NO. 14-1175

In the
Supreme Court of the United States

FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT,
Respondent.

On Writ of Certiorari to the Supreme Court of Nevada

BRIEF FOR PETITIONER

SCOTT W. DEPEEL
FRANCHISE TAX
BOARD OF THE STATE
OF CALIFORNIA
9646 Butterfield Way
Sacramento, CA 95827

PAT LUNDVALL
DEBBIE LEONARD
MCDONALD CARANO
WILSON, LLP
2300 West Sahara Avenue
Las Vegas, NV 89102

PAUL D. CLEMENT
Counsel of Record
GEORGE W. HICKS, JR.
STEPHEN V. POTENZA
BANCROFT PLLC
500 New Jersey Avenue NW
Seventh Floor
Washington, DC 20001
202-234-0090
pclement@bancroftpllc.com

Counsel for Petitioner

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QUESTIONS PRESENTED

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

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

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INTRODUCTION

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

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

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

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

OPINIONS BELOW

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

JURISDICTION

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

CONSTITUTIONAL PROVISIONS INVOLVED

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

STATEMENT OF THE CASE

A. Factual Background

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

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

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

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

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

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

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

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

B. The Nevada Litigation

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

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

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

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

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

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

C. *Hyatt I*

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

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

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

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

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

D. Trial and Appeal

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

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

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

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

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

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

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

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

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

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

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

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

SUMMARY OF ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* * *

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

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted,

SCOTT W. DEPEEL
FRANCHISE TAX
BOARD OF THE STATE
OF CALIFORNIA
9646 Butterfield Way
Sacramento, CA 95827

PAT LUNDVALL
DEBBIE LEONARD
MCDONALD CARANO
WILSON, LLP
2300 West Sahara Avenue
Las Vegas, NV 89102

PAUL D. CLEMENT
Counsel of Record
GEORGE W. HICKS, JR.
STEPHEN V. POTENZA
BANCROFT PLLC
500 New Jersey Avenue NW
Seventh Floor
Washington, DC 20001
202-234-0090
pclement@bancroftpllc.com

Counsel for Petitioner

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STATUTORY APPENDIX

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U.S. Const. art. III

Section 1.

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

Section 2.

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

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

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

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

Section 3.

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

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

U.S. Const. art. IV

Section 1.

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

Section 2.

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

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

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

Section 3.

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

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

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

Section 4.

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

U.S. Const. amend. XI

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