
Use of this system constitutes your agreement to the service conditions in the current FedEx Service Guide, available on fedex.com.FedEx will not be responsible for any claim in excess of $100 per package, whether the result of loss, damage, delay, non-delivery,misdelivery,or misinformation, unless you declare a higher value, pay an additional charge, document your actual loss and file a timely claim.Limitations found in the current FedEx Service Guide apply. Your right to recover from FedEx for any loss, including intrinsic value of the package, loss of sales, income interest, profit, attorney's fees, costs, and other forms of damage whether direct, incidental,consequential, or special is limited to the greater of $100 or the authorized declared value. Recovery cannot exceed actual documented loss.Maximum for items of extraordinary value is $1,000, e.g. jewelry, precious metals, negotiable instruments and other items listed in our ServiceGuide. Written claims must be filed within strict time limits, see current FedEx Service Guide.

RA004030

FedEx Shipment Receipt

Address Information

Ship to:	**Ship from:**
Select or enter	Michael W. Kern
Franchise Tax Board	Piercy Bowler Taylor & Kern
n/a	6100 ELTON AVE STE 1000
SACRAMENTO, CA	Las vegas, NV
95827-1500	891070123
US	US
800 852-5711	702-384-1120

Shipment Information:
Tracking no.: 777330586754
Ship date: 12/23/2019
Estimated shipping charges: 28.25 USD

Package Information
Pricing option: FedEx Standard Rate
Service type: Priority Overnight
Package type: FedEx Envelope
Number of packages: 1
Total weight: 1 LBS
Declared Value: 0.00 USD
Special Services:
Pickup/Drop-off: Use an already scheduled pickup at my location

Billing Information:
Bill transportation to: MyAccount-393
Your reference: 429
P.O. no.:
Invoice no.:
Department no.:

Thank you for shipping online with FedEx ShipManager at fedex.com.

Please Note

Address:	1121 WEST CHEYENNE AVENUE NORTH LAS VEGAS NV 89030
Location:	VGTA
Device ID:	-BTC03

FedEx Express Package(s) - Dropped Off
777330586754

Total Pieces: 1

Subject to additional charges. See FedEx Service Guide at fedex.com for details. All merchandise sales final.

Visit us at: fedex.com
Or call 1.800.GoFedEx
1.800.463.3339

Dec 23, 2019 5:27:07 PM

RA004032

98A382999

DISTRICT COURT
CLARK COUNTY, NEVADA

Civil Conversion Case Type **COURT MINUTES** **April 23, 2020**

98A382999 Gilbert Hyatt
vs
California State Franchise Tax Board

April 23, 2020 **3:00 AM** **Motion for Attorney Fees and Costs**

HEARD BY: Jones, Tierra **COURTROOM:** RJC Courtroom 14B

COURT CLERK: Teri Berkshire

RECORDER:

REPORTER:

PARTIES PRESENT:

JOURNAL ENTRIES

- Following review of the papers and pleadings on file herein, COURT ORDERED, Defendant s Motion to for Attorney s Fees and Costs is DENIED, as the Court has already held there was no prevailing party in this case and neither party is entitled to attorney fees and costs. Applying the Beattie factor analysis, this Court finds that the Plaintiff s claims were brought in good faith under the existing and applicable law at the time, and that Plaintiff s decision to reject Defendant s offer was not unreasonable or in bad faith in light of the existing law of the time and as illustrated by the award the jury ultimately found reasonable. The fees sought by Defendant are not justified as the Court was within its discretion in finding that neither party prevailed in this case and that neither party is entitled to attorney fees and costs accordingly. Plaintiff s counsel is to prepare an Order consistent with the Court s findings and submit it to the Court for signature.

Clerk's Note: This Minute Order was electronically served by Courtroom Clerk, Teri Berkshire, to all registered parties for Odyssey File & Serve. /tb