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 WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEVADA

BRIEF FOR PETITIONER

WILLIAM C. HILSON, JR.
SCOTT W. DEPEEL
ANN HODGES
FRANCHISE TAX BOARD
OF THE STATE OF
CALIFORNIA
9646 Butterfield Way
Sacramento, CA 95827

JAMES W. BRADSHAW
PAT LUNDVALL
DEBBIE LEONARD
MCDONALD CARANO LLP
2300 West Sahara Ave.
Las Vegas, NV 89102

SETH P. WAXMAN
Counsel of Record
PAUL R.Q. WOLFSON
DANIEL WINIK
JOSHUA M. KOPPEL
JAMES BARTON
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

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.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

DOCKETED CASES

TABLE OF AUTHORITIES—Continued

Page(s)

STATUTES, RULES, AND REGULATIONS

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

No. 17-1299

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEVADA

BRIEF FOR PETITIONER

INTRODUCTION

This case arises from a protracted dispute between the Franchise Tax Board of the State of California (FTB) and an aggrieved taxpayer named Gilbert P. Hyatt. More than two decades ago, the FTB audited Hyatt's income tax returns and found that he had moved to Nevada later than he had claimed, creating a tax deficiency. Not satisfied with challenging the FTB's findings through California's administrative processes, Hyatt brought this suit against the FTB in Nevada state court, alleging that the FTB had committed numerous torts in the course of auditing his tax returns. After more than ten years of pretrial litigation, including a trip to this Court, Hyatt's suit proceeded to a four-month trial. The Nevada jury awarded Hyatt

more than $138 million in compensatory damages and $250 million in punitive damages—yielding, with costs and interest, a total judgment approaching half a billion dollars.

After an additional decade's worth of appeals, including a second trip to this Court, the monetary judgment against the FTB has been whittled down. But the burdens this litigation has imposed on the FTB—an agency of the State of California that is supposed to spend its time performing one of California's core sovereign functions—remain extraordinary. The litigation has cost California taxpayers millions of dollars, and even after the various appeals, the FTB *still* faces a judgment of $100,000, with Hyatt likely to seek costs in a further proceeding that could itself spawn additional appeals.

The Framers would have been horrified by this spectacle. When the Constitution was ratified, and for nearly two centuries after, it was universally understood that States could not be sued by individuals, without their consent, in the courts of other States. Yet this Court's decision in *Nevada* v. *Hall*, 440 U.S. 410 (1979), interpreted the Constitution to permit exactly that unintended result, on the theory that the Constitution did not explicitly address States' immunity in the courts of other States.

This Court's subsequent decisions make clear that *Hall* was wrongly decided. Although the *Hall* majority believed that any constitutional principle of state sovereign immunity had to be explicitly located in the constitutional text, the Court has since repeatedly held that "the scope of the States' immunity from suit is demarcated not by the text … alone but by fundamental postulates implicit in the constitutional design." *Alden*

v. *Maine*, 527 U.S. 706, 729 (1999). To discern those "fundamental postulates," the Court has held, one must examine "'history and experience, and the established order of things,'" which "reveal the original understanding of the States' constitutional immunity from suit." *Id.* at 726-727. The relevant question, then, is not whether the Constitution explicitly recognized interstate sovereign immunity—the question on which the *Hall* majority focused—but rather whether the Framers intended to abrogate the States' pre-ratification immunity from suit in the courts of other States. The historical record makes clear they did not. *Hall* also gave short shrift to the values protected by state sovereign immunity, including dignity and self-government, that are undermined by allowing States to be haled into the potentially hostile home-state courts of individual plaintiffs.

Although this Court is ordinarily and rightly reluctant to overrule its precedents, the considerations favoring stare decisis are at their weakest here. Not only does this case involve a constitutional rule rather than a statute, but it is a constitutional rule that does not govern primary conduct and that has therefore engendered no reliance interests. Unlike in most cases, even in most constitutional cases, there is no reason here for the Court to perpetuate an erroneous interpretation of the Constitution merely for the sake of consistency. Indeed, *Hall* is a doctrinal outlier, in deep tension not only with this Court's later statements about constitutional interpretation but also with the Court's recognition of state and tribal sovereign immunity in numerous other contexts. The Court should overrule *Hall* and restore interstate sovereign immunity to its intended place in our constitutional structure.

OPINIONS BELOW

The opinion of the Supreme Court of Nevada (Pet. App. 1a-66a) is reported at 407 P.3d 717. An earlier version of that opinion (Pet. 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 (Pet. App. 135a-136a) is unreported. The relevant orders of the Nevada District Court (Pet. 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 (Pet. 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. Pet. App. 1a. The petition for certiorari was timely filed on March 12, 2018 and granted on June 28, 2018. This Court has jurisdiction under 28 U.S.C. § 1257.

STATEMENT

A. Hyatt's Tax Dispute

Respondent Gilbert Hyatt resided in California for decades and earned hundreds of millions of dollars from technology patents he developed in California. Pet. 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 resident of Nevada (which has no personal income tax), on October 1, 1991, shortly before he received substantial licensing fees. 538 U.S. at 490-491.

Petitioner, the Franchise Tax Board of the State of California, is the agency responsible for assessing personal income tax in California. In 1993, the FTB became aware of circumstances suggesting that Hyatt had not actually moved to Nevada in October 1991, as he claimed. Pet. App. 5a. The FTB therefore commenced an audit of Hyatt's 1991 return. *Id.* The audit determined that Hyatt did not move to Nevada until April 1992 and remained a California resident until that time. Pet. App. 7a. The FTB accordingly found that Hyatt owed approximately $1.8 million in unpaid California income taxes for 1991, plus penalties and interest. *Id.* Because the FTB determined that Hyatt had resided in California for part of 1992 yet paid no California taxes, it also opened an audit for that year, which concluded that Hyatt owed an additional $6 million in taxes and interest plus further penalties. Pet. App. 7a-8a.

Disputes between Hyatt and the FTB over the validity of those determinations have consumed two decades. The California State Board of Equalization, which until recently heard administrative appeals from the FTB's determinations, affirmed the FTB's assessment of taxes for the 1991 tax year but sustained Hyatt's appeals for 1992. *See* Minutes of the State Bd. of Equalization (Aug. 29, 2017), https://tinyurl.com/yb3lhhcq. Those decisions remain under review by the Office of Tax Appeals, which assumed the Board of Equalization's appellate function.[1] The U.S. Court of Appeals for the Ninth Circuit recently affirmed the dismissal of a lawsuit that Hyatt brought against the members of the FTB and Board of Equalization, seek-

[1] *See* Taxpayer Transparency and Fairness Act, 2017 Cal. Legis. Serv. ch. 16 (A.B. 102) (West).

ing to enjoin further administrative proceedings. *Hyatt* v. *Yee*, 871 F.3d 1067 (9th Cir. 2017).

B. The Nevada Litigation

In January 1998, as the 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 various 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. Pet. App. 8a. Hyatt sought compensatory and punitive damages, as well as a declaratory judgment that he had resided in Nevada during the periods relevant to the FTB's audits. Pet. App. 3a, 8a.

The parties engaged in a long series of discovery battles, ranging from disagreements over the FTB's invocation of the deliberative-process privilege to challenges over the trial court's protective order. Pet. App. 147a-148a. The parties pressed their arguments before a discovery commissioner, the trial court, and, ultimately, the Nevada Supreme Court, which performed a document-by-document assessment to resolve the parties' disputes. Pet. App. 142a, 147a-148a.

The parties also engaged in extensive motion practice. The FTB sought summary judgment on multiple grounds, *see* Pet. App. 9a-10a, including that it was entitled to immunity from suit in Nevada as it would be in California, Pet. 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 Nevada courts were required to grant it the same immunity under the Full Faith and Credit Clause and under principles of sovereign immunity and comity. *Hyatt I*, 538 U.S. at 491-492. The trial court denied that motion. *Id.* at 492.

The FTB then petitioned the Nevada Supreme Court for a writ of mandamus, arguing that it was immune from suit in the Nevada courts. *Hyatt I*, 538 U.S. at 492. The Nevada Supreme Court rejected that claim of complete immunity, noting that in *Nevada* v. *Hall*, 440 U.S. 410 (1979), this Court had held that the Constitution does not grant the States sovereign immunity from suit in the courts of other States. Pet. App. 144a & n.12. The Nevada Supreme 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. Pet. App. 10a.

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 it would have received 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 had under California law. *Hyatt I*, 538 U.S. at 496-497.

The Court 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. Although *Hall*—which involved tort damages flowing from a traffic accident in California be-

tween a Nevada state employee and residents of California—had 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, the Court in *Hyatt I* declined to draw such a distinction, *see* 538 U.S. at 497-499.

D. Trial and Appeal

After this Court's decision in *Hyatt I*, the parties spent the next half decade engaged in extensive discovery and pretrial proceedings in state court. During that time, the parties filed thousands of pages of briefing on challenges to the scope of discovery, the appropriateness of in camera review, and other issues. In addition, the parties took 155 depositions and exchanged more than 168,000 documents.[2]

Finally, in 2008—more than ten years after Hyatt filed suit—the case proceeded to a jury trial that lasted approximately four months. Pet. App. 11a. The Nevada jury found for Hyatt on all claims that were tried and awarded him more than $85 million in damages for emotional distress, $52 million in damages for invasion of privacy, $1 million in damages for fraud, and $250 million in punitive damages. *Id.* The trial court later added $102 million in prejudgment interest, and after appointing a special master to rule on Hyatt's motion for costs—a process that required an additional fifteen months of discovery and even more motion practice—the trial court tacked on an additional $2.5 million to

---

[2] *See* Appellants' Br. 26 n.22, *Franchise Tax Board* v. *Hyatt*, No. 53264 (Nev. Aug. 7, 2009), 2009 NV S. Ct. Briefs LEXIS 153.

Hyatt's award, Pet. App. 11a-12a. In total, the judgment against the FTB exceeded $490 million.

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 it 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 $50,000 statutory damages cap that Nevada law creates for Nevada governmental entities, and thus affirmed the fraud damages that the jury had awarded. *Id.* at 145-147. The court did, however, conclude as a matter of comity that the FTB was immune from punitive damages (as Nevada agencies are). *Id.* at 154. Because of 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.

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).

On the first question, the Court held that the Nevada Supreme Court had erred. *Hyatt II*, 136 S. Ct. at 1279. The Court divided equally on whether *Hall* should be overruled. *Id.*

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. Consistent with this Court's opinion, the Nevada Supreme Court instructed the trial court to enter a damages award for fraud within the statutory cap of $50,000. Pet. App. 107a. The court also held—in a reversal of its prior decision—that a new trial on the amount of damages for intentional infliction of emotional distress was no longer required, because the evidence at trial supported damages on that claim up to the $50,000 cap. Pet. App. 121a-122a. The court thus denied the FTB a jury trial on emotional distress damages by deeming "harmless" evidentiary errors it had previously determined to be prejudicial. *Id.* The court also remanded for consideration of costs. Pet. App. 124a-125a. The court subsequently issued a new opinion on rehearing, reaffirming those holdings, Pet. App. 4a, 41a, 56a, 59a, and clarifying that the statutory damages cap covers prejudgment interest, Pet. App. 3a n.1, 41a, 56a.

SUMMARY OF ARGUMENT

I. *Hall* was wrongly decided. This Court's subsequent precedents make that clear in two ways.

First, whereas the *Hall* majority asked whether the Constitution expressly codified interstate sovereign immunity, this Court has since recognized that is the wrong question. The States retain the degree of sovereign immunity they enjoyed *before* the ratification of the Constitution, unless the Constitution *abrogates* their immunity. The relevant question, then, is whether States enjoyed immunity in each other's courts be-

fore the ratification of the Constitution—and, if so, whether the Framers intended to alter that state of affairs and allow States to be sued in other States' courts.

The historical record shows beyond doubt that the States *did* enjoy immunity in each other's courts in the pre-ratification era and that the Framers had no intention of abrogating that immunity. Rather, participants on all sides of the ratification debates—in the course of discussing whether Article III allowed States to be sued in the new federal courts—assumed without hesitation that States could not be sued in other States' courts. That understanding was confirmed by the outraged reaction to this Court's decision in *Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419 (1793), allowing States to be sued in the neutral federal courts—a reaction that would have made little sense had anyone thought States could be sued in the potentially more hostile courts of other States. And the Framing-era consensus was further confirmed by decisions of this Court and state courts for nearly two centuries preceding *Hall*.

Hyatt has argued that in the Framing era, sovereigns were understood to possess enforceable immunity only in their own courts, not in the courts of other sovereigns. He bases that view on *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116 (1812), which dealt with one nation's amenability to suit in the courts of another nation. But the relevant holding of *The Schooner Exchange*—that a forum nation may choose whether to recognize another nation's sovereign immunity in its courts—says nothing about whether states in a federal union are required to recognize each other's sovereign immunity in their courts. Rather, it reflects the absence of any supranational tribunal that could *force* one nation to respect another's sovereign immunity. The Constitution, by contrast, created a tri-

bunal—this Court—with the power to require one State to respect another's sovereign immunity. *The Schooner Exchange* thus sheds no light on the question presented here.

Second, *Hall* gave little consideration to the constitutional values that are protected by sovereign immunity. As articulated in this Court's subsequent decisions, those values, including States' dignity interests and their citizens' interests in self-government, are inconsistent with the holding of *Hall*. This suit—in which a California state agency has been subjected to astonishing burdens for two decades, and in which a Nevada judge and jury have passed judgment on California's conduct of one of its core sovereign functions—exemplifies why *Hall* cannot be squared with the values the Court has recognized in later decisions.

II. Although this Court is ordinarily and rightly loath to overrule its precedents, the presumption in favor of stare decisis should be overcome here for several reasons.

First, *Hall* is a poorly reasoned decision that is inconsistent with this Court's subsequent precedents in numerous respects. In addition to *Hall*'s inconsistency with the Court's subsequent statements about constitutional interpretation and the values protected by sovereign immunity, *Hall* stands in tension with numerous decisions in which this Court has recognized States' sovereign immunity in forums less potentially hostile to their sovereignty than state courts are to the interests of other States. Since *Hall*, the Court has held that Congress's Article I powers do not allow it to abrogate a State's sovereign immunity from suit on a federal claim in federal court; that state sovereign immunity extends to federal agency adjudications; and that

States are immune from suit on federal claims in the States' *own* courts. The Court has also held that Indian Tribes are immune from suit in state courts, even suits arising from a Tribe's commercial activities. *Hall* is an extreme outlier in the Court's sovereign immunity jurisprudence.

The Court has recognized that, when one of its prior decisions has come to stand out as an outlier, overruling that decision can promote rather than undermine the consistency of this Court's jurisprudence. That is the case here. As a jurisprudential anomaly, *Hall* also has not given rise to a broader line of precedents that would have to be overruled along with it.

Second, the considerations favoring stare decisis are at their lowest ebb here. *Hall* is a constitutional decision, not a statutory one. And because *Hall* addresses a question of sovereign immunity, which does not affect primary conduct, it has given rise to no reliance interests that would be disturbed by overruling it.

Third, *Hall* has had significant harmful effects. This case, for example, has cost the taxpayers of California millions of dollars and has put the State's tax-collection agency through two decades' worth of distractions from its primary mission—a core sovereign function. It has also encouraged copycat complaints by other plaintiffs outside California. And it is just one of many cases in which States have been haled into other States' courts without their consent, often in circumstances presenting serious threats to their dignity and self-government interests. Neither the doctrine of comity nor the possibility of an interstate compact can adequately mitigate those harms.

ARGUMENT

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

I. States Are Constitutionally Immune From Suit In Each Other's Courts

Nevada v. *Hall* arose from a collision in which California residents were injured by a car owned by the State of Nevada, which was being driven by an employee of the University of Nevada on official state business. 440 U.S. 410, 411 (1979). The California residents filed suit in California against the State of Nevada and the university, as well as the driver's estate. *Id.* at 411-412. A California jury awarded the plaintiffs more than $1 million. *Id.* at 413. The State of Nevada and the university petitioned for certiorari, arguing that they were immune from suit in California's courts. This Court held, however, that constitutional principles of sovereign immunity did not preclude one State from being haled into the courts of another against its will. *See id.* at 426-427.

The Court acknowledged that sovereign immunity "[u]nquestionably … was a matter of importance in the early days of independence." 440 U.S. at 418. It recognized that, at the time of the Framing, the States were "vitally interested" in whether they could be subjected to suit in the new federal courts. *Id.* And it observed that the debates over ratification, as well as later deci-

sions 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. It reasoned that, because the "need for constitutional protection against" the "contingency" of a state defendant's 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." 440 U.S. at 418-419. And it refused to "infer[] from the structure of our Constitution" any protection for sovereign immunity beyond the limits on federal-court jurisdiction explicitly set forth in Article III and the Eleventh Amendment. *Id.* at 421, 426. The Court thus 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 that 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.

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 flows not from "an express provision of the Constitution" but rather from "a guarantee that is implied as an essential component of federalism." 440 U.S. at 430 (Blackmun, J., dissenting). The "only reason why this immunity did not receive specific mention" during ratification, in the

dissenters' view, was 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." 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, joined by Chief Justice Burger, likewise wrote that "when the Constitution is ambiguous or silent on a particular issue, this Court has often relied on notions of a constitutional plan—the implicit ordering of relationships within the federal system necessary to make the Constitution a workable governing charter and to give each provision within that document the full effect intended by the Framers." 440 U.S. at 433 (Rehnquist, J., dissenting). "The tacit postulates yielded by that ordering," Justice Rehnquist wrote, "are as much engrained in the fabric of the document as its express provisions, because without them the Constitution is denied force and often meaning." *Id.* He found support for that view in no less foundational a precedent than *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), in which the Court recognized the doctrine of intergovernmental tax immunity notwithstanding the absence of any express provision creating it.

Justice Rehnquist explained that the majority'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." 440 U.S. at 432-433 (Rehnquist, J., dissenting). The "States that ratified the Eleventh Amendment," Justice Rehnquist wrote, "thought that they were putting an end to the possibility of individual States as unconsenting defendants in foreign jurisdictions," but under the majority's decision they had "perversely foreclosed the neutral federal forums only to be left to defend suits in the courts of other States." *Id.* at 437.

Hall is inconsistent with this Court's subsequent sovereign-immunity precedents, which repudiated two of *Hall*'s foundational premises. First, the Court has rejected *Hall*'s view that any protection for interstate sovereign immunity must be explicitly located in the constitutional text. To the contrary, the Court has repeatedly recognized that States continue to enjoy the immunity they possessed before the ratification of the Constitution, unless the Constitution abrogated that immunity, and thus that the scope of States' immunity must be discerned not just by the constitutional text but by the historical record and the intent of the Framers. *Alden* v. *Maine*, 527 U.S. 706, 713 (1999). Second, the Court has emphasized the importance of state sovereign immunity in safeguarding the dignity and self-government interests of the States—interests neither recognized nor accounted for in *Hall*. *Id.* at 714-715; *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 58 (1996).

A. *Hall* Ignored The Framing-Era Understanding Of Interstate Sovereign Immunity

In *Hall*, as discussed above, the Court refused to "infer[] from the structure of our Constitution" any protection for sovereign immunity beyond the limits on federal-court jurisdiction explicitly set forth in Article III and the Eleventh Amendment. 440 U.S. at 421, 426. The dissenting Justices criticized the majority for its undue focus on the constitutional text to the exclusion of other modes of constitutional interpretation. Subsequent decisions of this Court have made clear that the *Hall* dissenters, and not the majority, employed the correct mode of constitutional interpretation.

First, whereas *Hall* reasoned that neither Article III nor the Eleventh Amendment expressly codified interstate sovereign immunity, 440 U.S. at 421—and refused to "infer[]" such a doctrine "from the structure of our Constitution," *id.* at 426—this Court's decisions have since 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. In *Tennessee Student Assistance Corp.* v. *Hood*, 541 U.S. 440 (2004), for example, the Court observed that "the States' sovereign immunity is not limited to the literal terms of the Eleventh Amendment." *Id.* at 446. In *Federal Maritime Commission* v. *South Carolina State Ports Authority*, 535 U.S. 743 (2002), the Court described the Eleventh Amendment as just "one particular exemplification of [States' sovereign] immunity." *Id.* at 753. And in *Virginia Office for Protection & Advocacy* v. *Stewart*, 563 U.S. 247 (2011), the Court observed that the Eleventh Amendment merely "confirm[s] the structural understanding that States entered the Union with their sovereign immunity in-

tact." *Id.* at 253; *see also Seminole Tribe*, 517 U.S. at 54; *Blatchford* v. *Native Vill. of Noatak*, 501 U.S. 775, 779 (1991).[3]

It is necessary to look beyond the constitutional text, the Court has explained, because neither the original Constitution nor the Eleventh Amendment "explicitly memorializ[es] the full breadth of the sovereign immunity retained by the States when the Constitution was ratified." *Federal Mar. Comm'n*, 535 U.S. at 753. Indeed, "[t]he Constitution never would have been ratified if the States … were to be stripped of their sovereign authority except as expressly provided by the Constitution itself." *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 238-239 n.2 (1985).

Second, and relatedly, the Court's post-*Hall* decisions recognize that the way to determine the principles of state sovereign immunity implicit in the constitutional structure is to examine "'history and experience, and the established order of things,'" which "reveal the original understanding of the States' constitutional immunity from suit." *Alden*, 527 U.S. at 726-727 (quoting *Hans* v. *Louisiana*, 134 U.S. 1, 14 (1890)). 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, the Court has since taken the opposite approach. It has recognized that "the States' immunity from suit is a fundamental aspect of the sovereignty which the

[3] Even decisions before *Hall*—most notably *Hans* v. *Louisiana*, 134 U.S. 1 (1890)—recognized that the constitutional principle of state sovereign immunity is not limited to the express terms 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 brief citations in footnotes. 440 U.S. at 420 nn.18, 20.

States enjoyed before the ratification of the Constitution," and that the States "retain" the same degree of sovereignty "today … *except as altered by the plan of the Convention*." *Alden*, 527 U.S. at 713 (emphasis added). The Court has thus "presum[ed]" that sovereign immunity prohibits "any proceedings against the States that were 'anomalous and unheard of when the Constitution was adopted.'" *Federal Mar. Comm'n*, 535 U.S. at 755.

The Court's more recent precedents thus explain why *Hall* reached the wrong answer: It asked the wrong question. The relevant question is not whether the Constitution explicitly codified interstate sovereign immunity but, rather, whether it abrogated the immunity that States had previously enjoyed in each other's courts.

As discussed below, a considerable body of historical evidence establishes that the Framers did not intend to abrogate States' immunity in the courts of other States. First, States were immune from suit in each other's courts during the pre-ratification era. Second, participants on all sides of the ratification debates agreed that the Constitution did not render States more amenable to suit in the courts of other States than they had been before. Third, the backlash to this Court's decision in *Chisholm*—culminating in the enactment of the Eleventh Amendment—confirmed the consensus that States were immune from suit in other States' courts as well as in the new federal courts. That consensus is further confirmed by pre-*Hall* decisions of this Court and state courts. *Hall* barely engaged with any of this history. *See, e.g.*, Simson, *The Role of History in Constitutional Interpretation: A Case Study*, 70

Cornell L. Rev. 253, 270 (1985) ("[T]he Court in *Hall* gave history far less than its due.").[4]

1. Before the Constitution, States were immune from suit in each other's courts

Before the ratification of the Constitution, it was widely accepted that the States enjoyed sovereign immunity from suit in each other's courts. That was clear from the reaction to *Nathan* v. *Virginia*, 1 U.S. (1 Dall.) 77 (Pa. Ct. Com. Pl. 1781), in which a Pennsylvania citizen sued in the Pennsylvania courts to attach property belonging to Virginia. The suit "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). Virginia "applied to the Supreme Executive Council of Pennsylvania, which directed the state's attorney general, William Bradford, to secure the action's dismissal." Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 Calif. L. Rev. 555, 585 (1994). And

[4] In addition to reflecting a mode of analysis that has been repudiated by this Court's later decisions, the *Hall* Court's inattention to history can at least partly be explained by the manner in which that case was presented to the Court. First, the state-court decision reviewed in *Hall* rejected Nevada's claim of sovereign immunity on grounds different from those embraced by this Court. The California Supreme 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 Nevada*, 503 P.2d 1363, 1364 (Cal. 1972). Second, the respondents before this Court largely advanced the argument on which the California Supreme Court had relied and barely addressed the constitutional issues. *See* Resp. 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, e.g.*, *Penson* v. *Ohio*, 488 U.S. 75, 84 (1988).

Bradford—who later became Attorney General of the United States under President Washington—urged that the case be dismissed on the ground 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." *Nathan*, 1 U.S. at 78. The Pennsylvania court agreed and dismissed the case. *Id.* at 80.

Nathan marked "a decisive rejection of state suability in the courts of other states," Pfander, 82 Calif. L. Rev. at 587, one with which the Framers were intimately familiar. Not only was the case highly publicized at the time, but James Madison was one of the Virginia delegates who sought its dismissal, and Thomas Jefferson—then Governor of Virginia—took a particular interest in the case as well. *See id.* at 586-587.

Another decision from the same time period—*Moitez* v. *The South Carolina*, 17 F. Cas. 574 (Pa. Adm. 1781) (No. 9,697)—reflects the same understanding of state sovereign immunity. In that case, the crew of a South Carolina ship sued the vessel in admiralty to recover wages they were allegedly due. As in *Nathan*, the Pennsylvania admiralty court dismissed the action because the attached vessel was owned by the "sovereign independent state" of South Carolina. *Id.* at 574; *see* Pfander, 82 Calif. L. Rev. at 587 n.127; *see also National City Bank of N.Y.* v. *Republic of China*, 348 U.S. 356, 358 (1955) (*Moitez* recognized "[t]he freedom of a foreign sovereign from being haled into court as a defendant").

Thus, it was widely accepted before the ratification of the Constitution that States' sovereign immunity from suit extended to proceedings in the courts of other States.

2. The Constitution did not abrogate States' immunity from suit in each other's courts

As discussed above, the relevant question under this Court's post-*Hall* decisions is whether the "the plan of the Convention" "*altered*" the immunity that States enjoyed before ratification, *Alden*, 527 U.S. at 713 (emphasis added)—not whether the Constitution explicitly codified that immunity. The historical evidence from the ratification debates makes clear that the Framers had no desire to strip States of their pre-ratification immunity from suit in the courts of other States. To the contrary, the ratification debates reinforced the pre-ratification understanding of state sovereign immunity.

The question of States' sovereign immunity in the new federal courts was central to the debate over Article III's proposed extension of the "Judicial Power" of the United States to cases "between a State and Citizens of another State," U.S. Const. art. III, § 2, cl. 1. Antifederalists, who assailed that provision of the draft Constitution, based their arguments on the fact that, up to that point, States had not been amenable to suit in *any* court without their consent. For example, the Federal Farmer contrasted Article III's requirement that a State "answer to an individual in a court of law" with the fact that "the states are now subject to no such actions." *Federal Farmer No. 3* (Oct. 10, 1787), *in* 4 *The Founders' Constitution* 227 (Kurland & Lerner eds., 1987). The Antifederalist Brutus similarly attacked Article III for requiring States to "answer in a court of law, to the suit of an individual," noting that "[t]he states are now subject to no such actions." Brutus No. 13 (Feb. 21, 1788), *in* 4 *The Founders' Constitution* 237, 238.

Proponents of ratification offered two conflicting responses, but neither response disputed the premise that suits by a citizen of one State against a different nonconsenting State were unprecedented. One response was offered by Federalists who contended that Article III *did* abrogate state sovereign immunity in such suits in federal court, and who viewed that as a virtue of the new federal courts, for those courts would provide a forum for suits that could not otherwise be brought. Those Federalists argued that Article III provided federal jurisdiction over suits by individuals against States precisely because of the "impossibility of calling a sovereign state before the jurisdiction of another sovereign state." Pendleton, *Speech to the Virginia Ratifying Convention*, *in* 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 549 (Elliot ed., 1836) (hereinafter *Elliot's Debates*).

An alternative response was offered by Federalists who argued, contrary to the Antifederalists' interpretation, that Article III did *not* abrogate state sovereign immunity in suits brought by individuals. But although those leading proponents of ratification took issue with the Antifederalist view of what Article III accomplished, they embraced the premise that a suit by a private individual against a nonconsenting State would be an unprecedented novelty. Indeed, they emphasized the absurdity of such suits as part of the reason Article III did not authorize them in federal court. Alexander Hamilton, for example, wrote that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*," an immunity he characterized as "now enjoyed by the government of every State in the Union." *The Federalist* No. 81, at 511 (Rossiter ed., 1961) (Hamilton). Hamilton added

that such immunity would "remain with the States" absent a "surrender" of it in the Constitution. *Id.* At the Virginia convention, James Madison similarly argued that "[i]t is not in the power of individuals to call any state into court," 3 *Elliot's Debates* 533, and John Marshall claimed that "[i]t is not rational to suppose that the sovereign power should be dragged before a court," *id.* at 555. Although those remarks concerned the jurisdiction of the federal courts to be established under Article III, their references to what is "inherent in the nature of sovereignty" and the relative powers of individuals and sovereigns "most plausibly included suits in the courts of another state" as well. Woolhandler, *Interstate Sovereign Immunity*, 2006 Sup. Ct. Rev. 249, 256-257.

In short, although the ratification debates focused on whether States would be subject to suit in federal court, the tenor of the debates made clear that the Framers fully intended for States to remain immune from suit in the courts of other States. Article III was thus "enacted against a background assumption that the states could not entertain suits against one another." Woolhandler, 2006 Sup. Ct. Rev. at 263; *see also id.* at 253 (interstate sovereign immunity was a "foundation on which all sides of the framing era debates" premised their arguments regarding the reach of Article III). As Justice Blackmun recognized in his dissent from *Hall*, the "only reason" why 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).

3. The history of the Eleventh Amendment confirms the understanding that States were immune in each other's courts

The Framing-era understanding of interstate sovereign immunity was confirmed by the reaction to this Court's decision in *Chisholm* v. *Georgia* 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). That description was if anything an understatement of the reaction within state capitols. The Massachusetts Legislature denounced *Chisholm* as "repugnant to the first principles of a federal government," while the Georgia House of Representatives made any effort to enforce *Chisholm* a felony punishable by death "without benefit of clergy." *See Alden*, 527 U.S. at 720-721. The backlash culminated in the enactment of the Eleventh Amendment, which provided that the federal judicial power did not extend to suits "against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.

The uprising against *Chisholm* confirmed the depth and breadth of the understanding that States could not be sued by individuals, without their consent, in *any* courts—not their own, not the federal courts, and certainly not another State's courts. The Connecticut legislature, for example, pronounced its desire that "speedy and effectual measures be adopted to procure an alteration" of the Constitution to make clear that "no State can on any Construction be held liable … to make answer in any Court, on the Suit, of any Individual or Individuals whatsoever." *Resolution of the Connecticut General Assembly* (Oct. 29, 1793), *in* 5 *The Docu-*

mentary History of the Supreme Court of the United States, 1789-1800, at 609 (Marcus ed., 1994) (hereinafter *Documentary History*). The Virginia legislature declared that "a state cannot … be made a defendant at the suit of any individual or individuals." *Proceedings of the Virginia House of Delegates* (Nov. 28, 1793), *in* 5 *Documentary History* 338, 339 n.1. The South Carolina Senate stated that "the power of compelling a State to appear, and answer to the plea of an individual, is utterly subversive of the separate dignity and reserved independence of the respective States." *Proceedings of the South Carolina Senate* (Dec. 17, 1793), *in* 5 *Documentary History* 610-611. And John Hancock, in a speech to the Massachusetts General Court, rejected the idea that "each State should be held liable to answer … to every individual resident in another State or in a foreign kingdom." *John Hancock's Address to the Massachusetts General Court* (Sept. 18, 1793), *in* 5 *Documentary History* 416.

The notion that the Framing generation would so strongly and universally condemn suits brought by citizens of one State against another State in the neutral federal courts, while tolerating such suits in the plaintiffs' home-state courts, strains credulity. As the *Hall* dissenters emphasized, the objectors to *Chisholm* were hardly embracing the view that Georgia could not be sued by Chisholm in federal court but *could* be sued by Chisholm in South Carolina state court. Although the Eleventh Amendment does not explicitly address interstate sovereign immunity, it 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). By immunizing States from suit in the neutral forum of the federal courts, while leaving open the possibility of their being sued in the potentially hostile courts of another State, *Hall* "makes nonsense of the effort embodied in the Eleventh Amendment to preserve the doctrine of sovereign immunity." *Id.* at 441 (Rehnquist, J., dissenting).

4. Pre-*Hall* decisions of this Court and other courts reflect the Framing-era consensus

This Court's pre-*Hall* decisions reflect the Framing-era understanding that nonconsenting States could not be subject to suit anywhere, including in other States' courts. In *Beers* v. *Arkansas*, 61 U.S. (20 How.) 527 (1857), 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). In *Cunningham* v. *Macon & Brunswick Railroad Co.*, 109 U.S. 446 (1883), the Court stated with equal clarity that "neither a state nor the United States can be sued as defendant in any court in this country without their consent." *Id.* at 451. In *Hans* v. *Louisiana*, the Court observed that "[t]he suability of a State without its consent was a thing unknown to the law" at the time the Constitution was ratified, and that "the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States." 134 U.S. 1, 15-16 (1890). And in *Western Union Telegraph Co.* v. *Pennsylvania*, 368 U.S. 71 (1961), the Court held that because the State of New York was a necessary party to proceedings commenced in the Pennsylvania courts,

those proceedings had to be dismissed, since the Pennsylvania courts had "no power to bring other States before them." *Id.* at 80.

States recognized the same principle. In *Paulus* v. *South Dakota*, 227 N.W. 52 (N.D. 1929), for example, the North Dakota Supreme Court affirmed the dismissal of a citizen's suit against a sister State. "[S]o carefully ha[d] the sovereign prerogatives of a state been safeguarded in the Federal Constitution," it held, that "no state could be brought into the courts of the United States at the suit of a citizen of another state." *Id.* at 54-55. It added that involuntarily haling one State into the courts of a sister State would be inconsistent "with any sound conception of sovereignty." *Id.* at 55. Likewise, when New Hampshire wanted to help its citizens recover debts owed by other States, it did not assert a power to entertain suits against sister States in its own courts; rather, it enacted a statute allowing citizens to assign to the State claims that the State would then pursue in original actions before this Court. *See New Hampshire* v. *Louisiana*, 108 U.S. 76, 88-89 (1883).

That pre-*Hall* understanding of interstate sovereign immunity is confirmed by the surprised reaction of state supreme courts to the decision in *Hall*. The New York Court of Appeals remarked, a year after *Hall*, that it had been "long thought that a State could not be sued by the citizens of a sister State except in its own courts." *Ehrlich-Bober & Co.* v. *University of Houston*, 404 N.E.2d 726, 729 (N.Y. 1980). The Iowa Supreme Court likewise noted that "[f]or the first two hundred years of this nation's existence it was generally assumed that the United States Constitution would not allow one state to be sued in the courts of another state," because "this immunity was an attribute of state sovereignty that was preserved in the Constitution."

Struebin v. *State*, 322 N.W.2d 84, 85 (Iowa 1982). And the Delaware Supreme Court later observed that "[f]or almost two hundred years, it had been assumed that the United States Constitution implicitly prohibited one state from being sued in the courts of another state—just as the Eleventh Amendment explicitly prohibited states from being sued in federal courts." *Kent Cty.* v. *Shepherd*, 713 A.2d 290, 297 (Del. 1998).

5. Hyatt's reliance on *The Schooner Exchange* is unavailing

1. Hyatt's brief in opposition to certiorari argued (at 12-14) that the pre-ratification understanding of state sovereign immunity does *not* support the conclusion that States are immune from suit in each other's courts, because it distinguished "between a state's sovereignty in its own courts and its sovereignty in the courts of another sovereign." The latter, Hyatt argued, was purely a matter of comity and not a legal right. Hyatt based that argument on this Court's decision in *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116 (1812). Hyatt's argument misinterprets *The Schooner Exchange*, which addresses relations among independent nations and sheds no light on the distinct question of interstate sovereign immunity under our constitutional structure.

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 possesses "exclusive and abso-

lute" 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.

The Schooner Exchange supports the view that nations lack any judicially enforceable obligation to respect the sovereign immunity of other nations that are sued in their courts. But that proposition simply reflects the absence of any supranational tribunal that could enforce one nation's rights against another. Because a forum nation cannot be forced to recognize a defendant nation's sovereign immunity, its choice whether to do so depends on a set of considerations sometimes referred to as comity—"standards of public morality, fair dealing, reciprocal self-interest, and respect for the 'power and dignity' of the foreign sovereign." *National City Bank*, 348 U.S. at 362. Nor, conversely, are defendant nations limited to legal recourses if the nation in whose courts they are sued chooses not to respect their sovereign immunity. Rather, the defendant nation may avail itself of recourses like "the negotiation of treaties, the exchange of ambassadors, and, if necessary, … war." Pfander, 82 Calif. L. Rev. at 583; *see also* Vattel, *The Law of Nations or the Principles of Natural Law*, bk. IV, ch. VII § 102 (1758) (Fenwick trans., 1916) (the "proper course" to punish a "State which had violated the Law of Nations" was "public war").

In the pre-ratification era, the relationship among States was similar to that among independent nations:

No State could be required to respect another's sovereign immunity in its courts.[5] But in that respect, the Constitution *did* change the pre-ratification relationship among the States, by creating exactly the sort of neutral tribunal among the States that is lacking among nations—this Court. If the courts of one State entertain a suit against another State, the defendant State now has recourse to this Court to vindicate its sovereign immunity. And just as the Constitution created that judicial enforcement mechanism, it withdrew from States the extrajudicial recourses available to nations, as well as the ability to refuse to recognize the judgment of another State. *See* U.S. Const. art. I, § 10 (prohibiting States from entering into treaties, imposing import duties, or waging war); *id.* art. IV, § 1 ("Full Faith and Credit shall be given in each State to the … judicial Proceedings of every other State."); *Kansas* v. *Colorado*, 185 U.S. 125, 141 (1902) (traditional "remedies resorted to by independent states for the determination of controversies raised by collision between them" were "withdrawn from the states by the Constitution"); Smith, *States As Nations: Dignity in Cross-Doctrinal Perspective*, 89 Va. L. Rev. 1, 92 (2003) (the Constitution "specifically divested the states of the traditional sovereign powers of diplomacy"). The Constitution thus substituted a judicial means of enforcing interstate sovereign immunity for the extrajudicial options available to independent nations. *See* Rogers,

---

[5] That is why, when Virginia was sued in Pennsylvania's courts before the ratification of the Constitution (*see supra* pp. 21-22), it "followed the usual diplomatic course" in seeking the dismissal of the suit: "[I]t applied to the Supreme Executive Council of Pennsylvania, which directed the state's attorney general … to secure the action's dismissal," on the ground that it "violated the law of nations." Pfander, 82 Calif. L. Rev. at 585-586.

Applying the International Law of Sovereign Immunity to the States of the Union, 1981 Duke L.J. 449, 468 (this Court was envisioned as a "substitute" for the "methods that sovereign states use to enforce their rights under international law," such as "diplomacy and war").

Because the Constitution allows States to vindicate their sovereign immunity against other States in a way that independent nations cannot, *The Schooner Exchange*—which reflected the absence of an enforcement mechanism in the international context—has no bearing on the issue of interstate sovereign immunity. That is why, in the 167 years between *The Schooner Exchange* and *Hall*, no federal or state court cited *The Schooner Exchange* as even tangentially relevant to the question whether States are immune from suit in the courts of other States.

If *The Schooner Exchange* were read to mean that States may freely choose to entertain suits against other States, it would be inconsistent with the long historical understanding to the contrary, discussed above. And such an interpretation would run perversely counter to the constitutional plan, by undermining the Framers' effort to calm the interstate tensions that prevailed under the Articles of Confederation. *See, e.g.*, Clark, *The Eleventh Amendment and the Nature of the Union*, 123 Harv. L. Rev. 1817, 1873-1874 (2010) (the Framers drafted Article III with an eye toward resolving interstate disputes peacefully). If Hyatt were correct that States could choose to entertain suits brought by their citizens against other States, then a decision by one State's courts to hear a dispute involving another State could give rise to exactly the kind of simmering resentment, or reprisal, that the Framers hoped to avoid.

2. Hyatt further argues (Opp. 15-16) that States have a sovereignty interest in hearing disputes that arise within their borders, including disputes against other States. That is true. But in a federal union, that sovereignty interest is not unqualified, and it must be reconciled with another weighty sovereignty interest: each State's immunity from suit in the courts of other States. There is little question which of those competing interests carried greater weight at the time the Constitution was ratified, and equally little question which interest the States prefer to protect today.

As discussed above, the Framing generation thought it anathema that one State might be subjected to suit in another's courts—hence the reaction to *Nathan* v. *Virginia*, in which a Pennsylvania citizen sought to attach Virginia's property in the Pennsylvania courts. *See supra* pp. 21-22. Virginia was not the only State with sovereignty interests at stake in *Nathan*; Pennsylvania had an interest in adjudicating a suit arising within its borders. But no one thought that interest should outweigh Virginia's. To the contrary, Pennsylvania's own attorney general, at the direction of the State's Supreme Executive Council, urged the dismissal of the suit. *Id.* The Framers' purpose was to knit the States together into a federal union that would protect each State's sovereignty while permitting the States to resolve disputes amicably. *See* Hill, *In Defense of Our Law of Sovereign Immunity*, 42 B.C. L. Rev. 485, 582-583 (2001). That goal is advanced by recognizing Virginia's immunity from suit in Pennsylvania; it would be considerably threatened by prioritizing Pennsylvania's ability to hear a suit against Virginia.

Furthermore, the States' overwhelming support for overruling *Hall*—as evidenced by the amicus brief in support of certiorari filed by 45 States—makes clear

which sovereignty interest States prefer to vindicate today. Given the extraordinary burdens that States face when haled into the courts of another State, it is little surprise that States care more about avoiding those burdens than they do about allowing their courts to adjudicate each and every dispute that arises within their borders.

This compromise of one sovereignty interest in favor of another was not thrust upon the States; it was part and parcel of every State's choice to ratify the Constitution. As the Court recognized in *The Schooner Exchange*, a nation can "consent" to "exceptions … to the full and complete power" of its courts within its borders. 11 U.S. at 136. By entering into the federal compact, the States chose to give up a part of their sovereign power to adjudicate disputes. In particular, the States relinquished jurisdiction (or allowed Congress to limit their jurisdiction) where adjudication in state court would be inconsistent with the federal structure. Thus, for example, the States accepted that only this Court may adjudicate disputes between States, U.S. Const. art. III, § 2, cl. 1, and that Congress may channel suits against the federal government, federal officers, foreign states, and ambassadors into the federal courts (as it ultimately chose to do, *see, e.g.*, 28 U.S.C. §§ 1251, 1346, 1441, 1442, 2409a).[6] It is likewise inconsistent with the federal structure of the Union for a State's courts to exercise jurisdiction over another State with-

[6] Similarly, when the States ratified the Fourteenth Amendment, they accepted that the Due Process Clause limits their authority to exercise jurisdiction over cases lacking a territorial connection to the State. *See, e.g.*, *J. McIntyre Mach., Ltd.* v. *Nicastro*, 564 U.S. 873, 879-881 (2011) (plurality opinion); *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 291-292, 294 (1980).

out the defendant State's consent, and the States thus impliedly agreed to cede jurisdiction over such suits.

In sum, *Hall* was wrongly decided because it ignored the Framing-era understanding of interstate sovereign immunity. *Hall* focused on the question whether the Constitution expressly codified that immunity, whereas this Court's later precedents have made clear that the relevant question is whether the Framers intended to *abrogate* the immunity the States enjoyed before ratification. The historical evidence clearly shows they did not.

B. Post-*Hall* Decisions Have Clarified The Constitutional Values That *Hall* Flouts

Aside from its failure to consider the Framing-era consensus regarding interstate sovereign immunity, *Hall* also gave little consideration to the constitutional *values* that are protected by state sovereign immunity in a federal union. To the extent *Hall* addressed the reasons for state sovereign immunity at all, it suggested incorrectly that they were limited to the protection of 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"). Although the States' financial integrity is certainly one reason for state sovereign immunity, later decisions, especially *Alden*, have underscored the importance of two additional principles underlying sovereign immunity that are inconsistent with *Hall*.

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; *cf. Michigan* v. *Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2039 (2014) ("Sovereignty implies immunity from

lawsuits."). The 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 sovereignty "together with the dignity and essential attributes inhering in that status." *Alden*, 527 U.S. at 714; *see id.* at 749.

The States' dignity interests as sovereigns, though given little attention by *Hall*, have been uniformly recognized by the Court's later decisions as a fundamental feature of state sovereign immunity. In *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), for example, the Court explained that sovereign immunity "is designed to protect" "the dignity and respect afforded a State." *Id.* at 268; *see also Seminole Tribe*, 517 U.S. at 58 ("The Eleventh Amendment … serves to avoid 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties[.]'"); *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (the Eleventh Amendment "accords the States the respect owed them as members of the federation"). Indeed, the Court has characterized the protection of States' "dignity[,] … consistent with their status as sovereign entities," as "[t]he *preeminent* purpose of state sovereign immunity." *Federal Mar. Comm'n*, 535 U.S. at 760 (emphasis added).

Second, and equally important, is the Court's recognition that state sovereign immunity promotes self-government by the citizens of the 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)). The Court has recognized since *Hall* that, "[i]f 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"—and certainly not by judicial decree of another State. *Alden*, 527 U.S. at 751.

This case well illustrates how *Hall* disserves the interests that state sovereign immunity is supposed to protect. California has been subjected to an astonishing intrusion on its dignity, as well as the concrete burdens of litigation, by being forced to defend the conduct of a state agency in the courts of another State. This litigation required years of discovery and a four-month trial, and it resulted in a judgment against the FTB of nearly $500 million. *Franchise Tax Bd. of Cal.* v. *Hyatt* (*Hyatt II*), 136 S. Ct. 1277, 1280 (2016). The judgment was eventually reduced by the Nevada Supreme Court and this Court on the basis of constitutional and comity concerns, *see id.* at 1280, 1282-1283—but the FTB *still* faces a judgment of $100,000, with the potential for Hyatt to seek costs in a remand proceeding that could itself spawn further appeals, Pet. App. 65a-66a.

California has also suffered harm to its citizens' interest in self-government. In *Alden*, as noted above, the Court recognized a State's immunity in its own courts, partly on the basis that a State's "'administration of [its] public affairs'" could otherwise "become 'subject to and controlled by the mandates of judicial tribunals … and in favor of individual interests.'" 527 U.S. at 750. If that danger was present where Maine's conduct was subject to review in its own courts, it is even clearer here, where the actions of a California

agency have been litigated before Nevada judges and jurors who lacked any incentive to consider the burden that a large financial sanction would impose on California's taxpayers.

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 from 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").

II. STARE DECISIS DOES NOT JUSTIFY MAINTAINING *HALL*

Although this Court is ordinarily loath to overrule its precedents, "[*s*]*tare 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). In particular, "*stare decisis* does not prevent [the Court] from overruling a previous decision where there has been a significant change in, or subsequent development of, … constitutional law." *Agostini* v. *Felton*, 521 U.S. 203, 235-236 (1997). As explained above, this Court's sovereign-immunity decisions since *Hall* have undermined *Hall*'s reasoning and left it an outlier.

Moreover, none of the other stare decisis factors counsels against overruling *Hall*. *Hall* does not involve a statutory interpretation, which the Court is ordinarily more reluctant to overrule. *Hall* has given rise to no reliance interests. And *Hall* has proven impracticable in its "real world implementation," *South Dakota* v. *Wayfair, Inc.*, 138 S. Ct. 2080, 2097 (2018).

A. The Court's Post-*Hall* Jurisprudence Has Left *Hall* An Outlier

"[T]he Court has not hesitated to overrule an earlier decision" where "intervening development of the law" has "removed or weakened the conceptual underpinnings [of] the prior decision" or "rendered the decision irreconcilable with competing legal doctrines or policies." *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 173 (1989); *see also, e.g.*, *United States* v. *Gaudin*, 515 U.S. 506, 521 (1995). A decision is properly overruled, the Court has explained, where the "development of constitutional law since the case was decided has implicitly or explicitly left [it] behind as a mere survivor of obsolete constitutional thinking." *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 857 (1992). The development of sovereign-immunity doctrine since *Hall* is thus reason enough to overturn that decision.

As explained above (at 18-20), this Court's more recent cases have rejected the key "conceptual underpinning[]" of *Hall*—namely the idea that a State's sovereign immunity is limited to the express terms of the Constitution. *Hall* is also inconsistent with the Court's recognition in more recent decisions of the values underlying the doctrine of sovereign immunity. *See supra* pp. 36-39. *Hall* thus represents an outmoded way of thinking and is "no more than a remnant of abandoned doctrine." *Casey*, 505 U.S. at 855.

Hall is also out of step with this Court's recognition of state sovereign immunity in other contexts. Even at the time *Hall* was decided, it created a striking anomaly in this Court's sovereign immunity jurisprudence: States could not be sued in their own courts, or in the neutral federal courts, but could be sued in the poten-

tially hostile courts of sister States. That anomaly has grown even more glaring over time, as the Court has decided case after case expanding the reach of sovereign immunity for States and Indian Tribes.

Since *Hall*, for example, the Court has held that Congress's Article I powers do not allow it to abrogate a State's sovereign immunity from suit on a federal claim in federal court. *See Seminole Tribe*, 517 U.S. at 47. The Court has also held that state sovereign immunity extends to federal agency adjudications. *Federal Mar. Comm'n*, 535 U.S. at 747. And it has immunized States against federal claims brought by individuals in the defendant State's own courts. *Alden*, 527 U.S. at 712. Those decisions, when contrasted with *Hall*, have created a "bizarre state of doctrinal affairs" in which "the states have more authority with respect to each other than the federal government has with respect to the states." Smith, 89 Va. L. Rev. at 101. Even as the Court has recognized the constitutional imperative to shield States from litigation in one tribunal after another, it has exempted from that otherwise consistent doctrinal progression the single type of forum potentially most hostile to a State's interests—the courts of another State.

It is also hard to reconcile *Hall* with this Court's decisions recognizing the sovereign immunity of Indian Tribes. The Court has long held that Tribes possess "the 'common-law immunity from suit traditionally enjoyed by sovereign powers.'" *Bay Mills*, 134 S. Ct. at 2030. It had applied that immunity even before *Hall* to suits against Tribes by States, even when brought in the plaintiff State's own courts. *See id.* at 2031 (citing prior cases). After *Hall*, the Court held that a Tribe's immunity extends even to "suits arising from [its] commercial activities, even when they take place off

Indian lands." *Id.* (citing *Kiowa Tribe of Okla.* v. *Manufacturing Techs., Inc.*, 523 U.S. 751 (1998)). The Court reaffirmed that holding in *Bay Mills*. *Id.* at 2036-2039. Those decisions have created what several Justices have recognized as a "striking[] anomal[y]"—that is, that Tribes have "broader immunity than the States," *Kiowa*, 523 U.S. at 765 (Stevens, J., dissenting, joined by Thomas and Ginsburg, JJ.), even though they arguably possess less sovereignty than the States, *see Bay Mills*, 134 S. Ct. at 2030-2031 (noting the "qualified nature of Indian sovereignty").

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. *See* Fallon et al., *Hart & Wechsler's The Federal Courts & The Federal System* 976 n.2 (7th ed. 2015) (noting the "difficulty of reconciling *Hall*'s rationale with that of *Alden*"); *see also* Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 Notre Dame L. Rev. 1011, 1037 n.110 (2000).

In short, *Hall* cannot be reconciled with this Court's subsequent decisions, which have emphasized the need to look beyond the constitutional text to consider the historical understanding of state sovereign immunity, articulated the values that state sovereign immunity protects, and recognized the immunity of

States in contexts that pose less of a threat to sovereignty than allowing States to be haled into the courts of other States. Because *Hall* is a jurisprudential outlier, it can be overruled without threatening other precedents.

B. Stare Decisis Has Little Force Here Because *Hall* Is A Constitutional Decision That Has Not Engendered Reliance Interests

The other stare decisis factors, moreover, provide the Court no reason to perpetuate *Hall*'s error merely for the sake of consistency.

First, stare decisis "is at its weakest" when, as in *Hall*, the Court "interpret[s] the Constitution." *Agostini*, 521 U.S. at 235. In such cases, only the Court can correct the error of a prior decision, because "correction through legislative action is practically impossible." *Payne*, 501 U.S. at 828 (internal quotation marks omitted).

Second, stare decisis is further weakened here—more than in many cases involving constitutional issues—because sovereign immunity "does not alter primary conduct," *Hohn* v. *United States*, 524 U.S. 236, 252 (1998), and rules governing sovereign immunity therefore do not engender 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). Here, by contrast, 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), or have otherwise conducted their lives in a

manner that assumes the continuing vitality of a constitutional precedent.

C. *Hall* Has Proven Harmful In Practice

The decades since *Hall* have also exposed that decision's "practical deficiencies," *Montejo* v. *Louisiana*, 556 U.S. 778, 792 (2009), and the extent to which it undermines the values underlying the sovereign-immunity doctrine. None of Hyatt's proposed workarounds can cure the problems *Hall* creates.

1. This case exemplifies the damage that suits permitted by *Hall* can cause.

One purpose of sovereign immunity is to "shield[] state treasuries" from private litigants. *Federal Mar. Comm'n*, 535 U.S. at 765; *see also Alden*, 527 U.S. at 750 ("Private suits against nonconsenting States—especially suits for money damages—may threaten the financial integrity of the States."). Yet Hyatt has forced California to spend vast sums of taxpayer money defending itself. From its filing to the first day of trial, Hyatt's suit dragged California through ten years of litigation. Once the case finally reached trial, the Nevada jury 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. Since trial, California has spent another ten years fighting that verdict, and it will face additional proceedings on remand if this Court upholds *Hall*. And although appeals succeeded in trimming the trial court's half-billion-dollar judgment, the prospect of any damages award against California "place[s] unwarranted strain on [its] ability to govern in accordance with the will of [its] citizens." *Alden*, 527 U.S. at 750-751.

Such damages awards necessarily crowd out "other important needs and worthwhile ends" that California's public fisc must fund. *Id.* at 751.

Another purpose of sovereign immunity, as discussed above, is to protect the "dignity and respect" States are owed in our federal union. *E.g.*, *Coeur d'Alene Tribe*, 521 U.S. at 268. This suit has offended that purpose as well, by forcing California to submit its official conduct to the review of another State's judiciary and jury. And that harm is exacerbated because the conduct in question involves taxation, which "is an essential attribute of sovereignty," *Railroad Co.* v. *Maine*, 96 U.S. 499, 508 (1877). In short, this case shows how *Hall* imposes "substantial costs" on "the autonomy, the decisionmaking ability, and the sovereign capacity" of the State in conducting a core sovereign function, *Alden*, 527 U.S. at 750.[7]

---

[7] This case may not even fully represent the extent of *Hall*'s harmful effects in the long-running dispute between Hyatt and the FTB. In the California administrative proceedings, Hyatt alleged that the FTB has committed "continuing bad faith act[s]," suggesting he may yet try to bring another 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").

Furthermore, in case there were any doubt that suits of this nature 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, on the view that 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*, Nev. Lawyer, Jan. 2015, at 24 & n.9.

This suit has also encouraged others outside California to file similar complaints, raising the prospect of comparable litigation that would only compound the costs imposed by Hyatt's suit. For example, another taxpayer sued the FTB on fraud claims in Washington state court in 2015; more than three years later, that suit remains pending. *See* Compl., *Satcher* v. *California Tax Franchise Bd.*, No. 15-2-00390-1 (Wash. Super. Ct., Skagit Cty. Mar. 20, 2015); Status Report, *Satcher*, No. 16-2-00194-0 (July 30, 2018). Such copycat suits are regrettable yet, given *Hall*, unsurprising. Sovereign governments undertake many 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.

California is not alone in facing *Hall*'s consequences. States are regularly haled into the courts of a sister State against their will, and (unlike in *Hall* itself) those suits often challenge acts of public policy, thus striking at the heart of the dignity and self-government concerns underlying sovereign immunity. Recently, for example, Nevada has been sued without its consent in the California courts. The pending petition for certiorari in *Nevada Department of Wildlife* v. *Smith*, No. 17-1348 (U.S. Mar. 21, 2018), arises from a suit against Nevada Department of Wildlife officials in California court, alleging torts arising from a wildlife training presentation to California law enforcement officials; Nevada asks the Court to overrule *Hall* even though its own courts exercised jurisdiction over the FTB in this case. In another case against Nevada, the plain-

tiff—demanding monetary and equitable relief—challenged Nevada's policy of providing bus vouchers to indigent patients discharged from state-run medical facilities, who occasionally used them to travel to California. Pet. for Cert. i, *Nevada* v. *City & Cty. of San Francisco*, No. 14-1073 (U.S. Mar. 4, 2015), *cert. denied*, 135 S. Ct. 2937 (2015). A 2015 settlement agreement required Nevada to pay out of the state treasury and to alter its state policy—intrusions of the sort that sovereign immunity is meant to prevent. *See* Decl. of Kristine Poplawski, *City & Cty. of San Francisco* v. *Nevada*, No. CGC-13-534108 (Cal. Super. Ct., San Francisco Cty. Dec. 3, 2015).

Nor is Nevada the only other State that has been sued without its consent in cases that implicate its sovereignty interests. In *Faulkner* v. *University of Tennessee*, 627 So. 2d 362 (Ala. 1992), for example, a former graduate student at the University of Tennessee asked an Alabama court to stop the university from revoking his doctoral degree after it determined that his dissertation did not contain original work. *Id.* at 363-364. The Supreme Court of Alabama ruled that the courts should exercise jurisdiction over the case because the University of Tennessee is not subject "to the will of the democratic process in Alabama," *id.* at 366—thus subjecting it, rather perversely, to the control of the Alabama courts. And in *Head* v. *Platte County*, 749 P.2d 6 (Kan. 1988), the Supreme Court of Kansas held that state courts should exercise jurisdiction over a suit alleging that a Missouri county and Missouri officials failed to train employees and establish policies concerning the execution of arrest warrants, thus permitting Kansas courts to decide which policies Missouri law enforcement officials should or should not adopt. *Id.* at 7-10. The States that supported certiorari in this case

supplied numerous other examples. Br. of Indiana and 44 Other States as Amici Curiae in Support of Pet'r 8-10. In each of those cases, *Hall* allowed state courts to interfere with the public policy choices made by another State.

2. Hyatt's brief in opposition to certiorari argued (at 12, 17) that any detrimental effects of *Hall* can be mitigated through the "voluntary doctrine of comity." But this case—which, ironically, Hyatt cited as an example of the proper functioning of that doctrine—demonstrates the inadequacy of relying on comity to protect the values underlying sovereign immunity. Comity has not saved the FTB from the burdens of litigation or prevented the Nevada courts from interjecting themselves into the tax-collection process here. And 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 cited (Opp. 12), the defendant—an Arizona governmental trust—had to litigate for 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 (but 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 allows a defendant State to terminate litigation quickly and without incurring the extraordinary costs seen in this case, in *Sam*, and in many other cases.

Hyatt also contended (at 17) that States could enter into an agreement to confer immunity in each other's courts. But the States already entered into an agreement that provides such immunity—namely the Consti-

tution. "It is inconsistent with the Court's proper role to ask [the States] to address a false constitutional premise of this Court's own creation." *Wayfair*, 138 S. Ct. at 2096. Interstate compacts "can take decades, or longer, to hammer out," Br. of Amicus Curiae Multistate Tax Comm'n in Support of Pet'r 13, and States should not have to resort to them to vindicate the protection that *Hall* wrongly extinguished.

CONCLUSION

The judgment of the Supreme Court of Nevada should be reversed.

Respectfully submitted.

WILLIAM C. HILSON, JR.
SCOTT W. DEPEEL
ANN HODGES
FRANCHISE TAX BOARD
OF THE STATE OF
CALIFORNIA
9646 Butterfield Way
Sacramento, CA 95827

JAMES W. BRADSHAW
PAT LUNDVALL
DEBBIE LEONARD
MCDONALD CARANO LLP
2300 West Sahara Ave.
Las Vegas, NV 89102

SETH P. WAXMAN
Counsel of Record
PAUL R.Q. WOLFSON
DANIEL WINIK
JOSHUA M. KOPPEL
JAMES BARTON
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

SEPTEMBER 2018