No. 17-1299

In The Supreme Court of the United States

FRANCHISE TAX BOARD OF CALIFORNIA,

Petitioner,

v.

GILBERT P. HYATT,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Nevada

BRIEF FOR RESPONDENT GILBERT P. HYATT

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QUESTION PRESENTED

Whether there is a compelling justification for setting aside principles of stare decisis and overruling *Nevada v. Hall*, 440 U.S. 410 (1979).

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STATEMENT OF THE CASE

The underlying facts

This lawsuit concerns intentional tortious acts committed by the Petitioner, California Franchise Tax Board ("the Board"), and its employees while seeking to build a case to assess additional state income taxes against Gilbert P. Hyatt. The torts against Hyatt occurred while he was a resident of Nevada and thus this case is about the ability of that state to provide a remedy for one of its citizens who has been seriously injured. *See Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488, 495 (2003) ("[T]he plaintiff claims to have suffered injury in Nevada while a resident there; and it is undisputed that at least some of the conduct alleged to be tortious occurred in Nevada.")[1]

The Board speaks of the "astonishing intrusion" to the dignity of California for having to defend in Nevada the intentionally tortious acts committed by California officials in Nevada. Brief for Petitioner at 38. But the astonishing intrusions were the other way around: the Board never acknowledges the egregious, tortious behavior of the Board and its employees directed at Hyatt. To be clear, this case does not involve alleged misconduct merely stated in a pleading. Rather, after a lengthy contested trial, a jury found that the

[1] The Brief Amicus Curiae of Alan B. Morrison & Darien Shanske in Support of Neither Party mistakenly asserts that the "vast majority" of the acts by the Board and its employees against Hyatt occurred in California. *Id.* at 9. Quite the contrary, the torts that occurred and were the basis for the jury's verdict largely occurred in Hyatt's state of residence, Nevada.

Board and its employees had committed intentional torts. Then, after a careful review of the evidence from the trial, the Nevada Supreme Court affirmed the decision of the trial court that torts had been committed against Hyatt.

The evidence at trial showed that the Board's lead auditor Sheila Cox, as well as other employees of the Board, went well beyond legitimate bounds in their attempts to extract a tax settlement from Hyatt. Referring to Hyatt, the lead auditor declared that she was going to "get that Jew bastard." *See* 4/23/08 Reporter's Tr. ("RT") at 165:15-20; 4/24/08 RT at 56:15-20. The lead auditor operated on the view that most of the large income taxpayers in California were Jewish. 4/28/08 RT at 132:2-23; 140:11-141:25. According to testimony from a former Board employee, the lead auditor freely discussed personal information about Hyatt—much of it false—causing her former colleague to believe that the lead auditor had created a "fiction" about Hyatt. *See* 4/23/08 RT at 184:18-20; 4/24/08 RT at 42:4-43:8.

The lead auditor also went to Hyatt's Nevada home, peered through his windows and examined his mail and trash. *See* 4/24/08 RT at 62:16-24. After the lead auditor had closed the audit, she boasted about having "convicted" Hyatt and then returned to his Nevada home to take trophy-like pictures. *See* 85 Resp.'s App. ("RA") at 021011-13 (Nev. filed Dec. 21, 2009). The lead auditor's incessant discussion of the investigation conveyed the impression to others within the Board that she had become "obsessed" with the case. *See*

4/23/08 RT at 184:16-20; 4/24/08 RT at 134:1-12. Within her department, the lead auditor pressed for harsh action against Hyatt, including imposition of fraud penalties that are rarely issued in residency audits. *See* 4/24/08 RT at 28:6-13. To bolster this effort, she enlisted Hyatt's ex-wife and other estranged members of Hyatt's family against him. *See*, *e.g.*, 80 RA at 019993-94; 83 RA at 020616-20, 020621-24, 020630-35. The lead auditor often spoke coarsely and disparagingly about Hyatt and his associates. *See* 4/23/08 RT at 171:13-172:8; 4/24/08 RT at 56:21-58:19.

Fueled by the lead auditor's desire to "get" Hyatt, the Board also repeatedly violated promises of confidentiality. Although Board auditors had agreed to protect information submitted by Hyatt in confidence, the Board bombarded people with "Demand[s] for Information" about Hyatt and disclosed his confidential home address and social security number to third parties, including California and Nevada newspapers. *See*, *e.g.*, 83 RA at 020636-47; 4/24/08 RT at 41:17-24. Demands to furnish information, naming Hyatt as the subject, were sent to his two places of worship in Nevada and to a Nevada newspaper. *See* 83 RA at 020653-54, 020668-69, 020735-36, 020745. The Board also disclosed its investigation of Hyatt to patent licensees of the U.S. Philips Corporation in Japan. *See* 84 RA at 020788, 020791.[2] The Board knew that Hyatt, like other private inventors, had significant concerns

[2] Hyatt signed an agreement in July 1991 with the U.S. Philips Corporation granting Philips the exclusive authority to license Hyatt's patents.

about privacy and security. *See* 83 RA at 020704. Rather than respecting those concerns, the Board sought to use them as a way to coerce him into a settlement.

One Board employee pointedly warned Eugene Cowan, a tax attorney representing Hyatt, that tax payments were the price for maintaining Hyatt's privacy. *See* 4/30/08 RT at 155:12-25; 5/12/08 RT at 73:23-74.23.2. The Board employee told Cowan that there would "extensive" demands for information from Hyatt, while simultaneously raising the subject of "settlement possibilities" in regard to the Board's audit and resulting tax assessments. *See* 5/22/08 RT at 80:3-81:2.

The initial litigation

Hyatt brought suit against the California Franchise Tax Board in Nevada state court, asserting both negligent and intentional torts, including for invasion of privacy, fraud, and the intentional infliction of emotional distress. In response, the Board asserted that it was entitled to absolute sovereign immunity. The Board did not challenge clearly established law that a state does not have sovereign immunity when sued in the courts of another state. *Nevada v. Hall*, 440 U.S. 410 (1979). The Board instead argued that the Full Faith and Credit Clause required Nevada to give effect to California's own immunity laws, which allegedly would have given the Board full immunity against Hyatt's state-law claims. The Nevada Supreme Court unanimously rejected the Board's argument that it

was obligated to apply California's law of sovereign immunity. Nevertheless, the Nevada Supreme Court extended significant immunity to the Board as a matter of comity. Although the court found that "Nevada has not expressly granted its state agencies immunity for all negligent acts," it explained that "Nevada provides its agencies with immunity for the performance of a discretionary function even if the discretion is abused." *Franchise Tax Bd. of Cal. v. Hyatt*, Nos. 35549 & 36390, 2002 Nev. LEXIS 57, at *10 (Nev. Apr. 4, 2002) (judgment noted at 106 P.3d 1220 (table)). The court thus concluded that "affording Franchise Tax Board statutory immunity [under California law] for negligent acts does not contravene any Nevada interest in this case." *Id.*

The Nevada Supreme Court declined, however, to apply California's immunity law to Hyatt's intentional tort claims. The court first observed that "the Full Faith and Credit Clause does not require Nevada to apply California's law in violation of its own legitimate public policy." *Id.* at *9. It then determined that "affording Franchise Tax Board statutory immunity for intentional torts does contravene Nevada's policies and interests in this case." *Id.* at *11. The court pointed out that "Nevada does not allow its agencies to claim immunity for discretionary acts taken in bad faith, or for intentional torts committed in the course and scope of employment." *Id.* Against this background, the court declared that "greater weight is to be accorded Nevada's interest in protecting its citizens from injurious intentional torts and bad faith acts committed by

sister states' government employees, than California's policy favoring complete immunity for its taxation agency." *Id.*

Supreme Court Review: *Hyatt I*

This Court, in a unanimous opinion, affirmed the decision of the Nevada Supreme Court. *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488 (2003) ("*Hyatt I*"). Rejecting the Board's argument that the Full Faith and Credit Clause required Nevada courts to apply California's immunity laws, the Court reiterated the well-established principle that the Full Faith and Credit Clause "does not compel a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." *Id.* at 494 (internal quotation marks omitted). Applying that test, the Court found that Nevada was "undoubtedly 'competent to legislate' with respect to the subject matter of the alleged intentional torts here, which, it is claimed, have injured one of its citizens within its borders." *Id.* The Court noted that it was "not presented here with a case in which a State has exhibited a 'policy of hostility to the public Acts' of a sister State." *Id.* at 499 (quoting *Carroll v. Lanza*, 349 U.S. 408, 413 (1955)). To the contrary, the Court noted, "[t]he Nevada Supreme Court sensitively applied comity principles with a healthy regard for California's sovereign status, relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis." 538 U.S. at 499.

The trial, verdict, and review in the Nevada Supreme Court

On remand from this Court, a trial was held and the jury found the Board liable for a variety of intentional torts, ranging from fraud to invasion of privacy to intentional infliction of emotional distress. The jury awarded Hyatt a total of $139 million in compensatory damages and $250 million in punitive damages. Pet. App. 11a. This substantial verdict reflects the jury's view that the conduct of the Board and its employees was truly egregious.

The Nevada Supreme Court reversed in part, affirmed in part, and remanded. *Franchise Tax Bd. of Cal. v. Hyatt*, 335 P.3d 125 (Nev. 2014). In doing so, it reduced the Board's liability for compensatory damages to $1 million on Hyatt's fraud claim and remanded the case for a retrial on damages with respect to Hyatt's intentional infliction of emotional distress claim. *Id.* at 131. Proceeding to the merits, the Nevada Supreme Court set aside much of the judgment against the Board, finding that Hyatt had not established the necessary elements for various other torts under Nevada law. *Id.* at 140.

The Nevada Supreme Court, however, affirmed the portion of the judgment based on fraud. The court noted evidence that, despite its promises of confidentiality, the Board's employees had "disclosed [respondent's] social security number and home address to numerous people and entities and that [auditors] revealed to third parties that Hyatt was being audited."

Id. at 144. The court also pointed to evidence that "the main auditor on Hyatt's audit, Sheila Cox, . . . had made disparaging comments about Hyatt and his religion, that Cox essentially was intent on imposing an assessment against Hyatt, and that [the Board] promoted a culture in which tax assessments were the end goal whenever an audit was undertaken." *Id.* at 145. The court thus determined "that substantial evidence supports each of the fraud elements." *Id.*

Having upheld liability on the fraud claim, the Nevada Supreme Court next considered whether it should apply a statutory damages cap applicable to Nevada officials—a condition on Nevada's waiver of sovereign immunity—to the Board. *See* Nev. Rev. Stat. § 41.035(1). The court decided that "comity does not require this court to grant [the Board] such relief." *Id.* at 147. The court pointed out that officials from other states are not similarly situated to Nevada officials with respect to intentional torts because in-state officials "'are subject to legislative control, administrative oversight, and public accountability.'" *Id.* at 147 (citation omitted). As a result, "'[a]ctions taken by an agency or instrumentality of this state are subject always to the will of the democratic process in [Nevada],'" while out-of-state agencies like the Board "'operate[] outside such controls in this State.'" *Id.* (citation omitted).

Considering this lack of authority over other states' agencies, the court concluded that "[t]his state's policy interest in providing adequate redress to Nevada citizens is paramount to providing [the Board] a

statutory cap on damages under comity." *Id.* With respect to Hyatt's intentional infliction of emotional distress claim, the Nevada Supreme Court affirmed the jury's finding of liability—noting that Hyatt had "suffered extreme treatment" at the hands of the Board (*id.* at 148)—but it reversed the award of damages. Finding errors in the introduction of evidence and instructions to the jury, the court determined that the Board was entitled to a new trial to determine the proper level of damages on this claim. *Id.* at 149-157.

The court remanded the case to the trial court for that purpose. Finally, as a matter of comity, the Nevada Supreme Court reversed the award of punitive damages. The court stated that, "under comity principles, we afford [the Board] the protections of California immunity to the same degree as we would provide immunity to a Nevada government entity as outlined in NRS 41.035(1)." *Id.* at 154. The court then added: "Because punitive damages would not be available against a Nevada government entity, we hold that under comity principles [the Board] is immune from punitive damages." *Id.*

Supreme Court Review: *Hyatt II*

This Court granted review on two questions: whether *Nevada v. Hall*, 440 U.S. 410 (1979), which held that a state government may be sued in the courts of another state, should be overruled; and whether the Nevada Supreme Court erred by failing to apply to the Franchise Tax Board the statutory immunities that

would be available to Nevada agencies in Nevada courts. *Franchise Tax Board of California v. Hyatt*, 136 S.Ct. 1277, 1280 (2016) (*Hyatt II*).

After briefing and oral argument on both of these questions, the Court said that it was evenly divided, 4-4, on the question of whether *Nevada v. Hall* should be overruled and therefore "affirm[ed] the Nevada courts' exercise of jurisdiction over California." *Id.* at 1279. As to the second question, this Court held that the Constitution 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. The Court concluded that "[d]oing so violates the Constitution's requirement that Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State." *Id.* (internal quotation marks omitted).

The case on remand to the Nevada Supreme Court

The case was remanded to the Nevada Supreme Court. After additional briefing, the Nevada Supreme Court stated: "In light of the Court's ruling, we reissue our vacated opinion except as to the damages portions addressed by the Supreme Court and apply the statutory damages caps FTB is entitled to under *Hyatt II*." *Franchise Tax Bd. of Cal. v. Hyatt*, 401 P.3d 1110, 1117 (Nev. 2017). The Nevada Supreme Court ruled that the Franchise Tax Board is entitled to the benefit of

Nevada's statutory damages cap. The court concluded that Hyatt was entitled to $50,000 in damages for his fraud claim under Nevada law. App. 107a. The Court also decided that Hyatt was entitled to $50,000 in damages for his claim of intentional infliction of emotional distress. *Id.* 121a-122a. The case was remanded for determination of costs and attorneys' fees.

In response to a petition for rehearing, the Nevada Supreme Court issued a revised opinion. App. 4a. The court reaffirmed its earlier holdings and also ruled that the statutory damages cap includes prejudgment interest.

SUMMARY OF ARGUMENT

1. The petition for writ of certiorari should be dismissed as improvidently granted.

This is the third time that this case has been before this Court. *Franchise Tax Bd. of Cal. v. Hyatt* (*Hyatt I*), 538 U.S. 488 (2003); *Franchise Tax Bd. of Cal. v. Hyatt* (*Hyatt II*), 136 S.Ct. 1277 (2016).

In the first instance, the Board did not raise the issue of whether *Nevada v. Hall*, 440 U.S. 410 (1977), should be overruled. In a unanimous opinion, the Court in *Hyatt I* explained: "[In *Nevada v. Hall*] [w]e affirmed, holding, first, that the Constitution does not confer sovereign immunity on States in the courts of sister States. Petitioner does not ask us to reexamine that ruling, and we therefore decline the invitation of

petitioner's *amici* States . . . to do so." *Hyatt I*, 538 U.S. at 497.

This Court remanded the case and a trial was held. Only after the jury verdict against the Board and the decision of the Nevada Supreme Court affirming key aspects of liability and damages did the Board decide that it wanted this Court to reconsider *Nevada v. Hall*. The Court granted certiorari on the issue of whether to overrule *Nevada v. Hall* and it was briefed and argued. The Court issued its decision on this issue and declared: "The board has asked us to overrule *Hall* and hold that the Nevada courts lack jurisdiction to hear this lawsuit. The Court is equally divided on this question, and *we consequently affirm the Nevada courts' exercise of jurisdiction over California*." *Hyatt II*, 136 S.Ct. at 1279 (emphasis added). This Court, though, did announce a new rule limiting the damages that can be awarded against a state in another state's court: California could be held liable only to the extent that Nevada would be liable in its own courts. *Id.* at 1281. This holding was premised on the affirmance of *Nevada v. Hall*. The Board did not ask for rehearing and reconsideration of this Court's decision.

The case was remanded to the Nevada Supreme Court which, after briefing and argument, lowered the damage award against the Board to $100,000. The Board here does not question any aspect of the Nevada Supreme Court's reasoning or decision.

First, the law of the case doctrine should resolve this case. It is long and firmly established that an

affirmance by an evenly divided Court is a judgment on the merits. *See Durant v. Essex Co.*, 74 U.S. 107, 112 (1869); *Etting v. United States*, 24 U.S. 59, 78 (1826). The law of the case doctrine provides that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983). The law of the case doctrine "promotes the finality and efficiency of the judicial process." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988).

This Court's decision in *Hyatt II*, reaffirming *Nevada v. Hall*, is the law of the case for this litigation. After the Board did not ask the Court to reconsider *Nevada v. Hall* in *Hyatt I*, Hyatt tried the case and litigated the appeal in reliance on that precedent. After this Court reaffirmed *Nevada v. Hall* in *Hyatt II*, Hyatt litigated the case on remand in reliance on *Nevada v. Hall* being settled law for this case. The Nevada courts likewise handled this matter with the expectation and reliance that *Nevada v. Hall* was the law to be followed in this case. This Court decided the "rule of law" for this case in *Hyatt I* and *Hyatt II* and it would violate the law of the case doctrine and basic fairness to change it now for this litigation.

Second, the Board did not ask this Court to reconsider *Nevada v. Hall* when this case was first here. As the Court noted, the Board expressly chose not to ask the Court to reconsider this decision. *Hyatt I*, 538 U.S. at 497. The Board could have done so then. By failing to do this in the Supreme Court, the Board should be

deemed to have waived the ability to ask for *Nevada v. Hall* to be overruled. *See*, *e.g.*, *Granite Rock Corp. v. International Bhd. of Teamsters*, 561 U.S. 287, 306 (2010) (argument not raised in the Supreme Court is "deemed waived"); *Stop the Beach Renourishment v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 729 (2010) (arguments not raised in the Supreme Court are deemed waived). Hyatt chose to litigate this case in the Nevada courts, at huge expense, in reliance on this Court's ruling—and reaffirmation—that state governments may be sued in the courts of other states.

Simply put, the Board should be bound by its own choices in this litigation. It could have, but did not ask this Court to reconsider *Nevada v. Hall* when the case was here in *Hyatt I*. It could have, but did not file a petition for rehearing after this Court's decision in *Hyatt II* to reaffirm *Nevada v. Hall*. Because of these choices, the petition in this case should be dismissed as certiorari having been improvidently granted.

2. *Nevada v. Hall* should not be overruled

On the merits, the central issue in this case is whether the Constitution *prohibits* a state court from exercising its sovereign power to provide a forum to its citizens when they are injured by another state. In *Nevada v. Hall*, the Court concluded that a state may exercise its sovereignty to permit such suits and thus the question is whether there is a "compelling justification" for overruling this almost 40-year-old precedent. *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S.

197, 202 (1991) (stare decisis requires that there be a "compelling justification" for overruling prior decisions).

The Board's core argument is that this Court's decisions concerning sovereign immunity, especially *Alden v. Maine*, 527 U.S. 706 (1999), undermine *Nevada v. Hall*. The Board, though, misses a crucial distinction: *Alden v. Maine* is about whether a state court is *required* to hear cases against its state government. *Nevada v. Hall* is about whether the Constitution *forbids* a state from choosing to hear suits by its own citizens against another state government. The Tenth Amendment creates a huge difference between compelling a state to do something, which is impermissible commandeering, as opposed to finding that a state is constitutionally prohibited from doing something. *See*, *e.g.*, *Murphy v. National Collegiate Athletic Ass'n*, 138 S.Ct. 1461 (2018); *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992) (explaining the Tenth Amendment forbids the commandeering of state governments).

No case after *Nevada v. Hall* ever suggested that the Constitution imposes a limit on a state's sovereign power to define the jurisdiction of its courts and to provide a remedy for its citizens, including when they are injured by another state. This Court's decisions about the Eleventh Amendment are inapposite because they are about a constitutional limit on *federal* court power. *See*, *e.g.*, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996) (emphasis added) (citations omitted) ("For over a century we have reaffirmed that

federal jurisdiction over suits against unconsenting States was not contemplated by the Constitution when establishing the judicial power of the United States.").

Alden v. Maine dealt solely with whether a state court is constitutionally required to hear a federal claim against its state government by its own citizens. In *Alden v. Maine*, this Court expressly drew a "distinction . . . between a sovereign's immunity in its own courts and its immunity in the courts of another sovereign." 527 U.S. at 739-740.

Thus, unlike any of the other cases about sovereign immunity that the Board cites, this is a case about the Tenth Amendment and whether the Constitution prohibits a state from using its power to provide a forum for its injured citizens. There is nothing in the text of the Constitution which justifies such a limit on state power.

Nevada v. Hall reflects that states have a vital sovereign interest in providing a remedy for their citizens when they suffer injuries. *See*, *e.g.*, *Farmer v. United Bhd. of Carpenters & Joiners*, 430 U.S. 290, 302-304 (1977) (recognizing "the legitimate and substantial interest of the State in protecting its citizens"). As this Court stated in *Nevada v. Hall*, history "supports the conclusion that no sovereign may be sued in its own courts without its consent, but it affords no support for a claim of immunity in another sovereign's courts. Such a claim necessarily implicates the power and authority of a second sovereign." 440 U.S. at 416. *Nevada v. Hall* stressed that there is no constitutional limit on

the ability of a sovereign state to provide a forum for its citizens when they are injured, including by another state.

Quite tellingly, the Board concedes that "[i]n the pre-ratification era . . . [n]o State could be required to respect another's sovereign immunity in its courts." Brief for Petitioner at 31-32. Nor is there anything in the Constitution or its history that establishes a limit on the sovereign power of a state to provide a remedy for its citizens when they are injured by another state. As Justice Thomas declared, "immunity does not apply of its own force in the courts of another sovereign." *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 815 (2014) (Thomas, J., dissenting).

This, though, does not mean that state governments are without protection when they are sued in other states. This Court ruled in *Hyatt II* that the Full Faith and Credit Clause means that a state court cannot hold another state liable for more than the liability that would be allowed for the forum state in its own courts. *Hyatt II*, 136 S.Ct. at 1281. Additionally, state courts can and do accord comity to other states, as in this case where the Nevada Supreme Court ruled that negligence claims could not go forward against the Board and that punitive damages are not available against the Board because of considerations of comity. Moreover, states can enter into agreements that provide for greater immunity. *Nevada v. Hall*, 440 U.S. at 416. Obtaining this protection through comity and mutual agreements is preferable to a new constitutional rule that limits state sovereignty by stripping states of

the power to determine the jurisdiction of their own courts and of the ability to protect their own citizens.

Under the Tenth Amendment a state can do anything except that which is prohibited by the Constitution. There is no constitutional prohibition against a state exercising its sovereignty to provide a forum for its citizens when they are injured by another state. The Board thus has failed to provide the "compelling justification" for overruling a long-standing precedent.

ARGUMENT

I. The Court Should Dismiss This Case As Certiorari Having Been Improvidently Granted

A. The Law of the Case Doctrine Resolves the Issue Before This Court and This Case

1. An affirmance by an evenly divided Court is a decision on the merits

This Court has been clear that the decisions of an equally divided court are binding and conclusive on the parties on the issues presented, although the rulings do not have precedential value for other litigation. *See* Justin Pidot, *Tie Votes in the Supreme Court*, 101 Minn. L. Rev. 245, 252 (2016) ("The Supreme Court has long applied the rule that where the Justices reach a tie vote on the judgment in a case, the lower court's

opinion is affirmed. Such a decision binds the parties, but has no precedential value.").

This principle is long established. As early as 1826, Chief Justice John Marshall held that in a case where the Court was equally divided, "the principles of law which have been argued cannot be settled; but the judgment is affirmed, the Court being divided in opinion upon it." *Etting v. United States*, 24 U.S. 59, 78 (1826). Particularly instructive is this Court's decision in *Durant v. Essex Co.*, 74 U.S. 107, 112 (1869) (cited by this Court in its affirmance in *Hyatt II*, 136 S.Ct. at 1279). Durant filed a bill against the Essex Company for certain real estate. *Id*. at 109. Durant lost in the lower courts and appealed to the Supreme Court. *Id*. at 108. The Supreme Court was equally divided and "affirmed with costs" the Circuit Court's decision. *Id*. Durant, believing that an equally divided court meant that the Court had actually not decided the issue, filed another bill against Essex. *Id.* at 109. Essex argued that the judgment of the equally divided Supreme Court was a bar on the second litigation and the Court agreed. The Court explained that the first suit "was an adjudication of the merits of the controversy," and as such "constitutes a bar to any further litigation on the same subject between the same parties." *Id*.

The Court went on to specifically reject the idea that an equally divided court's judgment constitutes no decision, explaining:

> There is nothing in the fact that the judges of this court were divided in opinion upon the

> question whether the decree should be reversed or not, and, therefore, ordered an affirmance of the decree of the court below. The judgment of affirmance was the judgment of the entire court. The division of opinion between the judges was the reason for the entry of that judgment; but the reason is no part of the judgment itself.
>
> . . . The judgment of the court below, therefore, stands in full force. It is, indeed, the settled practice in such case to enter a judgment of affirmance; but this is only the most convenient mode of expressing the fact that the cause is finally disposed of in conformity with the action of the court below, and that that court can proceed to enforce its judgment. The legal effect would be the same if the appeal, or writ of error, were dismissed.

Id. at 110-112.

This Court has reaffirmed on many occasions that a decision by an equally divided Court is a conclusive resolution of the law in the litigation between the parties. *See Hertz v. Woodman*, 218 U.S. 205, 213-214 (1910) (explaining both precedent and reason justify the rule that "affirmance by an equally divided court is . . . a conclusive determination and adjudication of the matter adjudged; but the principles . . . having [not] been agreed upon by a majority . . . prevents the case from becoming an authority for the determination of other cases); *Neil v. Biggers*, 409 U.S. 188, 191-192 (1972) (explaining that a decision by an evenly divided Court resolves a matter between the parties).

Similarly, in *United States v. Pink*, 315 U.S. 203, 216 (1942), the Court held that a ruling by an equally divided court binds the parties, although it does not have precedential value. The Court explained the significance of its earlier ruling by an evenly divided Court: "*While it was conclusive and binding upon the parties as respects that controversy*, the lack of an agreement by a majority of the Court on the principles of law involved prevents it from being an authoritative determination for other cases." *Id.* at 216 (emphasis added) (citation omitted).

Thus, under precedents stretching back throughout American history, it is firmly established that this Court's decision in *Hyatt II*, reaffirming *Nevada v. Hall*, is a decision on the merits for these parties.

2. Under the law of the case doctrine, the prior decision of this Court in this case should not be reconsidered

This Court has explained that the law of the case doctrine "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983). The law of the case doctrine protects the parties in litigation by allowing them to rely on a court's ruling in their case without needing to fear that the rug later will be pulled out from under them by a court changing its mind about the law to be applied in their litigation. It also protects lower courts, here the Nevada Supreme Court,

which expended great resources hearing and deciding the issues presented to it because this Court had ruled twice that the Board could be sued in Nevada state court.

Justice Gorsuch, while a Circuit Judge, expressed the importance of this doctrine when he stated:

> Law of the case doctrine permits a court to decline the invitation to reconsider issues already resolved earlier in the life of a litigation. It's a pretty important thing too. Without something like it, an adverse judicial decision would become little more than an invitation to take a mulligan, encouraging lawyers and litigants alike to believe that if at first you don't succeed, just try again. A system like that would reduce the incentive for parties to put their best effort into their initial submissions on an issue, waste judicial resources, and introduce even more delay into the resolution of lawsuits that today often already take long enough to resolve. All of which would 'gradual[ly] undermin[e] . . . public confidence in the judiciary.'

Entek GRB, LLC v. Stull Ranches, LLC, 840 F.3d 1239, 1240 (10th Cir. 2016) (citations omitted). This is the rationale that this Court has followed in articulating the law of the case doctrine. *See*, *e.g.*, *Arizona v. California*, 460 U.S. at 618.

Having split 4-4, this Court, of course, could have dismissed the petition for certiorari as improvidently granted or it could have put the case over for

reargument instead of deciding it. Neither of these actions would have produced a decision on the merits. But instead this Court expressly chose to "affirm the Nevada courts' exercise of jurisdiction over California." *Hyatt II*, 136 S.Ct. at 1279. Having reaffirmed that principle of law, this Court went on to address the question of whether the Full Faith and Credit Clause required the Nevada court to reduce damages to the amount that could be awarded against Nevada agencies under these circumstances, an issue necessarily dependent on its affirmation of *Nevada v. Hall*. The parties and the Nevada Supreme Court then relied on this ruling, exactly as the law of the case doctrine is meant to facilitate. As this Court explained, the law of the case doctrine "promotes the finality and efficiency of the judicial process by 'protecting against the agitation of settled issues.'" *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988).

If the Board did not want this Court's decision to be the law of the case in this litigation, the Board could have moved this Court for rehearing after its decision in *Hyatt II*. *See* Rule 44, Rules of the Supreme Court of the United States ("Any petition for the rehearing of any judgment or decision of the Court on the merits shall be filed within 25 days after entry of the judgment or decision, unless the Court or a Justice shortens or extends the time."). It did not do so. It is therefore bound by the Court's decision in *Hyatt II* as the law of the case for this litigation.

3. The application of the law of the case doctrine is particularly important in this lengthy and complex litigation

Although the law of the case doctrine is discretionary, this Court has been clear that "*as a rule courts should be loath* [to depart from it] . . . *in the absence of extraordinary circumstances* such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'" *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. at 817-818 (1988) (emphasis added) (quoting *Arizona v. California*, 460 U.S. at 618 n.8); *see also Agostini v. Felton*, 521 U.S. 203, 236 (1997) (internal quotation marks omitted) ("The [law of the case] doctrine does not apply if the court is convinced that [its prior decision] is clearly erroneous and would work a manifest injustice.").

But whatever the Court ultimately decides concerning whether to overrule *Nevada v. Hall*, it cannot be asserted that it was "clearly erroneous" or that following it would "work a manifest injustice." Overruling *Nevada v. Hall* in *this litigation* would be a manifest injustice to Gilbert Hyatt. This litigation has gone on for over 20 years. Both sides have spent an enormous amount of time and money litigating the issues. The costs, even apart from attorney's fees, have been huge. Hyatt has undertaken this litigation in full reliance on the decisions of this Court. The Board did not challenge *Nevada v. Hall* in the first phase of litigation, expressly telling this Court it was not doing so. Hyatt relied on this, and that the viability of *Nevada v. Hall* was not at

issue, in taking this case to trial and in defending the appeals.

After this Court's decision in *Hyatt II*, Hyatt continued to litigate the matter in the Nevada Supreme Court in reliance on this Court's ruling in his case to reaffirm *Nevada v. Hall* and affirm the Nevada court's jurisdiction over this issue. It would be unjust to change the law in this case and expose Hyatt to the potential of having to bear the costs that the Board has incurred in this litigation, as well as the costs Hyatt incurred in reliance on this Court's affirmation of Nevada's jurisdiction. Hyatt properly and justifiably relied on this Court's decisions as to the law in his case, which were binding on the Nevada courts, and the law of the case doctrine protects his reliance. If litigants are to count on prior rulings to mean anything in their case, that must start with respect for decisions by this Court. And this is especially true here, where this Court, despite two opportunities to do so, did not disturb its holding in *Nevada v. Hall*.

Of course, this Court might reconsider *Nevada v. Hall* in other cases presenting that issue.[3] But in this litigation, this Court affirmed the Nevada courts' exercise of jurisdiction over the Board, reaffirmed *Nevada v. Hall*, and remanded for further proceedings. *Hyatt*

[3] In fact, there is a petition for a writ of certiorari now pending in another case posing the same issue. Petition for Writ of Certiorari, *Nevada Department of Wildlife v. Smith*, No. 17-1348 (U.S. March 21, 2018).

II, 136 S.Ct. at 1279, 1283. That should be regarded as the law of the case deciding the matter.

B. The Board Waived the Ability to Challenge *Nevada v. Hall*

As explained above, the Board had the opportunity to ask this Court to reconsider *Nevada v. Hall* when this case was before it in 2003. Although the Board had asserted sovereign immunity from the outset of this litigation, the Board made the express decision to not ask this Court to overrule *Nevada v. Hall*. As the Court explained in its unanimous ruling: "Petitioner does not ask us to reexamine that ruling [*Nevada v. Hall*], and we therefore decline the invitation of petitioner's *amici* States . . . to do so." *Hyatt I*, 538 U.S. at 497.

The law is clear that if an argument is not raised in a petition for certiorari, it is deemed waived. *See*, *e.g.*, *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 75 n.13 (1996); *see also Tennessee Student Ass'n Corp. v. Hood*, 541 U.S. 440, 456 (2004) (Thomas, J., dissenting). This is in accord with the general rule that a party waives an argument by choosing not to raise it. *See*, *e.g.*, *Granite Rock Corp. v. International Bhd. of Teamsters*, 561 U.S. 287, 306 (2010) (argument not raised in the Supreme Court is "deemed waived" (quoting this Court's Rule 15.2) ("briefs in opposition")); *Stop the Beach Renourishment v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 729 (2010) (arguments not raised in the Supreme Court are deemed waived).

The Board decided to challenge *Nevada v. Hall* only after lengthy proceedings in state court, including a jury trial, and after aspects of the jury's verdict were affirmed by the Nevada Supreme Court. *Franchise Tax Bd. v. Hyatt*, 335 P.3d 125, 130-131 (Nev. 2014). As explained above, Hyatt participated in this protracted litigation in reliance on *Nevada v. Hall* and his knowledge that the Board was not asking it to be overruled.

The Board may argue that it can raise sovereign immunity at any time in the proceedings and that should include the ability to argue for the overruling of *Nevada v. Hall*. But this Court long has been clear that a state may waive its sovereign immunity. *See Clark v. Barnard*, 108 U.S. 436, 447 (1883) (observing that sovereign immunity "is a personal privilege [that the state] may waive at pleasure"); *see also Raygor v. Regents of the Univ.*, 534 U.S. 533, 547 (2002); *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304 (1990). Moreover, this Court, and Courts of Appeals across the country, have held that a state can be deemed to waive its sovereign immunity by its choices during litigation. *See*, *e.g.*, *Wisconsin Dep't of Corr. v. Schacht*, 524 U.S. 381, 388-390 (1998); *Rhode Island Dep't of Envtl. Mgmt. v. United States*, 304 F.3d 31, 50 (1st Cir. 2002) ("Claims of waiver of immunity are like any other legal argument and may themselves be waived or forfeited if not seasonably asserted."); *Hill v. Blind Indus. & Servs. of Md.*, 179 F.3d 754, 760 (9th Cir. 1999) (waiver found based on participating in litigation). As Justice Kennedy observed, "[i]n certain

respects, the [sovereign] immunity bears substantial similarity to personal jurisdiction requirements, since it can be waived and courts need not raise the issue *sua sponte*." *Schacht*, 524 U.S. at 394 (Kennedy, J., concurring).

When this case was first here, the Board tried to have the case against it dismissed, but without asking this Court to reconsider *Nevada v. Hall*. *See Hyatt I*, 538 U.S. at 491-492. It could have done so, but expressly said it was not asking for reconsideration of this precedent. Thus, it should be seen as waiving this argument in litigation before this Court.

II. *Nevada v. Hall* Should Not Be Overruled

A. The Strong Presumption Against Overruling Precedent

On the merits, the sole issue presented in this case is whether this Court should overrule its almost 40-year-old precedent in *Nevada v. Hall*. "The Court has said often and with great emphasis that 'the doctrine of *stare decisis* is of fundamental importance to the rule of law.'" *Patterson v. McLean Credit Union*, 491 U.S.164, 172 (1989) (citations omitted). That is because "*stare decisis* 'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process'. . . . *Stare decisis* thereby avoids the instability and unfairness that accompany disruption of settled legal expectations." *Randall v. Sorrell*, 548 U.S. 230, 248 (2006)

(quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). Stare decisis "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez v. Hillery*, 474 U.S. 254, 265-266 (1986).

Because "[a]dherence to precedent promotes stability, predictability, and respect for judicial authority," this Court has emphasized that it "will not depart from the doctrine of stare decisis without some compelling justification." *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991). The Board, though, offers no compelling reason why *Nevada v. Hall* should be overruled.

B. *Nevada v. Hall* Safeguards a State's Sovereign Power Under the Tenth Amendment in Protecting Its Own Citizens From Harm

The Board and its *amici* stress a state's sovereign interest in not being sued. But they ignore another very important sovereign interest of states: providing a forum for their citizens when they are injured and providing a remedy for them, especially when none other exists. This Court repeatedly has recognized "the legitimate and substantial interest of the State in protecting its citizens." *Farmer v. United Bhd. of Carpenters & Joiners*, 430 U.S. 290, 302-304 (1977); *see also Watson v. Employers Liability Assurance Corp.*, 348

U.S. 66, 72-73 (1954) (interest of state in protecting its citizens when they are injured). The "States have a perfectly legitimate interest, exercised in a variety of ways, in redressing and preventing careless conduct, no matter who is responsible for it, that inflicts actual, measurable injury upon individual citizens." *Rosenbloom v. Metromedia*, 403 U.S. 29, 64 (1971) (Harlan, J., dissenting).

Nevada v. Hall was expressly based on this interest of a sovereign state in being able to protect its citizens. As this Court explained, history "supports the conclusion that no sovereign may be sued in its own courts without its consent, but it affords no support for a claim of immunity in another sovereign's courts. Such a claim necessarily implicates the power and authority of a second sovereign[.]" *Nevada v. Hall*, 440 U.S. at 416.

The Board speaks of the "dignity" interest of states in not being sued, Brief for Petitioner at 38, but fails to recognize the dignity interest of a state in being able as a sovereign to determine the jurisdiction of its own courts and to protect its own citizens from harm. In this case it is the interest of Nevada in protecting its citizens from egregious intentional torts, behavior sufficiently outrageous that it caused the jury to award $389 million in damages against the Board, including $250 million in punitive damages. As this Court approvingly quoted in *Hyatt I*: "'Few matters could be deemed more appropriately the concern of the state in which [an] injury occurs or more completely within its power.'" 538 U.S. at 495 (quoting *Pacific Employers Ins.*

Co. v. Industrial Accident Comm'n, 306 U.S. 493, 503 (1939)). As Chief Justice Roberts explained in *Hyatt II*: "[T]here is no doubt that Nevada has a 'sufficient' policy interest in protecting Nevada residents from such injuries." *Hyatt II*, 136 S.Ct. at 1287 (Roberts, C.J., dissenting).

Since early in American history, the Court has recognized the limits of the political process when a state harms those in other states. In *McCulloch v. Maryland*, Chief Justice John Marshall explained that one reason Maryland could not tax the Bank of the United States was because Maryland then effectively would be taxing those in other states who do not have representation in the Maryland political process. 17 U.S. (4 Wheat.) 316, 435 (1819). Likewise, the Court has "a virtually per se rule" against laws discriminating against out-of-staters when such laws burden interstate commerce because a state is inflicting harms on others who are not able to protect themselves in the state's political process. *Granholm v. Heald*, 544 U.S. 460, 476 (2005) (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)). As the Court explained in *South Carolina Highway Dept. v. Barnwell Bros., Inc.*, 303 U.S. 177, 185 n.2 (1938), "when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state."

Similarly, a Nevada resident who is injured by the State of California has no possible remedy except in

the Nevada courts. As Chief Justice Roberts explained, "Nevada is not, however, required to treat its sister State as equally committed to protection of Nevada citizens." *Hyatt II*, 136 S.Ct. at 1287 (Roberts, C.J., dissenting). Nevada, as a sovereign state has a crucial interest in ensuring the protection of its citizens. The Nevada Supreme Court said this explicitly in this case, declaring: "This state's policy interest in providing adequate redress to Nevada citizens is paramount." 335 P.3d at 147.

The Board posits that sovereign immunity serves the "constitutional values" of protecting the dignity of states and promoting self-government. Brief for Petitioner at 36-37. Both of these constitutional values, though, are directly served by allowing a state to provide a forum for their citizens when they are injured. *See Hyatt I*, 538 U.S. at 494 (The State of Nevada "is undoubtedly competent to legislate" concerning "intentional torts . . . which . . . have injured one of its citizens within its borders."). It affirms the dignity and autonomy of a state to be able to determine the jurisdiction of its courts and to provide a remedy for its citizens when they are hurt, especially within their own state. As Professor Weinberg explains, "[w]ithout *Nevada v. Hall*, a state's own residents cannot obtain justice for injuries received at the hands of a different state intruding on the home state's own territory." Weinberg, *Saving* Nevada v. Hall (November 12, 2018 draft), Social Science Research Network, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3254349 (providing Abstract, View, and Download), at 19.

Additionally, citizens' interest in self-government is harmed when a state loses its ability to determine the jurisdiction of its courts and to provide its own citizens a remedy.

The Board focuses on the ability of a state to avoid being sued, but the flip side presents an even more important self-governance issue: the ability of citizens, through their representatives and judges, to protect the interests of those injured within the state by providing them a forum for redress. This case illustrates the importance of Nevada's interest. Agents from another state entered Nevada, spied on Hyatt in his home and searched his trash bins. They called him filthy names and tried to extort money from him by threatening to reveal private information. Without *Nevada v. Hall*, a state would have no way of protecting its residents who are harassed by employees of another state.

The Board and its *amici* fail to recognize this interest. They stress the harms to states of being sued. Although *Nevada v. Hall* is almost four decades old, they can point to only a relative handful of suits against state governments pursuant to it. Brief for Petitioner at 46-47; Brief of Indiana and 43 Other States as *Amici Curiae* in Support of Petitioners at 13-14; Brief of *Amici Curiae* Multistate Tax Commission, National Governors Association, and National Conference of State Legislatures in Support of Petitioners at 17-18. Suits against states in state court—rare before the decision in *Nevada v. Hall*—are still rare today. *See* Jeffrey W. Stempel, Hyatt v. Franchise Tax Board of

California: *Perils of Undue Disputing Zeal and Undue Immunity for Government Inflicted Injury*, 18 Nev. L.J. 61, 83 (2018) ("According to the *Nevada v. Hall* critics, states have sometimes been sued for conduct causing injury in other states, placing legal and financial pressure on the states. But the empirical burden of such litigation is far from clear and hardly seems oppressive.").

Moreover, *Nevada v. Hall* does not mean that states are without protection from suit in other states' courts. As this Court held when this case was last before it, the Full Faith and Credit Clause means that a state court cannot hold another state liable for more than the liability that would be allowed for the forum state in its own courts. *Hyatt II*, 136 S.Ct. at 1281. This matters greatly in protecting state governments. In this case, the jury's award of $139 million in compensatory damages and $250 million in punitive damages now has been reduced to $100,000. *Franchise Tax Bd. v. Hyatt*, 407 P.3d 717, 725 (Nev. 2017). States thus have ample means of "avoiding [the] burdens" of being haled into another state's court, Brief for Petitioner at 35, without abrogating their ability to protect their own citizens and contradicting fundamental principles of sovereignty.

Also, state courts can and do accord comity to other states. In this case, the Nevada Supreme Court ruled that negligent claims could not go forward and also that punitive damages are not available against the Board because of considerations of comity. *Id.* Furthermore, in those relatively infrequent instances

when such suits have been filed, state courts have typically relied on the voluntary doctrine of comity to extend broad protections to their sister states, as the Nevada Supreme Court did here. *See*, *e.g.*, *Cox v. Roach*, 723 S.E.2d 340, 344-347 (N.C. Ct. App. 2012); *Sam v. Sam*, 134 P.3d 761, 762-763 (N.M. 2006).

Moreover, the states need not rely exclusively on the doctrine of comity in their quest for greater immunity in other states' courts. If both California and Nevada believe that expanded immunity is appropriate, the two states are free to enter into an agreement to provide immunity in each other's courts, *see Nevada v. Hall*, 440 U.S. at 416, or to join in a broader agreement with all states sharing similar views. Because such voluntary agreements would not aggregate state power at the expense of the federal government, they would not require Congress's approval. *See Cuyler v. Adams*, 449 U.S. 433, 440 (1981) ("Congressional consent is not required for interstate agreements that fall outside the scope of the Compact Clause.").[4]

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[4] The Brief of the *Amici Curiae* Multistate Tax Commission, et al., also argues that *Nevada v. Hall* should be overturned because it subjects states to erroneous choice-of-law decisions of other state courts and risks disruption of states' tax enforcement systems. Brief of *Amici Curiae* Multistate Tax Commission, National Governors Association, and National Conference of State Legislatures in Support of Petitioner at 5-11. But states are not left without recourse if they feel the judgment of a sister-state court has been made in error. This Court has recognized that "[o]rders commanding action or inaction have been denied enforcement in a sister State when they purported to accomplish an official act within the exclusive province of that other State or interfered with litigation over which the ordering State had no

C. *Nevada v. Hall* Reflects the Original Understanding that a Sovereign Could Be Sued in Another Sovereign's Courts

The core of the arguments from the Board and its *amici*—besides that state governments don't want to be sued—is that *Nevada v. Hall* was wrong. There is no new historical evidence that suggests that the Court erred. The Board and its *amici* present the same historical arguments that were made in 1977 when the Court decided *Nevada v. Hall*.

This Court has been clear that "an argument that we got something wrong—even a good argument to that effect—cannot by itself justify scrapping settled precedent." *Kimble v. Marvel Entm't, LLC*, 135 S.Ct. 2401, 2409 (2015). Rather, "[t]o reverse course, we require as well what we have termed a 'special justification'—over and above the belief 'that the precedent was wrongly decided.'" *Id*. (citations omitted). But no such special justification exists here. *Nevada v. Hall* was based on careful historical analysis. *See Nevada v. Hall*, 440 U.S. at 414-417.

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authority." *Baker v. GMC*, 522 U.S. 222, 235 (1997). Additionally, the defendant state may be able to reject the judgment for lack of subject matter jurisdiction, lack of personal jurisdiction, or other invalidating grounds such as fraud, as long as those issues were not litigated in the original forum state. *See* James P. George, *Enforcing Judgments Across State and National Boundaries: Inbound Foreign Judgments and Outbound Texas Judgments*, 50 S. Tex. L. Rev. 400, 407 (2009). And if states wish, they can enter into agreements limiting their ability to be sued in each other's courts.

The primary argument advanced by the Board and its *amici* is that *Nevada v. Hall* is inconsistent with principles of sovereign immunity. *See* Brief for Petitioner at 14-30. But Petitioner ignores the key distinction that has been drawn from the earliest days of American history and that underlies *Nevada v. Hall*: the difference between a state's sovereignty in its own courts and its immunity in the courts of another sovereign. To reach the conclusion that *Nevada v. Hall* was wrongly decided, this Court would not only have to eliminate this distinction, but it would have to revisit the myriad precedents that depend upon it.

Nevada v. Hall was the mirror image of this case. California plaintiffs sued the State of Nevada in California state court on a claim that could not have been brought in Nevada. *Nevada v. Hall*, 440 U.S. at 411. The plaintiffs had been seriously injured in a car accident caused by an employee of the University of Nevada. *Id.*

This Court expressly rejected Nevada's claim that sovereign immunity protected it from suit in California state court. *Id.* at 426-427. The Court reviewed the history of sovereign immunity and concluded that it protects a state from being sued in its own courts without its consent. *Id.* at 414-417. The Court explained that sovereign immunity means that

> no sovereign may be sued in its own courts without its consent, but it affords no support for a claim of immunity in another sovereign's courts. Such a claim necessarily implicates the power and authority of a second sovereign;

> its source must be found either in an agreement, express or implied, between the two sovereigns, or in the voluntary decision of the second to respect the dignity of the first as a matter of comity.

Id. at 416.

Relying on precedent from the earliest days of American history—Chief Justice John Marshall's decision in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812)—this Court in *Nevada v. Hall* concluded that sovereign immunity never was meant to protect a state from suits in another state's court. *Nevada v. Hall*, 440 U.S. at 416. *The Schooner Exchange* has been seen as establishing the principle throughout American history that a sovereign is under no legal obligation to grant immunity to other sovereigns in its own courts. Simply put, a state's sovereign immunity in its own courts is a function of its sovereignty there; but that does not give it sovereign immunity when it is sued in the courts of another sovereign. *See*, *e.g.*, *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 352 (1822); *see also* William Baude, "Sovereign Immunity and the Constitutional Text," 103 Virginia L. Rev. 1, 23-24 (2017) ("Immunity in one's own courts, the Court wrote, 'has been enjoyed as a matter of absolute right for centuries,' while immunity in another sovereign's courts was a matter of mutual agreement or comity." (quoting *Nevada v. Hall*, 440 U.S. at 414)).

The Board argues that this Court got it wrong in *Nevada v. Hall* in relying on *The Schooner Exchange v.*

McFaddon because that case involved the immunity of nations and not of states. Brief for Petitioner at 33. For many reasons this Court's invocation of *The Schooner Exchange* in *Nevada v. Hall* was apt. To begin with, *The Schooner Exchange* established the power of a state to define the jurisdiction of its courts and to provide a remedy to its injured citizens against out-of-staters. *See* 11 U.S. (7 Cranch) at 144. That, of course, is exactly why *Nevada v. Hall* invoked *The Schooner Exchange* as precedent.

The Schooner Exchange also established the lack of immunity that a sovereign has when it is sued in the courts of another sovereign. *See id*. 146-147. As Justice Thomas stated: "[I]mmunity does not apply of its own force in the courts of another sovereign." *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 815 (2014) (Thomas, J., dissenting).

Moreover, the crucial fact that the Board points to—"the absence of an enforcement mechanism"—also is true if this Court were to overrule *Nevada v. Hall*. There would be no enforcement mechanism of any kind for those like Gilbert Hyatt who have been injured by another state government. The "neutral tribunal" of this Court that the Board asserts to be the "judicial enforcement mechanism" that compensated the states for depriving them of "the ability to refuse to recognize the judgment of another state," Brief for Petitioner at 32, applies only to cases between state governments. Hyatt cannot sue the Board in this Court, nor in any other forum apart from Nevada.

Nevada v. Hall was based on three basic and unassailable premises. First, prior to formation of the Union, the states were independent sovereign nations and had the same immunity in each other's courts as other sovereign nations had in the courts of foreign nations. *See Nevada v. Hall*, 440 U.S. at 417. Second, before the founding of the United States, sovereign nations could not assert immunity as of right in the courts of other nations, but enjoyed immunity only with the consent of the host nation. *See id.* at 416. Third, nothing in the Constitution or formation of the Union altered that balance among the still-sovereign states, giving priority to the rights of visiting states at the expense of host states. *See id.* at 421. As Professors Stephen E. Sachs and William Baude observe: "The Constitution left sister-state immunity alone, neither abrogating it nor transforming it into a rule of constitutional law." Brief of Professors William Baude and Stephen E. Sachs as *Amicus Curiae* in Support of Neither Party, at 6. As Professor Louise Weinberg explained: "[B]oth in history and law, *Nevada v. Hall* is in accord with general understandings and cannot be disturbed without damage to the 'seamless web' of established legal understandings." Louise Weinberg, at 3-4.

The Board asserts that "[b]efore the ratification of the Constitution, it was widely accepted that the States enjoyed sovereign immunity from suit in each other's courts." Brief for Petitioner at 21; Brief of Law Professors as *Amici Curiae* in Support of Petitioners at 9-10. But this is not correct and the Board itself admits this later in its brief when it states: "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.*" Brief for Petitioner at 31-32 (emphasis added).

The Board's initial conclusion, which it later rightly contradicts, was based on generalizing from two cases from Pennsylvania in the unique context of admiralty law—*Nathan v. Virginia*, 1 U.S. (1 Dall.) 77 (Pa. Ct. Com. Pl. 1781); *Moitez v. South Carolina*, 17 F. Cas. 574, Pa. Adm. 1781 (No. 9,767). *See also* Brief of Law Professors as *Amici Curiae in Support of Petitioner* at 10-11 (relying on these cases as the basis for its analysis). Under the Articles of Confederation, however, there was no limit on the ability of a state to be sued. In *Chisholm v. Georgia*, Justice Cushing explained that *before* the ratification of the Constitution, states were subject to suit in the courts of other states. 2 U.S. (2 Dall.) 419, 474 (1793). He observed that "[e]ach State was obliged to acquiesce in the measure of justice which another State might yield *to her, or to her citizens*[.]" *Id*. (emphasis added). In fact, out of the original thirteen colonies, only two directly opposed jurisdiction over state governments. Susan Randall, *Sovereign Immunity and the Uses of History*, 81 Neb. L. Rev. 1, 55 (2002).

Nathan v. Virginia, invoked by the Board, reflected a common law immunity. 1 U.S. (1 Dall.) 77 (Pa. Ct. Com. Pl. 1781). But the Board and its *amici* offer no evidence that the framers meant to turn this common law immunity against a state being sued in another state into a constitutional rule. As Professors Sachs

and Baude point out: "The Board repeatedly confuses the Founders' choice *not to abrogate* sovereign immunity with a decision *to entrench it*, transforming the traditional common-law immunities into new rules of constitutional law." Amicus Brief of Professors William Baude and Stephen Sachs, at 11.

This is why the Board is wrong in its assertion that *Alden v. Maine*, 527 U.S. 706 (1999) is inconsistent with *Nevada v. Hall*. Brief for Petitioner at 36-37. *Alden v. Maine* is about the ability of a state to choose to not be sued in its own state courts, a choice that this Court said was protected by an immunity that has existed throughout American history. *Alden*, 527 U.S. at 738. But a state's sovereignty in its own courts tells nothing about its immunity in the courts of another state. In fact, as this Court noted in *Alden v. Maine*, "*the Constitution did not reflect an agreement between the States to respect the sovereign immunity of one another*[.]" 527 U.S. at 738 (emphasis added).

In *Alden v. Maine*, the Court reaffirmed the basic distinction between suing a state in its own state courts and suing a state in the courts of another state. The Court stated:

> In fact, the distinction drawn between a sovereign's immunity in its own courts and its immunity in the courts of another sovereign, as well as the reasoning on which this distinction was based, are consistent with, and even support, the proposition urged by respondent here—that the Constitution reserves to the States a constitutional immunity from private

> suits in their own courts which cannot be abrogated by Congress.

Id. at 739-740. There is an enormous difference in terms of the intrusion on state sovereignty between forcing a state court to hear a case against its state government, what *Alden* protects state courts from having to do, and precluding a state court from hearing a suit to protect its citizens against another state. The Board relies heavily on *Alden* as the reason why *Nevada v. Hall* should be overruled, but then ignores the reasoning in *Alden* and this fundamental distinction which *Alden* expressly recognizes.

The Board and its *amici* stress state sovereignty, but keeping a state from hearing suits is itself a significant limit on state prerogatives. In *Nevada v. Hall*, this Court stressed that preventing a state court from hearing suits against other states would be inconsistent with a concern for state sovereignty. *Nevada v. Hall*, 440 U.S. at 426-427. The Court declared:

> It may be wise policy, as a matter of harmonious interstate relations, for States to accord each other immunity or to respect any established limits on liability. They are free to do so. But if a federal court were to hold, by inference from the structure of our Constitution and nothing else, that California is not free in this case to enforce its policy of full compensation, that holding would constitute the real intrusion on the sovereignty of the States—and the power of the people—in our Union.

Id.

The Tenth Amendment is crucial in explaining the distinction between *Alden v. Maine* and *Nevada v. Hall*. Because the Constitution is silent about the power of state courts to hear suits against state governments, *see Nevada v. Hall*, 440 U.S. at 421, a state may make the choice—as Maine did in *Alden v. Maine*—to not allow itself to be sued in its state courts. But a state also may choose, as Nevada did here and as California did in *Nevada v. Hall*, to provide a forum for its citizens when they are injured by another state. As this Court recently noted in discussing the Tenth Amendment, "[t]he Constitution limited but did not abolish the sovereign powers of the States, which retained 'a residuary and inviolable sovereignty.'" *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S.Ct. 1461, 1475 (2018) (citations omitted). An aspect of that sovereignty is being able to determine the jurisdiction of its courts and to choose to allow its courts to hear claims by its citizens who have been injured, including by other states. *See Nevada v. Hall*, 440 U.S. at 426-427.

The Tenth Amendment means that a state has the power to act unless prohibited by the Constitution. There is nothing in the Constitution that forbids a state from providing a forum for its citizens when they are injured by another state. *See id*. at 426-427. Nor is there anything in the framers' intent or original understanding at the time the Constitution was adopted that indicates that such a prohibition on state prerogatives was intended. As this Court explained in *Nevada v. Hall*, "the question whether one State might be subject to suit in the courts of another State was apparently

not a matter of concern when the new Constitution was being drafted and ratified." 440 U.S. at 418-419. To be sure, there are many declarations about the immunity of a state government from suit, but none said that this includes *constitutional* protection from suit in the courts of another state or a *constitutional* limit on the ability of a state to choose to provide a forum for its citizens when they are injured by another state.

The Board asserts that decisions about sovereign immunity since *Nevada v. Hall* undermine its reasoning. Brief for Petitioner at 40-43. But this Court's decisions about sovereign immunity in federal courts are about the scope of a constitutional limit on federal court jurisdiction: the Eleventh Amendment. *See*, *e.g.*, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996) (discussing the meaning of the Eleventh Amendment as a limit on federal judicial power and on congressional authority to abrogate sovereign immunity in federal court). Unlike the limits the Constitution places on Congress's powers, including its power to abrogate state sovereign immunity, the Constitution places no similar limits on the ability of states to create a forum for their citizens when they are injured in the state. *See Nevada v. Hall*, 440 U.S. at 426-427. Moreover, as discussed above, *Alden v. Maine* is about whether a state court is constitutionally required to hear suits against that state government. *Alden*, 527 U.S. at 738. The issue in this case is very different; it is about whether there is a *constitutional prohibition* on a state court choosing to provide a forum for its citizens when they are injured by another state. *Nevada v. Hall*

resolves this question and no subsequent case addresses it.[5]

The Board suggests that it "strains credulity" to believe that the framers would have allowed a state to be sued in another state's courts. Brief for Petitioner at 27. It does not strain credulity at all to believe that the framers assumed and even wanted to protect the sovereign prerogative of states to define the jurisdiction of their own courts, including by continuing to provide a forum for their citizens when injured.

The Board seeks to turn a power of a state to choose not to hear cases against itself as recognized in *Alden v. Maine*, 527 U.S. at 739-740, into a constitutional prohibition against states choosing to make their courts available to protect their residents when they have been injured. Nothing in the Constitution or

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[5] The Board raises the sovereign immunity of Indian tribes as a basis for finding that states have sovereign immunity and cannot be sued in the courts of other states. Brief for Petitioner at 14, 41-42. But this Court has long recognized that "the immunity possessed by Indian tribes is not coextensive with that of the States." *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 756 (1998). Unlike the Board's characterization of tribal immunity, this Court said that "it developed almost by accident." *Kiowa*, *Id.* at 756. In fact, this Court noted that "[t]here are reasons to doubt the wisdom of perpetuating the doctrine." *Id.* at 758. Also, the scope of tribal immunity remains uncertain. In *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 799 n.8 (2014), the Court specifically declined to consider (and stated that it had never previously addressed) "whether immunity should apply in the ordinary way if a tort victim, or other plaintiff who has not chosen to deal with a tribe, has no alternative way to obtain relief for off-reservation commercial conduct."

the framers' intent—and nothing cited by the Board or its *amici*—supports the conclusion that such a constitutional limit exists on state power.

In *Hyatt II*, this Court reiterated that

> the very nature of the federal union of states, to which are reserved some of the attributes of sovereignty, precludes resort to the full faith and credit clause as the means for compelling a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.

136 S.Ct. at 1285-1286 (citation omitted). That is why in *Hyatt I*, this Court held that the Nevada court was not required to extend full faith and credit to California's statute conferring complete immunity on California agencies. 538 U.S. at 494. But the Board's sovereign immunity argument here would allow California to substitute its legislative judgment for the judgment of other states in the same way that this Court held that the Full Faith and Credit clause does not permit. Essentially, the Board is arguing that the California legislature was entitled to waive immunity or not, but whichever way it decided, its judgment is binding on other states. That result would indeed disrupt "the very nature of the federal union of states."

The Board argues that *Nevada v. Hall* was a significant departure from precedent. Brief for Petitioner at 28-29. But notably it did not overrule a single decision of this Court and saw itself as following

the long-standing understanding that a state court can choose to hear suits against another state government.

D. There Is No Compelling Reason for Overruling *Nevada v. Hall*

The sole issue in this case is whether there is a "compelling justification" for overruling *Nevada v. Hall*. *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991) ("[W]e will not depart from the doctrine of stare decisis without some compelling justification."). In terms of reconsidering precedent, this Court has explained:

> [W]hen this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask whether the rule has proven to be intolerable simply in defying practical workability; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or whether facts have so changed, or come to be seen so differently, as to have

> robbed the old rule of significant application or justification.

Planned Parenthood v. Casey, 505 U.S. 833, 854-855 (1992) (citations omitted).

Under each of these criteria, there is no justification for overruling *Nevada v. Hall*. First, *Nevada v. Hall* has not proven "intolerable simply in defying practical workability." The Board says that the impracticality of *Nevada v. Hall* is reflected in the jury's large verdict against it and the length of this litigation. Brief for Petitioner at 44. But the large jury verdict reflects the egregious conduct of the Board and the length of the litigation is a result of the choices of the Board, including choosing to make three trips to this Court as Petitioner. Furthermore, the jury verdict has been reduced to $100,000, showing the protections for state governments that the Board seeks. *Franchise Tax Bd. v. Hyatt*, 407 P.3d 717, 725 (Nev. 2017).

The Board and its *amici* point to a handful of cases brought against state governments. Brief for the Petitioner at 46-47; Brief of Indiana and 43 Other States as *Amici Curiae* in Support of Petitioners at 13-14. But the fact that states are occasionally sued does not show that *Nevada v. Hall* defies practical workability. Quite the contrary, it shows that *Nevada v. Hall* is working exactly as it should: allowing states to provide a forum when their citizens are injured by other states. Neither the Board nor its *amici* ever show that these are non-meritorious suits or that if they were, they could not be dismissed like any other non-meritorious litigation.

Admittedly, states do not like to be sued; no one does. But as noted above, states that conclude that litigation against each other is problematic have a fix: they can enter into a mutual agreement to not allow such litigation in their courts. When there is a solution to a problem that is readily available by action by elected officials, this Court should resist intervention in what is fundamentally a political decision. That states have not yet chosen to do so is certainly not reason to overrule *Nevada v. Hall*. The failure of states to enter into such compacts precluding litigation perhaps reflects that such suits are relatively rare and the judgment of the states that it is important to have their courts available to provide redress for their citizens when injured by agents of another state.

Second, the Board is wrong in its assertions that rules governing sovereign immunity do not engender reliance interests and that there has been no reliance on *Nevada v. Hall*. Brief for Petitioner at 43. Gilbert Hyatt has relied, at enormous cost, on *Nevada v. Hall* in litigating this matter for 20 years. Nor is he alone. The Board and its *amici* point to other cases that have been brought in reliance on *Nevada v. Hall*. *Id*. at 46-47; Brief of Indiana and 43 Other States as *Amici Curiae* in Support of Petitioners at 13-14. The Board and its *amici* cannot have it both ways: they cannot simultaneously claim that there are a number of lawsuits based on *Nevada v. Hall* and assert that no one has relied on *Nevada v. Hall*. The plaintiffs in all of the suits identified by the Board and its *amici* have incurred great costs in litigation in reliance on this

Court's decision—and they would be potentially liable for having to pay the other sides' litigation costs if this Court were to hold that *Nevada v. Hall* is overruled.[6]

Third, there has been no change in the law that "has left the old rule no more than a remnant of

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[6] It is for this reason that there is a strong argument that if this Court were to overrule *Nevada v. Hall*, it should do so prospectively only. Those, like Hyatt, who have relied on this Court's decision in *Nevada v. Hall*, should not be penalized for doing so. This Court has recognized that the Constitution neither compels nor prohibits the retroactive application of its newly announced rules. *See*, *e.g.*, *Johnson v. New Jersey*, 384 U.S. 719, 728 (1966) (holding that "the choice between retroactivity and nonretroactivity in no way turns on the value of the constitutional guarantee involved."). In *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971), this Court indicated that a decision should not be applied retroactively when it establishes a "new principle of law," including by "overruling clear past precedent" on which litigants relied, when applying a decision only prospectively would not lessen its impact in the future, and when there has been great reliance on a Court's prior decision.

All three of these factors counsel against a retroactive change in the law. Overturning *Nevada v. Hall* would clearly establish a new principle of law because it would overturn long-standing past precedent. As for the second factor, overruling *Nevada v. Hall* only prospectively will not lessen the impact of the Court's decision in the future. Finally, as to the third factor, Hyatt relied upon *Hyatt I*, in which the Court ruled to continue the litigation in Nevada state courts. In reliance on this Court's ruling and *Nevada v. Hall*, there was a jury trial and an appeal by the Franchise Tax Board from the verdict in favor of Hyatt. Hyatt relied on this Court's decision in *Hyatt II*, in which the Court directed the Nevada courts on how to address the tort damages issue. Hyatt has engaged in extremely lengthy and highly costly proceedings, as the plaintiffs did in *Chevron*. *Id*. at 108. Although the presumption is in favor of retrospective application, in this instance any decision to overrule *Nevada v. Hall* should only be prospective.

abandoned doctrine." The Board argues that this Court has significantly changed the law of sovereign immunity and especially points to *Alden v. Maine*. Brief for Petitioner at 17, 23, 36-37. But again, no decision of this Court has questioned the distinction explicitly drawn in *Alden v. Maine* between a state being sued in its own state courts and a state being sued in another state's courts. 527 U.S. at 739-740. As explained above, there is a crucial difference between forcing a state court to hear a suit against its state government and precluding a state court from choosing to hear a suit to protect its citizens. This Court's Eleventh Amendment decisions address a constitutional limit on federal court power. They do not address, explicitly or implicitly, whether there is a constitutional prohibition on a state's choice to provide a forum for its citizens when they are injured by another state. Most of all, they do not establish a limit on a state's power under the Tenth Amendment to define the jurisdiction of its courts and to provide a remedy to its citizens when they are injured by agents of another state.

Finally, the facts have not "so changed . . . as to have robbed the old rule of significant application or justification[.]" *Casey*, 505 U.S. at 855. There has been no change in facts since *Nevada v. Hall* was decided almost four decades ago. Every argument made by the Board and its *amici* against the conclusion of *Nevada v. Hall* could have been made then. *Nevada v. Hall* was based on the text and history of the Constitution and its protection of the ability of sovereign states to allow jurisdiction in their courts to protect their citizens.

Nothing has changed since then to undermine this basic power of states that is protected by the Tenth Amendment.

CONCLUSION

For all of these reasons, the judgment of the Supreme Court of Nevada should be affirmed.

Respectfully submitted,

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