No. _____

In the Supreme Court of the United States

NEVADA DEPARTMENT OF WILDLIFE,
Petitioner,

v.

MARK E. SMITH,
Respondent.

On Petition for Writ of Certiorari to the Superior Court of California, County of Nevada

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

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

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The decisions of the Superior Court of California, County of Nevada (App. 4), the California Court of Appeal (App. 2), and the California Supreme Court (App. 1) are unreported.

JURISDICTION

The Superior Court issued its decision on December 27, 2017. App. 4. On January 9, 2018, Petitioner filed a petition for writ of mandate in the California Court of Appeal. It was denied on January 11, 2018. *Id.* at 2. On January 18, 2018, Petitioner filed a petition for review in the California Supreme Court. It was denied *en banc* on February 21, 2018. *Id.* at 1. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Articles III and IV and the Eleventh Amendment of the United States Constitution are reproduced at App. 31-35.

STATEMENT OF THE CASE

Almost four decades ago, this Court in *Nevada v. Hall* declared that one State is subject to suit in another State's courts. That decision was controversial when decided, and inconsistent with historical practice and this Court's other state sovereign-immunity decisions. Time has confirmed the error. The *Hall* dissenters' concerns materialized and commentators continue to question how *Hall*'s rationale survives this Court's subsequent cases. Individual Justices of this Court have called *Hall* a "tremendous anomaly" that results in "very odd" disparities in the Court's jurisprudence. Two terms ago, this Court appeared to be on the verge of overruling *Hall* when, after the passing of Justice Scalia, the Court split 4-4 on the issue. *Franchise Tax Bd. of Cal. v. Hyatt* (*Hyatt II*), 136 S. Ct. 1277, 1279 (2016).

No State has borne the brunt of this Court's *Hall* decision more than Nevada. First, in *Hall* itself, Nevada was subjected to a million dollar-plus California court judgment that ignored Nevada's tort damages cap for governmental entities. In the next major case in which this Court took up interstate sovereign immunity, Nevada watched as California asked this Court to force Nevada to apply *both* California's *and* Nevada's governmental-immunity caps in Nevada courts (in *Hyatt I*[1] and *Hyatt II*, respectively). And then, a few years ago, while this Court was considering *Hyatt II*, Nevada was again forced to pay over a million dollars in attorney's fees and settlement costs—and change its sovereign

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[1] *Franchise Tax Bd. of Cal. v. Hyatt* (*Hyatt I*), 538 U.S. 488 (2003).

policies—because it was sued by San Francisco in San Francisco's home court.[2] Despite attempting to faithfully apply *Hall*—and showing considerably more concern for California's agencies than California courts have shown to the State of Nevada—Nevada's courts have nonetheless been repeatedly reviewed by this Court in *Hyatt I* and *Hyatt II*. Now California asks this Court to revisit *Hyatt* for a third time.[3] *Hall* has been a stick that hits Nevada from both ends.

In the instant case a Nevada resident has sued a Nevada agency in California. He claims that officials of the Nevada Department of Wildlife defamed him and his Nevada nonprofit organizations. He sued in a state court headquartered in Nevada City, Nevada County, *California*. Relying on *Hall*, the California Superior Court refused to dismiss the lawsuit against the Nevada agency on sovereign-immunity grounds (as Nevada requested) but instead retained jurisdiction. Nevada appealed that decision to the California Court of Appeals and California Supreme Court, both of which summarily denied Nevada's petitions.

This case presents a particularly good and clean vehicle for the Court, restored to its full complement of Justices, to decide whether *Hall* is still good law. The California courts, in refusing to dismiss the case based on Nevada's interstate sovereign immunity, and in

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[2] *See* Decl. of Kristine Poplawski in Support of Joint Request for Approval of Dismissal, *City & Cnty. of San Francisco v. Nevada*, No. CGC-13-534108 (Cal. Super. Ct., San Francisco Cnty. Dec. 3, 2015).

[3] *See* Cert. Pet., *Franchise Tax Bd. of Cal. v. Hyatt* (*Hyatt III*), No. 17-1299 (U.S. Mar. 14, 2017) (pending).

retaining jurisdiction over the Nevada Department of Wildlife, relied directly and exclusively on this Court's *Hall* decision. App. 7-8, 9-10. Because Nevada's sovereign immunity was raised and addressed at the outset of this case, it squarely presents the *Hall* sovereignty issue—and *only* that issue. The State of Nevada, as petitioner in this case, is also uniquely positioned to address the various ways that *Hall* has proven unworkable in practice. And counsel for the State of Nevada, having recently sought review on this same question in a companion case to *Hyatt II*—and having closely followed the *Hyatt II* briefing and argument as a result—is intimately familiar with the issues and arguments surrounding *Hall*.[4]

This Court demonstrated in *Hyatt II* that the issue presented by this case merits review by the Court. This case presents the perfect vehicle to consummate that review and decide whether States should continue to be subject to suits like this in another State's court, or whether *Nevada v. Hall* should be overruled.

I. FACTUAL BACKGROUND

Petitioner is the Nevada Department of Wildlife, a Nevada state agency that is among the named defendants in a defamation suit pending (and stayed) in a California Superior Court.[5] Respondent is Mark E. Smith, plaintiff below, who is (and at all relevant times has been) a resident of Washoe County, Nevada.

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[4] *See* Cert. Pet., *Nevada v. City & Cnty. of San Francisco*, No. 14-1073 (U.S. Mar. 4, 2015) (cert. denied).

[5] *Mark E. Smith v. Brian Wakeling, et al.,* Case No. TCU17-6741 (Cal. Super. Ct., Nev. Cnty. July 13, 2017).

App. 12. He claims that in 2016 a Department of Wildlife employee gave a wildlife training presentation to law enforcement in Truckee, California, during which the employee made defamatory remarks about Smith. Smith also alleges that other Department of Wildlife officials knew of and condoned this disparagement. And Smith accuses other Department of Wildlife officials of making false statements about him on other occasions.

II. THE PROCEEDINGS BELOW

Smith filed his complaint in July 2017. In September, Petitioner appeared specially and moved to quash service of summons for lack of jurisdiction on grounds of interstate sovereign immunity. In December, the California Superior Court for Nevada County heard argument and in a written order rejected Nevada's arguments on immunity. The Court wrote that "under the U.S. Supreme Court's decision in *Nevada v. Hall* (1979) 440 U.S. 410, specific jurisdiction may exist over the Nevada Department of Wildlife. Accordingly, the motion to quash on the basis of interstate sovereign immunity is denied." App 8.

The California Superior Court *sua sponte* decided to stay proceedings "in the interest of substantial justice," under a California procedural rule, to permit the case to be heard in Nevada courts. App. 5-10. But the Court also determined that it would "retain jurisdiction during the pendency of the Nevada litigation and may permit discovery under this Court's jurisdiction, and subject to California law, should such discovery be required." App. 9-10.

As required by California procedure, Nevada filed a petition for writ of mandate to challenge the Superior Court's refusal to dismiss the case on sovereign-immunity grounds. In January 2018, Nevada's petition for writ of mandate was denied by the California Court of Appeal, Third Appellate District. App. 2. In February 2018, the California Supreme Court, *en banc*, denied Nevada's petition for review. App. 1.

REASONS FOR GRANTING THE PETITION

I. *NEVADA V. HALL*, WHICH PERMITS A STATE TO BE HALED INTO THE COURTS OF ANOTHER STATE WITHOUT ITS CONSENT, SHOULD BE OVERRULED.

Nevada v. Hall addressed an issue of profound importance to every State. Yet despite its astonishing implications, *Hall* presents the first—and last—time that this Court directly addressed interstate sovereign immunity. *Id.* at 414, 430. In *Hall*, three dissenting Justices warned that anything less than absolute immunity from suit in another State's courts would "open[] the door to avenues of liability and interstate retaliation that will prove unsettling and upsetting for our federal system." *Id*. at 427 (Blackmun, J., dissenting); *see id*. at 442–43 (Rehnquist, J., dissenting) (similar).

Time has proved the *Hall* dissenters correct. In 2015, this Court confronted two certiorari petitions, one from California, the other from Nevada—each involving one of these neighboring States being sued in the courts of the other. Each State independently

urged the Supreme Court to overrule *Hall*.[6] The spectacle of two States being sued in each other's courts—each unsuccessfully invoking sovereign immunity—undoubtedly contributed to this Court's grant of certiorari in *Hyatt II*. But with the loss of Justice Scalia, the Court ultimately divided equally on the question of whether to overrule *Hall*. *See Hyatt II,* 136 S. Ct. at 1279.

The decision in this case raises the same question about *Hall*'s correctness—and again involves the Golden and Silver States. The twist here, however, is that instead of a Californian suing Nevada in California (*Hall*) or a Nevadan suing California in Nevada (*Hyatt*), here we have a Nevadan suing Nevada in California. In other words, this case lacks, by contrast to those prior cases, even a state's classic sovereign interest in protecting its own residents—since the parties here constitute, as it were, an all-Nevada roster. This is why the California Superior Court ordered the parties to take their dispute across the border to Nevada (while nonetheless retaining jurisdiction).

Yet even in a case such as this, California's courts refused to grant any solicitude for a sister state's sovereignty—dismissing Nevada's sovereignty arguments with a cursory citation to *Hall*. App. 8. It is particularly telling that this occurred right alongside California's executive branch repeatedly asking this Court to provide *it* immunity from suit in Nevada's

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[6] *See* Cert. Pet. 12 n.3, 17 n.8, 19, *Nevada v. City & Cnty. of San Francisco*, No. 14-1073; Cert. Pet. 26-35, *Franchise Tax Bd. of Cal. v. Hyatt* (*Hyatt II*), No. 14-1175 (U.S. Mar. 23, 2015) (cert. granted).

courts (*see Hyatt II* and *Hyatt III*, but not *Hyatt I*). This case—and the ones before it—confirm the *Hall* dissenters' prediction that discarding interstate sovereign immunity would substitute a race-to-the-bottom for cooperative federalism. *See* 440 U.S. at 429-30 (Blackmun, J.). The *Hall* dissenters (and the Framers) were right: the structure of our constitutional order requires real protections for state sovereignty, not leaving such fundamentally important structural norms to the whim of a toothless concept like "comity." There is no reason to think that the Framers, who cherished structural protections and distrusted reliance on mere neighborly goodwill, thought otherwise. The same interstate sovereign immunity that States undeniably enjoyed as a matter of the law of nations or common law *before* incorporation they should still enjoy as a matter of constitutional structure today.

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In *Nevada v. Hall*, 440 U.S. 410 (1979), a Nevada state employee, driving in California on official business, injured two California residents in a crash. The plaintiffs sued Nevada in San Francisco Superior Court. *Id*. at 411-12. This Court held that the State of Nevada could be subjected, without its consent, to this tort suit in a California state court.

The Court agreed that Nevada's immunity defense "would have been sustained" by a sister State "when the Constitution was being framed," but the majority chose not to rely on that history. *Id.* at 417. The majority instead ruled on the lack of an explicit textual bar in the Constitution, as well as the lack of specific discussion of state-court immunity during the framing

and ratification debates. *See id.* at 418-19, 421. The majority compared the States to "independent and completely sovereign nations," concluding that immunity from suit in the courts of another sovereign generally exists only as a matter of "comity." *Id.* at 417-18.

Three dissenting Justices argued that such immunity from suit is part of the Constitution's "implicit ordering of relationships within the federal system necessary to make the Constitution a workable governing charter." *Id.* at 433 (Rehnquist, J., dissenting); *see id.* at 430 (Blackmun, J., dissenting) (similar).

A. *Nevada v. Hall* is historically unsupported.

From the time of the framing generation until *Hall*, States' immunity was "often described … in sweeping terms, without reference to whether the suit was prosecuted in state or federal court." *Alden v. Maine*, 527 U.S. 706, 745 (1999). During Virginia's ratification debate, for example, James Madison flatly stated: "'It is not in the power of individuals to call any state into court.'" *Id.* at 717 (citation omitted); *see also id*. at 718 (quoting John Marshall: "It is not rational to suppose that the sovereign power should be dragged before a court."). The "doctrine that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified," *id.* at 715-16, and there is no historical evidence that suits against states by private non-residents were any exception to this "universal" understanding. On the

contrary, post-*Hall* scholarship has concluded the opposite.[7]

Sovereign immunity, in short, meant that although States could be plaintiffs, or willingly submit to a suit, they could not be coerced into becoming defendants. This was no minor procedural rule. "The generation that designed and adopted our federal system," wrote this Court in *Alden*, "considered immunity from private suits central to sovereign dignity." 527 U.S. at 715.

Yet during ratification a debate arose over whether the draft Constitution, particularly the clause in Article III, Section 2, which spoke of federal judicial cognizance of suits "between a State and Citizens of another State," operated to lift that immunity as to suits against States that might be brought in the new federal courts. Alexander Hamilton, no apologist for state power, observed in *Federalist* No. 79:

> It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without its consent* …. [This] exemption, as one of the

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[7] *See*, *e.g.*, Ann Woolhandler, *Interstate Sovereign Immunity*, 2006 Sup. Ct. Rev. 249, 252-53 ("Justice Stevens's opinion in *Hall* asserts that the 'the question whether one State might be subject to suit in the courts of another State was apparently not a matter of concern when the new Constitution was being drafted and ratified....' [If] Stevens's statement means that the founders had nothing on their minds with regard to state jurisdiction over sister states, it is incorrect. Rather, the impossibility of unconsented *in personam* suits against states in the courts of other states was a foundation on which all sides of the framing era debates built their argument as to whether Article III's state/citizen diversity provisions effected a waiver of state immunity.") (footnotes omitted).

> attributes of sovereignty, is now enjoyed by the government of every state in the union.[8]

But Hamilton italicized "without its consent" because he knew that soon to arise in the courts was the question of whether such consent would in fact be rendered by States choosing to ratify the Constitution. The States retained their sovereign immunity, he continued, "unless" there was a "surrender of this immunity in the plan of the convention." Hamilton, like everyone else, was focused on whether such immunity might be surrendered in the *federal* courts. It was inconceivable—even to a Federalist nation-builder like Hamilton—that the States might somehow surrender their sovereign immunity to suits in another *State*'s courts.

Whether this federal surrender occurred was the issue in *Chisholm v. Georgia*, 2 U.S. 419 (1793), the case that put to a practical test the new Constitution's effect on traditionally unassailable state immunity. A South Carolinian sued Georgia, in federal court, over unpaid war debts. The suability of a state was an explosive question—one of "uncommon magnitude," *id.* at 453, wrote Justice James Wilson—for it called into question the validity of sovereign immunity itself. Pointing to Article III, Section 2, the Court stunned the nation by finding that the South Carolinian *could* maintain the suit. *Id*. at 452 (Blair, J.), 466 (Wilson, J.), 467 (Cushing, J.), 476 (Jay, C.J.). As Justice Blair wrote: "[W]hen a State, by adopting the Constitution, has agreed to be amenable to *the judicial power of the*

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[8] THE FEDERALIST No. 79, at 422 (Alexander Hamilton) (George W. Carey ed., 2001).

United States, she has, *in that respect*, given up her right of sovereignty." *Id*. at 452 (emphases added).

Suits against states, mostly over war debts, began immediately nationwide—but notably only in the federal courts. Virtually nobody attempted to bring such suits against one State in another State's courts. But even the federal suits resulted in a roar of protest that brought on the Court's first crisis.[9] Georgia's lower house passed a bill providing that any federal agent bold enough to try to enforce the Court's decision would be "declared guilty of felony and shall suffer death, without benefit of clergy, by hanging." (Imagine what would have happened had one State allowed a suit against another State to proceed in state court.) The next day a constitutional amendment, eventually the Eleventh Amendment, was introduced in Congress to immunize States from suits in federal court. The "swiftness and near unanimity" by which the amendment swept legislatures proved how comprehensively Americans viewed the inviolability of state sovereign immunity. *Alden*, 527 U.S. at 724.

It also proves how wrong *Hall* was. *Chisholm* found that the Constitution created an *exception* to sovereign immunity when suit was brought against a State in *federal* court. The Eleventh Amendment eliminated that exception—even supposing, as many denied, that it existed in the first place. *Id.* at 722. But no one had even suggested, to paraphrase Justice Blair, that "by adopting the Constitution" States had somehow

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[9] Joseph Tartakovsky, THE LIVES OF THE CONSTITUTION: TEN EXCEPTIONAL MINDS THAT SHAPED AMERICA'S SUPREME LAW (2018), 39-40 (recounting history of *Chisholm v. Georgia*).

"agreed to be amenable to the judicial power of" *other* States. Unlike abrogation of sovereign immunity in *federal* courts—which, though controversial, had its supporters—abrogation of sovereign immunity in *other State courts* was practically unthinkable. States scandalized by the very idea of jurisdiction over them for private suits by arbiters like the U.S. Supreme Court were hardly ready to accept similarly offensive arrogations of power by a rival state's trial courts.

Alden concerned suits by private individuals, against their *own* nonconsenting State, in that State's courts. But *Alden*'s historical observations apply no less to suits brought against a nonconsenting State in *another* State's courts. *Alden*, for instance, noted that at the founding "many of the States could have been forced into insolvency but for their immunity from private suits for money damages." 527 U.S. at 750, 756. Surely this financial threat was only *more* acute if the State was being forced to appear by a private party in a *foreign* jurisdiction, where the sympathies of local juries and judges was lost.

Thus it is no surprise that before *Hall*, when state courts were infrequently asked to assert jurisdiction over another State, they inevitably repulsed the request in unqualified terms. When Virginia was sued in Pennsylvania's courts, for example, the Pennsylvania Attorney General urged dismissal, arguing that "all sovereigns are in a state of equality and independence, exempt from each other's jurisdiction, and accountable to no power on earth, unless with their own consent." *Nathan v. Virginia*, 1 U.S. (Dall.) 77 (Pa. Com. Pl. 1781). The court agreed, dismissing the case. Or the Tennessee Supreme Court,

in 1879, wrote that "[n]o State can be sued in its own courts, except by its consent, and certainly cannot be impleaded in a foreign State, against its consent. These are axiomatic principles of jurisprudence, about which there can be no doubt or debate." *Tappan v. W. & Atl. R.R. Co.*, 71 Tenn. 106, 112-13 (1879).[10]

This categorical understanding of sovereign immunity was echoed in this Court's own cases before *Hall*. In *Beers v. Arkansas*, 61 U.S. 527, 529 (1857), this Court broadly stated that "[i]t 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," (emphasis added). In *Cunningham v. Macon & Brunswick Railroad Co.*, 109 U.S. 446, 451 (1883), this Court reiterated that "neither a state nor the United States can be sued as defendant *in any court in this country* without their consent, except in the limited class of cases in which a state may be made a party in the supreme court of the United States by virtue of the original jurisdiction conferred on that court by the constitution. This principle is conceded in all the cases," (emphasis added). This Court's pre-*Hall*

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[10] See also *In re Dalrymple's Estate*, 31 Pa. C.C. 177 (Pa. Orph. 1905), *aff'd*, 64 A. 554 (Pa. 1906) ("nor, indeed, could the commonwealth of Pennsylvania be made a party [to a case in Wisconsin] without its continuing assent"); *Paulus v. South Dakota*, 201 N.W. 867, 869 (N.D. 1924) ("It is so well settled that an action cannot be maintained against a state without its consent that the citation of authorities in support of that proposition would be a fruitless labor."); *Stockwell v. Bates*, 10 Abb. Pr. (n.s.) 381 (N.Y. Sup. Ct. 1871) (dismissing a suit against Illinois and stating that "no judgment can be had, so as to attach money of the State, and thereby coerce its appearance").

decisions are peppered with similarly broad statements on the States' immunity from suit.[11]

B. *Nevada v. Hall* is inconsistent with the Constitution's structure.

Hall held that the Constitution was silent on interstate sovereign immunity. Nothing, said the majority, authorized the Court to "impose limits on the powers of California exercised," *i.e.*, the assertion of jurisdiction over a sister state. 440 U.S. at 421. Nevada, apparently, either had (1) to submit or (2) to resort to self-help, say, by ignoring the summons and defying any attempt to enforce an adverse judgment. The Constitution was irrelevant here, the Court concluded, because the doctrine of interstate sovereign immunity "developed at common law," with "its origins in the feudal system," but lacked any constitutional foundation. *Id.* at 414. And the *Hall* majority would not "infer[]" immunity "from the structure of our Constitution." *Id*. at 426.

The *Alden* Court, by contrast, located that immunity precisely in our constitutional structure. "Although the sovereign immunity of the States derives at least in part from the common-law tradition," wrote

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[11] See, *e.g.*, *W. U. Tel. Co. v. Pennsylvania*, 368 U.S. 71, 80 (1961) ("It is plain that Pennsylvania courts, with no power to bring other States before them, cannot give such hearings."); *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 53-54 (1944) ("[W]hen we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found."); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 321 (1934); *In re State of New York*, 256 U.S. 490, 497 (1921); *Hans v. Louisiana*, 134 U.S. 1, 16 (1890).

the Court, "the structure and history of the Constitution make clear that the immunity exists today by constitutional design." 527 U.S. at 733. Such immunity, the Court said, is secured by "fundamental postulates implicit in the constitutional design." *Id*. at 728-29. This all but restated Justice Rehnquist's dissent in *Hall*: interstate sovereign immunity, he wrote, flows from the Constitution's "implicit ordering of relationships within the federal system necessary to make the Constitution a workable governing charter." 440 U.S. at 433 (Rehnquist, J., dissenting).

If the Constitution had any universally agreed-upon purpose, it was to bring stability, order, and goodwill to interstate relations. Its drafters in Philadelphia sought to suppress the existing sources of cross-border irritation and menace, like tariffs and interstate military alliances. Yet even with all the bitter rivalry, protectionism, and hostility of the 1780s, no State dared to allow suits, in its courts, against other States. Such a dangerous incursion upon sovereignty, which wore the fearsome aspect of legal warfare, was scarcely contemplated. Woolhandler, *Interstate Sovereign Immunity*, 2006 Sup. Ct. Rev. 249, 252.

But this intrusion—considered so awful that, unlike other potential sources of interstate conflict, it was rarely attempted and *always* categorically repulsed—is precisely what *Hall* encourages. Under *Hall*, Nevada is recognized as immune to suit in home courts, and even in neutral federal courts, but not in the courts of another State, where Nevada's treasury and sovereign policies are most in peril. Justice Rehnquist noted this obvious incongruity. *Hall*, 440 U.S. at 437, 442 (Rehnquist, J., dissenting). In *Hyatt I*, in 2003, at oral

argument, the Court considered this incongruity further. Justice Kennedy stated that "it's very odd to me that California can't be sued in its own courts and it can't be sued in a federal court, but it can be sued in a Nevada court, which, if we follow the declension really has … the least interest in maintaining the dignity of the State of California." *See* Transcript of Oral Argument at 25-26, *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488 (2003) (No. 02-42). Justice Breyer similarly observed the "tremendous anomaly" presented by *Alden* and *Hall*. *Id.* at 27-30. Chief Justice Rehnquist opined that the "idea that the framers would provide for … original jurisdiction in the Supreme Court … for suits by one state against another suggests they thought it might be pretty hard to bring such a suit anywhere else." *Id.* at 32.

C. "Comity" is a poor constitutional rule.

By finding that interstate sovereign immunity is a matter of common law, and federally unenforceable, *Hall* chose to leave the limitations on California's attempt to subject Nevada to jurisdiction to the vagaries of "comity," the doctrine that nations ought to behave honorably and nonviolently in the hope of reciprocal treatment. The Court actually analogized the relationship between Nevada and California to that between Napoleon's France and Madison's America, as if the neighboring States were "independent and completely sovereign nations." *Hall*, 440 U.S. at 416-17 (citing *The Schooner Exchange v. McFaddon*, 7 Cranch 116 (1812)). The Court, in short, likened border states that had, by 1979, been part of the same Union for 115 years, to two countries, separated by the Atlantic, that

had in fact warred against each other a decade before *Schooner Exchange* was decided.

That is a troubling analogy. Between sovereign nations, comity is the best one can hope for. There is no supreme authority above nation-states to conclusively adjust differences. Every nation must look to its own sense of justice and responsibility in choosing whether to behave like a part of the family of nations or a rogue. Comity was the state of affairs in our country—*before* the Constitution. But the point of ratification was precisely to change the relationship between States from one based on mere comity to one with binding and reciprocal rights. American States were no longer as nation-states to each other. The very purpose of our national charter was to introduce a structure to peacefully resolve conflicts and to bind States by a glue stronger than mere good intentions.

To take just one example, Article IX of the Articles of Confederation took a major stride toward union by authorizing ad hoc commissions of "last resort" to hear boundary disputes between States. The Constitution institutionalized this power in Article III, Section 2, offering the U.S. Supreme Court as a permanent standing tribunal to handle State boundary disputes—as the Court would later do in substantial number, including between California and Nevada. *See*, *e.g., California v. Nevada*, 447 U.S. 125 (1980). This and similar powers sought to *replace* comity as the basis of adjudicating controversies—substituting a neutral court for, say, militias, as the mechanism by which to rectify a contretemps.

Comity is generally observed between independent nations because they have a war chest full of tools to "encourage" other nations to respect their sovereignty. If one nation's courts attempt to invade another nation's sovereignty by judicial decree, the defendant nation can refuse to enforce the other nation's judgments, or impose punitive tariffs and other economic retaliation, or—if nothing else works—even go to war. But these countermeasures against judicial interference by other States were forsworn by States when they submitted to the Full Faith and Credit Clause, Commerce Clause, and other constitutional commands. *Hall*, in holding that interstate immunity exists only as a matter of "comity," assumes that the States gave up those extralegal means of self-defense without requiring some substitute protection in return against overreaching by other States. Even if *Hall* is correct, we should be candid about where *Hall* leaves States in relation to each other with respect to nonconsensual suits: under the law of nations, but without the tools that make the law of nations work (when it does work). *Hall* presumes that our Founders created a system of "cooperative federalism" without balanced structural constraints to ensure it remained "cooperative."

This is why "comity" is a poor constitutional rule—or rather a misapplied vestige of a pre-constitutional order. Comity means that States do their best to work it out but otherwise are on their own. When California, then, in the present case, purported to obligate Nevada to defend itself against a private plaintiff in California, could Nevada, in resisting jurisdiction, have shredded the summons? Or threatened to garnish California assets held in Nevada

to the extent of any judgment entered against Nevada? Or refused to recognize any judgment ordered against it by a California court? Or resolved to engage in whatever other retaliatory financial sanctions it thought appropriate? Such recourses would be highly suspect under, if not expressly prohibited by, our Constitution—and appropriately so. And even if they were not, they would undermine the spirit of mutual cooperation that our Constitution envisions, and that States cultivate between themselves, such as by Nevada's recent voluntary adoption of a uniform interstate discovery law that empowers Nevada courts to enforce California subpoenas. *See* Nev. Rev. Stat. § 53.100-200.

In short, reliance on comity for interstate sovereign immunity under our constitutional order is naked reliance on a neighboring State's goodwill when all the historical tools to actually encourage and incentivize such goodwill were given up over 200 years ago. Comity doesn't work, as the saga of Nevada and California being repeatedly sued in each other's courts, while simultaneously arguing in vain for immunity, painfully illustrates. And the Framers would not have expected such an odd system to work. Rather, they undoubtedly expected that the law-of-nations principle of immunity from suit would carry forward into the new constitutional relationship between the states, not as some disembodied specter of comity, but as a right commensurate with the new, *structurally* cooperative relationship between the States.

D. *Nevada v. Hall* conflicts with this Court's sovereignty cases after *Hall*.

Hall is inconsistent with the approach this Court has taken after *Hall*. Since *Hall*, the Court has not interpreted the lack of an explicit textual bar in the Constitution as cutting against a State's immunity from suit. *See*, *e.g.*, *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 754 (2002) ("[T]his Court has repeatedly held that the sovereign immunity enjoyed by the States extends beyond the literal text of the Eleventh Amendment") (citations omitted). Nor has the Court interpreted the Founders' silence on a specific immunity question as indicating a lack of immunity. *See*, *e.g.*, *Alden*, 527 U.S. at 741 ("[T]he Founders' silence is best explained by the simple fact that no one, not even the Constitution's most ardent opponents, suggested the document might strip the States of the immunity."). Rather, the Court, as noted, has consistently evaluated the metes and bounds of the States' immunity from suit by looking to the "structure and history of the Constitution" and the "essential principles of federalism" implicit in our constitutional design. *Id.* at 733, 748; *see also Fed. Mar. Comm'n*, 535 U.S. at 754; *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267-68 (1997) (explaining that a "broader concept of immunity" is "implicit in the Constitution").

II. THIS CASE IS AN EXCELLENT VEHICLE FOR ANSWERING THE QUESTION PRESENTED.

This case allows the Court to address whether the time has come to reverse *Hall* and restore recognition of interstate sovereign immunity—the question this Court sought to address in *Hyatt II*. This case presents

that question in the cleanest, simplest, and most striking form: California has allowed a private Nevadan to sue Nevada in California. This case involves no sovereign California interest in protecting its own residents, as in *Hall*. The jurisdictional facts are undisputed and straightforward. The proceedings below had one relevant issue—this one—and it was decided early and unambiguously by California courts. Unlike the latest *Hyatt* petition, this dispute presents no antecedent law-of-the-case concerns. And, finally, no State has had more experience in the practical problems created by *Hall* than the State of Nevada.

This Court has said that the "fact that a decision has proved 'unworkable' is a traditional ground for overruling it," and that "[b]eyond workability, the relevant factors in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned." *Montejo v. Louisiana*, 556 U.S. 778, 792-93 (2009).

Nevada v. Hall merits overruling on every count. The decision has proven that it is unworkable in practice, but more than that, that it encourages behavior by States that is antithetical to the structural intent of the Constitution, by leaving them no other choice. *Hall* dates from 1979, and, by contrast to the centuries-old tradition that it departed from, does not deserve the approbation of antiquity. The existence of immunity does not affect primary conduct and so cannot be said to have created reliance interests. And finally, the reasoning and historical assumptions of *Hall* were inadequate at the time it was decided and

have been fatally undermined by this Court's more recent State sovereign immunity decisions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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