No. 17-1299

IN THE

Supreme Court of the United States

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA
Petitioner,

v.

GILBERT P. HYATT,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Nevada

BRIEF OF INDIANA AND 44 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

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

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INTEREST OF THE *AMICI* STATES[1]

The States of Indiana, Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming respectfully submit this brief as *amici curiae* in support of petitioner. The *amici* States have a strong interest in protecting their sovereign immunity by overturning *Nevada v. Hall,* 440 U.S. 410 (1979). *Hall* is—and always has been—irreconcilable with the Court's larger body of sovereign immunity decisions, and the *amici* States support certiorari in any case that presents an appropriate vehicle for a full-strength Court to overturn it.

SUMMARY OF THE ARGUMENT

Since the Court deadlocked over the issue the last time this case was before it, *Franchise Tax Bd. of Cal. v. Hyatt* (*Hyatt II*), 136 S. Ct. 1277 (2016), the need to overturn *Hall* has only grown. As discussed in detail below, States all too frequently find themselves the targets of private-plaintiff lawsuits filed in the courts of other States. Such cases not only insult the sovereign dignity of defendant States, but also pose the real

[1] Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties have received notice of the Amici States' intention to file this brief at least 10 days prior to the due date of this brief.

risk of exposing States to judgments unrestrained by any concern for local fiscal impact. And where, as here, the State is haled into another State's courts based on how it has exercised its authority to conduct tax audits, the interest in preserving immunity as an attribute of State sovereignty is particularly acute.

REASONS FOR GRANTING THE PETITION

I. That *Hall* Enables Another State's Courts To Review a State Tax Audit Demonstrates the Severity of the Insult to Sovereignty

Every case brought against one State in a court of another State undermines the defendant State's sovereignty, both in terms of the insult to sovereign dignity and in terms of the required expenditure of sovereign resources to litigate the matter. *See Alden v. Maine*, 527 U.S. 706, 751 (1999). States must use scarce resources to meet a number of competing policy goals, and "it is inevitable that difficult decisions involving the most sensitive and political of judgments must be made." *Id.* Sovereign immunity "assures the states . . . from unanticipated intervention in the processes of government." *Id.* at 750 (quoting *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 53 (1944)). In all cases, a limitation of immunity "carries with it substantial costs to the autonomy, the decisionmaking ability, and the sovereign capacity of the States." *Id.*

Yet the Court has also recognized that vitiating sovereign immunity when the power to tax is at stake is particularly harmful, as "the power to promulgate and enforce income tax laws is an essential attribute of sovereignty." *Franchise Tax Bd. of Cal. v. Hyatt*

(*Hyatt I*), 538 U.S. 488, 498 (2003). "[T]axes," the Court has recognized, "are the life-blood of government, and their prompt and certain availability an imperious need." *Franchise Tax Bd. of Cal. v. U.S. Postal Serv.*, 467 U.S. 512, 523 (1984) (quoting *Bull v. United States*, 295 U.S. 247, 259–60 (1935)).

The taxing power of States is so important that Congress has limited the ability of the federal judiciary to restrain it. The Tax Injunction Act of 1937 prevents federal district courts from "enjoin[ing], suspend[ing] or restrain[ing] the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. The purpose of the Act is "to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 522 (1981). It "has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations." *Tully v. Griffin, Inc.*, 429 U.S. 68, 73 (1976). Such a substantive limit on the power of federal courts demonstrates the core status of the taxing power to the States.

For their part, States often limit the processes their own taxpayers may use to challenge assessments and audits. Of the forty-three States that have some form of income tax, many have an administrative review process that taxpayers must complete before seeking judicial review of an audit or assessment. *See, e.g.*, Ind. Code § 6-8.1-5-1. Many States require a

final administrative decision to be appealed to a special tax court, rather than a court of general jurisdiction. *See, e.g.*, Ind. Code § 33-26-3-1; Ala. Code § 40-29-90. *See generally* All St. Tax Guide (RIA). For sales and use taxes, similarly, many States require administrative review before challenging an audit or assessment in State court. In Indiana, for example, a taxpayer must first file a protest with Indiana Department of Revenue before appealing to the Indiana Tax Court. Ind. Code § 6-8.1-5-1. In Illinois, to take another example, the taxpayer has the option of either filing a protest with the Department of Revenue, 35 Ill. Comp. Stat. 120/5, paying the tax and then filing a claim for a credit with the Department, 35 Ill. Comp. Stat. 735/3-2, or paying the tax under protest and then filing an action in state court, 30 Ill. Comp. Stat. 230/1. *See generally* Am. Bar Ass'n, *Sales & Use Tax Deskbook* (30th ed. 2016–17). *See also* Am. Bar Ass'n, *Property Tax Deskbook* (22nd ed. 2017) (showing specialized administrative review procedures for property tax assessments).

Channeling tax claims into administrative review or specialized courts is one way States safeguard core taxation authority. Accordingly, in Nevada and California—the two States with direct ties to this case—bypassing administrative review and immediately seeking judicial review of an audit (or the tactics used during an audit) is not permitted. In Nevada, a taxpayer must complete administrative review *and* pay the tax bill before seeking judicial review of an audit. Nev. Rev. Stat. § 360.395. In California, a taxpayer may either file an appeal with the Office of Tax Appeals (without paying the underlying tax) or may first

pay the tax and then file a claim with the Franchise Tax Board for a refund. *See* Cal. Gov't Code § 15677; Cal. Rev. & Tax. Code § 19381. If the Franchise Tax Board denies the claim or does not act within six months, the taxpayer may file a suit for a refund in the Superior Court. Cal. Rev. & Tax. Code § 19381. By suing California's tax authorities in Nevada courts, however, Hyatt has bypassed these procedures.

Similarly, in Virginia, where Massachusetts has been sued in a court of general jurisdiction by a taxpayer seeking relief from Massachusetts sales taxes, a taxpayer applying for relief from a *Virginia* sales tax assessment must first apply to the Tax Commissioner. Va. Code Ann. § 58.1-1821. Only after the Tax Commissioner issues a final determination may the taxpayer apply to the appropriate circuit court for judicial review of the determination. *Id.* § 58.1-3703.1.7a. Meanwhile, when its sales tax assessments are challenged at home, Massachusetts enjoys the protection of a system that requires taxpayers to (1) file for abatement and (2) seek review by the Appellate Tax Board. Frank J. Scharaffa, *Massachusetts Taxation and DOR Practice A Guide to Collections, Audits, Abatements, and Appeals* § 14.2 (4th ed. 2018).

Kentucky, whose courts of general jurisdiction have provided the forum for a suit challenging an Ohio corporate tax assessment, requires its own taxpayers in similar circumstances to exhaust administrative remedies through the newly restructured Ken-

tucky Claims Commission before seeking judicial relief. *See* Ky. Rev. Stat. Ann. § 49.220; *Smallwood v. River Valley Behavioral Health, Inc.*, No. 2007-CA-000728-MR, 2008 WL 1108519, at *1 (Ky. Ct. App. April 11, 2008). And Ohio taxpayers in similar situations must, after receiving a final determination of the tax commissioner, proceed through the board of tax appeals (or, in limited instances, the court of common pleas) before seeking judicial relief. Ohio Rev. Code Ann. § 5717.02.

In North Dakota, where South Dakota has been sued over a sales tax audit in a State trial court, all challenges to *North Dakota* audits must first be heard by the Tax Commissioner. N.D. Cent. Code § 57-01-11. And in Minnesota—where South Dakota also has been sued over a sales tax audit—taxpayers must challenge *Minnesota* tax audits either through the Minnesota Department of Revenue or to the Minnesota Tax Court. Minn. Stat. Ann. §§ 270C.35, 271.09.

Hall undermines these administrative processes and the federal Tax Injunction Act by providing an end-run for plaintiffs around a State's tax enforcement system without requiring plaintiffs to abide by the carefully crafted administrative procedures established by the taxing State. *Hall* also undermines the exercise of core State functions such as taxation, assessment, and audit by permitting a court from another State to overrule a State's policymaking and enforcement decisions. 440 U.S. at 425–27. By exercising jurisdiction over the taxation authority of another State, a State court may make decisions that effectively determine what revenue goals the defendant

State should pursue and how it should pursue them. Such lawsuits "place unwarranted strain on the States' ability to govern in accordance with the will of their citizens," and inject another State's courts into "the heart of the political process" of a State. *Alden*, 527 U.S. at 750–51.

Worse still, the courts of the other State may be tempted to rule in a manner that benefits their own State's citizens, treasuries, and policy priorities. This case has already inspired other lawsuits in Nevada courts against FTB, which may force FTB to alter its enforcement policies. *See, e.g.*, Compl., *Schroeder v. California*, No. 14-2613 (D. Nev. Dec. 18, 2014).

To be sure, the Court in *Hyatt I* struggled to find a "principled distinction between [a State's] interest in tort claims arising out of its university employee's automobile accident, at issue in *Hall*, and [a State's] interests in tort claims . . . arising out of its tax collection agency's residency audit." 538 U.S. at 498. But that only means that the Court should not create different standards for different types of claims. The point remains that this case demonstrates the degree to which *Hall* opened the door not only to suits that seek compensation for other States' seemingly ordinary torts, but also for suits challenging other States' core policy and enforcement determinations that the courts of the forum State may find objectionable.

II. *Hall* Continues To Enable Widespread State Judicial Interference with the Sovereign Functions of Other States

This case is no outlier. As a result of *Hall*, State courts commonly exercise jurisdiction over officials and agencies of other States—particularly in cases directly implicating the defendant State's sovereign power to establish and enforce policy. Recurring State judicial interference with sister State core functions is the principal legacy of *Hall*'s unsound destruction of interstate sovereign immunity.

As West Virginia's cert-stage multistate amicus brief apprised the Court three years ago in this case, in the wake of *Hall*, state courts have exercised jurisdiction over other States in cases involving the revocation of a degree by a state university, *Faulkner v. Univ. of Tennessee*, 627 So. 2d 362 (Ala. 1992), the firing of a state auditor, *McDonnell v. Illinois*, 725 A.2d 126 (N.J. Super. Ct. App. Div. 1999), *aff'd per curiam*, 748 A.2d 1105 (N.J. 2000), and the treatment of indigent patients of a state-run psychiatric hospital, *Nev. v. Superior Court of Cal.*, 135 S. Ct. 2937 (2015). Indeed, as noted above, this is not even the only case where a Nevada resident has sued the FTB in a Nevada court. Compl., *Schroeder v. California*, No. 14-2613 (D. Nev. Dec. 18, 2014).

For its part, the State of Nevada—the very State whose courts chose to exercise jurisdiction in this case—both joined other States urging the Court to take this case to revisit *Hall* the last time around, Brief of Amici Curiae State of West Virginia and 39

Other States in Support of Petitioner, *Franchise Tax Bd. v. Hyatt*, 136 S. Ct. 1277 (2016) (No. 14-1175), *and* filed its own cert. petition asking the Court to overrule *Hall* in *Nevada v. Superior Court of California*, which the Court denied. 135 S. Ct. 2937 (2015).

This Term, it is déjà vu all over again. Nevada has both joined this brief and just recently filed a petition for writ of certiorari in yet *another* case where it has been sued in California state court. Petition for Writ of Certiorari, *Nevada Dep't of Wildlife v. Smith*, No. 17-1348 (Mar. 21, 2018).

Alas, the fate of *Hall* is not simply a matter of whether the courts of Nevada and California may continue to launch summonses over the border at one another's State agencies. In recent years, many other State governments also have found themselves on the receiving end of process issued by the court of another State.

As alluded to above, at least five other tax cases have been brought against one State in a court of another State. Massachusetts is currently being sued in Virginia state court over a recently promulgated sales and use tax regulation. The suit seeks to invalidate the regulation as a violation of both the Dormant Commerce Clause and a rarely-invoked fedral statute, the Internet Tax Freedom Act. Mass. Comm'r of Revenue's Mem. of Points and Auths. in Supp. of his Mot. to Dismiss for Lack of Personal Jurisdiction at 4, *Crutchfield Corp. v. Harding*, No. CL17001145-00 (Va. Cir. Ct. Feb. 15, 2018). Similarly, Ohio has an

appeal pending in the Kentucky Court of Appeals concerning a section 1983 claim over a corporate activity tax assessment. Notice of Appeal of Defs./Appellants State of Ohio & Joseph W. Testa, Tax Comm'r of Ohio at 1, *Great Lakes Minerals, LLC v. Ohio*, No. 17-CI-00311 (Ky. Ct. App. Mar. 16, 2018). And South Dakota has been sued in both North Dakota *and* Minnesota over a tax audit. Compl., *Agvise Labs., Inc. v. Gerlach*, No. 18-2018-CV-00460 (N.D. D. Ct. Mar. 26, 2018); Compl., *Agvise Labs., Inc. v. Gerlach*, No. 76-CV-18-80 (Minn. D. Ct. Mar. 7, 2018). Finally, Connecticut was sued in Texas state court by a Connecticut taxpayer seeking declaratory and injunctive relief against the collection of Connecticut taxes, along with damages. Pls.' Original Pet., Req. for Declaratory J., Req. for Injunctive Relief & Req. for Disclosure, *Hendrick v. Conn. Dep't of Revenue Servs.*, No. DC 13-08568 (Tex. D. Ct. Aug. 6, 2013).

Outside the tax arena, Ohio also is a defendant in an Indiana state court case arising out of a motor vehicle collision. Order Denying Summ. J., *Chilton v. Ohio Dept. of Transp.*, No. 15D01-1404-CT-019 (Ind. Sup. Ct. Dec. 19, 2016). North Dakota is currently defending against a contract dispute in Minnesota state court. Compl., *Rosewood Hospitality, LLC v. N.D. Dept. of Soc. Servs.*, No. 62-CO-18-538 (Minn. D. Ct. Feb. 27, 2018). Rhode Island has a family law case in Connecticut state court. Compl., *Reale v. R.I.*, No. WWM-CV18-5008257-S (Conn. Sup. Ct. Nov. 17, 2017). And Texas recently defended a medical malpractice case in New Mexico state court. *Montano v. Frezza*, 339 P.3d 700 (N.M. 2017).

As these cases make clear, *Hall* has had a sustained nationwide impact, affecting many States in many legal contexts. The widespread practice of haling State agencies into the courts of their sister States is an insult to the most fundamental notions of State sovereignty. The Court should grant certiorari to reconsider *Hall* in light of this legacy.

III. *Hall* Is Fundamentally Contrary to the Remainder of Sovereign Immunity Doctrine and Should Be Overruled

Nevada v. Hall rests on the flawed premise that State courts may assert jurisdiction over their sister States unless there is something in the Constitution that expressly limits such jurisdiction. 440 U.S. 410, 421 (1979). Because the Court found nothing in Article III or in the Eleventh Amendment that explicitly forbade such jurisdiction, it held that lawsuits against a State in the courts of another State do not offend sovereign immunity. *Id.* But later decisions from the Court reject that premise.

As the Court recognized in *Hall* itself, the Framers assumed that "prevailing notions of comity would provide adequate protection against the unlikely prospect of an attempt by the courts of one State to assert jurisdiction over another." *Id.* at 419. Stated more directly, "[t]he Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239 n.2 (1985). But while *Hall* took that underlying sentiment to mean

that an expectation of comity was sufficient protection against interstate jurisdiction, the more appropriate inference is that the inquiry for this Court should be whether anything in the Constitution *allows* jurisdiction of State courts over their sister States—not whether anything *forbids* it.

Sovereign immunity cases since *Hall* have established what *Hall* rejected—sovereign immunity is derived from the history and structure of the Constitution and is antecedent to the text of both Article III and the Eleventh Amendment. *Cf. Hall*, 440 U.S. at 426–27. In *Seminole Tribe of Florida v. Florida*, the Court, overturning *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), said that "we long have recognized that blind reliance upon the text of the Eleventh Amendment is to strain the Constitution and the law to a construction never imagined or dreamed of." 517 U.S. 44, 69 (1996) (internal citations omitted). The very next year, in *Idaho v. Coeur d'Alene Tribe of Idaho* the Court again emphasized that the "recognition of sovereign immunity has not been limited to the suits described in the text of the Eleventh Amendment." 521 U.S. 261, 267 (1997).

Later, in *Alden v. Maine*, 527 U.S. 706 (1999), the Court elaborated on this principle: "The generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity." *Id.* at 715. The Eleventh Amendment was adopted "not to change" the Constitution "but to restore the original constitutional design." *Id.* at 722. For this reason, "the sovereign immunity of the States neither derives from, nor is limited by, the terms of

the Eleventh Amendment." *Id.* at 713; *see also Federal Maritime Comm'n v. S.C. State Ports Authority*, 535 U.S. 743, 753 (2002) ("[T]he Eleventh Amendment does not define the scope of the States' sovereign immunity; it is but one particular exemplification of that immunity."). Ultimately, "as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today." *Alden*, 527 U.S. at 713.

Seminole Tribe, *Coeur d'Alene*, *Alden*, and *Federal Maritime Commission* represent a fundamental course correction in the law of sovereign immunity—one that respects constitutional history and structure in a way that several earlier decisions, including not only *Union Gas* but also *Hall*, did not. Yet *Hall* remains as a vestige of the discarded doctrine, one that starkly contradicts other governing sovereign immunity precedents. The Court should overturn it.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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Dated: April 13, 2018

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