No. 17-

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

PETITION FOR A 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 haled into another State's courts without its consent, should be overruled.

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PETITION FOR A WRIT OF CERTIORARI

The Franchise Tax Board of the State of California (FTB) respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Nevada in this case.

OPINIONS BELOW

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 An earlier version of that opinion (App. 67a-131a), which was withdrawn on rehearing, was reported at 401 P.3d 1110.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

139a-152a) is unreported but is noted at 106 P.3d 1220 (Table).

JURISDICTION

The Supreme Court of Nevada entered judgment on rehearing on December 26, 2017. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1257.

STATEMENT

A. Hyatt's Tax Dispute

Respondent Gilbert Hyatt is a former 23-year resident of California who earned hundreds of millions of dollars in licensing fees on technology patents he once owned and developed in California. App. 5a; *Franchise Tax Bd. of Cal.* v. *Hyatt* (*Hyatt I*), 538 U.S. 488, 490-491 (2003). In 1992, Hyatt filed a California tax return stating that he had ceased to be a California resident, and had become a Nevada resident, on October 1, 1991. *Hyatt I*, 538 U.S. at 490.

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

lion in taxes and interest, plus further penalties. App. 7a-8a.

Disputes between Hyatt and the FTB over the validity of those audit determinations have consumed two decades. The California State Board of Equalization, which hears appeals from the FTB's determinations, denied Hyatt's appeal as to the issues of California-sourced income and interest abatement, affirming the FTB's assessment of taxes for the 1991 tax year, and sustained Hyatt's appeals as to tax fraud and as to California residency for 1992. Administrative proceedings in California are ongoing. The Court of Appeals for the Ninth Circuit also recently affirmed the dismissal of another lawsuit that Hyatt brought against the members of the FTB and Board of Equalization, which sought to enjoin further administrative proceedings. *Hyatt* v. *Yee*, 871 F.3d 1067 (9th Cir. 2017).

B. The Nevada Litigation

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

The FTB moved for summary judgment, arguing that it was entitled to immunity from suit in Nevada, as it would be in California. App. 142a. Under California

law, no public entity may be held liable for "instituting any judicial or administrative proceeding or action for or incidental to the assessment or collection of a tax," or for any "act or omission in the interpretation or application of any law relating to a tax." Cal. Gov't Code § 860.2. The FTB argued that the Full Faith and Credit Clause, together with principles of sovereign immunity and comity, required the Nevada courts to grant the FTB the same immunity. *Hyatt I*, 538 U.S. at 491-492.

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

C. *Hyatt I*

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

The Court also noted that in *Nevada* v. *Hall*, it had held that "the Constitution does not confer sovereign immunity on States in the courts of sister States." 538 U.S. at 497. Nineteen States and Puerto Rico filed an amicus brief in *Hyatt I*, urging the Court to overrule *Hall* as inconsistent with its other decisions on state sovereign immunity. States Amici Br. 17, No. 02-42 (U.S. Dec. 9, 2002). But because the FTB had not asked for *Hall* to be overruled, the Court declined to consider whether to do so. *Hyatt I*, 538 U.S. at 497.[1]

D. Trial and Appeal

After this Court's decision in *Hyatt I*, the parties engaged in extensive discovery and pretrial proceedings in state court. Finally, in 2008—more than ten years after Hyatt filed suit—the case proceeded to a jury trial that lasted approximately four months. App. 11a. The Nevada jury found for Hyatt on all claims that were tried and awarded him more than $1 million on his fraud claim, $52 million for invasion of privacy, $85 million for emotional distress, and $250 million in punitive damages. *Id.* The trial court added more than $2.5 million in costs and $102 million in prejudgment interest, for a total judgment exceeding $490 million. App. 11a-12a.

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[1] The Court's decision in *Hall*, which involved a traffic accident, left open the possibility that a different result might obtain in a case where one State's exercise of jurisdiction over another State would "interfere with [the defendant State's] capacity to fulfill its own sovereign responsibilities." 440 U.S. at 424 n.24. In *Hyatt I*, the Court declined to adopt this suggestion in *Hall*, and in ruling against the FTB, refused to distinguish among state interests in determining whether one State could subject another State to suit in its courts. *See* 538 U.S. at 497-499 (discussing Full Faith and Credit Clause).

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

E. *Hyatt II*

This Court again granted certiorari, agreeing to consider two questions: whether the Nevada Supreme Court erred by failing to apply to the FTB the statutory immunities available to Nevada agencies, and whether *Nevada* v. *Hall* should be overruled. *Franchise Tax Bd. of Cal.* v. *Hyatt* (*Hyatt II*), 136 S. Ct. 1277, 1280 (2016). Several States filed amicus briefs at both the petition stage and merits stage in support of overruling *Nevada* v. *Hall*.

The Court divided equally on whether *Hall* should be overruled. *Hyatt II*, 136 S. Ct. at 1279. On the second question, the Court held that the Full Faith and Credit Clause does not "permit[] Nevada to award

damages against California agencies under Nevada law that are greater than it could award against Nevada agencies in similar circumstances." *Id.* at 1281. "In light of the 'constitutional equality' among the States," the Court explained, "Nevada has not offered 'sufficient policy considerations' to justify the application of a special rule of Nevada law that discriminates against its sister States." *Id.* at 1282.

F. Post-Remand Proceedings

On remand from this Court, and after supplemental briefing in which the FTB raised concerns about continuing hostile and discriminatory treatment, the Nevada Supreme Court issued a new opinion. It held that the FTB is entitled to the benefit of Nevada's statutory damages cap. App. 70a. The court therefore instructed the trial court to enter a damages award for fraud within the cap of $50,000. App. 107a. In an about-face, the court then held that a new trial was unnecessary on Hyatt's intentional infliction of emotional distress claim because the evidence at trial supported a damages award on that claim at the $50,000 cap. App. 121a-122a. The court thus denied the FTB a jury trial on emotional distress damages by deeming evidence it previously determined to be prejudicial as "harmless." *Id.* The court also remanded for consideration of costs and attorneys' fees. App. 124a. The court subsequently issued a new opinion on rehearing, reaffirming those holdings, App. 4a, 41a, 56a, 59a, and clarifying that the statutory damages cap covers prejudgment interest, App. 3a n.1, 41a.

As a result of the Nevada Supreme Court's judgment, nothing remains for the trial court to do except enter judgment against the FTB, determine which par-

ty, if any, is the prevailing party, and entertain any requests for costs and attorney's fees. App. 65a-66a.

REASONS FOR GRANTING THE PETITION

This petition presents the Court with the opportunity to answer the question that it agreed to decide in *Hyatt II*: whether *Nevada* v. *Hall*, 440 U.S. 410 (1979), should be overruled. *Hall* was wrong when it was decided and has become only more clearly wrong in the intervening years. As four Justices have already recognized, *Hall* cannot be squared with the Nation's constitutional structure. This Court should therefore grant certiorari and hold that, under our federal system, an agency of one State may not (absent its consent) be sued in the courts of another State.

I. AS FOUR MEMBERS OF THIS COURT HAVE ALREADY AGREED, *NEVADA* V. *HALL* SHOULD BE OVERRULED

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

1.a. In *Hall*, California residents injured in an automobile accident with a University of Nevada employee filed suit in California against the State of Nevada. 440 U.S. at 411-412. A California jury found the state employee negligent and awarded more than $1,000,000 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 426-427.

In so holding, the Court acknowledged that sovereign immunity "[u]nquestionably … was a matter of importance in the early days of independence." *Hall*, 440 U.S. at 418. The Court 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 decisions of this Court, reflected "widespread acceptance of the view that a sovereign state is never amenable to suit without its consent." *Id.* at 419-420 & n.20.

The Court nonetheless dismissed this "widespread" Framing-era view as irrelevant to the constitutional question whether States are immune from suit in the courts of their fellow sovereigns. The Court recognized that, at the time of the Framing, the States were "vitally interested" in whether they could be subjected to suit in the *federal* courts authorized by the Constitution. *Hall*, 440 U.S. at 418. But, the Court stated, it did not follow that the Framers intended to enshrine any principle of interstate sovereign immunity in the Constitution—perhaps because the notion of one State being sued in the courts of another was too outlandish to contemplate. The Court reasoned that, since 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, it "was apparently not a matter of concern when the new Constitution was being drafted and ratified." *Id.* at 418-419.

The Court then ruled 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. *Hall*, 440 U.S. at 421. The Court refused to "infer[] from the structure of our Constitution" any protection for sovereign immunity beyond the explicit limits on federal-court jurisdiction set forth in 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, the Court explained, a State's only recourse is to hope that, as "a matter of comity" and "wise policy," a sister State will make the "voluntary decision" to exempt it from suit. *Id.* at 416, 425-426.

b. Justice Blackmun dissented, joined by Chief Justice Burger and then-Justice Rehnquist. Those Justices would have held that the Constitution embodies a "doctrine of interstate sovereign immunity" that is "an essential component of federalism." *Hall*, 440 U.S. at 430 (Blackmun, J., dissenting). The "only reason why this immunity did not receive specific mention" during ratification, Justice Blackmun wrote, is that it was "too obvious to deserve mention." *Id.* at 431.

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

that the "concept of sovereign immunity" that "prevailed at the time of the Constitutional Convention" was "sufficiently fundamental to our federal structure to have implicit constitutional dimension." *Id.*

Justice Rehnquist filed a separate dissent, 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." *Hall*, 440 U.S. at 432-433 (Rehnquist, J., dissenting). The "States that ratified the Eleventh Amendment," Justice Rehnquist emphasized, "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.* In Justice Rehnquist's view, *Hall* "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. *Hall* stands in sharp conflict with the Founding-era understanding of state sovereign immunity. Before the adoption of the Constitution, it was widely accepted that the States enjoyed sovereign immunity from suit in each other's courts. In *Nathan* v. *Virginia*, 1 U.S. (1 Dall.) 77 (Pa. Ct. Com. Pl. 1781), for example, a Pennsylvania citizen brought suit in the Pennsylvania courts to attach property belonging to 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 78. Pennsylvania's attorney general, William Bradford, urged that the case be dismissed on the grounds that each State is a sovereign, and that "every kind of process, issued against a sovereign, is a violation of the laws of nations; and is in itself null and void." *Id.* The Pennsylvania court agreed and dismissed the case. *Id.* at 80; *see also Moitez* v. *The South Carolina*, 17 F. Cas. 574 (Pa. Adm. Ct. 1781) (No. 9697).

The ratification of the Constitution did not abrogate this conception of state sovereignty. The Framing-era debates focused on the question whether States would be subject to suit in federal court. But those debates over the meaning of Article III *assumed* the unquestioned proposition that States would remain immune from suit in the courts of other States. In other words, "Article III was enacted against a background assumption that the states could not entertain suits against one another." Woolhandler, *Interstate Sovereign Immunity*, 2006 Sup. Ct. Rev. 249, 263; *see also id.* at 253 (interstate sovereign immunity was the "foundation on which all sides of the framing era debates" premised their arguments regarding the reach of Article III); Federalist No. 81, at 487 (Hamilton) (Rossiter ed., 1961) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." (emphasis omitted)). The "only reason" why interstate sovereign immunity was not specifically discussed during the ratification debates "is that it was too obvious to deserve mention." *Hall*, 440 U.S. at 431 (Blackmun, J., dissenting).

The force of the Founding-era conception of interstate sovereign immunity became clear after this Court held in *Chisholm* that States could be sued in federal court, without their consent, by citizens of another

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Even if the affirmance in *Hyatt II* constituted law of the case, however, that doctrine "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power." *Messenger* v. *Anderson*, 225 U.S. 436, 444 (1912). "A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance[.]" *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988); *see also Castro* v. *United States*, 540 U.S. 375, 384 (2003) (law of the case doctrine "cannot prohibit a court from disregarding an earlier holding in an appropriate case"); 18B Wright et al., *Fed. Prac. & Proc.* § 4478 (2d ed. 2017 Supp.). Moreover, law of the case doctrine is at its weakest when it comes to questions of jurisdiction and justiciability, which are more "likely to be reconsidered" than others "because of their conceptual importance" and the degree to which they are "affected with a public interest." *Fed. Prac. & Proc.* § 4478.5; *see, e.g.*, *Public Interest Research Grp. of N.J., Inc.* v. *Magnesium Elektron, Inc.*, 123 F.3d 111, 118 (3d Cir. 1997) ("[W]e conclude that the concerns implicated by the issue of standing—the separation of powers and the limitation of this Court's power to hearing cases or controversies under Article III of the Constitution—trump the prudential goals of preserving judicial economy and finality."); *American Canoe Ass'n* v. *Murphy Farms, Inc.*, 326 F.3d 505, 515-516 (4th Cir. 2003).

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

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

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

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

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

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

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

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

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

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

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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