No. 17-1299

IN THE

Supreme Court of the United States

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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

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

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

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

I. THE QUESTION PRESENTED IS DEEPLY IMPORTANT

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

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

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

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

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

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

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

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[1] Professor Stempel's contrary conclusion that "'the empirical burden of such litigation is far from clear and hardly seems oppressive,'" cited by Hyatt (at 12), is unsupported and should be taken with a healthy dose of skepticism given that Professor Stempel was a retained expert for Hyatt in this case. *See* Stempel, Hyatt v. Franchise Tax Board of California*: Perils of Undue Disputing Zeal and Undue Immunity for Government-Inflicted Injury*, 18 Nev. L.J. 61, 61 n.* (2017).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Stare Decisis Considerations Are At Their Weakest Here

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

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

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

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

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

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

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

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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