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IN THE SUPREME COURT OF THE UNITED STATES

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FRANCHISE TAX BOARD OF :

CALIFORNIA, :

Petitioner : No. 14-1175

v. :

GILBERT P. HYATT. :

- - - - - x

Washington, D.C.

Monday, December 7, 2015

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:06 a.m.

APPEARANCES:

PAUL D. CLEMENT, ESQ., Washington, D.C.; on behalf of Petitioner.

H. BARTOW FARR, ESQ., Washington, D.C.; on behalf of Respondent.

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1 P R O C E E D I N G S

2 (11:06 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next in Case 14-1175, Franchise Tax Board of California
5 v. Hyatt.

6 Mr. Clement.

7 ORAL ARGUMENT OF PAUL D. CLEMENT

8 ON BEHALF OF THE PETITIONER

9 MR. CLEMENT: Mr. Chief Justice, and may it
10 please the Court:

11 The States entered the Union saddled with
12 substantial war debts. As a result, critics of the
13 Constitution were quick to point out any possibility
14 that the States could be haled into court by individual
15 citizens without their consent in order to secure
16 potentially bankrupting judgments.

17 When this Court opened up the possibility of
18 just such a judgment by allowing Chisholm, a
19 South Carolina citizen, to sue the sovereign State of
20 Georgia in this Court, the nation quickly and
21 emphatically reacted with the Eleventh Amendment that
22 eliminated the possibility of such a suit even in this
23 most neutral of Federal forums.

24 Regardless of all that, Respondent's
25 position is that, if Chisolm has turned around and sued

1 Georgia in South Carolina State court, and
2 South Carolina in its unreviewable discretion decided to
3 exercise jurisdiction over the sovereign State of
4 Georgia --

5 JUSTICE KAGAN: There is one --

6 MR. CLEMENT: -- there is nothing in Federal
7 law --

8 JUSTICE KAGAN: There's one -- there's one
9 significant difference there, Mr. Clement, which is that
10 States are on a par with each other. So there's a kind
11 of mutuality. So if one State does something to you
12 that you don't like, you can turn it around and do it to
13 them. And that mutuality also makes it less likely that
14 the State will do that thing to you in the first place
15 because they know that.

16 So -- so I think what Mr. Farr says is the
17 fact that there was this outrage with respect to a
18 Federal court might not have registered in quite the
19 same way when States were aware that they were on a par
20 with each other and that they had many weapons that they
21 could use against each other.

22 MR. CLEMENT: Well, Justice Kagan, here's
23 why I disagree. And because most of the weapons that
24 independent nations would use vis-à-vis each other to
25 ensure that sovereign immunity as a comity did not

1 become sovereign immunity in name only are precisely the
2 tools that the States surrendered to the national
3 government in the plan of the convention.

4 So if South Carolina had --

5 JUSTICE KAGAN: Well, for sure, Mr. --
6 Mr. Clement, you know, you couldn't go to war with the
7 neighboring State anymore, and that's a difference. But
8 you could say, if you're going to treat me like that,
9 I'm going to treat you like that.

10 And -- and you have other ways of dealing
11 with -- with a State that you wouldn't have with the
12 Federal government.

13 MR. CLEMENT: Well, Justice Kagan, two
14 points. First, it's not just the act of war. It's the
15 ability to impose trade sanctions; it's the ability to
16 withdraw your ambassadors. All of that is taken away
17 from the States.

18 JUSTICE KENNEDY: Is there anything in
19 our -- in -- in our jurisprudence or our constitutional
20 tradition that say States can protect each other by
21 retaliating against each other?

22 MR. CLEMENT: Well, that's the second point
23 I was going to make, Justice Kennedy, which is it's an
24 odd thing to think that the framers, who had just
25 experienced the Articles of Confederation where they had

1 unsatisfied judgments and the potential that, if the
2 State of New York went after the State of Georgia
3 because Georgia hadn't complied with the requisition for
4 funds, that there would be civil war. The idea that the
5 way they would want sovereign immunity, which no one
6 doubted exists, enforced was that kind of race to the
7 bottom. It's --

8 JUSTICE KENNEDY: I -- I mean, I -- I
9 thought that -- I thought that it's illegal for a State
10 to ban Washington apples.

11 MR. CLEMENT: Well, there is that. It's
12 something that's implicit in the Constitution. And I
13 think --

14 JUSTICE GINSBURG: Mr. Clement, to take you
15 down to the practical level, and we're not getting
16 involved with war, take Nevada v. Hall. But Justice
17 Kagan's point is, if California says that a Nevada truck
18 coming on its California roads, injuring a California
19 resident, so then Nevada is liable to the courts and the
20 law of California, Nevada can say fine. If a California
21 truck comes into our State and injures Nevada people, we
22 will do the same thing.

23 That's what I think Justice Kagan had in
24 mind.

25 MR. CLEMENT: Absolutely. And I think

1 that's the exact opposite of what the framers were
2 trying to do. They weren't trying to adopt a union
3 where there would be signs on State borders that say, if
4 you come in here, you thereby waive any sovereign
5 immunity and we will hale you into court and allow our
6 citizens to do it. Instead, they were adopting a union
7 where the States came in with substantial war debts and
8 their sovereign immunity.

9 And there is no way they would have
10 sacrificed their sovereign immunity, which was the key
11 protection for those war debts not being used against
12 them to bankrupt them.

13 JUSTICE SOTOMAYOR: I'm sorry. The system
14 that you're advocating -- just so I get it right --
15 you're saying constitutionally any -- every State is
16 immune from any acts that they commit -- this is the
17 point that Justice Ginsburg is making -- from any acts
18 they commit against a noncitizen even if they've waived
19 sovereign immunity within their own State.

20 MR. CLEMENT: Well, their --

21 JUSTICE SOTOMAYOR: All -- all -- all I have
22 to do is what? There's no noncitizen of -- of a State
23 who can ever be held -- who could ever sue a State for
24 whatever bad acts they've had.

25 MR. CLEMENT: Two points, Justice Sotomayor.

1 First of all, let's take a Nevada resident, and let's
2 say California comes in. The Nevada resident can
3 certainly sue the State of California in California
4 court if there's a waiver of sovereign immunity. And
5 the Privileges and Immunities Clause of Article IV would
6 protect the Nevada citizen from California saying, well,
7 we're going to waive our sovereign immunity as to
8 California citizens but not Nevada residents.

9 So that's one protection that they have.

10 The other point is what we're really talking
11 about is, as to the starting point, is the default rule.
12 Do you start with sovereign immunity?

13 It's always possible --

14 JUSTICE SOTOMAYOR: What -- what's the --

15 MR. CLEMENT: -- for States to agree to
16 waive their sovereign immunity.

17 JUSTICE SOTOMAYOR: Why would they do that?

18 MR. CLEMENT: Well, for --

19 JUSTICE SOTOMAYOR: I -- I -- I could
20 understand them getting together, which they haven't
21 done, to agree upon limits to each other's or waivers of
22 sovereign immunity. But what would induce them to come
23 together to do that?

24 MR. CLEMENT: I suppose consideration --

25 JUSTICE SOTOMAYOR: If they -- if they don't

1 think that they're forced to?

2 MR. CLEMENT: Well, considerations of
3 convenience. I mean, Nevada and California could decide
4 that they have sufficient comity and respect for each
5 other that it's perfectly fine for California to be sued
6 in Nevada court.

7 But conversely, they could come and make a
8 contrary decision because of their sovereign immunity
9 and say, no, if you want to sue us, come into our
10 courts.

11 JUSTICE SOTOMAYOR: And we have here 34
12 states tell us that they didn't like this rule.

13 MR. CLEMENT: 45.

14 JUSTICE SOTOMAYOR: 45.

15 How come they haven't gotten together and
16 done an agreement among all of them?

17 MR. CLEMENT: Because it would be very
18 burdensome to do that. And I think, with all due
19 respect, they think there already was an agreement among
20 the States through their people that solved this
21 problem. And that's the Constitution. It preserved the
22 sovereign immunity they would have.

23 If I could --

24 JUSTICE SOTOMAYOR: There's no question that
25 they gave -- this is why the Eleventh Amendment -- they

1 gave up a lot of things to the Federal government. And
2 I can understand why they thought they needed the
3 Eleventh Amendment.

4 But what makes you think that they gave up
5 their sovereignty with each other with respect to these
6 kinds of issues?

7 MR. CLEMENT: Two things --

8 JUSTICE SOTOMAYOR: It's not in the
9 Constitution.

10 MR. CLEMENT: Two things principally, Your
11 Honor. First is, I don't think they actually gave
12 anything up. What my friend on the other side suggests
13 they gave up is the right of one sovereign court system
14 to hale another sovereign into that court system. And
15 that is a right that didn't exist at the founding.

16 JUSTICE GINSBURG: And that's what Hall said
17 didn't exist. Hall said the States, vis-à-vis each
18 other, don't agree to respect the other's sovereign
19 immunity. Hall distinguished sovereign immunity where
20 you are the king, where you are sovereign, a State's
21 immunity. And then said, but when another State is in
22 the -- in the picture, equally sovereign, then both of
23 them are sovereign, and neither has to respect the
24 sovereign immunity of the other, that it's just -- well,
25 when the -- when the nation was new, you will admit that

1 there was no full faith and credit obligation. If one
2 State was going to respect the sovereignty of the other,
3 it would be a matter of comity, right?

4 MR. CLEMENT: You say "comity." I would
5 say, as a starting point, law of nations. But
6 absolutely, it is true that whenever you're talking
7 about sovereign immunity in any court other than the
8 sovereign's own, you are talking about sovereign
9 immunity as of comity.

10 JUSTICE GINSBURG: Okay. So --

11 MR. CLEMENT: So --

12 JUSTICE GINSBURG: So when did it change
13 from comity to an obligation?

14 MR. CLEMENT: Upon the framing of the
15 Constitution, just as it did with respect to every other
16 sovereign immunity principle. The principle that
17 emerges from this Court's cases is that if the -- the
18 States had preexisting sovereign immunity from a suit
19 and they did not sacrifice it in the plan of convention,
20 then they continue to enjoy it as a matter of
21 constitutional right.

22 JUSTICE SCALIA: I would have thought you
23 would answer that the obligation was an obligation of
24 international law, that comity was an obligation of
25 international law insofar as it extended to sovereign

1 immunity of each State not being haled into the courts
2 of another State. That was international law.

3 JUSTICE GINSBURG: Yeah. The very concept
4 of comity is a matter of grace, that's international
5 law. That's what this Court said in Hilton against
6 Guyot. Comity is not a kind of a full faith and credit.

7 MR. CLEMENT: But two points are important,
8 Justice Ginsburg. First of all, although the law of
9 nations as the framing between independent nations was a
10 matter of comity, that didn't mean that there weren't
11 certain principles that were so well established that
12 any nation that didn't respect them would be committing
13 an act of war. And first on that list would be the idea
14 that you could not have an in personam suit against a
15 foreign sovereign. It was unheard of.

16 And my friend doesn't disagree with that. I
17 think his response to the possibility --

18 JUSTICE GINSBURG: Well, Mr. Clement,
19 haven't we now recognized that there is no automatic
20 immunity for a sovereign nation, another nation?
21 That -- the Foreign Sovereign Immunities Act said, yeah,
22 sometimes, sometimes we respect the sovereignty of that
23 foreign nation, but sometimes we don't, like in
24 commercial deals.

25 MR. CLEMENT: Right, Justice Ginsburg, and I

1 don't think that you want to resolve this case on the
2 law of nations' immunity principles, either in 1789 or
3 today. But if you were to do that, we would still win,
4 because despite the relative laxity of waivers of
5 sovereign immunity in the current age, you still don't
6 have an in personam suit for something that's of course
7 sovereign function, like tax collection. Even to this
8 day, we couldn't sue France over the exact same
9 situation today.

10 But I don't think the way that this Court's
11 cases apply the law of nations is the right way of
12 thinking about this. Rather, the right way to think
13 about it is that sovereign immunity at the framing
14 becomes a constitutional principle. And I think --

15 JUSTICE GINSBURG: There is -- there is a
16 certain irony, isn't there, that California is the State
17 that gave us a Nevada against California, right? And
18 California then was saying, oh, yes, we can sue the
19 sovereign in Nevada in our courts if they come into our
20 State and hurt our people. It was California.

21 So is California now saying they were wrong
22 in the argument that they made?

23 MR. CLEMENT: Well, I -- I think the FTB is
24 asking you -- which is an arm of California -- is asking
25 you to overrule Hall. So I think it is fair to say that

1 there is some buyer's remorse on the principle of Nevada
2 against Hall by the sovereign State of California.

3 But we're not estopped from making --

4 JUSTICE KENNEDY: Well, California has
5 joined the amicus brief, has it not?

6 MR. CLEMENT: They didn't, but I think
7 that's because they felt that an arm of State was --

8 JUSTICE KENNEDY: Well, what's that --

9 MR. CLEMENT: -- already here, so I think,
10 you know, that -- that that explains that.

11 But I want to make one point very clear,
12 which is this Court has a whole host of State sovereign
13 immunity cases dealing with the Federal courts. Every
14 one of those cases with the -- every one of the Federal
15 court cases and indeed every State sovereign immunity
16 case, with the exception of -- of -- of Alden against
17 Maine is a case that's applying sovereign immunity as of
18 comity. Because the new Federal court system is a
19 foreign court system. The sovereigns did not have
20 sovereign immunity as of right in any distinct court
21 system of a superior sovereign or of an independent
22 nation.

23 So when this Court says, well, the States
24 had sovereign immunity and they didn't sacrifice it in
25 the Constitution, they're not talking in those cases

1 about sovereign immunity as of right; they're talking
2 about sovereign immunity as of comity.

3 So, too, in the tribal immunity cases.

4 JUSTICE GINSBURG: Well, what do you --

5 MR. CLEMENT: Everybody on this Court --

6 JUSTICE GINSBURG: Mr. Clement, what do you
7 do with -- I mean, one time we had -- had this issue,
8 and the argument that you're making was -- was made
9 in -- in Alden, and the Court spent over two pages
10 distinguishing Nevada v. Hall on that very point, that
11 there -- when there are two sovereigns involved, then
12 it's different.

13 MR. CLEMENT: Oh, absolutely, and that's
14 because Alden is the only case that involves sovereign
15 immunity in the State sovereign immunity context. There
16 are also Federal sovereign immunity cases, but in the
17 State sovereign immunity context, Alden is the only one
18 that's dealing with sovereign immunity in the
19 sovereign's own court system. Every other one deals
20 with sovereign immunity in a different court system,
21 either the Federal court system or the tribal court
22 system. That's --

23 JUSTICE GINSBURG: But in -- in -- in Hall
24 it does say, we determine the Constitution did not
25 reflect an agreement between States to respect the

1 sovereign immunity of one another.

2 MR. CLEMENT: Well, I think that's
3 because -- I assume that comes from the part of Alden
4 where Alden is dealing with Hall as a given, and it's
5 saying that the result in Alden does not require the
6 overruling of Hall. I would take that. That's fine.
7 That's true, they are different issues.

8 I do think they create one anomaly after
9 another. I mean, Chisholm can't sue Georgia in a
10 perfectly neutral Federal court; Chisholm can't sue
11 Georgia in Georgia court; but Chisholm can sue Georgia
12 in the least neutral court available, the State of South
13 Carolina. That doesn't make any sense.

14 There is also apparently the anomaly that
15 apparently, Alden's mistake was suing Maine in Maine
16 court. If Alden would have sued Maine in New Hampshire
17 court, probably for Federal law or maybe for State law,
18 then that suit could have gone forward.

19 It is also anomalous that the tribes
20 apparently have greater immunity than the States, even
21 though they're inferior sovereigns, because you apply
22 these same principles to recognize tribal sovereign
23 immunity. And the dissenters in Footnote 1 of those
24 cases, even they recognize, well, States are different
25 because they are a superior sovereign.

1 JUSTICE BREYER: Well, they are not totally
2 bizarre. It flows from the principle in Nevada that the
3 State maintained the sovereign power to define the
4 jurisdiction of its own courts, which is also an
5 important sovereign power. So if you look at that
6 power, then you have to say, well, what is it in the
7 Federal Constitution that limits or takes away that
8 sovereign power?

9 So that's, I think, where I'm left after
10 Nevada. And now you have a whole set of arguments, but
11 they require us, for the most part, to overrule several
12 cases.

13 MR. CLEMENT: Well, I don't think so,
14 Justice Breyer. Let me make two points, one of which
15 may not be particularly responsive to you, which is to
16 say that I think all of this Court's post-Hall
17 decisions, some of which you have enjoined, actually
18 suggest that the burden's not on me to show where in the
19 Constitution it was taken away, but that the burden is
20 on my friend to show where the Constitution specifically
21 took away the States' sovereign immunity, where they
22 surrendered it.

23 But I still think, Justice Breyer, I'm
24 not -- I'm not trying to not get your vote, because I
25 think even if the burden is on me to show where the

1 Constitution took it away, I think I can. I think it's
2 implicit, but it is implicit in three places: Article
3 III, the Eleventh Amendment, and all the provisions that
4 took the diplomatic and war tools away from the States.

5 JUSTICE BREYER: Well, I'd like to get your
6 response to the second part of this. Because your -- I
7 mean, I -- I do -- that's -- I'm finding that rather
8 hard, and it seems to me intuitively at some level
9 correct that a State like Nevada should not be able to
10 give less sovereign immunity to California than it gives
11 its own officials.

12 So I thought, well, where in heaven's name
13 does that come from? And that's what's bothering me,
14 and I'd like a theory. I have -- all I have so far is
15 this: Full faith and credit, two statutes, sometimes
16 exist. And there is also, when you're giving full faith
17 and credit, the competing principle that, if you have a
18 policy of your own State that cuts the other way and
19 it's reasonable and so forth, you don't give full faith
20 and credit.

21 And here, if you're following that kind of
22 principle, the same kind of principles in the Congress
23 clause too, you would say, fine. Nevada, since it
24 doesn't give its own people the sovereign immunity,
25 doesn't have to recognize California's because of the

1 public policy it's following. But as soon as they run
2 out of sovereign immunity, which is at \$50,000, I think,
3 now they have no reason, and therefore they have to
4 follow California's law.

5 Now, I raise that because it's in the back
6 of my mind. I've been thinking about it. And I don't
7 find in the briefs either that theory or a competing
8 theory about why you can't -- you -- you see where I'm
9 going?

10 MR. CLEMENT: I think, Justice Breyer --

11 JUSTICE BREYER: I'd love your view on that.

12 MR. CLEMENT: -- and I'm going to give you
13 my best answer on that, which is ultimately loop back to
14 Hall.

15 So my best answer is the way to think about
16 this is Nevada has said, we're going to apply Nevada
17 law, not California law, and Hyatt I says that they can
18 do that. But then they -- when they start to apply
19 Nevada's law of sovereign immunity, they get to the
20 point where there's a 50,000 damage cap and they say --
21 unbelievably in my view -- but they say, oh, well, this
22 statute only applies to Nevada's government agencies.
23 And you're not a Nevada government agency, so you don't
24 get the benefit of it.

25 JUSTICE BREYER: Right.

1 MR. CLEMENT: Now, if -- rather, if Nevada
2 did the exact same thing to a citizen of California in a
3 damage cap that applied not to sovereigns but to
4 citizens, I read my friend on page 52 of his brief to
5 say that that would violent the Privileges and
6 Immunities Clause of Article IV, that you couldn't just
7 say, well, no, that's a benefit only for Nevada
8 residents.

9 So his position ultimately is the sovereign
10 is worse off than the citizen, which can't be right.

11 Now, I think there are two ways to respond
12 to that complete anomaly. One is to say that, although
13 maybe it's not right there in the text of it, that the
14 principles of Article IV's Full Faith and Credit Clause
15 provide the same principle, the same protection that the
16 Privileges and Immunities Clause applies to a citizen.

17 But I think ultimately the better way to
18 look at it is to say the reason the framers put the
19 Privileges and Immunities Clause in Article IV of the
20 unamended Constitution is they realized States could be
21 sued in other States' courts. So there was a
22 vulnerability they needed to address.

23 They simultaneously implicitly recognized
24 that there was no way on earth that a sovereign could be
25 sued in another State's court because of age-old

1 sovereign immunity principles. So they didn't feel they
2 needed to give express protection to the sovereign the
3 way they did to the citizen.

4 JUSTICE SCALIA: Mr. Clement, I -- I assume,
5 but maybe I'm wrong, that it -- it follows from your
6 argument that a -- a State could not adopt the
7 equivalent of the Foreign Sovereign Immunities Act and
8 make -- make other States suable in -- in their State
9 courts for commercial activities.

10 MR. CLEMENT: Not -- not of its own force.
11 I mean, I think one way of thinking about this is I
12 don't think --

13 JUSTICE SCALIA: I don't know what you mean:
14 Not of its own force.

15 MR. CLEMENT: Well, they -- they might be
16 able to agree to that mutually as a waiver of their
17 sovereign --

18 JUSTICE SCALIA: No, no, no. I'm talking
19 about a State just enacting --

20 MR. CLEMENT: Right.

21 JUSTICE SCALIA: -- a State legislature
22 enacting a statute that is the equivalent of the Foreign
23 Sovereign Immunities Act.

24 MR. CLEMENT: Yes.

25 JUSTICE SCALIA: Any foreign State that is

1 doing business, not just foreign country, foreign State
2 that is doing business in this -- in this State can be
3 sued if it's -- if it's --

4 MR. CLEMENT: Right. I think that's a power
5 they yielded to the Federal government in the plan --

6 JUSTICE KAGAN: But -- but that does
7 raise --

8 JUSTICE SCALIA: So that -- that creates
9 something of an -- of an anomaly which is that foreign
10 States can be sued, but -- but your sister State can't.
11 That's a little strange, isn't it?

12 MR. CLEMENT: No. No, I don't think it is
13 strange, Your Honor. But, I mean, I think coming at it
14 from a different angle -- and maybe you get to a
15 different place. I don't know. But I think it would be
16 plain as day that, the day after the plan of the
17 Convention passes, the State of South Carolina can't
18 entertain a suit against His Majesty, the King of
19 England, in their -- in -- in South Carolina court
20 because of law of nation principles first or the fact
21 that they yielded the opportunity to do that to the
22 Federal government.

23 I think in the same way, the States yielded
24 their ability to make determinations, make treaties with
25 foreign governments over foreign sovereign immunity.

1 They yielded that to the Federal government.

2 But vis-à-vis each other, what they
3 preserved as a constitutional matter is an immunity from
4 being haled into each other's courts.

5 JUSTICE KAGAN: But, Mr. Clement,
6 Justice Scalia's question does suggest that there are
7 sovereign interests on both sides of this. Right?
8 There's -- one is I want to have sovereign immunity. I
9 want to avail myself of sovereign immunity. And the
10 other is I want to subject another State to my court
11 system when I feel like it, and I want the choice of
12 doing that or reaching an agreement with another State
13 that we should all treat each other nicely.

14 So on your view, the States are giving up
15 some significant sovereignty interest. They're keeping
16 one, but they're also giving up one. And the question
17 that you have to answer is why -- why is it so obvious
18 that the States would have made that choice rather than
19 the other choice? Which is, hey, it's been working out
20 for us just fine to have the choice and to deal with our
21 States on a going-forward basis on principles of
22 mutuality.

23 MR. CLEMENT: Justice Kagan, I think there's
24 two reasons that it is glaringly obvious that the States
25 would have made exactly the choice I'm suggesting. One

1 is they weren't giving up anything they actually thought
2 existed. They did not think, because the law of nations
3 categorically forbid it, that they had the power to
4 assert in personam jurisdiction over a foreign
5 sovereign. They absolutely -- yes, it was law of
6 nations that laid down that principle.

7 JUSTICE GINSBURG: But it -- wasn't it --
8 didn't -- didn't Chief Justice John Marshall explain
9 that, as to a foreign country, yes, there was a rule of
10 comity, but it was not -- it was not binding. We --
11 we -- we were not bound by -- comity, yes, because
12 nations should be -- treat each other with respect. But
13 obligation, no.

14 I thought that was the whole distinction
15 made in Schooner.

16 MR. CLEMENT: Well, Justice Ginsburg, two
17 points about that.

18 First of all, here is what Chief Justice
19 Marshall says about the amenability of the sovereign to
20 sue. He says, quote, "One sovereign being in no respect
21 amenable to another."

22 He lays it down that -- as the bedrock
23 principle of international law.

24 Now, it is true that, when you're talking
25 about international law, every nation has the raw power

1 to disregard international law. So the United States --

2 JUSTICE GINSBURG: He didn't put it in terms
3 of raw power, did he?

4 MR. CLEMENT: I -- I -- I think if you read
5 the whole opinion, that's exactly what he's saying. You
6 would have had to have -- I mean, think about it.
7 Schooner Exchange arises in 1812. We're already at war
8 with Britain. So he did have -- the Federal courts
9 would have the raw power to exercise jurisdiction over a
10 ship of France, but there's a very good reason they
11 didn't do it: Because they recognized that asserting
12 that kind of authority would be equivalent to an act of
13 war.

14 And that's why I think it's so obvious that
15 the -- that the States did give this up. Because the
16 authority to bring in a foreign sovereign into your
17 court was unthinkable to that generation as a flat
18 violation of the law of nations. And if they did it, it
19 would be committing an act of war. And that's exactly
20 like the other things that they gave up.

21 The second reason I think it's glaringly
22 obvious, though, is that, on the one hand they give up
23 something that's inchoate and a violation of the law of
24 nations. Sovereign immunity, on the other hand, is the
25 single most important issue they're dealing with because

1 of those war debts. And that's why they're not going
2 to -- if they had to make a -- a choice, a conscious
3 choice, they would gladly give up some inchoate right
4 they've never exercised in exchange for preserving
5 themselves from the possibility of an individual citizen
6 suing them and procuring a possibly bankrupting
7 judgment.

8 If I could reserve the balance of my time.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.

10 Mr. Farr.

11 ORAL ARGUMENT OF H. BARTOW FARR

12 ON BEHALF OF THE RESPONDENT

13 MR. FARR: Mr. Chief Justice, and may it
14 please the Court:

15 Since much of the discussion this morning
16 has turned on the possible overruling of Nevada v. Hall,
17 I'd like to start, if I might, by setting out what I
18 think are the two main reasons why Nevada v. Hall
19 shouldn't be overruled.

20 First of all, the Court in Nevada v. Hall,
21 unlike the Board in its argument, took account of the
22 fact that, after the formation of the Union, the States
23 retained a great deal of their essential sovereign
24 attributes, and that it was fundamentally inconsistent
25 with those sovereign attributes for another State to

1 declare itself immune as of right from its jurisdiction.

2 The second reason is that the Board has
3 failed to show that the ordinary political processes --
4 in particular an agreement among the 46 States, which
5 are now represented before the Court, saying they all
6 agree there should be absolute immunity in each other's
7 courts -- why they can't reach that agreement and -- and
8 have that effectively be the law going forward without
9 the intervention of this Court and without the need for
10 this Court --

11 JUSTICE SCALIA: They would need the
12 intervention of Congress, I assume, right?

13 MR. FARR: I'm sorry, Justice Scalia?

14 JUSTICE SCALIA: They would need the
15 intervention of Congress.

16 MR. FARR: I do not believe they would
17 need --

18 JUSTICE SCALIA: Why wouldn't they?

19 MR. FARR: -- the intervention of Congress.
20 Because this is not --

21 JUSTICE SCALIA: I thought compacts between
22 States always required approval by the Congress.

23 MR. FARR: I -- I beg to differ,
24 Justice Scalia. Under this Court's cases --

25 JUSTICE KENNEDY: The Cuyler case.

1 MR. FARR: That's correct, that -- that the
2 question is whether an agreement among the States is an
3 aggregation of State power at the expense of the Federal
4 government. If that's true, then Congress's approval is
5 needed. But there are agreements among the States, some
6 of which are actually called compacts, which do not
7 require the consent of Congress, and I have no belief
8 that this one would.

9 I mean, this is not -- if the States got
10 together and mutually agreed we're going to honor each
11 other's idea of sovereign immunity in our own courts, I
12 don't think any reason that Congress would need to be --

13 JUSTICE KENNEDY: But that seems to me quite
14 disruptive of the union that the Congress contemplates
15 in that States would make different arrangements with
16 each other. Maybe they would freeze other States out.
17 You would have have States bargaining with each other.
18 It seems to me that that causes great dissension.

19 MR. FARR: Well, Justice Kennedy, there's
20 always --

21 JUSTICE KENNEDY: For instance, California
22 Franchise Tax Board has -- collects tax from people all
23 over the -- all over the United States. And I could see
24 some States saying, well, let's leave California out of
25 this agreement, but we'll agree with ourselves. That

1 seems to me highly disruptive.

2 MR. FARR: Well, you do have the 45 States
3 supporting California in this case, making the total of
4 46. So in this particular case, there really are not
5 very many States that are outside the circle.

6 JUSTICE KENNEDY: Do you say we're just
7 going to throw the States back on themselves; all the
8 States negotiate with each other? That's not part of
9 our constitutional tradition at all.

10 MR. FARR: Well, Justice Kennedy, I -- I
11 guess I do disagree with that. I mean, there is --
12 there is something that's been set up by the Council of
13 State Governments called the National Center for
14 Interstate Compacts, and its job is to help the State
15 facilitate agreements among themselves on matters of
16 common interest. And there are hundreds of these
17 agreements.

18 So the idea that -- that the States should
19 not be able to get together and formulate policies that
20 are mutually beneficial to them, and reach them by
21 agreement rather than approaching the Federal courts and
22 saying overrule one of your prior cases or invent a
23 novel principle of Federal law to -- to limit the
24 damages, seems to me exactly what the States, as
25 sovereigns, ought to be doing.

1 JUSTICE ALITO: If this --

2 JUSTICE GINSBURG: What is your first reason
3 for saying keep -- keep Nevada?

4 MR. FARR: The first reason, Justice
5 Ginsburg, is that Nevada v. Hall recognized, in a way
6 that the Board never does, that there are two sovereign
7 interests at stake here. And one can read the Board's
8 briefs and listen to the terrific argument this morning,
9 and one will not ever hear one word about Nevada's
10 sovereign interest here in protecting and
11 compensating --

12 JUSTICE KAGAN: Well, I think Mr. Clement
13 says that there are two answers to that.

14 One is that they actually never exercised
15 that sovereign interest, so it didn't mean very much to
16 them.

17 And the other is that in exercising that
18 sovereign interest, they would be violating norms of
19 international law, so that they wouldn't have really
20 thought that that was a significant and exercisable
21 interest.

22 But those are his two arguments against
23 that.

24 MR. FARR: Right. And I don't think,
25 frankly, either one really carries much weight. I mean

1 the -- the first one is a -- is a chicken-or-egg
2 problem, in a sense. It is true that they were not --
3 the States had not exercised their power, if we're
4 talking about the late 1700s. They -- they'd only had
5 the power for ten years, but they -- they hadn't
6 exercised the power to subject other States to their
7 jurisdiction.

8 Nathan v. Virginia is an example where, with
9 the intervention of the Pennsylvania executive
10 officials, the Pennsylvania courts said, no, we're not
11 going to exercise jurisdiction over Virginia. But the
12 other side of that, of course, is that they always had
13 immunity as a -- as a matter of comity from the other
14 States.

15 So if one is looking at the question of how
16 do we think about this, looking back in time, several
17 hundred years, what decision would the States have made?
18 The answer is we really don't know. They weren't faced
19 with that.

20 JUSTICE ALITO: So if the -- if the States
21 thought that they had retained this power, why have you
22 not cited any cases in which this was exercised before
23 Nevada v. Hall?

24 MR. FARR: Because there basically are no
25 cases where the power was exercised. Up to that point,

1 the courts -- I mean, the courts of the various States
2 -- were treating the other States as immune. There
3 weren't very many suits filed, but immune as a matter of
4 comity. But that, of course, is exactly what the
5 relationships between these sovereigns are all about.

6 If one goes back and starts with a
7 foundational decision, which is Schooner Exchange,
8 Schooner Exchange is a very important decision about
9 sovereign immunity, but it's also, and principally, a
10 decision about sovereignty.

11 And what Schooner Exchange says is that each
12 sovereign within its own territory has exclusive and
13 absolute authority. And therefore, if another sovereign
14 is going to come into that territory and act contrary to
15 the laws of the sovereign, it can only do that with the
16 consent of the home sovereign. That's the principle on
17 which all of this is based.

18 So this -- where there are obviously two
19 sovereigns involved, and a sovereign interest in each
20 case, an interest in immunity on the part of the
21 visiting sovereign, an interest in having its exclusive
22 authority over its territory over the home sovereign,
23 Schooner Exchange actually tells you the answer if they
24 come in conflict, because the requirement of consent of
25 the home sovereign is what is ultimately predominant.

1 JUSTICE SCALIA: Mr. Farr, I'm concerned
2 about -- about the Eleventh Amendment, which, of course,
3 does not prevent a -- its words do not prevent a State
4 from being sued in Federal court. They only prevent the
5 State being sued by citizens of another State in Federal
6 court. Okay?

7 Nonetheless, in Chisholm, we -- we -- we
8 held it it goes beyond that, Chisholm, which prompted --

9 JUSTICE GINSBURG: It prompts --

10 JUSTICE SCALIA: -- the -- the Eleventh
11 Amendment.

12 JUSTICE GINSBURG: Uh-huh. Plus against
13 Louisiana.

14 JUSTICE SCALIA: We -- we have held -- it
15 was Hans which held that it's also citizens of the same
16 State that cannot sue in Federal court, but that's not
17 in the Eleventh Amendment.

18 That rested upon -- this is what Justice
19 Hughes said it rested upon, "Manifestly, we cannot rest,
20 we cannot assume that the letter of the Eleventh
21 Amendment exhausts the restrictions upon suits against
22 nonconsenting States.

23 "Behind the words of the constitutional
24 provisions are postulates which limit and control.
25 There is the essential postulate that" -- "that the

1 controversies as contemplated shall be found to be of a
2 justiciable character. There is also the postulate that
3 States of the union, still possessing attributes of
4 sovereignty, shall be immune from suits without their
5 consent, save where there has been a surrender of this
6 immunity in the plan of the convention."

7 In other words, Hans says there's an
8 assumption behind the Eleventh Amendment that the States
9 cannot be sued without their consent.

10 Now, why -- why should that apply only to
11 suit in -- in Federal courts, and not to suits in the
12 State -- in -- in the courts of other States?

13 MR. FARR: I think the answer to that,
14 Justice Scalia, is because the situations are very
15 different. I think, in fact -- I mean, the notion that
16 the Board, I think, presents, generally -- and I want to
17 get very specifically to the question, but I want -- I
18 want to just preface with this one observation, if I
19 may.

20 The Board's suggestion, I think, is what the
21 Court really just needs to do now is put the third leg
22 on the immunity triangle. It's already made clear that
23 States have immunity in their own courts, which is the
24 English tradition, and that States have immunity in
25 Federal courts. That's the Eleventh Amendment. So all,

1 really, the Court should be doing now is to draw the
2 last part of that and say they have immunity in the
3 courts of other States. But those are all different
4 situations.

5 They -- the States have immunity in their
6 own courts, just as nations do, because they are the
7 sole sovereign involved there. There aren't two
8 sovereigns when you're talking about immunity in your
9 own courts. So that's one separate thing.

10 Now, to get specifically to the question
11 you're raising, Justice Scalia: Immunity in the Federal
12 courts, which is broader than the language of the
13 Eleventh Amendment. And of course, the Federal courts
14 are courts of a different sovereign, in a sense, than
15 the State courts.

16 But at the time that the Constitution was
17 being drafted and the question of ratification came up,
18 this was an issue that was specifically discussed. And
19 therefore, when the States were concerned about
20 ratifying the Constitution because of their war debts,
21 they raised questions, and the Framers, like Madison and
22 Hamilton, so on and so forth, gave them assurances. And
23 that was the deal.

24 JUSTICE SCALIA: The -- the assurances were
25 based upon the postulate, the assumption, that no State,

1 of course, can be haled into the -- into the courts of
2 another sovereign without its consent. That was the
3 answer. And that answer applies, not just to being
4 haled into -- into the Federal courts, but being haled
5 into the courts of other -- of other states.

6 MR. FARR: But, Justice Scalia, to be blunt
7 about it, there is no such postulate. I mean, if -- if
8 sovereign immunity is what the Board says it was or is,
9 that a sovereign can never be sued without its consent
10 in the courts of another State, then the entire
11 international world is operating on an incorrect
12 premise.

13 State -- nations can be sued in the
14 United States under the Foreign Sovereign Immunities Act
15 for commercial torts -- I mean -- excuse me -- for
16 commercial activities, for certain torts, without their
17 consent.

18 They can -- take the -- the Republic of
19 Austria case, the Altmann case where the Republic of
20 Austria objects to the United States' jurisdiction.
21 They say it's outside the FSIA. They say, you don't
22 have jurisdiction over us.

23 But the -- the Court doesn't say, you're
24 right. You're -- you're a sovereign. You have -- it's
25 unthinkable you would be subjected to suit in our

1 courts.

2 The Court resolves the case against the
3 Republic of Austria and finds no sovereign immunity.

4 So there isn't such a postulate as broadly
5 worded as you suggest.

6 JUSTICE SCALIA: How do you explain Hans v.
7 Louisiana?

8 MR. FARR: Hans v. Louisiana is the second
9 part of the triangle. That's the question of -- of a
10 State being sued in Federal court.

11 And Hans v. Louisiana makes perfect sense.
12 I mean, if one says, at the time of the convention, the
13 States were concerned about being sued in Federal courts
14 and the deal that was made, essentially, was they were
15 given assurances: If you ratify the Constitution, you
16 will not be subject to suit at the behest of individuals
17 in Federal court.

18 If you accept that deal and then you look at
19 the language of the Eleventh Amendment, well, the
20 Eleventh Amendment does -- the language doesn't capture
21 that deal because it leaves aside suits by citizens of
22 your own State.

23 JUSTICE KAGAN: So Mr. Farr, Mr. Clement
24 suggests that it's unthinkable that a State would be so
25 concerned about being haled into Federal court but not

1 just as concerned or even more so about being haled into
2 suit of another State.

3 What is the response to that?

4 MR. FARR: The response to that is that --
5 that that argument just doesn't give proper weight to
6 the balance of power and the difference in the balance
7 of power between the Federal government and State
8 governments and between the State governments
9 horizontally.

10 When you're -- to go back again to the
11 formation, Justice Kagan, if -- if one is looking at the
12 situation that the States were facing at that time,
13 they're forming a new union. So they get a say in this
14 because they have to ratify it before it actually
15 exists.

16 So when they're looking at this, what do
17 they see? They see a sovereign that is going to be a
18 superior sovereign. What does that mean for sovereign
19 immunity purposes? It means that, if that sovereign is
20 sued in the States -- in the State courts, the States
21 have to dismiss the suit. There is no principle that is
22 any clearer than the fact that a superior sovereign
23 cannot be brought to answer in the courts of inferior
24 sovereigns. So that's -- that's the state of play.

25 With respect to the other States, however,

1 there is inequality. They could subject other States to
2 suit in their courts, but if they did, then they might
3 be subject to suit because comity breaks down.

4 JUSTICE SCALIA: Why -- why do you say it
5 was so -- so clearly established that a superior
6 sovereign could not be sued in the courts of a lesser
7 sovereign?

8 MR. FARR: Because that would -- I'm sorry.

9 JUSTICE SCALIA: I -- I thought we invented
10 that system of -- of two sovereigns, a superior
11 sovereign and a -- and a lesser sovereign. What --
12 what -- what examples of -- of the absolutely clear rule
13 that you -- you can't be --

14 MR. FARR: As I --

15 JUSTICE SCALIA: -- as a superior sovereign
16 you can't be sued in a State court?

17 MR. FARR: I think if one looks at English
18 common law, you have stratifications in English common
19 law. You have --

20 JUSTICE SCALIA: There are no sovereigns in
21 England except the King.

22 MR. FARR: Well, the King was not answerable
23 in lesser courts. Maybe I used the word "sovereign"
24 improperly there, but --

25 JUSTICE SCALIA: That's a different point.

1 MR. FARR: Okay. If -- if -- if the fact --

2 JUSTICE BREYER: If -- if -- I don't want --

3 MR. FARR: Pardon me. I'm sorry,

4 Justice Breyer.

5 JUSTICE BREYER: Well, I -- I -- I just want
6 you at some point to give three minutes -- I mean, I
7 will accept for argument's sake that the great issue in
8 Philadelphia in 1787 was a division of power between the
9 Federal government and the States, not questions of what
10 States could do in respect to each other. And they
11 wrote what they wrote, but that's what they're thinking
12 of. And you're saying the second is what's at issue
13 here.

14 MR. FARR: That's correct. And --

15 JUSTICE BREYER: And therefore --
16 therefore --

17 MR. FARR: Excuse me.

18 JUSTICE BREYER: -- we have two cases on it.
19 We went through the whole thing. At the very least,
20 don't open it. All right. I'll accept -- or don't go
21 back because it's at least not that clear. And
22 therefore, I'll accept that.

23 Now, I would like just two minutes on what's
24 bothering me. And what is bothering me is I really
25 don't see how Nevada can say, we're going to give

1 immunity to our own State but we won't accept
2 California's similar immunity.

3 Now, that doesn't seem intuitively right,
4 but if I look at the Constitution, I see it says this.
5 It says: "Full faith and credit shall be given in each
6 State to the public acts of other States."

7 California has a public act which gives
8 immunity. Nevada is not giving full faith and credit to
9 that. I think those acts can sometimes include statutes
10 or common law rules or decisions of courts.

11 So I say, how does Nevada get away with
12 that? Answer: Because they have a strong public policy
13 in not doing it; namely, the policy of they don't give
14 anybody, including their own officials, that kind of
15 immunity.

16 If that's the answer, that answer runs out
17 of steam at the very point that they try to give
18 officials more immunity than California is giving.

19 Now, you see how I've lined up that legal
20 reasoning with what seems intuitive. But I have no
21 idea, to tell you the truth, about whether there is
22 precedent for that; about what that might, in fact, get
23 us into trouble on; or et cetera.

24 So I would -- you must have thought through
25 this. If I look in the briefs, the answer to this

1 question of equal treatment -- I can't find much.

2 MR. FARR: Well, I think that -- that the
3 important part there is that the only Federal basis that
4 they have really identified that conceivably could
5 support this claim is the Full Faith and Credit Clause,
6 because it is a Federal law. It's part of the
7 Constitution.

8 JUSTICE BREYER: But the Full Faith and
9 Credit Clause reinforced by it is the same policy
10 there --

11 MR. FARR: Well --

12 JUSTICE BREYER: -- that exists under the
13 Commerce Clause too --

14 MR. FARR: That's -- that's part of it.

15 JUSTICE BREYER: -- and the Privileges and
16 Immunities Clause.

17 MR. FARR: That's -- that's the part I want
18 to get to because, if one applies the Full Faith and
19 Credit Clause -- remember, of course, the Court did this
20 in Hyatt I and -- and rejected California's argument
21 that its immunity law, giving absolute immunity, has to
22 apply, and Nevada did not -- Nevada has to apply that.
23 So the Court has already crossed that bridge, at least
24 to some extent.

25 Now, I agree with you at that point there

1 was not a judgment, so there was no comparison of -- of
2 the damages. But then the question is: What is the
3 full faith and credit standard that this Court applies?
4 And that is the same standard that the Court applied in
5 Hyatt I, and that is, if Nevada is competent to
6 legislate, it can apply its own law. It doesn't have to
7 apply California law at all.

8 And in Nevada's own law, unless you try to
9 rewrite it on some basis, which I'll also get to,
10 California's law does not give immunity to other States
11 in the --

12 JUSTICE BREYER: Nevada's law is great.
13 Nevada's law says if you're a Nevada worker -- State,
14 you get -- you don't have to pay a dime. In fact, you
15 have to pay 50,000.

16 MR. FARR: Right.

17 JUSTICE BREYER: But if you're California or
18 some other State, you have to pay 40 million.

19 MR. FARR: No -- no. But let me go to your
20 point here. No, I understand that, but -- but I -- I'm
21 just -- what -- I want to be precise about this, because
22 I want to just walk through it step by step, all I'm
23 saying is Nevada law does not provide a cap for
24 officials from other States.

25 JUSTICE BREYER: I understand that. And

1 what trouble will I get into with precedents --

2 MR. FARR: Well --

3 JUSTICE BREYER: -- in the Constitution or
4 something else if I were to write the words that I
5 suggested?

6 MR. FARR: Because --

7 JUSTICE BREYER: That once they go beyond
8 their own immunities, they run out of steam and they
9 have no reason for not following California's law.

10 JUSTICE GINSBURG: You don't think that's
11 right. Because your argument --

12 JUSTICE BREYER: I know he doesn't think
13 it's right, and I want to have the reason.

14 MR. FARR: No, I don't think that's right.
15 And -- and Justice Ginsburg, thank you, because I'd like
16 to point out -- I think maybe by going step by step, I
17 didn't get to the step I want to get to quickly enough.

18 But the step that I want to get to is there
19 is no requirement in the Full Faith and Credit Clause
20 that goes on top of are you competent to legislate with
21 respect to the torts at issue?

22 In other words, when -- when a State says,
23 we're going to apply our own law to a lawsuit that it is
24 competent to legislate about, has legislative
25 jurisdiction, it doesn't have to answer a second

1 question that says, well, you -- if we're going to allow
2 you to do that, can you show us a public policy of yours
3 that would be offended by applying the law? But --

4 JUSTICE BREYER: Well, but it marriages in
5 all kinds of things. I've seen the public policy
6 language when -- when there is a -- a right for a State
7 to ignore the public act of another State where there is
8 some kind of -- it's a -- some kind of policy
9 orientation.

10 MR. FARR: But -- but I -- I want to draw a
11 distinction between the constitutional test, which is
12 are you competent to legislate. That's the -- the sum
13 total of the constitutional test.

14 Now, of course, just because you haven't
15 violated the Constitution when you're applying your own
16 laws doesn't mean that the way that your decision to
17 apply your own laws is not challengeable as a matter of
18 State law.

19 JUSTICE SCALIA: I'm not following -- I
20 guess I'm not -- the -- the California law that is being
21 given or that is argued to be given full faith and
22 credit here is what? The California law on --

23 MR. FARR: No.

24 JUSTICE SCALIA: -- sovereign immunity?

25 MR. FARR: I -- I -- you -- you're -- you're

1 well right to be confused, Justice Scalia, because --

2 JUSTICE SCALIA: All California says about
3 sovereign immunity is you can't be -- we can't be sued
4 in our courts. I don't think California has a law that
5 says we can't be sued anywhere, do they?

6 MR. FARR: Well --

7 JUSTICE SCALIA: And if they did, would they
8 have the jurisdiction to say that? I don't know.

9 MR. FARR: I don't think -- well, because of
10 what -- what the Court said in Hyatt I, they don't have
11 the power to enforce their own immunity and their laws
12 on another State if that --

13 JUSTICE SCALIA: What's -- what's being
14 given full faith and credit, then, under the argument
15 here? What --

16 MR. FARR: The original argument -- the fact
17 is that the Board has changed its argument about full
18 faith and credit, and that's why it's confusing.

19 In its brief, originally, the Board said
20 we're asking that Nevada apply California's law of
21 immunity. Now, they can't ask them to -- ask that it be
22 applied totally, because that was already rejected in
23 Hyatt I. So they say above the \$50,000. That's what
24 we're saying, apply California's law of immunity above
25 the \$50,000 mark.

1 In their reply brief, however, at pages 4
2 and 5, they're emphatic that they're not asking the
3 Court to apply California law at all. They say we're
4 asking that -- that Nevada's law of immunity be applied.
5 Well, that, in its literal term, simply doesn't work.
6 California's law of immunity doesn't apply to
7 California.

8 So what -- what the Board is groping for is
9 some sort of loose principle that the Court could apply
10 to override a State's judgment about how to apply its
11 own laws of immunity, all in the interest, I might note,
12 of promoting State sovereignty. But leaving that aside,
13 the question is where would that come from.

14 If -- let's -- let's assume, hypothetically,
15 that -- that California brought an original action in
16 this Court, and it said we want an injunction
17 ordering -- ordering Nevada to apply its damages cap to
18 all suits against California in Nevada courts. This is
19 assuming the Court doesn't overrule Nevada v. Hall, as I
20 certainly hope it does.

21 What would the basis in Federal law be for
22 that lawsuit? The only basis that I see in their brief
23 in Federal law is the Full Faith and Credit Clause. And
24 for the reasons I've explained, if you apply the
25 standard Full Faith and Credit constitutional provision,

1 that does not help them. Comity is a voluntary doctrine
2 among States. And their equal-footing doctrine seems
3 miles away from anything we're talking about.

4 Secondly, even if the Court had the power,
5 some Federal law, generally -- maybe Federal common law,
6 which is always something the Court, I guess, can create
7 if necessary -- why would they particularly choose this
8 rule? Because, although it sounds perfectly logical,
9 and it is a benchmark. I mean Nevada uses it not
10 without this one exception, but Nevada uses it to knock
11 down punitive damages claims against negligence, all of
12 that. As a benchmark, it's a perfectly fine rule for
13 States to choose. But as a mandatory Federal rule to
14 impose on the States, it's not quite so good.

15 JUSTICE GINSBURG: It's a little odd that
16 the Nevada courts say comity as far as punitive damages
17 is going -- we're not going to slap California with
18 punitive damages, but no comity before -- above 50,000.

19 MR. FARR: Well, I think that -- its
20 explanation of that actually makes quite good sense.
21 They say, you know, when we're compensating our people,
22 we're not just compensating.

23 Compensation serves two purposes. It serves
24 -- the compensation, it helps the person, obviously,
25 cope with their injuries. And I should, by the way,

1 point out that under the overruling of Nevada v. Hall,
2 anybody injured by a State gets nothing. It's just --
3 but that's a digression.

4 But back to the main point, when -- when
5 you're talking, however, about a situation with the
6 officials of another State, we also want -- we have an
7 element of protection, trying to protect our citizens.
8 We don't need the same protection from our own
9 government. We hire these people, we train them, we
10 supervise them. We can keep things from getting out of
11 hand like they did here where somebody just sets out on
12 a vendetta against a particular taxpayer. We can stop
13 that, but not when it's another State. So the idea of
14 having more compensatory damages in order to discourage
15 that kind of behavior, it actually seems to me quite
16 reasonable.

17 JUSTICE ALITO: Well, you seem to be arguing
18 that no matter how hostile one State is to another,
19 there would be no requirement -- there would be no
20 requirement for equal treatment. I mean, you're
21 making -- that argument seems to point to the need to
22 overrule Nevada v. Hall.

23 If that's the case, suppose Nevada were
24 completely hostile, uniformly, consistently hostile to
25 California on issues of collection of taxes --

1 MR. FARR: Well, first of all --

2 JUSTICE ALITO: -- there would be no --
3 there would be no remedy for that. And you could say,
4 well, the States could enter into an agreement. But if
5 it's not in the interest of both States, they wouldn't
6 enter into the agreement.

7 MR. FARR: Well, I don't see why it isn't in
8 the interest of both States. I mean, it is always true
9 you can have an outlier State. But just let me take the
10 -- the example, though, of California and Nevada,
11 because again, if we're looking at equality here, which
12 is supposedly what the equal treatment principle is all
13 about -- and I put "equal treatment principle" in
14 quotes. If we're looking at that, another possible way
15 of looking at things which States and nations have done
16 for years is reciprocity.

17 Now, if you look at this case from the
18 standpoint of reciprocity, what do you look at? Well,
19 you -- that brings in Nevada v. Hall. And in Nevada v.
20 Hall there was no cap on damages. Nevada was subjected
21 to unlimited damages in California.

22 That's exactly the same thing that happened
23 here. California was subjected to unlimited
24 compensatory damages.

25 JUSTICE GINSBURG: Except California has

1 unlimited damages for its own people.

2 MR. FARR: But -- that's correct,
3 Justice Ginsburg.

4 But if you're looking at the relationships
5 between the two States, which is what we're looking at
6 here, and the question of how States treat each other,
7 reciprocity actually is more important.

8 It's no solace to Nevada to say, well, you
9 had to pay unlimited damages in California, but they
10 only have to pay \$50,000 to your citizens because they
11 have a different rule. That doesn't help. Nevada is
12 being treated unequally, whether -- whether the
13 California rule is different or not.

14 JUSTICE GINSBURG: If -- if Nevada didn't
15 want to give that California tax people the benefit of
16 no punitive damages, that -- it could do that, right?
17 It would be a matter of comity?

18 MR. FARR: To be honest with you, I have my
19 doubts about that. I -- I suspect the subject would
20 never come up.

21 But in talking about this idea that there
22 could be something that -- that this Court could impose
23 on the States, there are things, for example, that could
24 be drawn from international law that might, in fact,
25 provide some sort of check, if they were truly universal

1 values.

2 Equal treatment is not a universal value.

3 For example, United States is exempt in its own courts
4 for torts based on battery and assault, and false
5 arrest. Foreign sovereigns are not. Under the Foreign
6 Sovereign Immunities Act, the foreign sovereigns do not
7 have immunity for those same torts.

8 So if there is an equal treatment principle
9 at large in the world and is universal, then that seems
10 to me to be something that the United States cannot do.
11 But nobody suggests that that's inappropriate because
12 these are all comity based. Ultimately, sovereigns can
13 serve their own interests if they're willing to accept
14 the possibility that other sovereigns will do that as
15 well.

16 So when -- when I go back to this idea is
17 there something out there, I don't think one can ever
18 completely rule that out when you're talking about
19 arrangements among States and among sovereigns, because
20 there is Federal common law. But there is no
21 principle --

22 JUSTICE GINSBURG: And don't you think the
23 -- before your time is up, to answer the argument based
24 on Kiowa Tribe, that is, that Indian tribes are immune
25 from suit by individuals in State courts. So the

1 argument that your colleague gave is how can the States
2 have less dignity than the Indian tribes?

3 MR. FARR: Well, let me just answer. I
4 don't want to take much my time -- extra time, but the
5 fact is they obviously have dignity. They are
6 sovereigns, and that's one of the reasons they -- that
7 they are treated so much -- with so much comity.

8 But the reason that they don't have the
9 exact same immunity is the historical basis is
10 different. The Indians, and their particular realized
11 relationship with the Federal government, is an
12 explanation for why they essentially partake of the same
13 kinds of -- of immunity that the Federal government
14 does.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 MR. FARR: Thank you.

17 CHIEF JUSTICE ROBERTS: Mr. Clement, four
18 minutes.

19 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

20 ON BEHALF OF THE PETITIONER

21 MR. CLEMENT: Thank you, Mr. Chief Justice,
22 and may it please the Court:

23 Three basic points in rebuttal. First of
24 all, my friend on the other side quite rightly points
25 out that the States, burdened with their war debts, were

1 very, very concerned that they would be haled in front
2 of the new Federal courts, so they sought an assurance.

3 And the clearest place to see the assurance
4 that they got is Federalist No. 81, where Alexander
5 Hamilton makes clear that there's nothing to worry about
6 here because they have sovereign immunity. And they
7 have sovereign immunity as an inherent aspect of their
8 sovereignty.

9 And that assurance then becomes the
10 postulate that this Court applies in *Hans* against
11 Louisiana, and applies in *Monaco* against Mississippi,
12 and all of these other cases where the immunity that's
13 provided by the Constitution is actually greater than
14 the text of the Eleventh Amendment. The assurance and
15 the postulate are one and the same.

16 Now, it may be that in the world of
17 international relations, we've wandered away from the
18 Hamilton Federalist No. 81 understanding. But I don't
19 think that matters. If it's constitutionalized, as it
20 is in every other context, then the understanding in
21 1789 is what controls.

22 Now, as to the all-important point of this
23 balance that you referred to, Justice Kagan, I do want
24 to be as emphatic as I can that the States were not
25 giving up anything they thought they possessed. And I

1 came upon a quote from Edmund Pendleton. It
2 explained -- talking about sovereignty. And he said the
3 following in 1792 -- and if you want to find this, this
4 is Volume 5 of the Documentary History of the Supreme
5 Court.

6 He said: "I have been taught by all writers
7 on the subject that there is no earthly tribunal before
8 whom sovereign and independent nations can be called and
9 compelled to do justice."

10 Now, I think that's pretty emphatic, and I
11 think pretty emphatically suggests that on the one hand,
12 they weren't giving up anything that they could
13 exercise. On the other hand, they were desperately
14 afraid of these war debts, and they were desperately --
15 wanted to ensure that they would preserve their
16 sovereign immunity. I don't think the balance is even
17 close.

18 And what I think is so problematic about
19 Respondent's position is that he seems to say at the
20 precise moment that the States were going to give up all
21 of the tools that nations used to make comity a reality,
22 that they unilaterally disarmed. They gave up all those
23 tools, and all they got was sovereign immunity as of
24 comity, and which my friend's position makes clear, is
25 as voluntary as can be and is just a matter of grace.

1 There's nothing that supports it.

2 JUSTICE KAGAN: Mr. --

3 MR. CLEMENT: So I tried to finish with some
4 anomalies here because we've talked about a couple of
5 them. We've talked about this idea that the Privileges
6 and Immunities Clause prevent Nevada from doing this to
7 a citizen.

8 Here's another anomaly. Now, my friend
9 suggested briefly as a parenthetical that there's
10 nothing that these -- these poor Nevada citizens are
11 going to be able to do. One thing they can do is go to
12 California and sue consistent with California's waiver
13 of sovereign immunity. As we point out in the reply
14 brief, there are some remedies there.

15 But the other thing they can do, as Justice
16 Kennedy pointed out for the Court in Alden, is there is
17 still the possibility of an individual capacity suit
18 against one of the California officers.

19 Now, here's something anomalous: If you
20 sued the California officer, who's presumably a
21 California resident, they would have the protection of
22 removal to Federal court, so they'd at least be given a
23 neutral Federal forum. When my client tried to remove
24 here, they were confronted with Mr. Hyatt's quite
25 correct objection that the Eleventh Amendment prevented

1 removal to Federal court.

2 But, my goodness. You have now converted
3 the Eleventh Amendment, clearly designed to enhance the
4 sovereignty into the States -- of the States, into what
5 Chief Justice Rehnquist called in Hall an albatross
6 around their neck, that they are the one party that is
7 least favored, even compared to an ordinary litigant.
8 That can't be right.

9 And of course, the granddaddy of all of the
10 anomalies here is that the idea that Chisholm could have
11 sued George in South Carolina State Court.

12 This Court doesn't lightly overrule its
13 precedents, but when it's faced with an anomaly that
14 dramatic and that inconsistent with the founders'
15 understanding, it's time to overrule. And I just ask
16 you --

17 JUSTICE KAGAN: You know, can I just ask you
18 to --

19 MR. CLEMENT: Sure.

20 JUSTICE KAGAN: On that last point -- I
21 think this is a very hard case straight up. But it's
22 not straight up, right? You need a special
23 justification on your side. So what is your special
24 justification?

25 MR. CLEMENT: My special justification is

1 workability, consistency with precedent. Those are all
2 of the same -- and lack of reliance interest. I mean,
3 the special justification is there, but then this Court
4 elaborates a variety of principles that govern when it
5 overrules precedents and I think all of them point in
6 our favor.

7 Thank you, Your Honor.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.

9 The case is submitted.

10 (Whereupon, at 12:07 p.m., the case in the
11 above-entitled matter was submitted.)

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