IN THE SUPREME COURT OF THE STATE OF NEVADA

GILBERT P. HYATT, Appellants, v. FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, Respondents.	Docket No. 84707 **APPENDIX OF EXHIBITS TO APPELLANT'S OPENING BRIEF** **VOLUME 20 OF 42**

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CERTIFICATE OF SERVICE

I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on this date the **APPENDIX OF EXHIBITS TO APPELLANT'S OPENING BRIEF VOLUME 20 OF 42** was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list.

DATED this 10th day of October, 2022.

/s/ Kaylee Conradi

_____

An employee of Hutchison & Steffen, PLLC

State. As one historian put it, that decision "fell upon the country with a profound shock." 1 Warren, *The Supreme Court in United States History* 96 (rev. ed. 1926). The furious backlash culminated in the adoption of the Eleventh Amendment, which confirms the Framers' understanding.

The Eleventh Amendment was intended to restore to the States their full "immunity from private suits." *Alden* v. *Maine*, 527 U.S. 706, 724 (1999). Although the Amendment does not explicitly address interstate sovereign immunity, it clearly shows that such immunity was assumed: "If the Framers were indeed concerned lest the States be haled before the federal courts—as the courts of a 'higher sovereign'—how much more must they have reprehended the notion of a State's being haled before the courts of a sister State." *Hall*, 440 U.S. at 431 (Blackmun, J., dissenting) (citation omitted). The federal courts were, after all, created to serve as neutral forums for the resolution of interstate disputes. A State would surely rather be tried in such a neutral forum than before a possibly partisan judge and jury in another State's courts. By precluding suit in federal forum while leaving open the worse possibility of being sued in another State's courts, *Hall* "makes nonsense of the effort embodied in the Eleventh Amendment to preserve the doctrine of sovereign immunity." *Id.* at 441 (Rehnquist, J., dissenting).

3. *Hall* rested on two fundamental premises, both of which have been repudiated by subsequent decisions of this Court. The first is that any constitutional principle of state sovereign immunity must be located in explicit textual provisions of the Constitution, such as the Eleventh Amendment, and that the "structure of the Constitution" has no bearing on that issue. *See* 440 U.S. at 426. The second is that, beyond those textual

provisions, any question of state sovereign immunity is solely a question of comity and "wise policy." *Id.* But this Court's later decisions make clear that state sovereign immunity is inherent in the federal structure of the Constitution, even beyond the Eleventh Amendment, and that the Constitution protects the dignitary and self-government interests of the States in protecting them from suit in the courts of another sovereign. *Hall* barely acknowledged either principle, but this Court's decisions have made explicit that both are fundamental.[2]

a. This Court's decisions since *Hall* have made clear that "the scope of the States' immunity from suit is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design." *Alden*, 527 U.S. at 729; *see also Blatchford* v. *Native Vill. of Noatak*, 501 U.S. 775, 779 (1991) (state sovereign immunity a "presupposition of our constitutional structure"); *Virginia Office for Prot. & Advocacy* v. *Stewart*, 563 U.S. 247, 253 (2011); *Federal*

[2] *Hall* was also inconsistent with prior decisions of this Court, which recognized that a sovereign State cannot be sued in any court without its consent. In *Beers* v. *Arkansas*, 61 U.S. (20 How.) 527, 529 (1858), for example, the Court stated that it "is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission." In *Cunningham* v. *Macon & Brunswick Railroad Co.*, 109 U.S. 446 (1883), the Court was equally clear: "[N]either a state nor the United States can be sued as defendant in *any court* in this country without their consent." *Id.* at 451 (emphasis added); *see also Hans* v. *Louisiana*, 134 U.S. 1, 16 (1890). And in *Western Union Telegraph Co.* v. *Pennsylvania*, 368 U.S. 71, 80 (1961), the Court held that because the State of New York was a necessary party to proceedings commenced in the Pennsylvania courts, those proceedings had to be dismissed, since the Pennsylvania courts had "no power to bring other States before them."

Mar. Comm'n v. *South Carolina State Ports Auth.*, 535 U.S. 743, 751-753 (2002); *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 54 (1996). Whereas *Hall* effectively limited state sovereign immunity to the words of Article III and the Eleventh Amendment, 440 U.S. at 421, 424-427, subsequent decisions have recognized that the Constitution protects principles of sovereign immunity beyond its literal text. *See, e.g.*, *Federal Mar. Comm'n*, 535 U.S. at 753; *Alden*, 527 U.S. at 728-729; *Blatchford*, 501 U.S. at 779.[3]

Moreover, whereas *Hall* placed the burden on the State to show that its sovereign immunity was affirmatively and explicitly incorporated into the Constitution, *see* 440 U.S. at 421, this Court in *Alden* recognized the opposite—that "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 … *except as altered by the plan of the Convention*," 527 U.S. at 713 (emphasis added).[4] And whereas *Hall* casually departed from the Framing-era view of sovereign immunity, subsequent decisions have consistently relied on the Framing-era view, and have interpreted sovereign immunity to prohibit "any proceedings against the States that were 'anoma-

[3] Decisions before *Alden*—most notably, *Hans* v. *Louisiana*, 134 U.S. 1 (1890)—had recognized that the constitutional principle of state sovereign immunity is not limited to the scope of the Eleventh Amendment, and is inherent in the federal nature of the Union. *See id.* at 13-15; *see also Monaco* v. *Mississippi*, 292 U.S. 313, 322-323 (1934). *Hall* limited its discussion of *Hans* and *Monaco* to a footnote, 440 U.S. at 420 n.20.

[4] The States did, of course, partially surrender their immunity from suit in the plan of the Convention—to suits by the United States, and to suits by other States in this Court. *See* U.S. Const. art. III, § 2.

lous and unheard of when the Constitution was adopted.'" *Federal Mar. Comm'n*, 535 U.S. at 755 (quoting *Hans* v. *Louisiana*, 134 U.S. 1, 18 (1890)).

To be sure, as this Court has refined its sovereign immunity jurisprudence, it has occasionally felt the need to distinguish *Hall*. For example, in recognizing a State's immunity from suit in its own courts even for a federal cause of action, *Alden* rejected the federal government's extensive reliance on *Hall* and found *Hall* distinguishable. *See* 527 U.S. at 738-739. But nothing in *Alden* suggests *Hall* was correct. To the contrary, *Alden*'s understanding of the constitutional underpinnings of sovereign immunity is irreconcilable with *Hall*'s view of the Eleventh Amendment as divorced from broader sovereign immunity principles.

b. *Hall* gave little consideration to the constitutional *values* that are protected by state sovereign immunity in a federal union.[5] But later decisions, especially *Alden*, take a broader view, and recognize the importance of two principles underlying sovereign immunity.

First, "[t]he generation that designed and adopted our federal system considered immunity from private suits central to *sovereign dignity*." *Alden*, 527 U.S. at 715 (emphasis added). The several States had attained the status of independent nations as a consequence of the Revolution, and the Constitution ensured that, except as surrendered in the plan of the Convention, the States would retain their sovereign status, "together

[5] To the extent *Hall* addressed the *reasons* for state sovereign immunity at all, it suggested they concerned the States' financial interests. *See* 440 U.S. at 418 (noting that "[m]any of the States were heavily indebted as a result of the Revolutionary War").

with the dignity and essential attributes inhering in that status." *Id.* at 714; *see id.* at 749. The dignitary interests of the State as sovereign, though given little attention by the decision in *Hall*, have been uniformly recognized by the Court's later decisions as a fundamental aspect of state sovereign immunity. Thus, in *Idaho* v. *Coeur d'Alene Tribe of Idaho*, the Court explained that sovereign immunity "is designed to protect" "the *dignity and respect* afforded a State." 521 U.S. 261, 268 (1997) (emphasis added); *see Federal Mar. Comm'n*, 535 U.S. at 760, 769; *Seminole Tribe*, 517 U.S. at 58; *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993).[6]

Second, and equally important, state sovereign immunity promotes self-government by the citizens of the several States. "When the States' immunity from private suits is disregarded, 'the course of their public policy and the administration of their public affairs' may become 'subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests.'" *Alden*, 527 U.S. at 750 (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)). If that danger was present in *Alden*, where the claim was that the State of Maine's conduct was subject to review in Maine's own courts (as well as jurors who, like the plaintiffs, would have been Maine residents), it is even more manifest in this case, where the actions of a California agency have been litigated before the judges and jurors of Nevada, who have no incentive to consider the cost to California's taxpayers and polity from imposing

[6] *See generally* Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*, 89 Va. L. Rev. 1, 11-28 (2003). Professor Smith, though somewhat critical of the Court's emphasis on dignity in recent decisions, acknowledges that it "is not without some precedential pedigree." *Id.* at 10; *see id.* at 28-38.

a large financial sanction on California. "If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government"—or another State. *Alden*, 527 U.S. at 751.[7]

Indeed, all of the concerns this Court expressed in *Alden* are present in this case. The State of California has been subjected to an astonishing intrusion on its dignity by being forced to defend the conduct of a core sovereign activity—its assessment of state taxes—in the courts of another State. That litigation required years of discovery and a four-month trial, and resulted in a judgment against the FTB of more than *$490 million* (though the judgment was eventually reduced due to constitutional and comity considerations). *See* App. 11a; *Hyatt II*, 136 S. Ct. at 1280. None of this would have been possible in the courts of California, which, like many sovereigns, does not permit tort suits against its state agencies for alleged injuries arising out of their tax-assessment activities. *See* Cal. Gov't Code § 860.2; *cf.* 28 U.S.C. § 2680(c) (no waiver of federal sovereign immunity for "[a]ny claim arising in respect of the assessment or collection of any tax").

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[7] It is also difficult to reconcile *Hall* with this Court's jurisprudence recognizing the suit immunity of Indian tribes. A Tribe may not be sued in a state court (absent consent or congressional authorization), *see Kiowa Tribe of Okla.* v. *Manufacturing Techs., Inc.*, 523 U.S. 751 (1998), even when the State may substantively regulate the tribal activity giving rise to the litigation, *see Michigan* v. *Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2034-2035 (2014). Allowing California to be sued in Nevada courts makes even less sense where, as here, Nevada had no authority to regulate the conduct that gave rise to respondent's lawsuit—the California authorities' conduct of audits of respondent's state tax returns.

4. Although this Court is ordinarily loath to overrule its precedents, "*stare decisis* is not an inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision.'" *Payne* v. *Tennessee*, 501 U.S. 808, 828 (1991). "This is particularly true in constitutional cases, because in such cases correction through legislative action is practically impossible." *Id.* (internal quotation marks omitted).

In deciding whether to overrule a prior decision, the Court considers "whether the decision is unsound in principle," "whether it is unworkable in practice," and the "reliance interests" at stake. *Allied-Signal, Inc.* v. *Director, Div. of Taxation*, 504 U.S. 768, 783 (1992) (internal quotation marks omitted). Stare decisis also does not prevent the Court "from overruling a previous decision where there has been a significant change in, or subsequent development of, our constitutional law." *Agostini* v. *Felton*, 521 U.S. 203, 235-236 (1997). As four Members of this Court have already recognized, those considerations favor overruling *Hall*; at the very least, they warrant allowing a fully constituted Court to consider *Hall*'s continuing vitality.

As explained above, *supra* pp. 11-13, *Hall*'s reasoning can "no longer withstand[] 'careful analysis'" in light of the Framing Era consensus on sovereign immunity and the Eleventh Amendment experience. *Arizona* v. *Gant*, 556 U.S. 332, 348 (2009) (quoting *Lawrence* v. *Texas*, 539 U.S. 558, 577 (2003)). *Hall*'s rejection of the firmly entrenched principle of interstate sovereign immunity—recognized before, during, and following the ratification of the Constitution, and for almost 200 years afterward—was "'unsound in principle,'" *Allied-Signal*, 504 U.S. at 783 (quoting *Garcia* v.

San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985)), and should be reconsidered.[8]

Furthermore, the "development of constitutional law" since *Hall* was decided has "left [*Hall*] behind as a mere survivor of obsolete constitutional thinking." *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 857 (1992); *see supra* pp. 13-18. This Court's sovereign immunity decisions since *Hall* recognize "the structural understanding that States entered the Union with their sovereign immunity intact" and "retained their traditional immunity from suit, except as altered by the plan of the Convention or certain constitutional amendments." *Virginia Office for Prot. & Advocacy*, 563 U.S. at 253 (internal quotation marks omitted). Those decisions have established that States possess sovereign immunity from individual suits in federal court, *see Seminole Tribe*, 517 U.S. at 54, 57-73, federal administrative adjudications, *Federal Mar. Comm'n*, 535 U.S. at 747, and their own courts, *see Alden*, 527 U.S. at 712; and that States may not choose, as a matter of policy, to deny Indian tribes immunity in their courts, *see Kiowa*

[8] Several factors may have contributed to *Hall*'s less-than-robust reasoning. First, the California Supreme Court decision resulting in *Hall* rejected Nevada's claim of sovereign immunity on different grounds from those embraced in *Hall*. That court held that a State does "not exercis[e] sovereign power"—and thus is not entitled to immunity—when it acts beyond its borders. *Hall* v. *University of Nev.*, 503 P.2d 1363, 1364 (Cal. 1972). Second, before this Court, the *Hall* respondents largely advanced that same argument, and barely addressed the constitutional issues. *See* Resp't Br., *Nevada* v. *Hall*, No. 77-1337, 1978 WL 206995, at *12-16 (U.S. Aug. 16, 1978). The Court thus lacked the robust adversarial presentation that contributes to sound decisionmaking. *See Penson* v. *Ohio*, 488 U.S. 75, 84 (1988) ("[T]ruth … is best discovered by powerful statements on both sides of the question." (internal quotation marks omitted)).

Tribe of Okla. v. *Manufacturing Techs., Inc.*, 523 U.S. 751, 760 (1998). Thus, *Hall* is a jurisprudential outlier—both in denying States sovereign immunity, and in permitting a forum State to determine the immunity it grants to another sovereign—and can be overruled without threatening other precedents of this Court.

Hall has also proven "unworkable." *Montejo* v. *Louisiana*, 556 U.S. 778, 792 (2009). Under *Hall*, a State has no way of knowing whether, and to what extent, a particular forum State will confer any immunities upon it in any particular suit. And if a State should find itself denied immunity, it may face years—in this case, two decades and counting—of litigation and untold financial and administrative burdens.

This case also demonstrates the bias that a State can face in another State's courts. The Nevada jury below was happy to side with a fellow Nevadan against the California tax authorities and award him some $388 million in damages, which the Nevada trial court raised to more than $490 million after costs and interest. To the extent a sovereign partially waives its sovereign immunity in its own courts, it can rely on the terms of its waiver and the jury's sense that a large verdict against the sovereign will ultimately be footed by members of the jury as taxpayers. But when a Nevada jury knows that California taxpayers will pay the tab, there is no obvious source of restraint, as the jury's verdict here attests.

Furthermore, by forcing California to defend itself against allegations that its core state function of tax assessment was deployed improperly, the Nevada courts have certainly demeaned California's "dignity and respect," which sovereign immunity is "designed to protect." *Coeur d'Alene Tribe*, 521 U.S. at 268. In short,

Hall has put "severe strains on our system of cooperative federalism," as the dissenters in that case warned it would. *Hall*, 440 U.S. 429-430 (Blackmun, J., dissenting).

Finally, as a constitutional decision regarding immunity, a matter that "does not alter primary conduct," *Hohn* v. *United States*, 524 U.S. 236, 252 (1998), *Hall* has engendered no reliance interests. "Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved." *Payne*, 501 U.S. at 828; *see also State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997). No such interests are implicated here; no parties "have acted in conformance with existing legal rules in order to conduct transactions." *Citizens United* v. *FEC*, 558 U.S. 310, 365 (2010). This Court can reconsider *Hall* without harming any reasonable reliance interests.

II. THIS CASE REMAINS AN IDEAL VEHICLE TO RECONSIDER *HALL*

1. As the Court must have concluded when it granted certiorari in *Hyatt II*, this case provides an appropriate opportunity to reconsider *Hall*.

a. The federal issue presented here was passed upon by the state courts. In a 2002 decision granting in part and denying in part the FTB's challenge to the district court's denial of its motions for summary judgment or dismissal, the Nevada Supreme Court "reject[ed]" the FTB's "argument[] that the doctrine[] of sovereign immunity … deprive[s] the district court of subject matter jurisdiction over Hyatt's tort claims." App. 144a. Citing *Hall*, the court held that "although California is immune from Hyatt's suit in federal courts under the Eleventh Amendment, it is not immune in Nevada courts." App. 144a & n.12 (citing *Hall*).

The FTB raised the issue again after trial. The FTB argued before the Nevada Supreme Court that "*Hall*'s continuing viability is questionable" in light of more recent decisions of the Supreme Court, including *Federal Maritime Commission*, *Alden*, and *Seminole Tribe*. Pet. Nev. S. Ct. Opening Br. 101 n.80 (Aug. 7, 2009). The FTB asked the Nevada Supreme Court to recognize its immunity, explaining that a state court "may evaluate the continuing viability of an old United States Supreme Court opinion, in light of more recent changes in the economy or the law." *Id.* The Nevada Supreme Court rejected that argument by affirming a judgment in favor of Hyatt. Accordingly, the question presented is ripe for this Court's review.

b. The decision of the Nevada Supreme Court is final for purposes of this Court's appellate jurisdiction under 28 U.S.C. § 1257(a) because "the federal issue would not be mooted or otherwise affected by the proceedings yet to be had" in the Nevada district court. *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 478 (1975). The only thing left for the Nevada district court to do on remand from the Nevada Supreme Court is enter judgment in favor of Hyatt and entertain any requests for costs or fees. This Court need not "await[] the completion of the[se] additional proceedings" before reviewing the judgment. *Id.* at 477; *see Washington State Dep't of Soc. & Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 381 n.5 (2003) (remand to consider "scope and basis for awarding attorney's fees" did not interfere with Court's jurisdiction); *Pierce Cty.* v. *Guillen*, 537 U.S. 129, 142 (2003) (reviewing state supreme court decision where "all that remains to be decided on remand … is the amount of attorney's fees to which respondents are entitled"). The remaining "proceedings would not require the decision of other federal

questions that might also require review by the Court at a later date, and immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed justice,' as well as precipitate interference with state litigation." *Cox*, 420 U.S. at 477-478 (citation omitted). Indeed, this case is in essentially the same procedural posture as when the Court granted certiorari in *Hyatt II*.

The judgment of a state high court on a federal issue will be "deemed final" where "the federal issue is conclusive or the outcome of further proceedings preordained." *Cox*, 420 U.S. at 479. The federal issue here is conclusive because if this Court recognizes the FTB's claim of sovereign immunity, the case will be finally dismissed. Furthermore, the outcome of the remaining proceedings in the Nevada district court is preordained. The Nevada Supreme Court has ordered the district court to enter judgment in favor of Hyatt. Postponing consideration of the federal issue "'would not only be an inexcusable delay of the benefits Congress intended to grant by providing for appeal to this Court, but it would also result in a completely unnecessary waste of time and energy in judicial systems already troubled by delays due to congested dockets.'" *Id.*

2. The affirmance by an equally divided Court in *Hyatt II* does not prevent the Court from again granting certiorari and reconsidering *Hall*. The rule that such an affirmance is "conclusive and binding upon the parties" means only that a judgment resting on such an affirmance, once final, does not lack res judicata effect. *Durant* v. *Essex Co.*, 74 U.S. 107, 109, 113 (1868). But the Court may revisit an issue previously affirmed by an equally divided Court at a later stage of the case, before final judgment has been entered. *Cf. Neil* v.

Biggers, 409 U.S. 188, 189-192 (1972) (affirmance by equally divided Court was not an "actual adjudication by the Supreme Court" barring subsequent consideration of the issue on habeas petition).

Even if the affirmance in *Hyatt II* constituted law of the case, however, that 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 or of a coordinate court in any circumstance[.]" *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988); *see also Castro* v. *United States*, 540 U.S. 375, 384 (2003) (law of the case doctrine "cannot prohibit a court from disregarding an earlier holding in an appropriate case"); 18B Wright et al., *Fed. Prac. & Proc.* § 4478 (2d ed. 2017 Supp.). Moreover, law of the case doctrine is at its weakest when it comes to questions of jurisdiction and justiciability, which are more "likely to be reconsidered" than others "because of their conceptual importance" and the degree to which they are "affected with a public interest." *Fed. Prac. & Proc.* § 4478.5; *see, e.g.*, *Public Interest Research Grp. of N.J., Inc.* v. *Magnesium Elektron, Inc.*, 123 F.3d 111, 118 (3d Cir. 1997) ("[W]e conclude that the concerns implicated by the issue of standing—the separation of powers and the limitation of this Court's power to hearing cases or controversies under Article III of the Constitution—trump the prudential goals of preserving judicial economy and finality."); *American Canoe Ass'n* v. *Murphy Farms, Inc.*, 326 F.3d 505, 515-516 (4th Cir. 2003).

The law of the case doctrine also does not prevent a court from "depart[ing] from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice." *Arizona* v. *California*, 460 U.S.

605, 618 n.8 (1983). This Court has found that standard met where the Court concludes that a controlling precedent "would be decided differently under [the Court's] current" jurisprudence. *Agostini*, 521 U.S. at 236. Thus, in *Agostini*, the Court felt free to reconsider its prior decision in the same case because that decision was inconsistent with the Court's current understanding of the relevant constitutional provisions. *Id.* Accordingly, if this Court finds, as it should, that *Nevada* v. *Hall* is inconsistent with more recent cases addressing sovereign immunity, law of the case principles will present no bar to such a holding.

Moreover, by granting certiorari to consider the important question presented, the Court would not be upsetting its decision in *Hyatt II* in any but the most formalist sense; it would be rendering a decision where it previously could not. The considerations traditionally animating law of the case doctrine—judicial economy and finality—do not weigh against review where, as here, the prior decision was not rendered because of a considered judgment on the merits of the question presented, but rather because of the inability of the Court to reach a conclusive determination of the question.

3. The question presented remains as important today as it was when the Court granted certiorari in *Hyatt II*. California has already spent two decades and incurred untold costs defending itself in this suit, and it still faces additional proceedings in the Nevada district court absent this Court's review. But the effects of Hyatt's suit hardly end there. In the California administrative proceedings, Hyatt alleged that the FTB has committed "continuing bad faith act[s]," suggesting that he may bring a subsequent tort action against the FTB in Nevada. *See* Pet. Nev. S. Ct. Req. for Judicial Notice at RJN-094 (Dec. 5, 2016) (Hyatt's brief before California

State Board of Equalization arguing that "[a]ssertion of the 1992 fraud penalties is a continuing bad faith act by FTB"); *id.* at RJN-103 to RJN-134 (describing the FTB's alleged "continuing bad faith conduct").

This suit has also encouraged others outside California to file similar complaints, raising the prospect of comparable litigation going forward. *See, e.g.*, Compl., *Satcher* v. *California Tax Franchise Bd.*, No. 15-2-00390-1 (Wash. Super. Ct., Skagit Cty. June 17, 2015) (alleging fraud by California FTB). Those suits are regrettable, yet, given *Hall*, unsurprising. Sovereign governments undertake many sovereign responsibilities that are inherently unpopular. Taxation is near the top of that list, which is why California and other jurisdictions decline to waive their sovereign immunity over tax disputes. *See, e.g.*, Cal. Gov't Code § 860.2; Nev. Rev. Stat. § 372.670; 28 U.S.C. § 2680(c). *Hall* has provided taxpayers with an avenue to skirt that immunity and disrupt the taxing authority. And in case there were any doubt that such suits disrupt a State's execution of its sovereign responsibilities, this case has already been used to encourage California residents to move to Nevada for tax-avoidance purposes, since it "should temper the FTB's aggressiveness in pursuing cases against those disclaiming California residency." Grant, *Moving from Gold to Silver: Becoming a Nevada Resident*, 23 Nev. Lawyer 22, 25 n.9 (Jan. 2015).

Although this egregious case amply demonstrates *Hall*'s shortcomings, those flaws arise in every case in which a nonconsenting State is haled into the courts of a sister State. Recently, for example, Nevada was haled into the California courts against its will. *See* Pet., *Nevada* v. *City & Cty. of San Francisco*, No. 14-1073 (U.S. Mar. 4, 2015), *cert. denied*, 135 S. Ct. 2937 (2015). In that case, the plaintiff demanded monetary

and equitable relief based on Nevada's policy of providing bus vouchers to indigent patients discharged from state-run medical facilities, who occasionally use them to travel to California. *Id.* at i. A 2015 settlement agreement required Nevada to pay out of the state treasury and to alter its state policy, both of which sovereign immunity is designed to prevent. *See* Decl. of Kristine Poplawski in Supp. of Joint Request for Approval of Dismissal, *City & Cty. of San Francisco* v. *Nevada*, No. CGC-13-534108 (Cal. Super. Ct., San Francisco Cty. Dec. 3, 2015). Other lawsuits have similarly involved challenges to state sovereign functions. *See, e.g.*, Compl., *Crutchfield Corp.* v. *Harding*, No. CL17001145-00 (Va. Cir. Ct., Albemarle Cty. Oct. 24, 2017) (suit against officials of the Massachusetts Department of Revenue in Virginia state court seeking declaration of invalidity of Massachusetts tax law); *Faulkner* v. *University of Tenn.*, 627 So. 2d 362 (Ala. 1992) (permitting suit in Alabama courts against university operated by Tennessee seeking damages and injunctive relief for decision to revoke a doctoral degree); *Head* v. *Platte Cty.*, 749 P.2d 6 (Kan. 1988) (agreeing to exercise jurisdiction over suit against Missouri county and officer of Missouri alleging a failure to train employees and establish policies concerning the execution of arrest warrants).

More generally, the spectacle of States being sued in each other's courts confirms the *Hall* dissenters' prediction that discarding interstate sovereign immunity would supplant cooperative federalism with a race to the bottom. *See* 440 U.S. at 429-430 (Blackmun, J., dissenting). Other States should not be put to the burdens the FTB has faced here—two decades of litigation and the need to fight off a verdict in the hundreds of mil-

lions of dollars—before the Court has another chance to decide the question presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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EXHIBIT 85

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 Petition For A Writ Of Certiorari
To The Supreme Court Of Nevada

BRIEF IN OPPOSITION FOR RESPONDENT

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QUESTION PRESENTED

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

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BRIEF IN OPPOSITION FOR RESPONDENT

Respondent Gilbert P. Hyatt respectfully opposes the Petition for a Writ of Certiorari by the Franchise Tax Board of the State of California in this case.

STATEMENT

This is the continuation of litigation that has been going on for over a quarter of a century and it is back in this Court for the third time. *Franchise Tax Board v. Hyatt* (*Hyatt I*), 538 U.S. 488 (2003); *Franchise Tax Board v. Hyatt* (*Hyatt II*), 136 S.Ct. 1277 (2016).

The Underlying Facts

This is a state-law tort suit brought in Nevada state courts and is one of several disputes between Gilbert P. Hyatt and petitioner California Franchise Tax Board ("the Board"). The original dispute arose out of a residency tax audit initiated by the Board with respect to the 1991 and 1992 tax years. The principal issue in the tax matter involves the date that Hyatt, a former California resident, became a permanent resident of Nevada. Hyatt contends that he became a Nevada resident in late September 1991, shortly before he received significant licensing income from certain patented inventions. The Board has taken the position that Hyatt became a resident of Nevada in April 1992. The tax dispute remains the subject of ongoing proceedings in California. *See, e.g.*, *Hyatt v. Yee*, 871 F.3d 1067 (9th Cir. 2017) (holding that Hyatt could not

enjoin Franchise Tax Board proceedings based on constitutional violations and the lengthy delay in the proceedings).[1]

This lawsuit concerns tortious acts committed by the Board and its employees against Hyatt. The evidence at trial showed that Board auditor Sheila Cox, as well as other employees of the Board, went well beyond legitimate bounds in their attempts to extract a tax settlement from Hyatt. Referring to Hyatt, the auditor declared that she was going to "get that Jew bastard." *See* 4/23/08 Reporter's Tr. ("RT") at 165:15-20; 4/24/08 RT at 56:15-20. According to testimony from a former Board employee, the auditor freely discussed personal information about Hyatt – much of it false – leading her former colleague to believe that the auditor had created a "fiction" about Hyatt. *See* 4/23/08 RT at 184:18-20; 4/24/08 RT at 42:4-43:8.

The auditor also went to Hyatt's Nevada home, peered through his windows and examined his mail and trash. *See* 4/24/08 RT at 62:16-24. After Cox had closed the audit, she boasted about having "convicted" Hyatt and then returned to his Nevada home to take trophy-like pictures. *See* 85 Resp.'s App. ("RA") at 021011-13 (filed Dec. 21, 2009). The auditor's

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[1] At a final hearing in August 2017, the California State Board of Equalization found five out of six tax issues in favor of Hyatt including that his Nevada residency began on October 20, 1991. The Franchise Tax Board has petitioned for rehearing with the California Office of Tax Appeals, a matter which is still pending. In the Matter of the Appeals of Gilbert P. Hyatt, California Office of Tax Appeals Case Nos. 435770 and 446509.

incessant discussion of the investigation conveyed the impression that she had become "obsessed" with the case. *See* 4/23/08 RT at 184:16-20; 4/24/08 RT at 134:1-12. Within her department, Ms. Cox pressed for harsh action against Hyatt, including imposition of fraud penalties that are rarely issued in residency audits. *See* 4/24/08 RT at 28:6-13. To bolster this effort, she enlisted Hyatt's ex-wife and estranged members of Hyatt's family against him. *See, e.g.*, 80 RA at 019993-94; 83 RA at 020616-20, 020621-24, 020630-35. Cox often spoke coarsely and disparagingly about Hyatt and his associates. *See* 4/23/08 RT at 171:13-172:8; 4/24/08 RT at 56:21-58:19.

The Franchise Tax Board also repeatedly violated promises of confidentiality. Although Board auditors had agreed to protect information submitted by Hyatt in confidence, the Board bombarded people with information "[d]emand[s]" about Hyatt and disclosed his home address and social security number to third parties, including California and Nevada newspapers. *See, e.g.*, 83 RA at 020636-47; 4/24/08 RT at 41:17-24. Demands to furnish information, naming Hyatt as the subject, were sent to his places of worship. *See* 83 RA at 020653-54, 020668-69, 020735-36. The Board also disclosed its investigation of Hyatt to Hyatt's patent licensees in Japan. *See* 84 RA at 020788, 020791. The Board knew that Hyatt, like other private inventors, had significant concerns about privacy and security. *See* 83 RA at 020704. Rather than respecting those concerns, the Board sought to use them as a way to coerce him into a settlement.

One Board employee pointedly warned Eugene Cowan, an attorney representing Hyatt, about the necessity for "extensive letters in these high profile, large dollar, fact-intensive cases," while simultaneously raising the subject of "settlement possibilities." *See* 5/22/08 RT at 80:3-81:2. Both Cowan and Hyatt understood the Board employee to be pushing for tax payments as the price for maintaining Hyatt's privacy. *See* 4/30/08 RT at 155:12-25; 5/12/08 RT at 73:23-74:23.2.

The Initial Litigation

Hyatt brought suit against the California Franchise Tax Board in Nevada state court, asserting both negligent and intentional torts, including for invasion of privacy and the intentional infliction of emotional distress. In response, the Board asserted that it was entitled to absolute sovereign immunity. Although it is clearly established that a state does not have sovereign immunity when sued in the courts of another state, *see Nevada v. Hall*, 440 U.S. 410 (1979), the Board argued that the Full Faith and Credit Clause required Nevada to give effect to California's own immunity laws, which allegedly would have given the Board full immunity against Hyatt's state-law claims. The Nevada Supreme Court rejected the Board's argument that it was obligated to apply California's law of sovereign immunity. Nevertheless, the Nevada Supreme Court extended significant immunity to the Board as a matter of comity. While the court found that "Nevada has not expressly granted its state agencies immunity for all negligent acts," *Franchise Tax Board of California v.*

Hyatt, Nos. 35549 and 36390, 2002 Nev. LEXIS 57, at *10 (Nev. Apr. 4, 2002) (judgment noted at 106 P.3d 1220 (table)), it explained that "Nevada provides its agencies with immunity for the performance of a discretionary function even if the discretion is abused." Id. The court thus concluded that "affording Franchise Tax Board statutory immunity [under California law] for negligent acts does not contravene any Nevada interest in this case." Id.

The Nevada Supreme Court declined, however, to apply California's immunity law to Hyatt's intentional tort claims. The court first observed that "the Full Faith and Credit Clause does not require Nevada to apply California's law in violation of its own legitimate public policy." Id. at *8. It then determined that "affording Franchise Tax Board statutory immunity for intentional torts does contravene Nevada's policies and interests in this case." Id. at *11. The court pointed out that "Nevada does not allow its agencies to claim immunity for discretionary acts taken in bad faith, or for intentional torts committed in the course and scope of employment." Id. (citation omitted). Against this background, the court declared that "greater weight is to be accorded Nevada's interest in protecting its citizens from injurious intentional torts and bad faith acts committed by sister states' government employees, than California's policy favoring complete immunity for its taxation agency." Id.

Supreme Court Review: *Hyatt I*

This Court, in a unanimous opinion, affirmed the decision of the Nevada Supreme Court. *Franchise Tax Board of California v. Hyatt*, 538 U.S. 488 (2003) ("*Hyatt I*"). Rejecting the Board's argument that the Full Faith and Credit Clause required Nevada courts to apply California's immunity laws, the Court reiterated the well-established principle that the Full Faith and Credit Clause does not compel "a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." Id. at 494 (internal quotation marks omitted). Applying that test, the Court found that Nevada was "undoubtedly 'competent to legislate' with respect to the subject matter of the alleged intentional torts here, which, it is claimed, have injured one of its citizens within its borders." Id. The Court noted that it was "not presented here with a case in which a State has exhibited a 'policy of hostility to the public Acts' of a sister State." Id. at 499, quoting *Carroll v. Lanza*, 349 U.S. 408, 413 (1955). To the contrary, the Court noted, "[t]he Nevada Supreme Court sensitively applied principles of comity with a healthy regard for California's sovereign status, relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis." 538 U.S. at 499.

The Trial, Verdict, and Review in the Nevada Supreme Court

On remand from this Court, a trial was held and the jury found the Board liable for a variety of intentional

torts, ranging from fraud to invasion of privacy to intentional infliction of emotional distress. The jury awarded Hyatt a total of $139 million in compensatory damages and $250 million in punitive damages.

The Nevada Supreme Court reversed in part, affirmed in part, and remanded. *Franchise Tax Board of California v. Hyatt*, 335 P.2d 125 (Nevada 2014). In doing so, it reduced the Board's liability for compensatory damages to approximately $1 million (pending a retrial on damages with respect to Hyatt's intentional infliction of emotional distress claim). Proceeding to the merits, the Nevada Supreme Court set aside most of the judgment against the Board, finding that Hyatt had not established the necessary elements for various torts under Nevada law.

The Nevada Supreme Court, however, affirmed the portion of the judgment based on fraud. The court noted evidence that, despite its promises of confidentiality, the Board had "disclosed [respondent's] social security number and home address to numerous people and entities and that [the Board] revealed to third parties that Hyatt was being audited." Id. at 144. The court also pointed to evidence that "the main auditor on Hyatt's audit, Sheila Cox, . . . had made disparaging comments about Hyatt and his religion, that Cox essentially was intent on imposing an assessment against Hyatt, and that [the Board] promoted a culture in which tax assessments were the end goal whenever an audit was undertaken." Id. at 145. The court thus determined "that substantial evidence supports each of the fraud elements." Id.

Having upheld liability on the fraud claim, the Nevada Supreme Court next considered whether it should apply a statutory damages cap applicable to Nevada officials – a condition on Nevada's waiver of sovereign immunity – to the Board. *See* Nev. Rev. Stat. § 41.035(1). The court decided that "comity does not require this court to grant [the Board] such relief." The court pointed out that officials from other states are not similarly situated to Nevada officials with respect to intentional torts because Nevada officials "'are subject to legislative control, administrative oversight, and public accountability in [Nevada].'" Id. at 147 (citation omitted). As a result, "'[a]ctions taken by an agency or instrumentality of this state are subject always to the will of the democratic process in [Nevada],'" while out-of-state agencies like the Board "'operate[] outside such controls in this State.'" Id. (citation omitted).

Considering this lack of authority over other states' agencies, the court concluded that "[t]his state's policy interest in providing adequate redress to Nevada citizens is paramount to providing [the Board] a statutory cap on damages under comity." Id. With respect to Hyatt's intentional infliction of emotional distress claim, the Nevada Supreme Court affirmed the jury's finding of liability – noting that Hyatt had "suffered extreme treatment" at the hands of the Board (id. at 148) – but it reversed the award of damages. Finding errors with respect to the introduction of evidence and instructions to the jury, the court determined that the

Board was entitled to a new trial to determine the proper level of damages. Id. at 159-63.

The court remanded the case to the trial court for that purpose. Finally, as a matter of comity, the Nevada Supreme Court reversed the award of punitive damages. The court stated that, "under comity principles, we afford [the Board] the protections of California immunity to the same degree as we would provide immunity to a Nevada government entity as outlined in NRS 41.035(1)." Id. at 153. The court then added: "Because punitive damages would not be available against a Nevada government entity, we hold that under comity principles [the Board] is immune from punitive damages." Id.

Supreme Court Review: *Hyatt II*

This Court granted review on two questions: whether *Nevada v. Hall*, 440 U.S. 410 (1979), which held that a state government may be sued in the courts of another state, should be overruled; and whether the Nevada Supreme Court erred by failing to apply to the Franchise Tax Board the statutory immunities that would be available to Nevada agencies in Nevada courts. *Franchise Tax Board of California v. Hyatt* (*Hyatt II*), 136 S.Ct. 1277, 1280 (2016).

After briefing and oral argument, the Court said that it was evenly divided, 4-4, on the question of whether *Nevada v. Hall* should be overruled. As to the second question, this Court held that the Constitution does not permit "Nevada to award damages against

California agencies under Nevada law that are greater than it could award against Nevada agencies in similar circumstances." Id. at 1281. The Court concluded that "[d]oing so violates the Constitution's requirement that Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State."

The Case on Remand to the Nevada Supreme Court

The case was remanded to the Nevada Supreme Court. After additional briefing, the Nevada Supreme Court ruled that the Franchise Tax Board is entitled to the benefit of Nevada's statutory damages cap. The Nevada Supreme Court concluded that Hyatt was entitled to $50,000 in damages for his fraud claim under Nevada law. App. 107a. The Court also decided that Hyatt was entitled to $50,000 in damages for his claim of intentional infliction of emotional distress. Id. at 121a-22a. The case was remanded for determination of costs and attorneys' fees.

In response to a petition for rehearing, the Nevada Supreme Court issued a revised opinion. App. 4a. The court reaffirmed its earlier holdings and also said that the statutory damages cap includes prejudgment interest.

REASON FOR DENYING THE WRIT

THERE IS NO COMPELLING JUSTIFICATION FOR OVERRULING *NEVADA V. HALL*

The sole issue presented in this case is whether this Court should overrule its almost 30-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). The Court has emphasized "that *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). 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, 265-66 (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).

Petitioner and its *amici* offer no such compelling justification for overruling *Nevada v. Hall*. The decision is almost 30 years old and yet Petitioner and its *amici* point to only a relatively small number of cases against state governments in the courts of other states and document little burden on state governments from such litigation. *See* Brief of Indiana and 44 Other States as *Amici Curiae* in Support of Petitioner, pp. 8-10. 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."). Furthermore, in those 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 (N.C. Ct. App. 2012); *Sam v. Sam*, 134 P.3d 761 (N.M. 2006).

The primary argument advanced by Petitioner and its *amici* is that *Nevada v. Hall* is inconsistent with principles of sovereign immunity. *See* Petition for a Writ of Certiorari at 11-19. 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 sovereignty 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. Nevada plaintiffs sued the State of Nevada in California state court on a claim that could not have been brought in Nevada. The plaintiffs had been seriously injured in a car accident caused by an employee of the University of Nevada.

This Court expressly rejected Nevada's claim that sovereign immunity protected it from suit in California state court. 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. 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." *Nevada v. Hall*, 440 U.S. 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) – the Court in *Nevada v. Hall* concluded that sovereign immunity was never meant to protect a state from suits in another state's court. Id. *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* 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.").

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 others' courts as other sovereign nations had in the courts of foreign nations. Second, that, before the founding of the United States (as now), sovereign nations could not assert immunity as of right in the courts of other nations, but enjoyed immunity only with the consent of the host nation. Third, that nothing in the Constitution or formation of the Union altered that balance among the still-sovereign states, giving priority to the rights of visiting states at the expense of host states.

This is why Petitioner is wrong in its assertion that *Alden v. Maine*, 527 U.S. 706 (1999) is inconsistent with *Nevada v. Hall*. Petition for a Writ of Certiorari at 13-19. *Alden v. Maine* is about the ability of a state to be sued in its own state courts, something this Court said was precluded by an immunity that has existed throughout American history. 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 739-40.

Petitioner and its *amici* stress state sovereignty, but they ignore that keeping a state from hearing suits is itself a significant limit on state prerogatives. Indeed, 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. 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." *Nevada v. Hall*, 440 U.S. at 426-27.

Petitioner and its *amici* do not cite a single word showing that, at the time of the writing and ratification of the Constitution, either the Framers or representatives of the states addressed a state's immunity from suit in another state's courts. Nothing in the text of the Constitution or its history supports giving a state sovereign immunity protection when it is sued in another state's courts. To be sure, there were 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.

This does not mean that states are without protection from suit in other state courts. As this Court held when this case was last before the Court, 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. This matters 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.

Also, state courts can and do accord comity to other states. In this case, the Nevada Supreme Court ruled that punitive damages are not available against the Board because of considerations of comity.

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).

Thus, this Court should deny the Petition for a Writ of Certiorari that asks it to reconsider an almost 30-year-old precedent that was based on decisions from the earliest days of American history. As this Court has noted: "[A]n argument that we got something wrong – even a good argument to that effect – cannot by itself justify scrapping settled precedent." *Kimble v. Marvel Entertainment, 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). No such "special justification" exists to warrant reconsideration of *Nevada v. Hall*.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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EXHIBIT 86

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 PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

REPLY BRIEF FOR PETITIONER

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No. 17-1299

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GILBERT P. HYATT,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

REPLY BRIEF FOR PETITIONER

This Court has already once granted certiorari to consider whether *Nevada* v. *Hall*, 440 U.S. 410 (1979), should be overruled, and four Members of an equally divided Court voted to answer that question in the affirmative. The question remains as worthy of review as it was two Terms ago. And this case remains an ideal vehicle for addressing it, as Hyatt does not dispute.

Instead of raising any vehicle concern, Hyatt tries to minimize the importance of the question presented. But an extraordinary 45 States have filed an amicus brief explaining *Hall*'s "sustained nationwide impact" and the extent to which it "insult[s] ... the most fundamental notions of State sovereignty." States Br. 11. Hyatt's other arguments against certiorari are that *Hall* was correctly decided and that it should be pre-

served by stare decisis. But even if those arguments had force—which they do not—they are properly addressed at the merits stage. They supply no reason to deny certiorari, particularly when four Justices have already disagreed with them.

The Court should not pass up this opportunity to resolve, at last, a question implicating fundamental principles of state sovereignty and our constitutional structure.

I. THE QUESTION PRESENTED IS DEEPLY IMPORTANT

Hyatt attempts (at 12, 16-17) to diminish the importance of the question presented by suggesting that States are only rarely sued in other States' courts, that allowing such suits imposes minimal burdens on the defendant States, and that comity or interstate compacts are adequate substitutes for interstate sovereign immunity. Those arguments are incorrect.

1. As the amici States explain, "[a]s a result of *Hall*, State courts commonly exercise jurisdiction over officials and agencies of other States." States Br. 8. They identify four cases challenging state taxation that were pending in other States' courts in the first few months of 2018 alone—suits brought against Massachusetts in Virginia, against Ohio in Kentucky, and against South Dakota in both North Dakota and Minnesota—as well as a 2013 case brought against Connecticut in Texas. *Id.* at 9-10. Outside the tax context, amici point to suits against Ohio in Indiana, against North Dakota in Minnesota, against Rhode Island in Connecticut, and against Texas in New Mexico—each of which has been pending in the past two years alone. *Id.* at 10. The petition provides additional examples, as does the States' amicus brief in *Hyatt II*. Pet. 27-28; States Br. 23-26,

Franchise Tax Bd. of Cal. v. *Hyatt*, No. 14-1175 (U.S. Sept. 10, 2015). Indeed, this petition is not even the only one currently asking the Court to reconsider *Hall*. *See* Pet. for Cert., *Nevada Dep't of Wildlife* v. *Smith*, No. 17-1348 (U.S. Mar. 21, 2018). And, of course, the very fact that 45 States have joined California in asking the Court to overrule *Hall*—including Nevada, whose courts exercised jurisdiction in this case—suggests that this is an important and recurring issue.

Hyatt's contention (at 12) that petitioner and amici have identified "little burden on state governments from such litigation" also rings hollow. In fact, petitioner and amici have explained the serious harms caused by suits brought under *Hall*. Such suits impose on defendant States the financial and administrative costs of litigation and the cost of any judgment. This case—having dragged on for 20 years, through a four-month trial, with costs in the millions of dollars, Pet. App. 11a-12a—well illustrates the kinds of "staggering burdens," *Alden* v. *Maine*, 527 U.S. 706, 750 (1999), that litigation of this nature can create. *See* Pet. 21. Aside from their pecuniary burdens, suits under *Hall* demean defendant States' dignity by forcing them to justify their core sovereign functions to the courts and juries of another State, rather than to their own citizens in the exercise of self-government. *See id.*; States Br. 2. And they permit state courts to inject themselves into the sovereign functions of other States, interfering with or even altering the defendant State's policies. *See* Pet. 27-28 (because of a case brought in California's courts, Nevada was forced to alter its policy of providing bus vouchers to indigent patients discharged from state-run medical facilities); States Br. 6-7. In some cases, such as in the tax context, suits brought under *Hall* can also undermine the administrative processes

States have created as conditions for waiving sovereign immunity. States Br. 3-7. Those are exactly the types of burdens that sovereign immunity is meant to prevent. *See, e.g.*, *Alden*, 527 U.S. at 750.[1]

2. Hyatt contends (at 12, 17) that the voluntary doctrine of comity is an adequate substitute for sovereign immunity, but this case—which, ironically, Hyatt cites as an example—exposes the fallacy of that argument. Petitioner has been litigating this case for more than 20 years and, unless this Court intervenes, faces a monetary judgment to be entered on remand from the decision below. Even though that judgment would be substantially less than the initial award imposed by the trial court, it remains significant. And the monetary judgment is dwarfed by the time and money that petitioner has spent litigating this case, to say nothing of the distraction from its core tax functions and the harm to California's dignity from being haled before a Nevada court and jury.

Moreover, even where a state court decides to grant protection to another State on comity grounds, that protection may take years of litigation to obtain and is often less than what the State would have in its own courts. For example, in *Sam* v. *Sam*, 134 P.3d 761 (N.M. 2006), which Hyatt cites (at 12), the defendant—an Arizona governmental trust—had to litigate for

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[1] Professor Stempel's contrary conclusion that "'the empirical burden of such litigation is far from clear and hardly seems oppressive,'" cited by Hyatt (at 12), is unsupported and should be taken with a healthy dose of skepticism given that Professor Stempel was a retained expert for Hyatt in this case. *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).

nearly five years before the New Mexico Supreme Court decided that it was entitled to the two-year statute of limitations afforded to New Mexico's government entities, though not the one-year statute of limitations that Arizona courts would have applied. Comity is no substitute for a clear rule of sovereign immunity, which should allow a defendant State to terminate litigation quickly and at the initial stage of a case, without incurring the extraordinary costs seen in this case and in *Sam*.

3. Hyatt also contends (at 17) that the States could enter into an agreement to provide immunity in each other's courts. But the States already entered into an agreement that provides such immunity—namely, the United States Constitution. Interstate compacts "can take decades, or longer, to hammer out," Multistate Tax Comm'n Br. 13, and States should not have to resort to them to vindicate the protection that *Hall* wrongly extinguished.

II. *HALL* WAS WRONGLY DECIDED, AND STARE DECISIS IS NO REASON TO PRESERVE IT

Hyatt devotes most of his brief in opposition to the merits of the question presented, arguing that *Hall* was correctly decided and that stare decisis counsels against overruling it. Those arguments are properly considered at the merits stage, not in deciding whether to grant certiorari. In any event, both are meritless.

A. Hyatt's Defense Of *Hall* Relies On A Selective And Incorrect Reading Of Precedents

1. Hyatt attempts to defend *Hall* by recapitulating *Hall*'s reasoning—particularly its reliance on *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch)

116 (1812). That reasoning is as unpersuasive now as it was in *Hall*.

The Schooner Exchange addressed whether a federal court in Pennsylvania could exercise jurisdiction over a ship in which Napoleon, the French emperor, claimed ownership. The plaintiffs, two Americans, alleged that the ship belonged to them and had been wrongfully seized by Napoleon's forces after it sailed from Baltimore to Spain; they sued to recover it once it had sailed back to Philadelphia. 11 U.S. at 117. This Court held that a nation's courts possess "exclusive and absolute" jurisdiction "within its own territory" and that "[a]ll exceptions" to that jurisdiction "must be traced up to the consent of the nation itself." *Id.* at 136. But it recognized "a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction," *id.* at 137, and held that the disputed ownership of the vessel in question fell within that class, so that the federal court lacked jurisdiction, *id.* at 146-147.

Hyatt relies on *The Schooner Exchange* for the supposedly "basic and unassailable premise[]" (Opp. 14) that States, like sovereign nations, cannot assert sovereign immunity in the courts of other sovereigns. But that premise is far from "basic and unassailable"; to the contrary, it conflicts with the view that prevailed from the Founding until *Hall*.

As the petition explains (at 11-12), it was widely understood in the Founding era that the States enjoyed sovereign immunity from suit in each other's courts. For example, when a Pennsylvania court exercised jurisdiction over property belonging to Virginia, *Nathan* v. *Virginia*, 1 U.S. (1 Dall.) 77 (Pa. Ct. Com. Pl. 1781), the episode "raised such concerns throughout the

States that the Virginia delegation to the Confederation Congress sought the suppression of the attachment order," *Hall*, 440 U.S. at 435 (Rehnquist, J., dissenting). The strength of national consensus on this issue became even clearer with the backlash to *Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419 (1793), that culminated in the Eleventh Amendment—which showed that the States, horrified at the notion of being subjected to suit in federal court, must even more strongly "have reprehended the notion of ... being haled before the courts of a sister State." *Hall*, 440 U.S. at 431 (Blackmun, J., dissenting).

In the decades that followed, numerous decisions of this Court expressed the view that States were not, as Hyatt suggests, free to entertain suits against sister States. In *Beers* v. *Arkansas*, 61 U.S. (20 How.) 527 (1858), for example, the Court stated that it "is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, *or in any other*, without its consent and permission." *Id.* at 529 (emphasis added); *see also Western Union Tel. Co.* v. *Pennsylvania*, 368 U.S. 71, 80 (1961); *Cunningham* v. *Macon & Brunswick R.R. Co.*, 109 U.S. 446, 451 (1883); Pet. 14 n.2. State courts shared that understanding. *See, e.g.*, *Paulus* v. *South Dakota*, 227 N.W. 52 (N.D. 1929). None of those decisions so much as mentioned *The Schooner Exchange*.

Hyatt makes no attempt to reconcile his reliance on *The Schooner Exchange* with this long history, or even to address it at all.

Hyatt does cite *Alden* for the proposition that "the Constitution did not reflect an agreement between the States to respect the sovereign immunity of one another." 527 U.S. at 738; *see* Opp. 15. But that is simply the *Alden* Court's characterization of what *Hall* held;

Alden did not reaffirm *Hall*'s erroneous reasoning. Nor is Hyatt correct to say (at 13), presumably with *Alden* in mind, that overruling *Hall* would require this Court to "revisit the myriad precedents that depend upon it." *Alden* does not "depend upon" *Hall* any more than it reaffirms *Hall*'s erroneous reasoning. Rather, the *Alden* Court felt the need to distinguish *Hall* (while noting that *Hall* in some respects could be read as "consistent with, and even support[ing]," the holding the Court ultimately reached). And Hyatt does not identify any other precedents of the supposed "myriad" that "depend upon" *Hall*.

2. Aside from his reliance on *The Schooner Exchange*, Hyatt invokes (at 16) two further elements of *Hall*'s erroneous reasoning: first, that the immunity of States in each other's courts was not discussed during the drafting or ratification of the Constitution; and second, that the constitutional text does not explicitly recognize interstate sovereign immunity.

As the petition explains, those premises were flawed at the time of *Hall* and have grown only weaker since. As the *Hall* dissenters recognized, the "only reason" interstate sovereign immunity was not specifically discussed during the ratification debates "is that it was too obvious to deserve mention." 440 U.S. at 431 (Blackmun, J., dissenting); *see also* Woolhandler, *Interstate Sovereign Immunity*, 2006 Sup. Ct. Rev. 249, 253, 263; Pet. 12. And this Court's decisions since *Hall* have made clear that "the scope of the States' immunity from suit is demarcated not by the text of the [Eleventh] Amendment alone but by fundamental postulates implicit in the constitutional design." *Alden*, 527 U.S. at 729; *see* Pet. 14-15 (collecting others). Hyatt offers no response. Nor does he address *Hall*'s inconsistency with the constitutional values of dignity and self-

government that are protected by state sovereign immunity, as this Court's subsequent decisions have made clear. *See, e.g.*, *Alden*, 527 U.S. at 715, 750; Pet. 16-18. Those values are particularly acute in the context of suits, like this one, that challenge a State's exercise of the core sovereign function of taxation. Pet. 18.

B. Stare Decisis Considerations Are At Their Weakest Here

As the petition explains (at 19-22), moreover, stare decisis considerations do not stand in the way of overruling *Hall*, and certainly provide no basis for refusing to consider doing so. "*Stare decisis* is not an inexorable command" and is weakest in a case—such as this one—involving a constitutional issue that has not engendered reliance interests. *Payne* v. *Tennessee*, 501 U.S. 808, 828 (1991). In such a case, stare decisis cannot justify adherence to a decision that is "unworkable or ... badly reasoned," *id.*, as *Hall* was.

Citing this Court's decisions in *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989), and *Kimble* v. *Marvel Entertainment, LLC*, 135 S. Ct. 2401 (2015), Hyatt notes that stare decisis "is of fundamental importance to the rule of law." Opp. 11 (internal quotation marks omitted) (quoting *Patterson*, 491 U.S. at 172); *see* Opp. 17. That is certainly true. But the Court has also explained that stare decisis has "special force in the area of statutory interpretation"—at issue in both *Patterson* and *Kimble*—because, "unlike in the context of constitutional interpretation, ... Congress remains free to alter" this Court's rulings. *Patterson*, 491 U.S. at 172-173; *see also Kimble*, 135 S. Ct. at 2409. In constitutional cases, like this one, stare decisis carries less force because "'correction through legislative

action is practically impossible.'" *Payne*, 501 U.S. at 828.

Stare decisis also carries less force in this context because, as a constitutional decision regarding sovereign immunity—a matter that "does not alter primary conduct," *Hohn* v. *United States*, 524 U.S. 236, 252 (1998)—*Hall* has not engendered reliance interests. Pet. 22. That too distinguishes this case from *Kimble* and *Patterson*, which involved the kinds of "property and contract" interests for which reliance is a serious concern and "[c]onsiderations in favor of *stare decisis* are at their acme," *Payne*, 501 U.S. at 828. *See Kimble*, 135 S. Ct. at 2410; *Patterson*, 491 U.S. at 174.

In any event, as the petition explains (at 11-13, 19-22), this case presents all of the considerations that justify overcoming stare decisis. *Hall*'s reasoning is inconsistent with the Framing-era conception of sovereign immunity and the history of the Eleventh Amendment, and thus was "unsound in principle" when it was decided, *Allied-Signal, Inc.* v. *Director, Div. of Taxation*, 504 U.S. 768, 783 (1992) (internal quotation marks omitted). And cases since *Hall* have "left [it] behind as a mere survivor of obsolete constitutional thinking," *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 857 (1992). *See supra* pp. 8-9; Pet. 13-18.

The petition also explains (at 21-22) that *Hall* has proven "unworkable," *Montejo* v. *Louisiana*, 556 U.S. 778, 792 (2009). *Hall* denies States the "dignity and respect" that sovereign immunity is "designed to protect," *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 268 (1997); interferes with their ability to govern by diverting their resources to defend suits across the country; subjects them to bias in other States' courts; and leaves them in the dark as to what protection—if any—they

will receive when they are haled into another State's courts. The considerations that favor overruling such a misguided precedent far outweigh those that favor retaining it simply for the sake of consistency.

CONCLUSION

The petition for a writ of certiorari should be granted.

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JUNE 2018

EXHIBIT 87

(ORDER LIST: 585 U.S.)

THURSDAY, JUNE 28, 2018

APPEAL -- SUMMARY DISPOSITION

16-166 HARRIS, DAVID, ET AL. V. COOPER, GOV. OF NC, ET AL.

The judgment is affirmed.

CERTIORARI -- SUMMARY DISPOSITIONS

16-1146 WOMAN'S FRIEND CLINIC, ET AL. V. BECERRA, ATT'Y GEN. OF CA

16-1153 LIVINGWELL MEDICAL CLINIC, ET AL V. BECERRA, ATT'Y GEN OF CA, ET AL.

The petitions for writs of certiorari are granted. The judgments are vacated, and the cases are remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *National Institute of Family and Life Advocates* v. *Becerra*, 585 U. S. ____ (2018).

16-9187 SOLANO-HERNANDEZ, SANTIAGO V. UNITED STATES

16-9587 VILLARREAL-GARCIA, AURELIANO V. UNITED STATES

The motions of petitioners for leave to proceed *in forma pauperis* and the petitions for writs of certiorari are granted. The judgments are vacated, and the cases are remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Rosales-Mireles* v. *United States*, 585 U. S. ____ (2018), and for consideration of the question whether the cases are moot.

17-166 ZANDERS, MARCUS V. INDIANA

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the Supreme

Court of Indiana for further consideration in light of *Carpenter* v. *United States*, 585 U. S. ____ (2018).

17-211 MOUNTAIN RIGHT TO LIFE, ET AL. V. BECERRA, ATT'Y GEN. OF CA

17-976 CTIA - THE WIRELESS ASSOCIATION V. BERKELEY, CA, ET AL.

The petitions for writs of certiorari are granted. The judgments are vacated, and the cases are remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *National Institute of Family and Life Advocates* v. *Becerra*, 585 U. S. ____ (2018).

17-981 RIFFEY, THERESA, ET AL. V. RAUNER, GOV. OF IL, ET AL.

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Seventh Circuit for further consideration in light of *Janus* v. *State, County, and Municipal Employees*, 585 U. S. ____ (2018).

17-1050 SALDANA CASTILLO, NOEL A. V. SESSIONS, ATT'Y GEN.

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Pereira* v. *Sessions*, 585 U. S. ____ (2018).

17-1194) INT'L REFUGEE ASSISTANCE, ET AL. V. TRUMP, PRESIDENT OF U.S., ET AL.
)
17-1270) TRUMP, PRESIDENT OF U.S., ET AL. V. INT'L REFUGEE ASSISTANCE, ET AL.

The petitions for writs of certiorari are granted. The judgments are vacated, and the cases are remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of *Trump* v. *Hawaii*, 585 U. S. ____ (2018).

17-5402 REED, TOBIAS O. V. VIRGINIA

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the Supreme Court of Virginia for further consideration in light of *Carpenter* v. *United States*, 585 U. S. ____ (2018).

17-5692 CHAMBERS, ANTOINE V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *Carpenter* v. *United States*, 585 U. S. ____ (2018).

17-5964 THOMPSON, ANTHONY C. V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Tenth Circuit for further consideration in light of *Carpenter* v. *United States*, 585 U. S. ____ (2018). Justice Gorsuch took no part in the consideration or decision of this motion and this petition.

17-6213 HANKSTON, GAREIC J. V. TEXAS

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the Court of Criminal Appeals of Texas for further consideration in light of *Carpenter* v. *United States*, 585 U. S. ____ (2018).

(ORDER LIST: 585 U.S.)

THURSDAY, JUNE 28, 2018

APPEAL -- SUMMARY DISPOSITION

16-166 HARRIS, DAVID, ET AL. V. COOPER, GOV. OF NC, ET AL.

The judgment is affirmed.

CERTIORARI -- SUMMARY DISPOSITIONS

16-1146 WOMAN'S FRIEND CLINIC, ET AL. V. BECERRA, ATT'Y GEN. OF CA

16-1153 LIVINGWELL MEDICAL CLINIC, ET AL V. BECERRA, ATT'Y GEN OF CA, ET AL.

The petitions for writs of certiorari are granted. The judgments are vacated, and the cases are remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *National Institute of Family and Life Advocates* v. *Becerra*, 585 U. S. ____ (2018).

16-9187 SOLANO-HERNANDEZ, SANTIAGO V. UNITED STATES

16-9587 VILLARREAL-GARCIA, AURELIANO V. UNITED STATES

The motions of petitioners for leave to proceed *in forma pauperis* and the petitions for writs of certiorari are granted. The judgments are vacated, and the cases are remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Rosales-Mireles* v. *United States*, 585 U. S. ____ (2018), and for consideration of the question whether the cases are moot.

17-166 ZANDERS, MARCUS V. INDIANA

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the Supreme

Court of Indiana for further consideration in light of *Carpenter* v. *United States*, 585 U. S. ____ (2018).

17-211 MOUNTAIN RIGHT TO LIFE, ET AL. V. BECERRA, ATT'Y GEN. OF CA

17-976 CTIA - THE WIRELESS ASSOCIATION V. BERKELEY, CA, ET AL.

The petitions for writs of certiorari are granted. The judgments are vacated, and the cases are remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *National Institute of Family and Life Advocates* v. *Becerra*, 585 U. S. ____ (2018).

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The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Seventh Circuit for further consideration in light of *Janus* v. *State, County, and Municipal Employees*, 585 U. S. ____ (2018).

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The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Pereira* v. *Sessions*, 585 U. S. ____ (2018).

17-1194) INT'L REFUGEE ASSISTANCE, ET AL. V. TRUMP, PRESIDENT OF U.S., ET AL.
)
17-1270) TRUMP, PRESIDENT OF U.S., ET AL. V. INT'L REFUGEE ASSISTANCE, ET AL.

The petitions for writs of certiorari are granted. The judgments are vacated, and the cases are remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of *Trump* v. *Hawaii*, 585 U. S. ____ (2018).

17-5402 REED, TOBIAS O. V. VIRGINIA

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the Supreme Court of Virginia for further consideration in light of *Carpenter* v. *United States*, 585 U. S. ____ (2018).

17-5692 CHAMBERS, ANTOINE V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *Carpenter* v. *United States*, 585 U. S. ____ (2018).

17-5964 THOMPSON, ANTHONY C. V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Tenth Circuit for further consideration in light of *Carpenter* v. *United States*, 585 U. S. ____ (2018). Justice Gorsuch took no part in the consideration or decision of this motion and this petition.

17-6213 HANKSTON, GAREIC J. V. TEXAS

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the Court of Criminal Appeals of Texas for further consideration in light of *Carpenter* v. *United States*, 585 U. S. ____ (2018).

17-6704 BANKS, ALBERT D. V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Tenth Circuit for further consideration in light of *Carpenter* v. *United States*, 585 U. S. ____ (2018).

CERTIORARI GRANTED

17-532 HERRERA, CLAYVIN V. WYOMING

17-571 FOURTH ESTATE PUB. BENEFIT CORP. V. WALL-STREET.COM, LLC, ET AL.

17-646 GAMBLE, TERANCE M. V. UNITED STATES

17-1174 NIEVES, LUIS A., ET AL. V. BARTLETT, RUSSELL P.

17-1299 CA FRANCHISE TAX BOARD V. HYATT, GILBERT P.

17-1307 OBDUSKEY, DENNIS V. McCARTHY & HOLTHUS LLP, ET AL.

The petitions for writs of certiorari are granted.

17-290 MERCK SHARP & DOHME CORP. V. ALBRECHT, DORIS, ET AL.

The petition for a writ of certiorari is granted. Justice Alito took no part in the consideration or decision of this petition.

CERTIORARI DENIED

16-6308 GRAHAM, AARON V. UNITED STATES

16-6761 CAIRA, FRANK V. UNITED STATES

16-7314 RIOS, ANTONIO V. UNITED STATES

16-9536 ALEXANDER, TYRAN M. V. UNITED STATES

17-243 ABDIRAHMAN, LIBAN H. V. UNITED STATES

17-425 WASS, SHAWN W. V. IDAHO

17-701 RICHARDS, JAMES W. V. UNITED STATES

17-840 CASH, TORIE A. V. UNITED STATES

17-6704 BANKS, ALBERT D. V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Tenth Circuit for further consideration in light of *Carpenter* v. *United States*, 585 U. S. ____ (2018).

CERTIORARI GRANTED

17-532 HERRERA, CLAYVIN V. WYOMING

17-571 FOURTH ESTATE PUB. BENEFIT CORP. V. WALL-STREET.COM, LLC, ET AL.

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The petitions for writs of certiorari are granted.

17-290 MERCK SHARP & DOHME CORP. V. ALBRECHT, DORIS, ET AL.

The petition for a writ of certiorari is granted. Justice Alito took no part in the consideration or decision of this petition.

CERTIORARI DENIED

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17-425 WASS, SHAWN W. V. IDAHO

17-701 RICHARDS, JAMES W. V. UNITED STATES

17-840 CASH, TORIE A. V. UNITED STATES

17-950 ULBRICHT, ROSS W. V. UNITED STATES

17-1002 UNITED STATES V. UNION PACIFIC RAILROAD CO.

17-1087 FIRST RESORT, INC. V. HERRERA, DENNIS J., ET AL.

17-1369 MAYOR AND CITY COUNCIL, ET AL. V. GREATER BALTIMORE CENTER

17-5943 RILEY, MONTAI V. UNITED STATES

17-6256 PATRICK, DAMIAN V. UNITED STATES

17-6892 WILFORD, RICHARD A. V. UNITED STATES

17-7220 BORMUTH, PETER C. V. JACKSON COUNTY, MI

17-7769 GRAY, RONALD V. UNITED STATES

The petitions for writs of certiorari are denied.

16-6694 JORDAN, ERIC V. UNITED STATES

The motion of respondent for leave to file a brief in opposition under seal with redacted copies for the public record is granted. The petition for a writ of certiorari is denied.

17-475 SEC V. BANDIMERE, DAVID F.

The petition for a writ of certiorari is denied. Justice Gorsuch took no part in the consideration or decision of this petition.

EXHIBIT 88

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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

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

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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

BRIEF FOR PETITIONER

INTRODUCTION

This case arises from a protracted dispute between the Franchise Tax Board of the State of California (FTB) and an aggrieved taxpayer named Gilbert P. Hyatt. More than two decades ago, the FTB audited Hyatt's income tax returns and found that he had moved to Nevada later than he had claimed, creating a tax deficiency. Not satisfied with challenging the FTB's findings through California's administrative processes, Hyatt brought this suit against the FTB in Nevada state court, alleging that the FTB had committed numerous torts in the course of auditing his tax returns. After more than ten years of pretrial litigation, including a trip to this Court, Hyatt's suit proceeded to a four-month trial. The Nevada jury awarded Hyatt

more than $138 million in compensatory damages and $250 million in punitive damages—yielding, with costs and interest, a total judgment approaching half a billion dollars.

After an additional decade's worth of appeals, including a second trip to this Court, the monetary judgment against the FTB has been whittled down. But the burdens this litigation has imposed on the FTB—an agency of the State of California that is supposed to spend its time performing one of California's core sovereign functions—remain extraordinary. The litigation has cost California taxpayers millions of dollars, and even after the various appeals, the FTB *still* faces a judgment of $100,000, with Hyatt likely to seek costs in a further proceeding that could itself spawn additional appeals.

The Framers would have been horrified by this spectacle. When the Constitution was ratified, and for nearly two centuries after, it was universally understood that States could not be sued by individuals, without their consent, in the courts of other States. Yet this Court's decision in *Nevada* v. *Hall*, 440 U.S. 410 (1979), interpreted the Constitution to permit exactly that unintended result, on the theory that the Constitution did not explicitly address States' immunity in the courts of other States.

This Court's subsequent decisions make clear that *Hall* was wrongly decided. Although the *Hall* majority believed that any constitutional principle of state sovereign immunity had to be explicitly located in the constitutional text, the Court has since repeatedly held that "the scope of the States' immunity from suit is demarcated not by the text ... alone but by fundamental postulates implicit in the constitutional design." *Alden*

v. *Maine*, 527 U.S. 706, 729 (1999). To discern those "fundamental postulates," the Court has held, one must examine "'history and experience, and the established order of things,'" which "reveal the original understanding of the States' constitutional immunity from suit." *Id.* at 726-727. The relevant question, then, is not whether the Constitution explicitly recognized interstate sovereign immunity—the question on which the *Hall* majority focused—but rather whether the Framers intended to abrogate the States' pre-ratification immunity from suit in the courts of other States. The historical record makes clear they did not. *Hall* also gave short shrift to the values protected by state sovereign immunity, including dignity and self-government, that are undermined by allowing States to be haled into the potentially hostile home-state courts of individual plaintiffs.

Although this Court is ordinarily and rightly reluctant to overrule its precedents, the considerations favoring stare decisis are at their weakest here. Not only does this case involve a constitutional rule rather than a statute, but it is a constitutional rule that does not govern primary conduct and that has therefore engendered no reliance interests. Unlike in most cases, even in most constitutional cases, there is no reason here for the Court to perpetuate an erroneous interpretation of the Constitution merely for the sake of consistency. Indeed, *Hall* is a doctrinal outlier, in deep tension not only with this Court's later statements about constitutional interpretation but also with the Court's recognition of state and tribal sovereign immunity in numerous other contexts. The Court should overrule *Hall* and restore interstate sovereign immunity to its intended place in our constitutional structure.

OPINIONS BELOW

The opinion of the Supreme Court of Nevada (Pet. App. 1a-66a) is reported at 407 P.3d 717. An earlier version of that opinion (Pet. App. 67a-131a), which was withdrawn on rehearing, was reported at 401 P.3d 1110. The order of the Nevada Supreme Court granting the petition for rehearing (Pet. App. 135a-136a) is unreported. The relevant orders of the Nevada District Court (Pet. App. 133a-134a, 153a-154a) are unreported. A prior decision of the Nevada Supreme Court is reported at 335 P.3d 125. Another prior decision of the Nevada Supreme Court (Pet. App. 139a-152a) is unreported but is noted at 106 P.3d 1220 (Table).

JURISDICTION

The Supreme Court of Nevada entered judgment on rehearing on December 26, 2017. Pet. App. 1a. The petition for certiorari was timely filed on March 12, 2018 and granted on June 28, 2018. This Court has jurisdiction under 28 U.S.C. § 1257.

STATEMENT

A. Hyatt's Tax Dispute

Respondent Gilbert Hyatt resided in California for decades and earned hundreds of millions of dollars from technology patents he developed in California. Pet. App. 5a; *Franchise Tax Bd. of Cal.* v. *Hyatt* (*Hyatt I*), 538 U.S. 488, 490-491 (2003). In 1992, Hyatt filed a California tax return stating that he had ceased to be a California resident, and had become a resident of Nevada (which has no personal income tax), on October 1, 1991, shortly before he received substantial licensing fees. 538 U.S. at 490-491.

Petitioner, the Franchise Tax Board of the State of California, is the agency responsible for assessing personal income tax in California. In 1993, the FTB became aware of circumstances suggesting that Hyatt had not actually moved to Nevada in October 1991, as he claimed. Pet. App. 5a. The FTB therefore commenced an audit of Hyatt's 1991 return. *Id.* The audit determined that Hyatt did not move to Nevada until April 1992 and remained a California resident until that time. Pet. App. 7a. The FTB accordingly found that Hyatt owed approximately $1.8 million in unpaid California income taxes for 1991, plus penalties and interest. *Id.* Because the FTB determined that Hyatt had resided in California for part of 1992 yet paid no California taxes, it also opened an audit for that year, which concluded that Hyatt owed an additional $6 million in taxes and interest plus further penalties. Pet. App. 7a-8a.

Disputes between Hyatt and the FTB over the validity of those determinations have consumed two decades. The California State Board of Equalization, which until recently heard administrative appeals from the FTB's determinations, affirmed the FTB's assessment of taxes for the 1991 tax year but sustained Hyatt's appeals for 1992. *See* Minutes of the State Bd. of Equalization (Aug. 29, 2017), https://tinyurl.com/yb3lhhcq. Those decisions remain under review by the Office of Tax Appeals, which assumed the Board of Equalization's appellate function.[1] The U.S. Court of Appeals for the Ninth Circuit recently affirmed the dismissal of a lawsuit that Hyatt brought against the members of the FTB and Board of Equalization, seek-

[1] *See* Taxpayer Transparency and Fairness Act, 2017 Cal. Legis. Serv. ch. 16 (A.B. 102) (West).

ing to enjoin further administrative proceedings. *Hyatt* v. *Yee*, 871 F.3d 1067 (9th Cir. 2017).

B. The Nevada Litigation

In January 1998, as the administrative review of the FTB's deficiency assessment was just beginning, Hyatt brought this suit against the FTB in Nevada state court. He alleged that the FTB had committed various torts in the course of auditing his tax returns: negligent misrepresentation, intentional infliction of emotional distress, fraud, invasion of privacy, abuse of process, and breach of a confidential relationship. Pet. App. 8a. Hyatt sought compensatory and punitive damages, as well as a declaratory judgment that he had resided in Nevada during the periods relevant to the FTB's audits. Pet. App. 3a, 8a.

The parties engaged in a long series of discovery battles, ranging from disagreements over the FTB's invocation of the deliberative-process privilege to challenges over the trial court's protective order. Pet. App. 147a-148a. The parties pressed their arguments before a discovery commissioner, the trial court, and, ultimately, the Nevada Supreme Court, which performed a document-by-document assessment to resolve the parties' disputes. Pet. App. 142a, 147a-148a.

The parties also engaged in extensive motion practice. The FTB sought summary judgment on multiple grounds, *see* Pet. App. 9a-10a, including that it was entitled to immunity from suit in Nevada as it would be in California, Pet. App. 142a. Under California law, no public entity may be held liable for "instituting any judicial or administrative proceeding or action for or incidental to the assessment or collection of a tax," or for any "act or omission in the interpretation or application

of any law relating to a tax." Cal. Gov't Code § 860.2. The FTB argued that the Nevada courts were required to grant it the same immunity under the Full Faith and Credit Clause and under principles of sovereign immunity and comity. *Hyatt I*, 538 U.S. at 491-492. The trial court denied that motion. *Id.* at 492.

The FTB then petitioned the Nevada Supreme Court for a writ of mandamus, arguing that it was immune from suit in the Nevada courts. *Hyatt I*, 538 U.S. at 492. The Nevada Supreme Court rejected that claim of complete immunity, noting that in *Nevada* v. *Hall*, 440 U.S. 410 (1979), this Court had held that the Constitution does not grant the States sovereign immunity from suit in the courts of other States. Pet. App. 144a & n.12. The Nevada Supreme Court then ruled that the "FTB should be granted partial immunity equal to the immunity a Nevada government agency would receive," which meant immunity for negligence-based torts but not for intentional torts. Pet. App. 10a.

C. *Hyatt I*

The FTB petitioned for certiorari, arguing that the Full Faith and Credit Clause required Nevada courts to afford it the same immunity that it would have received in California courts. This Court granted certiorari and affirmed, holding that the Full Faith and Credit Clause did not require Nevada to grant the FTB the full immunity that it would have had under California law. *Hyatt I*, 538 U.S. at 496-497.

The Court noted that, in *Nevada* v. *Hall*, it had held that "the Constitution does not confer sovereign immunity on States in the courts of sister States." 538 U.S. at 497. Although *Hall*—which involved tort damages flowing from a traffic accident in California be-

tween a Nevada state employee and residents of California—had left open the possibility that a different result might obtain in a case where one State's exercise of jurisdiction over another State would "interfere with [the defendant State's] capacity to fulfill its own sovereign responsibilities," 440 U.S. at 424 n.24, the Court in *Hyatt I* declined to draw such a distinction, *see* 538 U.S. at 497-499.

D. Trial and Appeal

After this Court's decision in *Hyatt I*, the parties spent the next half decade engaged in extensive discovery and pretrial proceedings in state court. During that time, the parties filed thousands of pages of briefing on challenges to the scope of discovery, the appropriateness of in camera review, and other issues. In addition, the parties took 155 depositions and exchanged more than 168,000 documents.[2]

Finally, in 2008—more than ten years after Hyatt filed suit—the case proceeded to a jury trial that lasted approximately four months. Pet. App. 11a. The Nevada jury found for Hyatt on all claims that were tried and awarded him more than $85 million in damages for emotional distress, $52 million in damages for invasion of privacy, $1 million in damages for fraud, and $250 million in punitive damages. *Id.* The trial court later added $102 million in prejudgment interest, and after appointing a special master to rule on Hyatt's motion for costs—a process that required an additional fifteen months of discovery and even more motion practice—the trial court tacked on an additional $2.5 million to

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[2] *See* Appellants' Br. 26 n.22, *Franchise Tax Board* v. *Hyatt*, No. 53264 (Nev. Aug. 7, 2009), 2009 NV S. Ct. Briefs LEXIS 153.

Hyatt's award, Pet. App. 11a-12a. In total, the judgment against the FTB exceeded $490 million.

The Nevada Supreme Court affirmed in part and reversed in part. *Franchise Tax Bd. of Cal.* v. *Hyatt*, 335 P.3d 125 (Nev. 2014). The court held that Hyatt's claims for invasion of privacy, abuse of process, and breach of a confidential relationship failed as a matter of law, but it affirmed the FTB's liability for fraud and intentional infliction of emotional distress. *Id.* at 130-131. The court also rejected the FTB's argument that it was entitled to the $50,000 statutory damages cap that Nevada law creates for Nevada governmental entities, and thus affirmed the fraud damages that the jury had awarded. *Id.* at 145-147. The court did, however, conclude as a matter of comity that the FTB was immune from punitive damages (as Nevada agencies are). *Id.* at 154. Because of evidentiary errors committed by the trial court, the court remanded for a new trial on the amount of emotional distress damages. *Id.* at 149-153.

E. *Hyatt II*

This Court again granted certiorari, agreeing to consider two questions: whether the Nevada Supreme Court erred by failing to apply to the FTB the statutory immunities available to Nevada agencies, and whether *Nevada* v. *Hall* should be overruled. *Franchise Tax Bd. of Cal.* v. *Hyatt* (*Hyatt II*), 136 S. Ct. 1277, 1280 (2016).

On the first question, the Court held that the Nevada Supreme Court had erred. *Hyatt II*, 136 S. Ct. at 1279. The Court divided equally on whether *Hall* should be overruled. *Id.*

F. Post-Remand Proceedings

On remand from this Court, and after supplemental briefing in which the FTB raised concerns about continuing hostile and discriminatory treatment, the Nevada Supreme Court issued a new opinion. Consistent with this Court's opinion, the Nevada Supreme Court instructed the trial court to enter a damages award for fraud within the statutory cap of $50,000. Pet. App. 107a. The court also held—in a reversal of its prior decision—that a new trial on the amount of damages for intentional infliction of emotional distress was no longer required, because the evidence at trial supported damages on that claim up to the $50,000 cap. Pet. App. 121a-122a. The court thus denied the FTB a jury trial on emotional distress damages by deeming "harmless" evidentiary errors it had previously determined to be prejudicial. *Id.* The court also remanded for consideration of costs. Pet. App. 124a-125a. The court subsequently issued a new opinion on rehearing, reaffirming those holdings, Pet. App. 4a, 41a, 56a, 59a, and clarifying that the statutory damages cap covers prejudgment interest, Pet. App. 3a n.1, 41a, 56a.

SUMMARY OF ARGUMENT

I. *Hall* was wrongly decided. This Court's subsequent precedents make that clear in two ways.

First, whereas the *Hall* majority asked whether the Constitution expressly codified interstate sovereign immunity, this Court has since recognized that is the wrong question. The States retain the degree of sovereign immunity they enjoyed *before* the ratification of the Constitution, unless the Constitution *abrogates* their immunity. The relevant question, then, is whether States enjoyed immunity in each other's courts be-

fore the ratification of the Constitution—and, if so, whether the Framers intended to alter that state of affairs and allow States to be sued in other States' courts.

The historical record shows beyond doubt that the States *did* enjoy immunity in each other's courts in the pre-ratification era and that the Framers had no intention of abrogating that immunity. Rather, participants on all sides of the ratification debates—in the course of discussing whether Article III allowed States to be sued in the new federal courts—assumed without hesitation that States could not be sued in other States' courts. That understanding was confirmed by the outraged reaction to this Court's decision in *Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419 (1793), allowing States to be sued in the neutral federal courts—a reaction that would have made little sense had anyone thought States could be sued in the potentially more hostile courts of other States. And the Framing-era consensus was further confirmed by decisions of this Court and state courts for nearly two centuries preceding *Hall*.

Hyatt has argued that in the Framing era, sovereigns were understood to possess enforceable immunity only in their own courts, not in the courts of other sovereigns. He bases that view on *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116 (1812), which dealt with one nation's amenability to suit in the courts of another nation. But the relevant holding of *The Schooner Exchange*—that a forum nation may choose whether to recognize another nation's sovereign immunity in its courts—says nothing about whether states in a federal union are required to recognize each other's sovereign immunity in their courts. Rather, it reflects the absence of any supranational tribunal that could *force* one nation to respect another's sovereign immunity. The Constitution, by contrast, created a tri-

bunal—this Court—with the power to require one State to respect another's sovereign immunity. *The Schooner Exchange* thus sheds no light on the question presented here.

Second, *Hall* gave little consideration to the constitutional values that are protected by sovereign immunity. As articulated in this Court's subsequent decisions, those values, including States' dignity interests and their citizens' interests in self-government, are inconsistent with the holding of *Hall*. This suit—in which a California state agency has been subjected to astonishing burdens for two decades, and in which a Nevada judge and jury have passed judgment on California's conduct of one of its core sovereign functions—exemplifies why *Hall* cannot be squared with the values the Court has recognized in later decisions.

II. Although this Court is ordinarily and rightly loath to overrule its precedents, the presumption in favor of stare decisis should be overcome here for several reasons.

First, *Hall* is a poorly reasoned decision that is inconsistent with this Court's subsequent precedents in numerous respects. In addition to *Hall*'s inconsistency with the Court's subsequent statements about constitutional interpretation and the values protected by sovereign immunity, *Hall* stands in tension with numerous decisions in which this Court has recognized States' sovereign immunity in forums less potentially hostile to their sovereignty than state courts are to the interests of other States. Since *Hall*, the Court has held that Congress's Article I powers do not allow it to abrogate a State's sovereign immunity from suit on a federal claim in federal court; that state sovereign immunity extends to federal agency adjudications; and that

States are immune from suit on federal claims in the States' *own* courts. The Court has also held that Indian Tribes are immune from suit in state courts, even suits arising from a Tribe's commercial activities. *Hall* is an extreme outlier in the Court's sovereign immunity jurisprudence.

The Court has recognized that, when one of its prior decisions has come to stand out as an outlier, overruling that decision can promote rather than undermine the consistency of this Court's jurisprudence. That is the case here. As a jurisprudential anomaly, *Hall* also has not given rise to a broader line of precedents that would have to be overruled along with it.

Second, the considerations favoring stare decisis are at their lowest ebb here. *Hall* is a constitutional decision, not a statutory one. And because *Hall* addresses a question of sovereign immunity, which does not affect primary conduct, it has given rise to no reliance interests that would be disturbed by overruling it.

Third, *Hall* has had significant harmful effects. This case, for example, has cost the taxpayers of California millions of dollars and has put the State's tax-collection agency through two decades' worth of distractions from its primary mission—a core sovereign function. It has also encouraged copycat complaints by other plaintiffs outside California. And it is just one of many cases in which States have been haled into other States' courts without their consent, often in circumstances presenting serious threats to their dignity and self-government interests. Neither the doctrine of comity nor the possibility of an interstate compact can adequately mitigate those harms.

ARGUMENT

Hall conflicts with the Framing-era understanding of state sovereign immunity and with numerous better reasoned precedents of this Court, which have recognized that state sovereign immunity is inherent in the federal structure of the Union and protects the dignity of the States and the right of the people of the States to govern themselves. There are no compelling reasons to preserve *Hall* in the name of stare decisis. It should be overruled.

I. States Are Constitutionally Immune From Suit In Each Other's Courts

Nevada v. *Hall* arose from a collision in which California residents were injured by a car owned by the State of Nevada, which was being driven by an employee of the University of Nevada on official state business. 440 U.S. 410, 411 (1979). The California residents filed suit in California against the State of Nevada and the university, as well as the driver's estate. *Id.* at 411-412. A California jury awarded the plaintiffs more than $1 million. *Id.* at 413. The State of Nevada and the university petitioned for certiorari, arguing that they were immune from suit in California's courts. This Court held, however, that constitutional principles of sovereign immunity did not preclude one State from being haled into the courts of another against its will. *See id.* at 426-427.

The Court acknowledged that sovereign immunity "[u]nquestionably ... was a matter of importance in the early days of independence." 440 U.S. at 418. It recognized that, at the time of the Framing, the States were "vitally interested" in whether they could be subjected to suit in the new federal courts. *Id.* And it observed that the debates over ratification, as well as later deci-

sions of this Court, reflected "widespread acceptance of the view that a sovereign State is never amenable to suit without its consent." *Id.* at 419-420 & n.20.

The Court nonetheless dismissed this "widespread" Framing-era view as irrelevant to the constitutional question whether States are immune from suit in the courts of their fellow sovereigns. It reasoned that, because the "need for constitutional protection against" the "contingency" of a state defendant's being sued in a court of a sister State was "not discussed" during the constitutional debates, it "was apparently not a matter of concern when the new Constitution was being drafted and ratified." 440 U.S. at 418-419. And it refused to "infer[] from the structure of our Constitution" any protection for sovereign immunity beyond the limits on federal-court jurisdiction explicitly set forth in Article III and the Eleventh Amendment. *Id.* at 421, 426. The Court thus determined that no "federal rule of law implicit in the Constitution ... requires all of the States to adhere to the sovereign-immunity doctrine as it prevailed when the Constitution was adopted." *Id.* at 418. Instead, the Court explained that a State's only recourse is to hope that, as "a matter of comity" and "wise policy," a sister State will make the "voluntary decision" to exempt it from suit. *Id.* at 416, 425-426.

Justice Blackmun dissented, joined by Chief Justice Burger and then-Justice Rehnquist. Those Justices would have held that the Constitution embodies a "doctrine of interstate sovereign immunity" that flows not from "an express provision of the Constitution" but rather from "a guarantee that is implied as an essential component of federalism." 440 U.S. at 430 (Blackmun, J., dissenting). The "only reason why this immunity did not receive specific mention" during ratification, in the

dissenters' view, was that it was "too obvious to deserve mention." *Id.* at 431.

Justice Blackmun also pointed to the swift adoption of the Eleventh Amendment after *Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419 (1793), which had held that citizens of one State could sue another State in federal court without the defendant State's consent. "If the Framers were indeed concerned lest the States be haled before the federal courts," he observed, "how much more must they have reprehended the notion of a State's being haled before the courts of a sister State." 440 U.S. at 431 (Blackmun, J., dissenting). He explained that the "concept of sovereign immunity" that "prevailed at the time of the Constitutional Convention" was "sufficiently fundamental to our federal structure to have implicit constitutional dimension." *Id.*

Justice Rehnquist, joined by Chief Justice Burger, likewise wrote that "when the Constitution is ambiguous or silent on a particular issue, this Court has often relied on notions of a constitutional plan—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." 440 U.S. at 433 (Rehnquist, J., dissenting). "The tacit postulates yielded by that ordering," Justice Rehnquist wrote, "are as much engrained in the fabric of the document as its express provisions, because without them the Constitution is denied force and often meaning." *Id.* He found support for that view in no less foundational a precedent than *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), in which the Court recognized the doctrine of intergovernmental tax immunity notwithstanding the absence of any express provision creating it.

Justice Rehnquist explained that the majority's decision "work[ed] a fundamental readjustment of interstate relationships which is impossible to reconcile ... with express holdings of this Court and the logic of the constitutional plan itself." 440 U.S. at 432-433 (Rehnquist, J., dissenting). The "States that ratified the Eleventh Amendment," Justice Rehnquist wrote, "thought that they were putting an end to the possibility of individual States as unconsenting defendants in foreign jurisdictions," but under the majority's decision they had "perversely foreclosed the neutral federal forums only to be left to defend suits in the courts of other States." *Id.* at 437.

Hall is inconsistent with this Court's subsequent sovereign-immunity precedents, which repudiated two of *Hall*'s foundational premises. First, the Court has rejected *Hall*'s view that any protection for interstate sovereign immunity must be explicitly located in the constitutional text. To the contrary, the Court has repeatedly recognized that States continue to enjoy the immunity they possessed before the ratification of the Constitution, unless the Constitution abrogated that immunity, and thus that the scope of States' immunity must be discerned not just by the constitutional text but by the historical record and the intent of the Framers. *Alden* v. *Maine*, 527 U.S. 706, 713 (1999). Second, the Court has emphasized the importance of state sovereign immunity in safeguarding the dignity and self-government interests of the States—interests neither recognized nor accounted for in *Hall*. *Id.* at 714-715; *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 58 (1996).

A. *Hall* Ignored The Framing-Era Understanding Of Interstate Sovereign Immunity

In *Hall*, as discussed above, the Court refused to "infer[] from the structure of our Constitution" any protection for sovereign immunity beyond the limits on federal-court jurisdiction explicitly set forth in Article III and the Eleventh Amendment. 440 U.S. at 421, 426. The dissenting Justices criticized the majority for its undue focus on the constitutional text to the exclusion of other modes of constitutional interpretation. Subsequent decisions of this Court have made clear that the *Hall* dissenters, and not the majority, employed the correct mode of constitutional interpretation.

First, whereas *Hall* reasoned that neither Article III nor the Eleventh Amendment expressly codified interstate sovereign immunity, 440 U.S. at 421—and refused to "infer[]" such a doctrine "from the structure of our Constitution," *id.* at 426—this Court's decisions have since made clear that "the scope of the States' immunity from suit is demarcated not by the text of the [Eleventh] Amendment alone but by fundamental postulates implicit in the constitutional design," *Alden*, 527 U.S. at 729. In *Tennessee Student Assistance Corp.* v. *Hood*, 541 U.S. 440 (2004), for example, the Court observed that "the States' sovereign immunity is not limited to the literal terms of the Eleventh Amendment." *Id.* at 446. In *Federal Maritime Commission* v. *South Carolina State Ports Authority*, 535 U.S. 743 (2002), the Court described the Eleventh Amendment as just "one particular exemplification of [States' sovereign] immunity." *Id.* at 753. And in *Virginia Office for Protection & Advocacy* v. *Stewart*, 563 U.S. 247 (2011), the Court observed that the Eleventh Amendment merely "confirm[s] the structural understanding that States entered the Union with their sovereign immunity in-

tact." *Id.* at 253; *see also Seminole Tribe*, 517 U.S. at 54; *Blatchford* v. *Native Vill. of Noatak*, 501 U.S. 775, 779 (1991).[3]

It is necessary to look beyond the constitutional text, the Court has explained, because neither the original Constitution nor the Eleventh Amendment "explicitly memorializ[es] the full breadth of the sovereign immunity retained by the States when the Constitution was ratified." *Federal Mar. Comm'n*, 535 U.S. at 753. Indeed, "[t]he Constitution never would have been ratified if the States ... were to be stripped of their sovereign authority except as expressly provided by the Constitution itself." *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 238-239 n.2 (1985).

Second, and relatedly, the Court's post-*Hall* decisions recognize that the way to determine the principles of state sovereign immunity implicit in the constitutional structure is to examine "'history and experience, and the established order of things,'" which "reveal the original understanding of the States' constitutional immunity from suit." *Alden*, 527 U.S. at 726-727 (quoting *Hans* v. *Louisiana*, 134 U.S. 1, 14 (1890)). Whereas *Hall* placed the burden on the State to show that its sovereign immunity was affirmatively and explicitly incorporated into the Constitution, *see* 440 U.S. at 421, the Court has since taken the opposite approach. It has recognized that "the States' immunity from suit is a fundamental aspect of the sovereignty which the

[3] Even decisions before *Hall*—most notably *Hans* v. *Louisiana*, 134 U.S. 1 (1890)—recognized that the constitutional principle of state sovereign immunity is not limited to the express terms of the Eleventh Amendment and is inherent in the federal nature of the Union. *See id.* at 13-15; *see also Monaco* v. *Mississippi*, 292 U.S. 313, 322-323 (1934). *Hall* limited its discussion of *Hans* and *Monaco* to brief citations in footnotes. 440 U.S. at 420 nn.18, 20.

States enjoyed before the ratification of the Constitution," and that the States "retain" the same degree of sovereignty "today ... *except as altered by the plan of the Convention.*" *Alden*, 527 U.S. at 713 (emphasis added). The Court has thus "presum[ed]" that sovereign immunity prohibits "any proceedings against the States that were 'anomalous and unheard of when the Constitution was adopted.'" *Federal Mar. Comm'n*, 535 U.S. at 755.

The Court's more recent precedents thus explain why *Hall* reached the wrong answer: It asked the wrong question. The relevant question is not whether the Constitution explicitly codified interstate sovereign immunity but, rather, whether it abrogated the immunity that States had previously enjoyed in each other's courts.

As discussed below, a considerable body of historical evidence establishes that the Framers did not intend to abrogate States' immunity in the courts of other States. First, States were immune from suit in each other's courts during the pre-ratification era. Second, participants on all sides of the ratification debates agreed that the Constitution did not render States more amenable to suit in the courts of other States than they had been before. Third, the backlash to this Court's decision in *Chisholm*—culminating in the enactment of the Eleventh Amendment—confirmed the consensus that States were immune from suit in other States' courts as well as in the new federal courts. That consensus is further confirmed by pre-*Hall* decisions of this Court and state courts. *Hall* barely engaged with any of this history. *See, e.g.*, Simson, *The Role of History in Constitutional Interpretation: A Case Study*, 70

Cornell L. Rev. 253, 270 (1985) ("[T]he Court in *Hall* gave history far less than its due.").[4]

1. Before the Constitution, States were immune from suit in each other's courts

Before the ratification of the Constitution, it was widely accepted that the States enjoyed sovereign immunity from suit in each other's courts. That was clear from the reaction to *Nathan* v. *Virginia*, 1 U.S. (1 Dall.) 77 (Pa. Ct. Com. Pl. 1781), in which a Pennsylvania citizen sued in the Pennsylvania courts to attach property belonging to Virginia. The suit "raised such concerns throughout the States that the Virginia delegation to the Confederation Congress sought the suppression of the attachment order." *Hall*, 440 U.S. at 435 (Rehnquist, J., dissenting). Virginia "applied to the Supreme Executive Council of Pennsylvania, which directed the state's attorney general, William Bradford, to secure the action's dismissal." Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 Calif. L. Rev. 555, 585 (1994). And

[4] In addition to reflecting a mode of analysis that has been repudiated by this Court's later decisions, the *Hall* Court's inattention to history can at least partly be explained by the manner in which that case was presented to the Court. First, the state-court decision reviewed in *Hall* rejected Nevada's claim of sovereign immunity on grounds different from those embraced by this Court. The California Supreme Court held that a State does "not exercis[e] sovereign power"—and thus is not entitled to immunity—when it acts beyond its borders. *Hall* v. *University of Nevada*, 503 P.2d 1363, 1364 (Cal. 1972). Second, the respondents before this Court largely advanced the argument on which the California Supreme Court had relied and barely addressed the constitutional issues. *See* Resp. Br., *Nevada* v. *Hall*, No. 77-1337, 1978 WL 206995, at *12-16 (U.S. Aug. 16, 1978). The Court thus lacked the robust adversarial presentation that contributes to sound decisionmaking, *see, e.g.*, *Penson* v. *Ohio*, 488 U.S. 75, 84 (1988).

Bradford—who later became Attorney General of the United States under President Washington—urged that the case be dismissed on the ground that each State is a sovereign and that "every kind of process, issued against a sovereign, is a violation of the laws of nations; and is in itself null and void." *Nathan*, 1 U.S. at 78. The Pennsylvania court agreed and dismissed the case. *Id.* at 80.

Nathan marked "a decisive rejection of state suability in the courts of other states," Pfander, 82 Calif. L. Rev. at 587, one with which the Framers were intimately familiar. Not only was the case highly publicized at the time, but James Madison was one of the Virginia delegates who sought its dismissal, and Thomas Jefferson—then Governor of Virginia—took a particular interest in the case as well. *See id.* at 586-587.

Another decision from the same time period—*Moitez* v. *The South Carolina*, 17 F. Cas. 574 (Pa. Adm. 1781) (No. 9,697)—reflects the same understanding of state sovereign immunity. In that case, the crew of a South Carolina ship sued the vessel in admiralty to recover wages they were allegedly due. As in *Nathan*, the Pennsylvania admiralty court dismissed the action because the attached vessel was owned by the "sovereign independent state" of South Carolina. *Id.* at 574; *see* Pfander, 82 Calif. L. Rev. at 587 n.127; *see also 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").

Thus, it was widely accepted before the ratification of the Constitution that States' sovereign immunity from suit extended to proceedings in the courts of other States.

2. The Constitution did not abrogate States' immunity from suit in each other's courts

As discussed above, the relevant question under this Court's post-*Hall* decisions is whether the "the plan of the Convention" "*altered*" the immunity that States enjoyed before ratification, *Alden*, 527 U.S. at 713 (emphasis added)—not whether the Constitution explicitly codified that immunity. The historical evidence from the ratification debates makes clear that the Framers had no desire to strip States of their pre-ratification immunity from suit in the courts of other States. To the contrary, the ratification debates reinforced the pre-ratification understanding of state sovereign immunity.

The question of States' sovereign immunity in the new federal courts was central to the debate over Article III's proposed extension of the "Judicial Power" of the United States to cases "between a State and Citizens of another State," U.S. Const. art. III, § 2, cl. 1. Antifederalists, who assailed that provision of the draft Constitution, based their arguments on the fact that, up to that point, States had not been amenable to suit in *any* court without their consent. For example, the Federal Farmer contrasted Article III's requirement that a State "answer to an individual in a court of law" with the fact that "the states are now subject to no such actions." *Federal Farmer No. 3* (Oct. 10, 1787), *in* 4 *The Founders' Constitution* 227 (Kurland & Lerner eds., 1987). The Antifederalist Brutus similarly attacked Article III for requiring States to "answer in a court of law, to the suit of an individual," noting that "[t]he states are now subject to no such actions." Brutus No. 13 (Feb. 21, 1788), *in* 4 *The Founders' Constitution* 237, 238.

Proponents of ratification offered two conflicting responses, but neither response disputed the premise that suits by a citizen of one State against a different nonconsenting State were unprecedented. One response was offered by Federalists who contended that Article III *did* abrogate state sovereign immunity in such suits in federal court, and who viewed that as a virtue of the new federal courts, for those courts would provide a forum for suits that could not otherwise be brought. Those Federalists argued that Article III provided federal jurisdiction over suits by individuals against States precisely because of the "impossibility of calling a sovereign state before the jurisdiction of another sovereign state." Pendleton, *Speech to the Virginia Ratifying Convention*, *in* 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 549 (Elliot ed., 1836) (hereinafter *Elliot's Debates*).

An alternative response was offered by Federalists who argued, contrary to the Antifederalists' interpretation, that Article III did *not* abrogate state sovereign immunity in suits brought by individuals. But although those leading proponents of ratification took issue with the Antifederalist view of what Article III accomplished, they embraced the premise that a suit by a private individual against a nonconsenting State would be an unprecedented novelty. Indeed, they emphasized the absurdity of such suits as part of the reason Article III did not authorize them in federal court. Alexander Hamilton, for example, wrote that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*," an immunity he characterized as "now enjoyed by the government of every State in the Union." *The Federalist* No. 81, at 511 (Rossiter ed., 1961) (Hamilton). Hamilton added

that such immunity would "remain with the States" absent a "surrender" of it in the Constitution. *Id.* At the Virginia convention, James Madison similarly argued that "[i]t is not in the power of individuals to call any state into court," 3 *Elliot's Debates* 533, and John Marshall claimed that "[i]t is not rational to suppose that the sovereign power should be dragged before a court," *id.* at 555. Although those remarks concerned the jurisdiction of the federal courts to be established under Article III, their references to what is "inherent in the nature of sovereignty" and the relative powers of individuals and sovereigns "most plausibly included suits in the courts of another state" as well. Woolhandler, *Interstate Sovereign Immunity*, 2006 Sup. Ct. Rev. 249, 256-257.

In short, although the ratification debates focused on whether States would be subject to suit in federal court, the tenor of the debates made clear that the Framers fully intended for States to remain immune from suit in the courts of other States. Article III was thus "enacted against a background assumption that the states could not entertain suits against one another." Woolhandler, 2006 Sup. Ct. Rev. at 263; *see also id.* at 253 (interstate sovereign immunity was a "foundation on which all sides of the framing era debates" premised their arguments regarding the reach of Article III). As Justice Blackmun recognized in his dissent from *Hall*, the "only reason" why interstate sovereign immunity was not specifically discussed during the ratification debates "is that it was too obvious to deserve mention." 440 U.S. at 431 (Blackmun, J., dissenting).

3. The history of the Eleventh Amendment confirms the understanding that States were immune in each other's courts

The Framing-era understanding of interstate sovereign immunity was confirmed by the reaction to this Court's decision in *Chisholm* v. *Georgia* that States could be sued in federal court, without their consent, by citizens of another State. As one historian put it, that decision "fell upon the country with a profound shock." 1 Warren, *The Supreme Court in United States History* 96 (rev. ed. 1926). That description was if anything an understatement of the reaction within state capitols. The Massachusetts Legislature denounced *Chisholm* as "repugnant to the first principles of a federal government," while the Georgia House of Representatives made any effort to enforce *Chisholm* a felony punishable by death "without benefit of clergy." *See Alden*, 527 U.S. at 720-721. The backlash culminated in the enactment of the Eleventh Amendment, which provided that the federal judicial power did not extend to suits "against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.

The uprising against *Chisholm* confirmed the depth and breadth of the understanding that States could not be sued by individuals, without their consent, in *any* courts—not their own, not the federal courts, and certainly not another State's courts. The Connecticut legislature, for example, pronounced its desire that "speedy and effectual measures be adopted to procure an alteration" of the Constitution to make clear that "no State can on any Construction be held liable ... to make answer in any Court, on the Suit, of any Individual or Individuals whatsoever." *Resolution of the Connecticut General Assembly* (Oct. 29, 1793), *in* 5 *The Docu-*

mentary History of the Supreme Court of the United States, 1789-1800, at 609 (Marcus ed., 1994) (hereinafter *Documentary History*). The Virginia legislature declared that "a state cannot ... be made a defendant at the suit of any individual or individuals." *Proceedings of the Virginia House of Delegates* (Nov. 28, 1793), *in* 5 *Documentary History* 338, 339 n.1. The South Carolina Senate stated that "the power of compelling a State to appear, and answer to the plea of an individual, is utterly subversive of the separate dignity and reserved independence of the respective States." *Proceedings of the South Carolina Senate* (Dec. 17, 1793), *in* 5 *Documentary History* 610-611. And John Hancock, in a speech to the Massachusetts General Court, rejected the idea that "each State should be held liable to answer ... to every individual resident in another State or in a foreign kingdom." *John Hancock's Address to the Massachusetts General Court* (Sept. 18, 1793), *in* 5 *Documentary History* 416.

The notion that the Framing generation would so strongly and universally condemn suits brought by citizens of one State against another State in the neutral federal courts, while tolerating such suits in the plaintiffs' home-state courts, strains credulity. As the *Hall* dissenters emphasized, the objectors to *Chisholm* were hardly embracing the view that Georgia could not be sued by Chisholm in federal court but *could* be sued by Chisholm in South Carolina state court. Although the Eleventh Amendment does not explicitly address interstate sovereign immunity, it shows that such immunity was assumed: "If the Framers were indeed concerned lest the States be haled before the federal courts—as the courts of a 'higher sovereign'—how much more must they have reprehended the notion of a State's being haled before the courts of a sister State."

Hall, 440 U.S. at 431 (Blackmun, J., dissenting) (citation omitted). By immunizing States from suit in the neutral forum of the federal courts, while leaving open the possibility of their being sued in the potentially hostile courts of another State, *Hall* "makes nonsense of the effort embodied in the Eleventh Amendment to preserve the doctrine of sovereign immunity." *Id.* at 441 (Rehnquist, J., dissenting).

4. Pre-*Hall* decisions of this Court and other courts reflect the Framing-era consensus

This Court's pre-*Hall* decisions reflect the Framing-era understanding that nonconsenting States could not be subject to suit anywhere, including in other States' courts. In *Beers* v. *Arkansas*, 61 U.S. (20 How.) 527 (1857), for example, the Court stated that it "is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, *or in any other*, without its consent and permission." *Id.* at 529 (emphasis added). In *Cunningham* v. *Macon & Brunswick Railroad Co.*, 109 U.S. 446 (1883), the Court stated with equal clarity that "neither a state nor the United States can be sued as defendant in any court in this country without their consent." *Id.* at 451. In *Hans* v. *Louisiana*, the Court observed that "[t]he suability of a State without its consent was a thing unknown to the law" at the time the Constitution was ratified, and that "the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States." 134 U.S. 1, 15-16 (1890). And in *Western Union Telegraph Co.* v. *Pennsylvania*, 368 U.S. 71 (1961), the Court held that because the State of New York was a necessary party to proceedings commenced in the Pennsylvania courts,

those proceedings had to be dismissed, since the Pennsylvania courts had "no power to bring other States before them." *Id.* at 80.

States recognized the same principle. In *Paulus* v. *South Dakota*, 227 N.W. 52 (N.D. 1929), for example, the North Dakota Supreme Court affirmed the dismissal of a citizen's suit against a sister State. "[S]o carefully ha[d] the sovereign prerogatives of a state been safeguarded in the Federal Constitution," it held, that "no state could be brought into the courts of the United States at the suit of a citizen of another state." *Id.* at 54-55. It added that involuntarily haling one State into the courts of a sister State would be inconsistent "with any sound conception of sovereignty." *Id.* at 55. Likewise, when New Hampshire wanted to help its citizens recover debts owed by other States, it did not assert a power to entertain suits against sister States in its own courts; rather, it enacted a statute allowing citizens to assign to the State claims that the State would then pursue in original actions before this Court. *See New Hampshire* v. *Louisiana*, 108 U.S. 76, 88-89 (1883).

That pre-*Hall* understanding of interstate sovereign immunity is confirmed by the surprised reaction of state supreme courts to the decision in *Hall*. The New York Court of Appeals remarked, a year after *Hall*, that it had been "long thought that a State could not be sued by the citizens of a sister State except in its own courts." *Ehrlich-Bober & Co.* v. *University of Houston*, 404 N.E.2d 726, 729 (N.Y. 1980). The Iowa Supreme Court likewise noted that "[f]or the first two hundred years of this nation's existence it was generally assumed that the United States Constitution would not allow one state to be sued in the courts of another state," because "this immunity was an attribute of state sovereignty that was preserved in the Constitution."

Struebin v. *State*, 322 N.W.2d 84, 85 (Iowa 1982). And the Delaware Supreme Court later observed that "[f]or almost two hundred years, it had been assumed that the United States Constitution implicitly prohibited one state from being sued in the courts of another state—just as the Eleventh Amendment explicitly prohibited states from being sued in federal courts." *Kent Cty.* v. *Shepherd*, 713 A.2d 290, 297 (Del. 1998).

5. Hyatt's reliance on *The Schooner Exchange* is unavailing

1. Hyatt's brief in opposition to certiorari argued (at 12-14) that the pre-ratification understanding of state sovereign immunity does *not* support the conclusion that States are immune from suit in each other's courts, because it distinguished "between a state's sovereignty in its own courts and its sovereignty in the courts of another sovereign." The latter, Hyatt argued, was purely a matter of comity and not a legal right. Hyatt based that argument on this Court's decision in *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116 (1812). Hyatt's argument misinterprets *The Schooner Exchange*, which addresses relations among independent nations and sheds no light on the distinct question of interstate sovereign immunity under our constitutional structure.

The Schooner Exchange addressed whether a federal court in Pennsylvania could exercise jurisdiction over a ship in which Napoleon, the French emperor, claimed ownership. The plaintiffs, two Americans, alleged that the ship belonged to them and had been wrongfully seized by Napoleon's forces after it sailed from Baltimore to Spain; they sued to recover it once it had sailed back to Philadelphia. 11 U.S. at 117. This Court held that a nation possesses "exclusive and abso-

lute" jurisdiction "within its own territory" and that "[a]ll exceptions" to that jurisdiction "must be traced up to the consent of the nation itself." *Id.* at 136. But it recognized "a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction," *id.* at 137, and held that the disputed ownership of the vessel in question fell within that class, so that the federal court lacked jurisdiction, *id.* at 146-147.

The Schooner Exchange supports the view that nations lack any judicially enforceable obligation to respect the sovereign immunity of other nations that are sued in their courts. But that proposition simply reflects the absence of any supranational tribunal that could enforce one nation's rights against another. Because a forum nation cannot be forced to recognize a defendant nation's sovereign immunity, its choice whether to do so depends on a set of considerations sometimes referred to as comity—"standards of public morality, fair dealing, reciprocal self-interest, and respect for the 'power and dignity' of the foreign sovereign." *National City Bank*, 348 U.S. at 362. Nor, conversely, are defendant nations limited to legal recourses if the nation in whose courts they are sued chooses not to respect their sovereign immunity. Rather, the defendant nation may avail itself of recourses like "the negotiation of treaties, the exchange of ambassadors, and, if necessary, ... war." Pfander, 82 Calif. L. Rev. at 583; *see also* Vattel, *The Law of Nations or the Principles of Natural Law*, bk. IV, ch. VII § 102 (1758) (Fenwick trans., 1916) (the "proper course" to punish a "State which had violated the Law of Nations" was "public war").

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.[5] But in that respect, the Constitution *did* change the pre-ratification relationship among the States, by creating exactly the sort of neutral tribunal among the States that is lacking among nations—this Court. If the courts of one State entertain a suit against another State, the defendant State now has recourse to this Court to vindicate its sovereign immunity. And just as the Constitution created that judicial enforcement mechanism, it withdrew from States the extrajudicial recourses available to nations, as well as the ability to refuse to recognize the judgment of another State. *See* U.S. Const. art. I, § 10 (prohibiting States from entering into treaties, imposing import duties, or waging war); *id.* art. IV, § 1 ("Full Faith and Credit shall be given in each State to the ... judicial Proceedings of every other State."); *Kansas* v. *Colorado*, 185 U.S. 125, 141 (1902) (traditional "remedies resorted to by independent states for the determination of controversies raised by collision between them" were "withdrawn from the states by the Constitution"); Smith, *States As Nations: Dignity in Cross-Doctrinal Perspective*, 89 Va. L. Rev. 1, 92 (2003) (the Constitution "specifically divested the states of the traditional sovereign powers of diplomacy"). The Constitution thus substituted a judicial means of enforcing interstate sovereign immunity for the extrajudicial options available to independent nations. *See* Rogers,

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[5] That is why, when Virginia was sued in Pennsylvania's courts before the ratification of the Constitution (*see supra* pp. 21-22), it "followed the usual diplomatic course" in seeking the dismissal of the suit: "[I]t applied to the Supreme Executive Council of Pennsylvania, which directed the state's attorney general ... to secure the action's dismissal," on the ground that it "violated the law of nations." Pfander, 82 Calif. L. Rev. at 585-586.

Applying the International Law of Sovereign Immunity to the States of the Union, 1981 Duke L.J. 449, 468 (this Court was envisioned as a "substitute" for the "methods that sovereign states use to enforce their rights under international law," such as "diplomacy and war").

Because the Constitution allows States to vindicate their sovereign immunity against other States in a way that independent nations cannot, *The Schooner Exchange*—which reflected the absence of an enforcement mechanism in the international context—has no bearing on the issue of interstate sovereign immunity. That is why, in the 167 years between *The Schooner Exchange* and *Hall*, no federal or state court cited *The Schooner Exchange* as even tangentially relevant to the question whether States are immune from suit in the courts of other States.

If *The Schooner Exchange* were read to mean that States may freely choose to entertain suits against other States, it would be inconsistent with the long historical understanding to the contrary, discussed above. And such an interpretation would run perversely counter to the constitutional plan, by undermining the Framers' effort to calm the interstate tensions that prevailed under the Articles of Confederation. *See, e.g.*, Clark, *The Eleventh Amendment and the Nature of the Union*, 123 Harv. L. Rev. 1817, 1873-1874 (2010) (the Framers drafted Article III with an eye toward resolving interstate disputes peacefully). If Hyatt were correct that States could choose to entertain suits brought by their citizens against other States, then a decision by one State's courts to hear a dispute involving another State could give rise to exactly the kind of simmering resentment, or reprisal, that the Framers hoped to avoid.

2. Hyatt further argues (Opp. 15-16) that States have a sovereignty interest in hearing disputes that arise within their borders, including disputes against other States. That is true. But in a federal union, that sovereignty interest is not unqualified, and it must be reconciled with another weighty sovereignty interest: each State's immunity from suit in the courts of other States. There is little question which of those competing interests carried greater weight at the time the Constitution was ratified, and equally little question which interest the States prefer to protect today.

As discussed above, the Framing generation thought it anathema that one State might be subjected to suit in another's courts—hence the reaction to *Nathan* v. *Virginia*, in which a Pennsylvania citizen sought to attach Virginia's property in the Pennsylvania courts. *See supra* pp. 21-22. Virginia was not the only State with sovereignty interests at stake in *Nathan*; Pennsylvania had an interest in adjudicating a suit arising within its borders. But no one thought that interest should outweigh Virginia's. To the contrary, Pennsylvania's own attorney general, at the direction of the State's Supreme Executive Council, urged the dismissal of the suit. *Id.* The Framers' purpose was to knit the States together into a federal union that would protect each State's sovereignty while permitting the States to resolve disputes amicably. *See* Hill, *In Defense of Our Law of Sovereign Immunity*, 42 B.C. L. Rev. 485, 582-583 (2001). That goal is advanced by recognizing Virginia's immunity from suit in Pennsylvania; it would be considerably threatened by prioritizing Pennsylvania's ability to hear a suit against Virginia.

Furthermore, the States' overwhelming support for overruling *Hall*—as evidenced by the amicus brief in support of certiorari filed by 45 States—makes clear

which sovereignty interest States prefer to vindicate today. Given the extraordinary burdens that States face when haled into the courts of another State, it is little surprise that States care more about avoiding those burdens than they do about allowing their courts to adjudicate each and every dispute that arises within their borders.

This compromise of one sovereignty interest in favor of another was not thrust upon the States; it was part and parcel of every State's choice to ratify the Constitution. As the Court recognized in *The Schooner Exchange*, a nation can "consent" to "exceptions ... to the full and complete power" of its courts within its borders. 11 U.S. at 136. By entering into the federal compact, the States chose to give up a part of their sovereign power to adjudicate disputes. In particular, the States relinquished jurisdiction (or allowed Congress to limit their jurisdiction) where adjudication in state court would be inconsistent with the federal structure. Thus, for example, the States accepted that only this Court may adjudicate disputes between States, U.S. Const. art. III, § 2, cl. 1, and that Congress may channel suits against the federal government, federal officers, foreign states, and ambassadors into the federal courts (as it ultimately chose to do, *see, e.g.*, 28 U.S.C. §§ 1251, 1346, 1441, 1442, 2409a).[6] It is likewise inconsistent with the federal structure of the Union for a State's courts to exercise jurisdiction over another State with-

[6] Similarly, when the States ratified the Fourteenth Amendment, they accepted that the Due Process Clause limits their authority to exercise jurisdiction over cases lacking a territorial connection to the State. *See, e.g., J. McIntyre Mach., Ltd.* v. *Nicastro*, 564 U.S. 873, 879-881 (2011) (plurality opinion); *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 291-292, 294 (1980).

out the defendant State's consent, and the States thus impliedly agreed to cede jurisdiction over such suits.

In sum, *Hall* was wrongly decided because it ignored the Framing-era understanding of interstate sovereign immunity. *Hall* focused on the question whether the Constitution expressly codified that immunity, whereas this Court's later precedents have made clear that the relevant question is whether the Framers intended to *abrogate* the immunity the States enjoyed before ratification. The historical evidence clearly shows they did not.

B. Post-*Hall* Decisions Have Clarified The Constitutional Values That *Hall* Flouts

Aside from its failure to consider the Framing-era consensus regarding interstate sovereign immunity, *Hall* also gave little consideration to the constitutional *values* that are protected by state sovereign immunity in a federal union. To the extent *Hall* addressed the reasons for state sovereign immunity at all, it suggested incorrectly that they were limited to the protection of States' financial interests. *See* 440 U.S. at 418 (noting that "[m]any of the States were heavily indebted as a result of the Revolutionary War"). Although the States' financial integrity is certainly one reason for state sovereign immunity, later decisions, especially *Alden*, have underscored the importance of two additional principles underlying sovereign immunity that are inconsistent with *Hall*.

First, "[t]he generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity." *Alden*, 527 U.S. at 715; *cf. Michigan* v. *Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2039 (2014) ("Sovereignty implies immunity from

lawsuits."). The States had attained the status of independent nations as a consequence of the Revolution, and the Constitution ensured that, except as surrendered in the plan of the Convention, the States would retain their sovereignty "together with the dignity and essential attributes inhering in that status." *Alden*, 527 U.S. at 714; *see id.* at 749.

The States' dignity interests as sovereigns, though given little attention by *Hall*, have been uniformly recognized by the Court's later decisions as a fundamental feature of state sovereign immunity. In *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), for example, the Court explained that sovereign immunity "is designed to protect" "the dignity and respect afforded a State." *Id.* at 268; *see also Seminole Tribe*, 517 U.S. at 58 ("The Eleventh Amendment ... serves to avoid 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties[.]'"); *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (the Eleventh Amendment "accords the States the respect owed them as members of the federation"). Indeed, the Court has characterized the protection of States' "dignity[,] ... consistent with their status as sovereign entities," as "[t]he *preeminent* purpose of state sovereign immunity." *Federal Mar. Comm'n*, 535 U.S. at 760 (emphasis added).

Second, and equally important, is the Court's recognition that state sovereign immunity promotes self-government by the citizens of the States. "When the States' immunity from private suits is disregarded, 'the course of their public policy and the administration of their public affairs' may become 'subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests.'"

Alden, 527 U.S. at 750 (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)). The Court has recognized since *Hall* that, "[i]f the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government"—and certainly not by judicial decree of another State. *Alden*, 527 U.S. at 751.

This case well illustrates how *Hall* disserves the interests that state sovereign immunity is supposed to protect. California has been subjected to an astonishing intrusion on its dignity, as well as the concrete burdens of litigation, by being forced to defend the conduct of a state agency in the courts of another State. This litigation required years of discovery and a four-month trial, and it resulted in a judgment against the FTB of nearly $500 million. *Franchise Tax Bd. of Cal.* v. *Hyatt* (*Hyatt II*), 136 S. Ct. 1277, 1280 (2016). The judgment was eventually reduced by the Nevada Supreme Court and this Court on the basis of constitutional and comity concerns, *see id.* at 1280, 1282-1283—but the FTB *still* faces a judgment of $100,000, with the potential for Hyatt to seek costs in a remand proceeding that could itself spawn further appeals, Pet. App. 65a-66a.

California has also suffered harm to its citizens' interest in self-government. In *Alden*, as noted above, the Court recognized a State's immunity in its own courts, partly on the basis that a State's "'administration of [its] public affairs'" could otherwise "become 'subject to and controlled by the mandates of judicial tribunals ... and in favor of individual interests.'" 527 U.S. at 750. If that danger was present where Maine's conduct was subject to review in its own courts, it is even clearer here, where the actions of a California

agency have been litigated before Nevada judges and jurors who lacked any incentive to consider the burden that a large financial sanction would impose on California's taxpayers.

None of this would have been possible in the courts of California, which, like many sovereigns, does not permit tort suits against its state agencies for alleged injuries arising from their tax-assessment activities. *See* Cal. Gov't Code § 860.2; *cf.* 28 U.S.C. § 2680(c) (no waiver of federal sovereign immunity for "[a]ny claim arising in respect of the assessment or collection of any tax").

II. STARE DECISIS DOES NOT JUSTIFY MAINTAINING *HALL*

Although this Court is ordinarily loath to overrule its precedents, "[*s*]*tare decisis* is not an inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision.'" *Payne* v. *Tennessee*, 501 U.S. 808, 828 (1991). In particular, "*stare decisis* does not prevent [the Court] from overruling a previous decision where there has been a significant change in, or subsequent development of, ... constitutional law." *Agostini* v. *Felton*, 521 U.S. 203, 235-236 (1997). As explained above, this Court's sovereign-immunity decisions since *Hall* have undermined *Hall*'s reasoning and left it an outlier.

Moreover, none of the other stare decisis factors counsels against overruling *Hall*. *Hall* does not involve a statutory interpretation, which the Court is ordinarily more reluctant to overrule. *Hall* has given rise to no reliance interests. And *Hall* has proven impracticable in its "real world implementation," *South Dakota* v. *Wayfair, Inc.*, 138 S. Ct. 2080, 2097 (2018).

A. The Court's Post-*Hall* Jurisprudence Has Left *Hall* An Outlier

"[T]he Court has not hesitated to overrule an earlier decision" where "intervening development of the law" has "removed or weakened the conceptual underpinnings [of] the prior decision" or "rendered the decision irreconcilable with competing legal doctrines or policies." *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 173 (1989); *see also, e.g.*, *United States* v. *Gaudin*, 515 U.S. 506, 521 (1995). A decision is properly overruled, the Court has explained, where the "development of constitutional law since the case was decided has implicitly or explicitly left [it] behind as a mere survivor of obsolete constitutional thinking." *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 857 (1992). The development of sovereign-immunity doctrine since *Hall* is thus reason enough to overturn that decision.

As explained above (at 18-20), this Court's more recent cases have rejected the key "conceptual underpinning[]" of *Hall*—namely the idea that a State's sovereign immunity is limited to the express terms of the Constitution. *Hall* is also inconsistent with the Court's recognition in more recent decisions of the values underlying the doctrine of sovereign immunity. *See supra* pp. 36-39. *Hall* thus represents an outmoded way of thinking and is "no more than a remnant of abandoned doctrine." *Casey*, 505 U.S. at 855.

Hall is also out of step with this Court's recognition of state sovereign immunity in other contexts. Even at the time *Hall* was decided, it created a striking anomaly in this Court's sovereign immunity jurisprudence: States could not be sued in their own courts, or in the neutral federal courts, but could be sued in the poten-

tially hostile courts of sister States. That anomaly has grown even more glaring over time, as the Court has decided case after case expanding the reach of sovereign immunity for States and Indian Tribes.

Since *Hall*, for example, the Court has held that Congress's Article I powers do not allow it to abrogate a State's sovereign immunity from suit on a federal claim in federal court. *See Seminole Tribe*, 517 U.S. at 47. The Court has also held that state sovereign immunity extends to federal agency adjudications. *Federal Mar. Comm'n*, 535 U.S. at 747. And it has immunized States against federal claims brought by individuals in the defendant State's own courts. *Alden*, 527 U.S. at 712. Those decisions, when contrasted with *Hall*, have created a "bizarre state of doctrinal affairs" in which "the states have more authority with respect to each other than the federal government has with respect to the states." Smith, 89 Va. L. Rev. at 101. Even as the Court has recognized the constitutional imperative to shield States from litigation in one tribunal after another, it has exempted from that otherwise consistent doctrinal progression the single type of forum potentially most hostile to a State's interests—the courts of another State.

It is also hard to reconcile *Hall* with this Court's decisions recognizing the sovereign immunity of Indian Tribes. The Court has long held that Tribes possess "the 'common-law immunity from suit traditionally enjoyed by sovereign powers.'" *Bay Mills*, 134 S. Ct. at 2030. It had applied that immunity even before *Hall* to suits against Tribes by States, even when brought in the plaintiff State's own courts. *See id.* at 2031 (citing prior cases). After *Hall*, the Court held that a Tribe's immunity extends even to "suits arising from [its] commercial activities, even when they take place off

Indian lands." *Id.* (citing *Kiowa Tribe of Okla.* v. *Manufacturing Techs., Inc.*, 523 U.S. 751 (1998)). The Court reaffirmed that holding in *Bay Mills*. *Id.* at 2036-2039. Those decisions have created what several Justices have recognized as a "striking[] anomal[y]"—that is, that Tribes have "broader immunity than the States," *Kiowa*, 523 U.S. at 765 (Stevens, J., dissenting, joined by Thomas and Ginsburg, JJ.), even though they arguably possess less sovereignty than the States, *see Bay Mills*, 134 S. Ct. at 2030-2031 (noting the "qualified nature of Indian sovereignty").

To be sure, as this Court has refined its sovereign immunity jurisprudence, it has occasionally felt the need to distinguish *Hall*. For example, in recognizing a State's immunity from suit in its own courts even for a federal cause of action, *Alden* rejected the federal government's extensive reliance on *Hall* and found *Hall* distinguishable. *See* 527 U.S. at 738-739. But nothing in *Alden* suggests *Hall* was correct. To the contrary, *Alden*'s understanding of the constitutional underpinnings of sovereign immunity is irreconcilable with *Hall*'s view of the Eleventh Amendment as divorced from broader sovereign immunity principles. *See* Fallon et al., *Hart & Wechsler's The Federal Courts & The Federal System* 976 n.2 (7th ed. 2015) (noting the "difficulty of reconciling *Hall*'s rationale with that of *Alden*"); *see also* Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 Notre Dame L. Rev. 1011, 1037 n.110 (2000).

In short, *Hall* cannot be reconciled with this Court's subsequent decisions, which have emphasized the need to look beyond the constitutional text to consider the historical understanding of state sovereign immunity, articulated the values that state sovereign immunity protects, and recognized the immunity of

States in contexts that pose less of a threat to sovereignty than allowing States to be haled into the courts of other States. Because *Hall* is a jurisprudential outlier, it can be overruled without threatening other precedents.

B. Stare Decisis Has Little Force Here Because *Hall* Is A Constitutional Decision That Has Not Engendered Reliance Interests

The other stare decisis factors, moreover, provide the Court no reason to perpetuate *Hall*'s error merely for the sake of consistency.

First, stare decisis "is at its weakest" when, as in *Hall*, the Court "interpret[s] the Constitution." *Agostini*, 521 U.S. at 235. In such cases, only the Court can correct the error of a prior decision, because "correction through legislative action is practically impossible." *Payne*, 501 U.S. at 828 (internal quotation marks omitted).

Second, stare decisis is further weakened here—more than in many cases involving constitutional issues—because sovereign immunity "does not alter primary conduct," *Hohn* v. *United States*, 524 U.S. 236, 252 (1998), and rules governing sovereign immunity therefore do not engender reliance interests. "Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved." *Payne*, 501 U.S. at 828; *see also State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997). Here, by contrast, no parties "have acted in conformance with existing legal rules in order to conduct transactions," *Citizens United* v. *FEC*, 558 U.S. 310, 365 (2010), or have otherwise conducted their lives in a

manner that assumes the continuing vitality of a constitutional precedent.

C. *Hall* Has Proven Harmful In Practice

The decades since *Hall* have also exposed that decision's "practical deficiencies," *Montejo* v. *Louisiana*, 556 U.S. 778, 792 (2009), and the extent to which it undermines the values underlying the sovereign-immunity doctrine. None of Hyatt's proposed workarounds can cure the problems *Hall* creates.

1. This case exemplifies the damage that suits permitted by *Hall* can cause.

One purpose of sovereign immunity is to "shield[] state treasuries" from private litigants. *Federal Mar. Comm'n*, 535 U.S. at 765; *see also Alden*, 527 U.S. at 750 ("Private suits against nonconsenting States—especially suits for money damages—may threaten the financial integrity of the States."). Yet Hyatt has forced California to spend vast sums of taxpayer money defending itself. From its filing to the first day of trial, Hyatt's suit dragged California through ten years of litigation. Once the case finally reached trial, the Nevada jury was happy to side with a fellow Nevadan against the California tax authorities and award him some $388 million in damages, which the Nevada trial court raised to more than $490 million after costs and interest. Since trial, California has spent another ten years fighting that verdict, and it will face additional proceedings on remand if this Court upholds *Hall*. And although appeals succeeded in trimming the trial court's half-billion-dollar judgment, the prospect of any damages award against California "place[s] unwarranted strain on [its] ability to govern in accordance with the will of [its] citizens." *Alden*, 527 U.S. at 750-751.

Such damages awards necessarily crowd out "other important needs and worthwhile ends" that California's public fisc must fund. *Id.* at 751.

Another purpose of sovereign immunity, as discussed above, is to protect the "dignity and respect" States are owed in our federal union. *E.g.*, *Coeur d'Alene Tribe*, 521 U.S. at 268. This suit has offended that purpose as well, by forcing California to submit its official conduct to the review of another State's judiciary and jury. And that harm is exacerbated because the conduct in question involves taxation, which "is an essential attribute of sovereignty," *Railroad Co.* v. *Maine*, 96 U.S. 499, 508 (1877). In short, this case shows how *Hall* imposes "substantial costs" on "the autonomy, the decisionmaking ability, and the sovereign capacity" of the State in conducting a core sovereign function, *Alden*, 527 U.S. at 750.[7]

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[7] This case may not even fully represent the extent of *Hall*'s harmful effects in the long-running dispute between Hyatt and the FTB. In the California administrative proceedings, Hyatt alleged that the FTB has committed "continuing bad faith act[s]," suggesting he may yet try to bring another tort action against the FTB in Nevada. *See* Pet. Nev. S. Ct. Req. for Judicial Notice at RJN-094 (Dec. 5, 2016) (Hyatt's brief before California State Board of Equalization arguing that "[a]ssertion of the 1992 fraud penalties is a continuing bad faith act by FTB"); *id.* at RJN-103 to RJN-134 (describing the FTB's alleged "continuing bad faith conduct").

Furthermore, in case there were any doubt that suits of this nature disrupt a State's execution of its sovereign responsibilities, this case has already been used to encourage California residents to move to Nevada for tax-avoidance purposes, on the view that it "should temper the FTB's aggressiveness in pursuing cases against those disclaiming California residency." Grant, *Moving from Gold to Silver: Becoming a Nevada Resident*, Nev. Lawyer, Jan. 2015, at 24 & n.9.

This suit has also encouraged others outside California to file similar complaints, raising the prospect of comparable litigation that would only compound the costs imposed by Hyatt's suit. For example, another taxpayer sued the FTB on fraud claims in Washington state court in 2015; more than three years later, that suit remains pending. *See* Compl., *Satcher* v. *California Tax Franchise Bd.*, No. 15-2-00390-1 (Wash. Super. Ct., Skagit Cty. Mar. 20, 2015); Status Report, *Satcher*, No. 16-2-00194-0 (July 30, 2018). Such copycat suits are regrettable yet, given *Hall*, unsurprising. Sovereign governments undertake many responsibilities that are inherently unpopular. Taxation is near the top of that list, which is why California and other jurisdictions decline to waive their sovereign immunity over tax disputes. *See, e.g.*, Cal. Gov't Code § 860.2; Nev. Rev. Stat. § 372.670; 28 U.S.C. § 2680(c). *Hall* has provided taxpayers with an avenue to skirt that immunity and disrupt the taxing authority.

California is not alone in facing *Hall*'s consequences. States are regularly haled into the courts of a sister State against their will, and (unlike in *Hall* itself) those suits often challenge acts of public policy, thus striking at the heart of the dignity and self-government concerns underlying sovereign immunity. Recently, for example, Nevada has been sued without its consent in the California courts. The pending petition for certiorari in *Nevada Department of Wildlife* v. *Smith*, No. 17-1348 (U.S. Mar. 21, 2018), arises from a suit against Nevada Department of Wildlife officials in California court, alleging torts arising from a wildlife training presentation to California law enforcement officials; Nevada asks the Court to overrule *Hall* even though its own courts exercised jurisdiction over the FTB in this case. In another case against Nevada, the plain-

tiff—demanding monetary and equitable relief—challenged Nevada's policy of providing bus vouchers to indigent patients discharged from state-run medical facilities, who occasionally used them to travel to California. Pet. for Cert. i, *Nevada* v. *City & Cty. of San Francisco*, No. 14-1073 (U.S. Mar. 4, 2015), *cert. denied*, 135 S. Ct. 2937 (2015). A 2015 settlement agreement required Nevada to pay out of the state treasury and to alter its state policy—intrusions of the sort that sovereign immunity is meant to prevent. *See* Decl. of Kristine Poplawski, *City & Cty. of San Francisco* v. *Nevada*, No. CGC-13-534108 (Cal. Super. Ct., San Francisco Cty. Dec. 3, 2015).

Nor is Nevada the only other State that has been sued without its consent in cases that implicate its sovereignty interests. In *Faulkner* v. *University of Tennessee*, 627 So. 2d 362 (Ala. 1992), for example, a former graduate student at the University of Tennessee asked an Alabama court to stop the university from revoking his doctoral degree after it determined that his dissertation did not contain original work. *Id.* at 363-364. The Supreme Court of Alabama ruled that the courts should exercise jurisdiction over the case because the University of Tennessee is not subject "to the will of the democratic process in Alabama," *id.* at 366—thus subjecting it, rather perversely, to the control of the Alabama courts. And in *Head* v. *Platte County*, 749 P.2d 6 (Kan. 1988), the Supreme Court of Kansas held that state courts should exercise jurisdiction over a suit alleging that a Missouri county and Missouri officials failed to train employees and establish policies concerning the execution of arrest warrants, thus permitting Kansas courts to decide which policies Missouri law enforcement officials should or should not adopt. *Id.* at 7-10. The States that supported certiorari in this case

supplied numerous other examples. Br. of Indiana and 44 Other States as Amici Curiae in Support of Pet'r 8-10. In each of those cases, *Hall* allowed state courts to interfere with the public policy choices made by another State.

2. Hyatt's brief in opposition to certiorari argued (at 12, 17) that any detrimental effects of *Hall* can be mitigated through the "voluntary doctrine of comity." But this case—which, ironically, Hyatt cited as an example of the proper functioning of that doctrine—demonstrates the inadequacy of relying on comity to protect the values underlying sovereign immunity. Comity has not saved the FTB from the burdens of litigation or prevented the Nevada courts from interjecting themselves into the tax-collection process here. And even where a state court decides to grant protection to another State on comity grounds, that protection may take years of litigation to obtain and is often less than what the State would have in its own courts. For example, in *Sam* v. *Sam*, 134 P.3d 761 (N.M. 2006), which Hyatt cited (Opp. 12), the defendant—an Arizona governmental trust—had to litigate for nearly five years before the New Mexico Supreme Court decided that it was entitled to the two-year statute of limitations afforded to New Mexico's government entities (but not the one-year statute of limitations that Arizona courts would have applied). Comity is no substitute for a clear rule of sovereign immunity, which allows a defendant State to terminate litigation quickly and without incurring the extraordinary costs seen in this case, in *Sam*, and in many other cases.

Hyatt also contended (at 17) that States could enter into an agreement to confer immunity in each other's courts. But the States already entered into an agreement that provides such immunity—namely the Consti-

tution. "It is inconsistent with the Court's proper role to ask [the States] to address a false constitutional premise of this Court's own creation." *Wayfair*, 138 S. Ct. at 2096. Interstate compacts "can take decades, or longer, to hammer out," Br. of Amicus Curiae Multistate Tax Comm'n in Support of Pet'r 13, and States should not have to resort to them to vindicate the protection that *Hall* wrongly extinguished.

CONCLUSION

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

Respectfully submitted.

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SEPTEMBER 2018

EXHIBIT 89

No. 17-1299

In The Supreme Court of the United States

FRANCHISE TAX BOARD OF CALIFORNIA,

Petitioner,

v.

GILBERT P. HYATT,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Nevada

BRIEF FOR RESPONDENT GILBERT P. HYATT

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QUESTION PRESENTED

Whether there is a compelling justification for setting aside principles of stare decisis and overruling *Nevada v. Hall*, 440 U.S. 410 (1979).

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STATEMENT OF THE CASE

The underlying facts

This lawsuit concerns intentional tortious acts committed by the Petitioner, California Franchise Tax Board ("the Board"), and its employees while seeking to build a case to assess additional state income taxes against Gilbert P. Hyatt. The torts against Hyatt occurred while he was a resident of Nevada and thus this case is about the ability of that state to provide a remedy for one of its citizens who has been seriously injured. *See Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488, 495 (2003) ("[T]he plaintiff claims to have suffered injury in Nevada while a resident there; and it is undisputed that at least some of the conduct alleged to be tortious occurred in Nevada.")[1]

The Board speaks of the "astonishing intrusion" to the dignity of California for having to defend in Nevada the intentionally tortious acts committed by California officials in Nevada. Brief for Petitioner at 38. But the astonishing intrusions were the other way around: the Board never acknowledges the egregious, tortious behavior of the Board and its employees directed at Hyatt. To be clear, this case does not involve alleged misconduct merely stated in a pleading. Rather, after a lengthy contested trial, a jury found that the

[1] The Brief Amicus Curiae of Alan B. Morrison & Darien Shanske in Support of Neither Party mistakenly asserts that the "vast majority" of the acts by the Board and its employees against Hyatt occurred in California. *Id.* at 9. Quite the contrary, the torts that occurred and were the basis for the jury's verdict largely occurred in Hyatt's state of residence, Nevada.

Board and its employees had committed intentional torts. Then, after a careful review of the evidence from the trial, the Nevada Supreme Court affirmed the decision of the trial court that torts had been committed against Hyatt.

The evidence at trial showed that the Board's lead auditor Sheila Cox, as well as other employees of the Board, went well beyond legitimate bounds in their attempts to extract a tax settlement from Hyatt. Referring to Hyatt, the lead auditor declared that she was going to "get that Jew bastard." *See* 4/23/08 Reporter's Tr. ("RT") at 165:15-20; 4/24/08 RT at 56:15-20. The lead auditor operated on the view that most of the large income taxpayers in California were Jewish. 4/28/08 RT at 132:2-23; 140:11-141:25. According to testimony from a former Board employee, the lead auditor freely discussed personal information about Hyatt—much of it false—causing her former colleague to believe that the lead auditor had created a "fiction" about Hyatt. *See* 4/23/08 RT at 184:18-20; 4/24/08 RT at 42:4-43:8.

The lead auditor also went to Hyatt's Nevada home, peered through his windows and examined his mail and trash. *See* 4/24/08 RT at 62:16-24. After the lead auditor had closed the audit, she boasted about having "convicted" Hyatt and then returned to his Nevada home to take trophy-like pictures. *See* 85 Resp.'s App. ("RA") at 021011-13 (Nev. filed Dec. 21, 2009). The lead auditor's incessant discussion of the investigation conveyed the impression to others within the Board that she had become "obsessed" with the case. *See*

4/23/08 RT at 184:16-20; 4/24/08 RT at 134:1-12. Within her department, the lead auditor pressed for harsh action against Hyatt, including imposition of fraud penalties that are rarely issued in residency audits. *See* 4/24/08 RT at 28:6-13. To bolster this effort, she enlisted Hyatt's ex-wife and other estranged members of Hyatt's family against him. *See*, *e.g.*, 80 RA at 019993-94; 83 RA at 020616-20, 020621-24, 020630-35. The lead auditor often spoke coarsely and disparagingly about Hyatt and his associates. *See* 4/23/08 RT at 171:13-172:8; 4/24/08 RT at 56:21-58:19.

Fueled by the lead auditor's desire to "get" Hyatt, the Board also repeatedly violated promises of confidentiality. Although Board auditors had agreed to protect information submitted by Hyatt in confidence, the Board bombarded people with "Demand[s] for Information" about Hyatt and disclosed his confidential home address and social security number to third parties, including California and Nevada newspapers. *See*, *e.g.*, 83 RA at 020636-47; 4/24/08 RT at 41:17-24. Demands to furnish information, naming Hyatt as the subject, were sent to his two places of worship in Nevada and to a Nevada newspaper. *See* 83 RA at 020653-54, 020668-69, 020735-36, 020745. The Board also disclosed its investigation of Hyatt to patent licensees of the U.S. Philips Corporation in Japan. *See* 84 RA at 020788, 020791.[2] The Board knew that Hyatt, like other private inventors, had significant concerns

[2] Hyatt signed an agreement in July 1991 with the U.S. Philips Corporation granting Philips the exclusive authority to license Hyatt's patents.

about privacy and security. *See* 83 RA at 020704. Rather than respecting those concerns, the Board sought to use them as a way to coerce him into a settlement.

One Board employee pointedly warned Eugene Cowan, a tax attorney representing Hyatt, that tax payments were the price for maintaining Hyatt's privacy. *See* 4/30/08 RT at 155:12-25; 5/12/08 RT at 73:23-74.23.2. The Board employee told Cowan that there would "extensive" demands for information from Hyatt, while simultaneously raising the subject of "settlement possibilities" in regard to the Board's audit and resulting tax assessments. *See* 5/22/08 RT at 80:3-81:2.

The initial litigation

Hyatt brought suit against the California Franchise Tax Board in Nevada state court, asserting both negligent and intentional torts, including for invasion of privacy, fraud, and the intentional infliction of emotional distress. In response, the Board asserted that it was entitled to absolute sovereign immunity. The Board did not challenge clearly established law that a state does not have sovereign immunity when sued in the courts of another state. *Nevada v. Hall*, 440 U.S. 410 (1979). The Board instead argued that the Full Faith and Credit Clause required Nevada to give effect to California's own immunity laws, which allegedly would have given the Board full immunity against Hyatt's state-law claims. The Nevada Supreme Court unanimously rejected the Board's argument that it

was obligated to apply California's law of sovereign immunity. Nevertheless, the Nevada Supreme Court extended significant immunity to the Board as a matter of comity. Although the court found that "Nevada has not expressly granted its state agencies immunity for all negligent acts," it explained that "Nevada provides its agencies with immunity for the performance of a discretionary function even if the discretion is abused." *Franchise Tax Bd. of Cal. v. Hyatt*, Nos. 35549 & 36390, 2002 Nev. LEXIS 57, at *10 (Nev. Apr. 4, 2002) (judgment noted at 106 P.3d 1220 (table)). The court thus concluded that "affording Franchise Tax Board statutory immunity [under California law] for negligent acts does not contravene any Nevada interest in this case." *Id.*

The Nevada Supreme Court declined, however, to apply California's immunity law to Hyatt's intentional tort claims. The court first observed that "the Full Faith and Credit Clause does not require Nevada to apply California's law in violation of its own legitimate public policy." *Id.* at *9. It then determined that "affording Franchise Tax Board statutory immunity for intentional torts does contravene Nevada's policies and interests in this case." *Id.* at *11. The court pointed out that "Nevada does not allow its agencies to claim immunity for discretionary acts taken in bad faith, or for intentional torts committed in the course and scope of employment." *Id.* Against this background, the court declared that "greater weight is to be accorded Nevada's interest in protecting its citizens from injurious intentional torts and bad faith acts committed by

sister states' government employees, than California's policy favoring complete immunity for its taxation agency." *Id.*

Supreme Court Review: *Hyatt I*

This Court, in a unanimous opinion, affirmed the decision of the Nevada Supreme Court. *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488 (2003) ("*Hyatt I*"). Rejecting the Board's argument that the Full Faith and Credit Clause required Nevada courts to apply California's immunity laws, the Court reiterated the well-established principle that the Full Faith and Credit Clause "does not compel a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." *Id.* at 494 (internal quotation marks omitted). Applying that test, the Court found that Nevada was "undoubtedly 'competent to legislate' with respect to the subject matter of the alleged intentional torts here, which, it is claimed, have injured one of its citizens within its borders." *Id.* The Court noted that it was "not presented here with a case in which a State has exhibited a 'policy of hostility to the public Acts' of a sister State." *Id.* at 499 (quoting *Carroll v. Lanza*, 349 U.S. 408, 413 (1955)). To the contrary, the Court noted, "[t]he Nevada Supreme Court sensitively applied comity principles with a healthy regard for California's sovereign status, relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis." 538 U.S. at 499.

The trial, verdict, and review in the Nevada Supreme Court

On remand from this Court, a trial was held and the jury found the Board liable for a variety of intentional torts, ranging from fraud to invasion of privacy to intentional infliction of emotional distress. The jury awarded Hyatt a total of $139 million in compensatory damages and $250 million in punitive damages. Pet. App. 11a. This substantial verdict reflects the jury's view that the conduct of the Board and its employees was truly egregious.

The Nevada Supreme Court reversed in part, affirmed in part, and remanded. *Franchise Tax Bd. of Cal. v. Hyatt*, 335 P.3d 125 (Nev. 2014). In doing so, it reduced the Board's liability for compensatory damages to $1 million on Hyatt's fraud claim and remanded the case for a retrial on damages with respect to Hyatt's intentional infliction of emotional distress claim. *Id.* at 131. Proceeding to the merits, the Nevada Supreme Court set aside much of the judgment against the Board, finding that Hyatt had not established the necessary elements for various other torts under Nevada law. *Id.* at 140.

The Nevada Supreme Court, however, affirmed the portion of the judgment based on fraud. The court noted evidence that, despite its promises of confidentiality, the Board's employees had "disclosed [respondent's] social security number and home address to numerous people and entities and that [auditors] revealed to third parties that Hyatt was being audited."

Id. at 144. The court also pointed to evidence that "the main auditor on Hyatt's audit, Sheila Cox, . . . had made disparaging comments about Hyatt and his religion, that Cox essentially was intent on imposing an assessment against Hyatt, and that [the Board] promoted a culture in which tax assessments were the end goal whenever an audit was undertaken." *Id.* at 145. The court thus determined "that substantial evidence supports each of the fraud elements." *Id.*

Having upheld liability on the fraud claim, the Nevada Supreme Court next considered whether it should apply a statutory damages cap applicable to Nevada officials—a condition on Nevada's waiver of sovereign immunity—to the Board. *See* Nev. Rev. Stat. § 41.035(1). The court decided that "comity does not require this court to grant [the Board] such relief." *Id.* at 147. The court pointed out that officials from other states are not similarly situated to Nevada officials with respect to intentional torts because in-state officials "'are subject to legislative control, administrative oversight, and public accountability.'" *Id.* at 147 (citation omitted). As a result, "'[a]ctions taken by an agency or instrumentality of this state are subject always to the will of the democratic process in [Nevada],'" while out-of-state agencies like the Board "'operate[] outside such controls in this State.'" *Id.* (citation omitted).

Considering this lack of authority over other states' agencies, the court concluded that "[t]his state's policy interest in providing adequate redress to Nevada citizens is paramount to providing [the Board] a

statutory cap on damages under comity." *Id.* With respect to Hyatt's intentional infliction of emotional distress claim, the Nevada Supreme Court affirmed the jury's finding of liability—noting that Hyatt had "suffered extreme treatment" at the hands of the Board (*id.* at 148)—but it reversed the award of damages. Finding errors in the introduction of evidence and instructions to the jury, the court determined that the Board was entitled to a new trial to determine the proper level of damages on this claim. *Id.* at 149-157.

The court remanded the case to the trial court for that purpose. Finally, as a matter of comity, the Nevada Supreme Court reversed the award of punitive damages. The court stated that, "under comity principles, we afford [the Board] the protections of California immunity to the same degree as we would provide immunity to a Nevada government entity as outlined in NRS 41.035(1)." *Id.* at 154. The court then added: "Because punitive damages would not be available against a Nevada government entity, we hold that under comity principles [the Board] is immune from punitive damages." *Id.*

Supreme Court Review: *Hyatt II*

This Court granted review on two questions: whether *Nevada v. Hall*, 440 U.S. 410 (1979), which held that a state government may be sued in the courts of another state, should be overruled; and whether the Nevada Supreme Court erred by failing to apply to the Franchise Tax Board the statutory immunities that

would be available to Nevada agencies in Nevada courts. *Franchise Tax Board of California v. Hyatt*, 136 S.Ct. 1277, 1280 (2016) (*Hyatt II*).

After briefing and oral argument on both of these questions, the Court said that it was evenly divided, 4-4, on the question of whether *Nevada v. Hall* should be overruled and therefore "affirm[ed] the Nevada courts' exercise of jurisdiction over California." *Id.* at 1279. As to the second question, this Court held that the Constitution does not permit "Nevada to award damages against California agencies under Nevada law that are greater than it could award against Nevada agencies in similar circumstances." *Id.* at 1281. The Court concluded that "[d]oing so violates the Constitution's requirement that Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State." *Id.* (internal quotation marks omitted).

The case on remand to the Nevada Supreme Court

The case was remanded to the Nevada Supreme Court. After additional briefing, the Nevada Supreme Court stated: "In light of the Court's ruling, we reissue our vacated opinion except as to the damages portions addressed by the Supreme Court and apply the statutory damages caps FTB is entitled to under *Hyatt II*." *Franchise Tax Bd. of Cal. v. Hyatt*, 401 P.3d 1110, 1117 (Nev. 2017). The Nevada Supreme Court ruled that the Franchise Tax Board is entitled to the benefit of

Nevada's statutory damages cap. The court concluded that Hyatt was entitled to $50,000 in damages for his fraud claim under Nevada law. App. 107a. The Court also decided that Hyatt was entitled to $50,000 in damages for his claim of intentional infliction of emotional distress. *Id.* 121a-122a. The case was remanded for determination of costs and attorneys' fees.

In response to a petition for rehearing, the Nevada Supreme Court issued a revised opinion. App. 4a. The court reaffirmed its earlier holdings and also ruled that the statutory damages cap includes prejudgment interest.

SUMMARY OF ARGUMENT

1. The petition for writ of certiorari should be dismissed as improvidently granted.

This is the third time that this case has been before this Court. *Franchise Tax Bd. of Cal. v. Hyatt* (*Hyatt I*), 538 U.S. 488 (2003); *Franchise Tax Bd. of Cal. v. Hyatt* (*Hyatt II*), 136 S.Ct. 1277 (2016).

In the first instance, the Board did not raise the issue of whether *Nevada v. Hall*, 440 U.S. 410 (1977), should be overruled. In a unanimous opinion, the Court in *Hyatt I* explained: "[In *Nevada v. Hall*] [w]e affirmed, holding, first, that the Constitution does not confer sovereign immunity on States in the courts of sister States. Petitioner does not ask us to reexamine that ruling, and we therefore decline the invitation of

petitioner's *amici* States . . . to do so." *Hyatt I*, 538 U.S. at 497.

This Court remanded the case and a trial was held. Only after the jury verdict against the Board and the decision of the Nevada Supreme Court affirming key aspects of liability and damages did the Board decide that it wanted this Court to reconsider *Nevada v. Hall*. The Court granted certiorari on the issue of whether to overrule *Nevada v. Hall* and it was briefed and argued. The Court issued its decision on this issue and declared: "The board has asked us to overrule *Hall* and hold that the Nevada courts lack jurisdiction to hear this lawsuit. The Court is equally divided on this question, and *we consequently affirm the Nevada courts' exercise of jurisdiction over California*." *Hyatt II*, 136 S.Ct. at 1279 (emphasis added). This Court, though, did announce a new rule limiting the damages that can be awarded against a state in another state's court: California could be held liable only to the extent that Nevada would be liable in its own courts. *Id.* at 1281. This holding was premised on the affirmance of *Nevada v. Hall*. The Board did not ask for rehearing and reconsideration of this Court's decision.

The case was remanded to the Nevada Supreme Court which, after briefing and argument, lowered the damage award against the Board to $100,000. The Board here does not question any aspect of the Nevada Supreme Court's reasoning or decision.

First, the law of the case doctrine should resolve this case. It is long and firmly established that an

affirmance by an evenly divided Court is a judgment on the merits. *See Durant v. Essex Co.*, 74 U.S. 107, 112 (1869); *Etting v. United States*, 24 U.S. 59, 78 (1826). The law of the case doctrine provides that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983). The law of the case doctrine "promotes the finality and efficiency of the judicial process." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988).

This Court's decision in *Hyatt II*, reaffirming *Nevada v. Hall*, is the law of the case for this litigation. After the Board did not ask the Court to reconsider *Nevada v. Hall* in *Hyatt I*, Hyatt tried the case and litigated the appeal in reliance on that precedent. After this Court reaffirmed *Nevada v. Hall* in *Hyatt II*, Hyatt litigated the case on remand in reliance on *Nevada v. Hall* being settled law for this case. The Nevada courts likewise handled this matter with the expectation and reliance that *Nevada v. Hall* was the law to be followed in this case. This Court decided the "rule of law" for this case in *Hyatt I* and *Hyatt II* and it would violate the law of the case doctrine and basic fairness to change it now for this litigation.

Second, the Board did not ask this Court to reconsider *Nevada v. Hall* when this case was first here. As the Court noted, the Board expressly chose not to ask the Court to reconsider this decision. *Hyatt I*, 538 U.S. at 497. The Board could have done so then. By failing to do this in the Supreme Court, the Board should be

deemed to have waived the ability to ask for *Nevada v. Hall* to be overruled. *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"); *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). Hyatt chose to litigate this case in the Nevada courts, at huge expense, in reliance on this Court's ruling—and reaffirmation—that state governments may be sued in the courts of other states.

Simply put, the Board should be bound by its own choices in this litigation. It could have, but did not ask this Court to reconsider *Nevada v. Hall* when the case was here in *Hyatt I*. It could have, but did not file a petition for rehearing after this Court's decision in *Hyatt II* to reaffirm *Nevada v. Hall*. Because of these choices, the petition in this case should be dismissed as certiorari having been improvidently granted.

2. *Nevada v. Hall* should not be overruled

On the merits, the central issue in this case is whether the Constitution *prohibits* a state court from exercising its sovereign power to provide a forum to its citizens when they are injured by another state. In *Nevada v. Hall*, the Court concluded that a state may exercise its sovereignty to permit such suits and thus the question is whether there is a "compelling justification" for overruling this almost 40-year-old precedent. *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S.

197, 202 (1991) (stare decisis requires that there be a "compelling justification" for overruling prior decisions).

The Board's core argument is that this Court's decisions concerning sovereign immunity, especially *Alden v. Maine*, 527 U.S. 706 (1999), undermine *Nevada v. Hall*. The Board, though, misses a crucial distinction: *Alden v. Maine* is about whether a state court is *required* to hear cases against its state government. *Nevada v. Hall* is about whether the Constitution *forbids* a state from choosing to hear suits by its own citizens against another state government. The Tenth Amendment creates a huge difference between compelling a state to do something, which is impermissible commandeering, as opposed to finding that a state is constitutionally prohibited from doing something. *See, e.g.*, *Murphy v. National Collegiate Athletic Ass'n*, 138 S.Ct. 1461 (2018); *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992) (explaining the Tenth Amendment forbids the commandeering of state governments).

No case after *Nevada v. Hall* ever suggested that the Constitution imposes a limit on a state's sovereign power to define the jurisdiction of its courts and to provide a remedy for its citizens, including when they are injured by another state. This Court's decisions about the Eleventh Amendment are inapposite because they are about a constitutional limit on *federal* court power. *See, e.g.*, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996) (emphasis added) (citations omitted) ("For over a century we have reaffirmed that

federal jurisdiction over suits against unconsenting States was not contemplated by the Constitution when establishing the judicial power of the United States.").

Alden v. Maine dealt solely with whether a state court is constitutionally required to hear a federal claim against its state government by its own citizens. In *Alden v. Maine*, this Court expressly drew a "distinction . . . between a sovereign's immunity in its own courts and its immunity in the courts of another sovereign." 527 U.S. at 739-740.

Thus, unlike any of the other cases about sovereign immunity that the Board cites, this is a case about the Tenth Amendment and whether the Constitution prohibits a state from using its power to provide a forum for its injured citizens. There is nothing in the text of the Constitution which justifies such a limit on state power.

Nevada v. Hall reflects that states have a vital sovereign interest in providing a remedy for their citizens when they suffer injuries. *See*, *e.g.*, *Farmer v. United Bhd. of Carpenters & Joiners*, 430 U.S. 290, 302-304 (1977) (recognizing "the legitimate and substantial interest of the State in protecting its citizens"). As this Court stated in *Nevada v. Hall*, 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." 440 U.S. at 416. *Nevada v. Hall* stressed that there is no constitutional limit on

the ability of a sovereign state to provide a forum for its citizens when they are injured, including by another state.

Quite tellingly, the Board concedes that "[i]n the pre-ratification era . . . [n]o State could be required to respect another's sovereign immunity in its courts." Brief for Petitioner at 31-32. Nor is there anything in the Constitution or its history that establishes a limit on the sovereign power of a state to provide a remedy for its citizens when they are injured by another state. As Justice Thomas declared, "immunity 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).

This, though, does not mean that state governments are without protection when they are sued in other states. This Court ruled in *Hyatt II* that 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. Additionally, state courts can and do accord comity to other states, as in this case where the Nevada Supreme Court ruled that negligence claims could not go forward against the Board and that punitive damages are not available against the Board because of considerations of comity. Moreover, states can enter into agreements that provide for greater immunity. *Nevada v. Hall*, 440 U.S. at 416. Obtaining this protection through comity and mutual agreements is preferable to a new constitutional rule that limits state sovereignty by stripping states of

the power to determine the jurisdiction of their own courts and of the ability to protect their own citizens.

Under the Tenth Amendment a state can do anything except that which is prohibited by the Constitution. There is no constitutional prohibition against a state exercising its sovereignty to provide a forum for its citizens when they are injured by another state. The Board thus has failed to provide the "compelling justification" for overruling a long-standing precedent.

ARGUMENT

I. The Court Should Dismiss This Case As Certiorari Having Been Improvidently Granted

A. The Law of the Case Doctrine Resolves the Issue Before This Court and This Case

1. An affirmance by an evenly divided Court is a decision on the merits

This Court has been clear that the decisions of an equally divided court are binding and conclusive on the parties on the issues presented, although the rulings do not have precedential value for other litigation. *See* Justin Pidot, *Tie Votes in the Supreme Court*, 101 Minn. L. Rev. 245, 252 (2016) ("The Supreme Court has long applied the rule that where the Justices reach a tie vote on the judgment in a case, the lower court's

opinion is affirmed. Such a decision binds the parties, but has no precedential value.").

This principle is long established. As early as 1826, Chief Justice John Marshall held that in a case where the Court was equally divided, "the principles of law which have been argued cannot be settled; but the judgment is affirmed, the Court being divided in opinion upon it." *Etting v. United States*, 24 U.S. 59, 78 (1826). Particularly instructive is this Court's decision in *Durant v. Essex Co.*, 74 U.S. 107, 112 (1869) (cited by this Court in its affirmance in *Hyatt II*, 136 S.Ct. at 1279). Durant filed a bill against the Essex Company for certain real estate. *Id.* at 109. Durant lost in the lower courts and appealed to the Supreme Court. *Id.* at 108. The Supreme Court was equally divided and "affirmed with costs" the Circuit Court's decision. *Id.* Durant, believing that an equally divided court meant that the Court had actually not decided the issue, filed another bill against Essex. *Id.* at 109. Essex argued that the judgment of the equally divided Supreme Court was a bar on the second litigation and the Court agreed. The Court explained that the first suit "was an adjudication of the merits of the controversy," and as such "constitutes a bar to any further litigation on the same subject between the same parties." *Id.*

The Court went on to specifically reject the idea that an equally divided court's judgment constitutes no decision, explaining:

> There is nothing in the fact that the judges of this court were divided in opinion upon the

> question whether the decree should be reversed or not, and, therefore, ordered an affirmance of the decree of the court below. The judgment of affirmance was the judgment of the entire court. The division of opinion between the judges was the reason for the entry of that judgment; but the reason is no part of the judgment itself.
>
> . . . The judgment of the court below, therefore, stands in full force. It is, indeed, the settled practice in such case to enter a judgment of affirmance; but this is only the most convenient mode of expressing the fact that the cause is finally disposed of in conformity with the action of the court below, and that that court can proceed to enforce its judgment. The legal effect would be the same if the appeal, or writ of error, were dismissed.

Id. at 110-112.

This Court has reaffirmed on many occasions that a decision by an equally divided Court is a conclusive resolution of the law in the litigation between the parties. *See Hertz v. Woodman*, 218 U.S. 205, 213-214 (1910) (explaining both precedent and reason justify the rule that "affirmance by an equally divided court is . . . a conclusive determination and adjudication of the matter adjudged; but the principles . . . having [not] been agreed upon by a majority . . . prevents the case from becoming an authority for the determination of other cases); *Neil v. Biggers*, 409 U.S. 188, 191-192 (1972) (explaining that a decision by an evenly divided Court resolves a matter between the parties).

Similarly, in *United States v. Pink*, 315 U.S. 203, 216 (1942), the Court held that a ruling by an equally divided court binds the parties, although it does not have precedential value. The Court explained the significance of its earlier ruling by an evenly divided Court: "*While it was conclusive and binding upon the parties as respects that controversy*, the lack of an agreement by a majority of the Court on the principles of law involved prevents it from being an authoritative determination for other cases." *Id.* at 216 (emphasis added) (citation omitted).

Thus, under precedents stretching back throughout American history, it is firmly established that this Court's decision in *Hyatt II*, reaffirming *Nevada v. Hall*, is a decision on the merits for these parties.

2. Under the law of the case doctrine, the prior decision of this Court in this case should not be reconsidered

This Court has explained that the law of the case doctrine "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983). The law of the case doctrine protects the parties in litigation by allowing them to rely on a court's ruling in their case without needing to fear that the rug later will be pulled out from under them by a court changing its mind about the law to be applied in their litigation. It also protects lower courts, here the Nevada Supreme Court,

which expended great resources hearing and deciding the issues presented to it because this Court had ruled twice that the Board could be sued in Nevada state court.

Justice Gorsuch, while a Circuit Judge, expressed the importance of this doctrine when he stated:

> Law of the case doctrine permits a court to decline the invitation to reconsider issues already resolved earlier in the life of a litigation. It's a pretty important thing too. Without something like it, an adverse judicial decision would become little more than an invitation to take a mulligan, encouraging lawyers and litigants alike to believe that if at first you don't succeed, just try again. A system like that would reduce the incentive for parties to put their best effort into their initial submissions on an issue, waste judicial resources, and introduce even more delay into the resolution of lawsuits that today often already take long enough to resolve. All of which would 'gradual[ly] undermin[e] . . . public confidence in the judiciary.'

Entek GRB, LLC v. Stull Ranches, LLC, 840 F.3d 1239, 1240 (10th Cir. 2016) (citations omitted). This is the rationale that this Court has followed in articulating the law of the case doctrine. *See, e.g.*, *Arizona v. California*, 460 U.S. at 618.

Having split 4-4, this Court, of course, could have dismissed the petition for certiorari as improvidently granted or it could have put the case over for

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]

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[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.

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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

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[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

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[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,

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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

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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."

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[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.

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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,

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[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.

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Kenneth Gast
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Kenneth Gast
Administrative Law Judge

We concur:

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Douglas Bramhall
Administrative Law Judge

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Jeffrey G. Angeja
Administrative Law Judge

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