

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

FRANCHISE TAX BOARD OF CALIFORNIA,)
) Petitioner,)
) v.) No. 17-1299
GILBERT P. HYATT,)
) Respondent.)

Pages: 1 through 59

Place: Washington, D.C.

Date: January 9, 2019

HERITAGE REPORTING CORPORATION

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FRANCHISE TAX BOARD OF CALIFORNIA,)
Petitioner,)
v.) No. 17-1299
GILBERT P. HYATT,)
Respondent.)
- - - - -

Washington, D.C.
Wednesday, January 9, 2019

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:
SETH P. WAXMAN, ESQ., Washington, D.C.;
on behalf of the Petitioner.
ERWIN CHEMERINSKY, ESQ., Berkeley, California;
on behalf of the Respondent.

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

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument this morning in Case 17-1299,
5 Franchise Tax Board of California versus Hyatt.
6 Mr. Waxman.

7 ORAL ARGUMENT OF SETH P. WAXMAN
8 ON BEHALF OF THE PETITIONER

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

11 The participants in the ratification
12 debates disagreed about whether the new
13 constitution would or should subject states to
14 suit in the new courts of the soon-to-be
15 superior sovereign, but they were unanimous in
16 their understanding that states could not be
17 sued in the courts of other states.

18 Edmund Pendleton, chairing the
19 Virginia Convention, proclaimed "the
20 impossibility of calling a sovereign before the
21 jurisdiction of another sovereign," echoing
22 writings and speeches given by Hamilton,
23 Marshall, and Madison, among others. In
24 Chisholm itself, Edmond Randolph --

25 JUSTICE SOTOMAYOR: Counsel, it's nice

1 that they felt that way, but what we know is
2 they didn't put it in the Constitution. And so
3 we talk a lot now about not relying on
4 legislative history but relying on the plain
5 text of the Constitution.

6 Could you tell me what there is in our
7 original case, the Nevada -- in our original
8 case, that didn't address this argument and say
9 it wasn't compelling?

10 MR. WAXMAN: So --

11 JUSTICE SOTOMAYOR: What is new
12 from --

13 MR. WAXMAN: Are -- you say the
14 original case. Do you mean Nevada versus Hall?

15 JUSTICE SOTOMAYOR: Yes. What's --
16 what -- what is new --

17 MR. WAXMAN: Well --

18 JUSTICE SOTOMAYOR: -- in any of the
19 arguments that were raised in Nevada versus
20 Hall that weren't addressed by the Court?

21 MR. WAXMAN: Well, as we point out --
22 first of all, what was new --

23 JUSTICE SOTOMAYOR: I know you say it
24 was wrong. Putting aside the wrongness.

25 MR. WAXMAN: I -- I want to -- I want

1 to -- I -- I -- I'm not going to harp on the
2 wrongness. I think that's relatively clear
3 from our petition and our merits brief.

4 JUSTICE SOTOMAYOR: Well, I know
5 that's your position, but let's --

6 MR. WAXMAN: Yeah. I think before I
7 address what the Court missed in Nevada versus
8 Hall, I just want to point out that when you
9 say what changed, the only thing -- Nevada
10 versus Hall represents the only case in state
11 or federal court in the 200 years prior that
12 had ever recognized the ability of one state to
13 compel another state to answer. It cited zero
14 cases.

15 And while it isn't new, from the time
16 this Court -- at least the time this Court
17 decided Hans versus Louisiana until whatever
18 its most recent case was on sovereign immunity,
19 it has always stated repeatedly, uniformly,
20 that, as the Court explained in -- in Alden,
21 state sovereign immunity is demarcated by
22 fundamental postulates implicit in the
23 constitutional design. It -- "sovereign
24 immunity derives from the structure of the
25 original constitution."

1 Now I can --

2 JUSTICE SOTOMAYOR: So what do you
3 think is the structure, since most sovereign
4 immunity -- there's a lot of customary law
5 involving it, but, at the essence, and it was
6 this way in the United States for a very long
7 time, recognizing the sovereign immunity of a
8 foreign state was at the discretion of the host
9 state.

10 MR. WAXMAN: So --

11 JUSTICE SOTOMAYOR: Now the U.S.
12 followed the pattern, but, in the Tate letter,
13 it changed it around. What do you think in the
14 constitutional design reflects the willingness
15 of one state to give up its power to protect
16 its own citizens from the actions of another
17 state who might intrude directly?

18 Now we know, because we recently had a
19 case, that states can be sued. Were you on
20 that case? I can't remember now.

21 MR. WAXMAN: I don't know what you're
22 talking about.

23 (Laughter.)

24 JUSTICE SOTOMAYOR: That there --
25 yeah. We had a case recently where there's a

1 question about whether a state can be sued to
2 quiet title in another state. So, if one state
3 owns property in another state, it be hauled
4 into court to quiet title of that property.

5 So we know that the rule wasn't
6 absolute possibly, and so the question I have
7 is where in the constitutional design do we
8 see, and in light of the -- of the
9 constitutional reservation to states of all
10 powers not designated by the Constitution,
11 their willing -- their ability to protect their
12 own citizens in their own states?

13 MR. WAXMAN: Okay. So I'm going to --
14 I'm going to give you what I believe are the
15 textual -- the textual basis in the
16 Constitution itself for the implicit plan, the
17 underlying postulate that this Court has
18 recognized for well over 130 years.

19 But let me just address first your
20 point about, you know, international --
21 national comity -- international comity under
22 the law of nations. It is true that nations
23 with no superior sovereign and no superior --
24 and no mechanism to enforce their rights under
25 the law of nations had the raw power to violate

1 the law of nations obligation that friendly
2 states respect each other's sovereign immunity,
3 just as nations had the raw power to violate
4 each other's borders or declare war or to
5 refuse to recognize each other's judgments.

6 But the states of the union, in
7 ratifying the Constitution to -- to form a more
8 perfect union, surrendered their powers to
9 treat each other as legal strangers. They gave
10 up the so -- the perhaps --

11 JUSTICE KAGAN: But just so I
12 understand you --

13 MR. WAXMAN: -- wild west of
14 international law.

15 JUSTICE KAGAN: Mr. Waxman, just so I
16 understand you, are you saying that the states,
17 pre the Constitution, were in the same position
18 as foreign nations? In other words, it was --
19 their immunity then was a matter of comity,
20 rather than as -- a matter of legal
21 requirement? Is that correct?

22 MR. WAXMAN: So my view is -- my view
23 is -- and I think this is -- this is well
24 recognized in the Court's cases -- that prior
25 to -- certainly, prior to the Articles of

1 Confederation, but, you know, in any event,
2 prior to the Constitution, the states stood in
3 respect to each other and had obligations under
4 the law of nations.

5 And the law of nations, you know, it's
6 true that the -- in essence, the law of nation
7 obligation to not haul an unconsenting
8 sovereign into your courts was unenforceable,
9 and it's true that this Court has referred to
10 it as, therefore, in effect, a matter of
11 comity.

12 And states were in that situation.
13 But this Court explained in First National City
14 Bank versus the Bank of China and in the
15 Sabbatino versus Cuba case that -- and it's
16 reflected in The Schooner Exchange itself, that
17 what comity meant was that there was no
18 obligation to adhere to -- to apply that or any
19 other law of nations except with respect to
20 friendly nations that the sovereign recognized.

21 JUSTICE ALITO: What do you --

22 MR. WAXMAN: And those -- that
23 certainly characterized the -- the states of
24 the union. And that's why, you know, this
25 Court in Alden and many other cases said that

1 "the contours of sovereign immunity are
2 determined by the founders' understanding."
3 And their understanding, expressed by the anti-
4 federalists, the federalists who thought it
5 would be terrific if states could be sued in
6 federal court, and the federalists who -- like
7 Madison and Marshall, who assured everyone that
8 it wouldn't, they all understood that because
9 the states were recognized by each other and
10 were friendly, there was an absolute law of
11 nations immunity.

12 JUSTICE BREYER: It's odd then that
13 Marshall didn't say that in Schooner McFaddon,
14 nor did Joseph Story in Santissima Trinidad or
15 whatever it is, nor did Vattel. What they said
16 was it's a question of consent, that of course
17 the state -- I mean, I can read it to you:
18 "All exceptions to the full and complete power
19 of a nation within its own territory must be
20 traced up to the consent of the nation itself."
21 And --

22 MR. WAXMAN: Yes.

23 JUSTICE BREYER: -- that's what they
24 said.

25 MR. WAXMAN: Yes. And --

1 JUSTICE BREYER: I didn't find
2 language like raw power. But what I found was
3 it's a matter of comity. It's a matter of
4 consent. And, of course, most nations follow
5 it.

6 But, if somebody didn't, you couldn't
7 say it violated international law. And then
8 the question that I would like to hear the
9 answer to is -- is what Justice Sotomayor
10 asked. And, of course, the founders are all
11 talking about a situation where they were
12 worried about federal power and the federal
13 suit and bringing who could sue people under
14 the federal power.

15 So, when I looked at this before,
16 which I did, I found international authority
17 after international authority, many, that said
18 just what Marshall said, that said just what
19 Story said, and you say, well, are states
20 different? Well, they're not different in two
21 respects.

22 Almost all of them do give immunity to
23 the other state. But, if you find an outlier
24 that doesn't, you can't say it violates
25 international law. Were they states? There we

1 have Justice Sotomayor's question.

2 MR. WAXMAN: With --

3 JUSTICE BREYER: And what in the
4 Constitution, it would have to be something
5 that in this respect makes them less sovereign,
6 what is it that says you can't have an outlier?

7 MR. WAXMAN: So, when you say, you
8 know, if some states refuse to recognize that
9 principle, well, that was one thing. No state
10 before ratification, until Nevada versus Hall,
11 had ever done such a thing.

12 This Court before Nevada versus Hall
13 in a half a dozen cases stretching over 100
14 years --

15 JUSTICE BREYER: I know they didn't.
16 That isn't quite my question.

17 MR. WAXMAN: Well, but --

18 JUSTICE BREYER: Of course, they
19 didn't.

20 MR. WAXMAN: So --

21 JUSTICE BREYER: Almost all countries
22 recognize sovereign immunity. But you might
23 have one, I mean, I don't know, maybe Tasmania
24 if it was a country then didn't recognize it
25 and the question is, do you have to?

1 MR. WAXMAN: So --

2 JUSTICE BREYER: And the answer of
3 Marshall, Story, Vattel, no, you don't have to.

4 MR. WAXMAN: So I think Vattel, who
5 was quoted and referenced in -- I'm going to
6 talk about Vattel, the Schooner Exchange, and
7 then the point of what changed when the
8 Constitution was adopted, and then where in the
9 text of the Constitution I'm citing my
10 authority, which I -- I forgot to address.

11 Vattel and other commentators at the
12 time whose jurisprudence was also referenced in
13 the ratification debate held, stated that
14 sovereign immunity was a mandatory limit on the
15 power of one sovereign to adjudicate another's
16 claim, another -- to adjudicate claims against
17 another sovereign. And he held that the
18 response to a violation of that law of nations
19 was war.

20 Now, in the Schooner Exchange, Chief
21 Justice Marshall says: Of course, you -- a
22 sovereign has absolute territory -- absolute
23 discretion over its own territory.

24 There is a law of nations principle
25 that friendly nations whose -- in that case

1 whose ships appear in our ports, whose
2 sovereign ships that appear in our ports, under
3 the law, there are certain principles under the
4 law of nations in which the host state is
5 deemed as a matter of the law of nations to
6 have waived its sovereign authority to have its
7 courts exercise jurisdiction. And he explained
8 why that was the case. That is, there was an
9 implicit consent.

10 Now, in the plan of convention, the
11 states -- you know, at international law, if
12 there was a violation of it, the nations had
13 all sorts of retaliatory measures. They could
14 blockade each other, embargo each other, make
15 war on each other, all sorts of things.

16 JUSTICE BREYER: Well, Marshall --
17 Marshall, who is a pretty good authority -- I
18 happen to know this because we had this case
19 before. But if you --

20 MR. WAXMAN: You did?

21 JUSTICE BREYER: -- look at quotes 4,
22 Vattel, 472, okay, and what he says Vattel says
23 -- I never read all those pages, I read some of
24 them -- he says Vattel says that the consent of
25 the foreign sovereign may be implied through a

1 tacit convention, but it suggests that it
2 rested upon consent.

3 MR. WAXMAN: So -- and --

4 JUSTICE BREYER: It says that consent
5 may be applied.

6 MR. WAXMAN: Yes, and with respect,
7 Justice Breyer, what the Schooner Exchange says
8 several times in Justice Mar -- Chief Justice
9 Marshall's opinion, is that the state --
10 sovereign states are deemed to have consented
11 to recognize the sovereign immunity of other
12 sovereigns in those instances in which, and
13 that are enumerated, and he explains why a
14 visiting warship of a friendly nation is one of
15 those things.

16 JUSTICE BREYER: Well, I don't want to
17 waste time.

18 JUSTICE ALITO: Mister --

19 MR. WAXMAN: Now, even if -- even if
20 I'm -- oh, I'm sorry. Can I?

21 JUSTICE ALITO: Yeah, sure.

22 MR. WAXMAN: Even if I'm wrong about
23 that, the fact of the matter is that in the
24 plan of convention and in the text itself, the
25 states, in order to form a more perfect union,

1 surrendered all of the retaliatory means that
2 nations would have had in order to deter or
3 enforce --

4 JUSTICE KAGAN: Well, that's what I
5 understood --

6 MR. WAXMAN: -- or punish violations,
7 and --

8 JUSTICE KAGAN: Mr. Waxman, that's
9 what I understood your basic argument to be,
10 right, that there was this system of comity, it
11 all worked very well, essentially at least in
12 part because states knew that they had all
13 these powers that they could use against each
14 other and then they gave up those powers at the
15 convention.

16 So what replaced it? What replaced it
17 was a constitutional rule. That's your basic
18 story. Is that correct?

19 MR. WAXMAN: Yes, a constitutional --

20 JUSTICE KAGAN: And I guess I just
21 find myself thinking that, I mean, sort of, you
22 know, going back to Justice Sotomayor's
23 question, what's the evidence of that, because
24 this is a gigantic constitute -- you know,
25 constitutional debate. There are a thousand

1 issues on the table. Everybody has things that
2 they want.

3 And this idea that there's this
4 one-for-one exchange that you have, we give up
5 our power to blockade, we get a rule of
6 sovereign immunity, I mean, that's just not how
7 big negotiations work.

8 MR. WAXMAN: What was --

9 JUSTICE KAGAN: And unless you can
10 show me evidence that that was the trade, I
11 mean, if I could just -- if you would bear with
12 me for one more moment -- Professors Baude and
13 Sachs tell about another trade. Their trade is
14 that there wasn't a rule of sovereign immunity,
15 but the states retained their ability not to
16 enforce judgments against them if they violated
17 their own immunity.

18 So I guess what I'm saying is all of
19 these trades, you can hypothesize them, but
20 they are just hypotheses. And what's the
21 evidence for any of them?

22 MR. WAXMAN: So I would say the
23 evidence -- I mean, there -- there is a lot of
24 evidence, I don't think there's any
25 disagreement that the framers intended to

1 constitutionalize fundamental aspects of
2 sovereignty.

3 The reference to the former colonies
4 as states, the reference to in the privileges
5 and immunities clause of citizens of states,
6 the limitation, the express limitations in the
7 Constitution, including Section 10 of Article
8 I, and, of course, the Eleventh Amendment
9 itself make sense only if the states are
10 sovereign.

11 JUSTICE ALITO: Well, maybe that's --

12 MR. WAXMAN: Now --

13 JUSTICE ALITO: -- your answer to this
14 question, but I'm still, you know -- because we
15 are all always very vigilant not to read things
16 into the Constitution that can't be found in
17 the text, I'm waiting for the answer to Justice
18 Sotomayor's question about what provisions of
19 the Constitution you would point to.

20 MR. WAXMAN: So I -- I've -- I would
21 point to the provisions of the Constitution
22 that are enumerated by Justice Scalia in his
23 opinion for the Court in Printz, which were
24 reiterated again by Justice Kennedy for the
25 Court in Alden, some of which I have -- I have

1 recognized, I -- I have -- I have already
2 recited.

3 The -- the -- preserving fundamental
4 aspects of sovereignty, yet withdrawing the
5 ability to protect sovereignty vis-à-vis either
6 nations or other states was in -- in exchange
7 for a guarantee that the then law of nations,
8 the then principle of sovereignty under the law
9 of nations, would be protected by the
10 Constitution and enforced by this Court,
11 Justice Kagan has referred to it as a
12 one-for-one bargain.

13 But what there really was, was the
14 plan -- the genius of the Constitution, the
15 structural provisions of the Constitution was
16 that the states, having had an unsatisfactory
17 experience with confederation, by ratifying,
18 they surrendered their powers to treat each
19 other as legal strangers.

20 In other words, in Chief Justice
21 Marshall's words, they were deemed to waive
22 whatever sovereign prerogative they had to
23 violate the law of nations principle and haul
24 one another into each other's courts. And --

25 JUSTICE KAVANAUGH: Given how --

1 MR. WAXMAN: -- that I -- I -- I mean
2 --

3 JUSTICE KAVANAUGH: Given -- given how
4 important this is, as you describe, why is it
5 not in the text of the Constitution in your
6 view, given that the Constitution is a
7 document, in my view, of majestic specificity.
8 It's got a lot of specific details on very
9 minute things, and this issue which you say
10 rightly is so important, but then somehow was
11 not mentioned in the text of the Constitution.

12 MR. WAXMAN: Well, I mean, this --
13 this Court has been explaining at least since
14 Hans that the principle of sovereign
15 immunity -- of state sovereign immunity was so
16 fundamental that it is a postulate that
17 underlies and gives meaning to other provisions
18 of the Constitution, including, as -- as then
19 Justice Rehnquist explained in his dissent in
20 Nevada versus Hall, the Eleventh Amendment
21 itself.

22 But, in this regard, Justice
23 Kavanaugh, this principle of state sovereign
24 immunity is no different than Chief Justice
25 Marshall's recognition in McCulloch versus

1 Maryland of the constitutional principle of
2 intergovernmental immunity, of the principle
3 against commandeering that's recognized by the
4 Court in Printz and New York versus United
5 States, in the principle --

6 JUSTICE SOTOMAYOR: Mr. Waxman --

7 MR. WAXMAN: -- the equal footing
8 doctrine and the Dormant Commerce Clause. The
9 Constitution was not, as -- as commentators and
10 I believe some of the founders explained, was
11 not meant to replicate a European code of laws
12 and regulations. There were some things that
13 were understood and were fundamental to the
14 union that are not expressed in texts like
15 those doctrines.

16 JUSTICE SOTOMAYOR: Mr. Waxman, when
17 the states disagreed with us in Chisholm about
18 the ability to haul states into federal court,
19 the states amended the Constitution. We got
20 the Eleventh Amendment.

21 We have 44 states suggesting we
22 overrule Hall. That's two-thirds of the
23 states. Why don't they move to get the
24 Constitution amended? If we're getting it
25 wrong? You're asking us to do their work.

1 If this is such a important principle
2 to them, they could express it very directly
3 the way they did in -- in the Eleventh
4 Amendment.

5 MR. WAXMAN: Well, that -- that
6 statement, that observation, Justice
7 Sotomayor -- and, by the way, I mean, including
8 California, there are 47 states. So we have
9 three states that haven't spoken.

10 JUSTICE SOTOMAYOR: They've got a lot
11 of --

12 MR. WAXMAN: But a lot of states --

13 JUSTICE SOTOMAYOR: -- representatives
14 in the House and in the Senate. If they're
15 really excised, they can do something about it.

16 MR. WAXMAN: You know, Justice --

17 JUSTICE SOTOMAYOR: Except -- but,
18 instead, they're choosing to let us decide --

19 MR. WAXMAN: You -- you could have
20 said --

21 JUSTICE SOTOMAYOR: -- that an
22 individual state doesn't have the right to
23 protect its citizens.

24 MR. WAXMAN: You could have said
25 exactly the same thing about why Parden

1 shouldn't be overruled. You could say exactly
2 the same thing about any number of outlier,
3 anomalous constitutional decisions of this
4 Court that were then overruled.

5 There is always, of course, the option
6 of amending the Constitution. The --

7 JUSTICE SOTOMAYOR: But this is a very
8 serious step.

9 MR. WAXMAN: Yes.

10 JUSTICE SOTOMAYOR: We are entrenching
11 very directly on the state's right to protect
12 its citizens. And there are amici who suggest
13 that there are principles that can cabin that.
14 We've already recognized them. This turned --
15 this turned from a multimillion-dollar case
16 into, what, a \$100,000 case now?

17 MR. WAXMAN: And counting.

18 JUSTICE SOTOMAYOR: Well, that's
19 because of the attorneys, but --

20 (Laughter.)

21 MR. WAXMAN: It's always the
22 attorneys.

23 JUSTICE SOTOMAYOR: Always the
24 attorneys.

25 MR. WAXMAN: Well, and the millions of

1 dollars in costs that the sovereign State of
2 California has expended defending itself. And
3 this is not some one-off problem. This is, in
4 fact, a significant problem.

5 We cited a half a dozen recent cases.
6 The -- the states themselves have added another
7 10. And just this weekend, the newspapers
8 reported -- I mean, this is -- this is
9 astonishing, in talking -- talking about
10 disrespecting the dignity and sovereignty of
11 states, a Nevada citizen sued the Commonwealth
12 of Massachusetts in Nevada state court, Steve
13 Wynn, the casino operator, and he sought and on
14 Friday evening obtained an injunction from a
15 Nevada state judge enjoining the Massachusetts
16 Department of Gaming Regulation from issuing a
17 report it had prepared evaluating the
18 suitability of Mr. Wynn to operate a casino in
19 the Boston area. That's the nature of the
20 problem.

21 Now, yes, the states could propose an
22 amendment to a constitution. Our Constitution
23 is not amended lightly. And the fact of the
24 matter is -- and we've cited a number of state
25 court, state supreme court, decisions that

1 followed Nevada versus Hall. They all express
2 shock, the same kind of shock and surprise that
3 met Chisholm. It's true Chisholm produced a --
4 a very under-inclusive constitutional
5 amendment, but they were -- all these state
6 supreme courts are basically saying, okay,
7 well, you know, we all thought for 200 years
8 before Nevada versus Hall that we couldn't
9 exercise sovereignty, we couldn't exercise
10 judicial power over another state's sovereign.

11 And, in fact, in 19 -- I think it was
12 1961, in the Western Union case, this Court
13 dismissed a suit in the Pennsylvania state
14 courts on the grounds that New York was a
15 necessary power -- was a necessary --

16 JUSTICE KAGAN: Mr. Waxman, if I could
17 take you back to some of the questions you were
18 previously asking, because I want to give you a
19 chance to sort of give your best argument,
20 which is, you know, given that you're claiming
21 that the system of comity, which was working
22 well for all the states, that this system was
23 converted into a particular constitutional rule
24 at the framing, and a very particular one,
25 because there could have been other ways, as

1 Professors Baude and Sachs suggest, for the
2 states to protect themselves.

3 Given that that's what you're
4 claiming, what is the best -- and I'll -- I'll
5 expand what some of my colleagues had said.
6 You don't have to give me even textual
7 evidence. What's the best textual or
8 historical evidence that the states made
9 exactly this bargain at the framing?

10 MR. WAXMAN: Okay. Let me take a try
11 with something I haven't hauled out yet.

12 Inherent in our federal union is the
13 principle that no state may regulate the
14 government of another state. And just as one
15 state's governor can't direct the bureaucracy
16 of another and one state's legislature can't
17 regulate the government actions of another, one
18 state's judiciary can't call another state's
19 government to the bar of the court and sanction
20 it for carrying out its own laws.

21 That is unconstitutional interference
22 with the independence of the states, just as
23 reflected in these other non-textual
24 constitutional principles that I previously
25 identified.

1 Now you've referred a couple times to
2 this amicus brief by Professor -- Professors
3 Baude and Sachs. Professors Baude and Sachs
4 acknowledge that there was a universal rule in
5 the law of nations. Their argument is it
6 wasn't constitutionalized; it just stayed some
7 sort of common law rule. It wasn't abrogated,
8 but it wasn't constitutionalized.

9 The world in which -- the regime they
10 envision in which states can ignore what they
11 acknowledge to be a universal rule but don't
12 worry about it, because by invoking common law
13 precedents superseded 150 years ago by *Pennoyer*
14 versus *Neff*, states can just refuse to honor
15 any resulting judgment.

16 That is not the constitutional union
17 that the framers envisioned or produced.
18 That's my -- that's my best shot. If I could
19 reserve the balance of my time.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Mr. Chemerinsky.

23 ORAL ARGUMENT OF ERWIN CHEMERINSKY
24 ON BEHALF OF THE RESPONDENT

25 MR. CHEMERINSKY: Good morning,

1 Mr. Chief Justice, and may it please the Court:

2 Forty years ago in Nevada versus Hall,
3 this Court held that states may exercise their
4 sovereign power under the Tenth Amendment to
5 define the jurisdiction of the courts to
6 protect their citizens when they're injured,
7 including by other states. There's no
8 compelling reason for overruling this precedent
9 discarding stare decisis.

10 At the very least, in this case, under
11 the law of the case doctrine, this is the
12 established law.

13 In Nevada versus Hall, this Court
14 concluded by saying that to prevent states from
15 exercising their jurisdiction in this manner
16 would be the real intrusion on the power of the
17 states and the people of the United States.

18 Under the Tenth Amendment, the
19 question for this Court is, is there anything
20 in the Constitution that keeps states from
21 exercising this jurisdiction? I'd suggest this
22 Court can look to three sources: the text of
23 the Constitution itself, the Constitutional
24 Convention, and the pre-ratification history.

25 JUSTICE SOTOMAYOR: Mr. Chemerinsky,

1 your -- Mr. Waxman did point to something
2 that's important. Intuitively and otherwise,
3 we would say it would be wrong for one state to
4 tell another state how to run its government or
5 how to run an agency or what rules it should
6 follow within its own state.

7 What in -- then what is it that keeps
8 them from doing that if it's not the
9 constitutional structure?

10 MR. CHEMERINSKY: First, comity
11 protects states. This is the comity that
12 existed at the pre-ratification period and
13 continues. This case shows the importance of
14 that comity.

15 Initially, the Nevada Supreme Court
16 excluded all negligence claims based on comity.
17 Then the Nevada Supreme Court struck a \$250
18 million punitive damage award based on comity.
19 It shows that comity was protection both in the
20 pre-ratification period and now.

21 JUSTICE SOTOMAYOR: I -- I just don't
22 see comity being enough. I know one of your
23 amici suggested that questions of personal
24 jurisdiction should take care of most cases.

25 And, actually, I did look at this case

1 and I was trying to figure out what it was that
2 Nevada did to intrude or what California did to
3 intrude physically on Nevada. And I know that
4 the supposed agent who was doing this
5 investigation -- not supposed, she is an agent
6 -- crossed state lines, I think it was alleged,
7 and rummaged through garbage and rummaged
8 through personal mail. Is that correct?

9 MR. CHEMERINSKY: Well, they invaded
10 his property rights. They defamed him. They
11 also revealed private information about him to
12 a large audience.

13 JUSTICE SOTOMAYOR: But was that in
14 Nevada or in California?

15 MR. CHEMERINSKY: That was in Nevada
16 at his home they did these things. And I think
17 it's crucial, Justice Sotomayor, because while
18 there's the importance of one state not
19 regulating another, there's also the crucial
20 interest that a state has in protecting its
21 citizens when they're injured, including by
22 another state. This Court has long recognized
23 that as a vital interest of the states.

24 But, to go back to your initial
25 question, in addition to comity, in addition to

1 personal jurisdiction, this Court created a
2 very important protection for states when this
3 case was last there. This Court said that a
4 state, when suing another state, is liable for
5 no more than the form state would be liable
6 for. So the damage judgment on the basis of
7 that rule, which this Court found on full faith
8 and credit, was limited to \$100,000.

9 I'd go back to your initial question
10 to Mr. Waxman, the text of the Constitution.
11 Where the text of the Constitution wanted to
12 limit state power, it did so explicitly: the
13 full faith and credit clause, the fugitive
14 slave clause, the privilege and immunities
15 clause. There is no textual provision in the
16 Constitution that limits the power of a state
17 under the Tenth Amendment to define its own
18 jurisdiction to provide a remedy for others
19 when they're injured.

20 If you -- if you look at the
21 Constitutional Convention, this wasn't
22 discussed at the Constitutional Convention. In
23 fact, in Nevada versus Hall, this Court
24 explicitly said, and I quote, "it was not a
25 matter of concern." And then you can go to the

1 pre-ratification period, and, Justice Kagan,
2 you summarized it accurately.

3 In the pre-ratification period, the
4 protection that a state had from another state
5 was based on comity. In fact, if you look at
6 pages 31 and 32 of the Petitioner's brief, it
7 explicitly says in the pre-ratification period
8 there was no protection based on sovereign
9 immunity. It was comity, the same comity that
10 exists today to protect a state from another
11 state.

12 JUSTICE KAVANAUGH: What do you do
13 with Federalist 81, which said that it was
14 inherent in the nature of sovereignty not to be
15 amenable to the suit of an individual without
16 its consent and said that would remain with the
17 states, that was Hamilton speaking in
18 Federalist 81, reflecting a notion that it's
19 inherent in the nature of sovereignty.

20 Is that incorrect?

21 MR. CHEMERINSKY: No, Your Honor, it's
22 not incorrect, but you must put it in the
23 context in which it's written. The concern at
24 that time was whether the new government and
25 these new federal courts were able to hold

1 state governments liable. They were very
2 afraid because of debts they might be bankrupt.

3 And so Hamilton was providing
4 assurance to the states that they wouldn't be
5 held liable in federal court. That's what the
6 Eleventh Amendment was about, overruling
7 Chisholm versus Georgia. It was about limiting
8 the power of the federal courts relative to
9 state governments.

10 Alden versus Maine was about the power
11 of Congress to require a state to have suits
12 against itself. In Nevada versus Hall, this
13 Court said sovereign immunity existed to
14 protect a government from being sued in its own
15 courts. It was only comity that protected
16 other states from being sued.

17 JUSTICE ALITO: But do you think it's
18 plausible that there would be a great concern
19 about a state's being sued in a federal court,
20 which is a more neutral tribunal, but no
21 concern about a state being sued in the state
22 -- in the courts of another state?

23 MR. CHEMERINSKY: Yes, for two
24 reasons, Your Honor.

25 First, the framers were very

1 concerned, especially the anti-federalists were
2 concerned about the powers of this new level of
3 government, the federal courts. They had
4 already seen that they had protection state to
5 state based on comity.

6 And, second, Your Honor, quite
7 important, the states didn't want to give up
8 their own power. Had the states put in the
9 Constitution a limit on the ability to have
10 suits against other states, put a limit on
11 state power, the states didn't perceive it
12 necessary because of comity, and they didn't
13 want to restrict their own authority.

14 JUSTICE ALITO: But the comity that
15 exists -- well, what is your answer to the --
16 to the argument that -- that once the United
17 States was formed, either under the articles or
18 under the Constitution, the relationship
19 between the states was entirely different from
20 the relationship among foreign states?

21 MR. CHEMERINSKY: Yes, Your Honor, it
22 was different. Where the Constitution wanted
23 to make it different, it said so explicitly in
24 provisions like the full faith and credit
25 clause, the fugitive slave clause, and the

1 privilege and immunities clause. There is no
2 indication of such a limit in the text of the
3 Constitution, in the Constitutional Convention,
4 or from the pre-ratification era.

5 JUSTICE ALITO: You know, if
6 California were a republic, I mean, we had --
7 if we had the California republic, which is
8 something some people in California would like
9 --

10 (Laughter.)

11 JUSTICE ALITO: -- it would have a lot
12 of leverage over Nevada that it doesn't have
13 now, wouldn't it?

14 MR. CHEMERINSKY: Well, yes and no,
15 Your Honor. Certainly --

16 JUSTICE ALITO: We could have, you
17 know, it overwhelms it in every respect. So
18 Nevada would have to be careful about what it
19 did to California. But the situation now is
20 different because they're states in the union.

21 MR. CHEMERINSKY: I think Nevada might
22 already feel that California overwhelms it too
23 much. But, in terms of international, I go
24 back to Justice Breyer's point with regard to
25 his questions to Mr. Waxman.

1 The Schooner Exchange case said that
2 under the national law, the only protection a
3 foreign country had on another sovereign was
4 based on comity. And there's no indication
5 that that was insufficient.

6 The reality is that this is an issue
7 that relatively rarely arises.

8 CHIEF JUSTICE ROBERTS: Well, the
9 remedy for the failure to accord comity at
10 international law was recognized to be war.
11 What remedy do the states have under your view
12 if a state chooses not to extend comity to a
13 sister state?

14 MR. CHEMERINSKY: Well, they certainly
15 have remedy in this Court based on Hyatt II.
16 The damages would be limited to the amount that
17 the forum state would be liable.

18 And, second, they have a perspective
19 remedy that's quite important. States can
20 enter into a compact with one another to
21 prevent themselves from being sued.

22 Justice Sotomayor talked about --

23 CHIEF JUSTICE ROBERTS: That requires
24 an agreement of the other states.

25 MR. CHEMERINSKY: Well, for example,

1 to go back to Justice Alito's question,
2 California and Nevada could enter into a
3 compact any time they want that they will not
4 allow suits in their courts against the other
5 state. There's nothing to prevent the states
6 from doing that.

7 CHIEF JUSTICE ROBERTS: Well, but you
8 have to assume that -- that -- that the two
9 states are willing to do that. Nevada may
10 think that given the disparity in a number of
11 respects between them and -- and California
12 that its best hope is to be able to sue
13 California in its states.

14 So it has an entirely different view
15 of the significance of that right than
16 California would. The idea that, well, you can
17 just go agree on something is not going to be a
18 complete answer.

19 MR. CHERMERINSKY: Well, Your Honor,
20 that's true, but then you go back to the Tenth
21 Amendment. Does Nevada have the sovereign
22 power as a state to choose to not enter a
23 compact, to define the jurisdiction of its
24 courts, and be able to provide a remedy when
25 its citizens are injured by another state?

1 That is part of its sovereign power,
2 which is exactly what Nevada versus Hall said.

3 Mr. Waxman says that there were no
4 cases prior to Nevada versus Hall. Actually,
5 if you look at Footnote 29 in Nevada versus
6 Hall, it does cite to a case, State of Georgia
7 versus City of Chattanooga. It says that, if a
8 state owns property in another state, it's
9 subject to eminent domain and judicial
10 proceedings in that state like any other owner
11 of property.

12 I think the key is there weren't many
13 cases either before Nevada versus Hall, and
14 there aren't many cases since Nevada versus
15 Hall. That's because this isn't something that
16 arises very frequently. But, when it does
17 arise, it is so important that a state be able
18 to exercise its sovereign power.

19 But, Your Honor, I would stress to you
20 that this doesn't come to the Court on a blank
21 slate, that there's a 40-year-old precedent,
22 and this Court has made clear that it will
23 overrule stare decisis only if there's a
24 compelling reason.

25 Everything that Mr. Waxman said to you

1 today about the plan of the convention was
2 argued to this Court in 1979 in Nevada versus
3 Hall. Nothing has changed since then.

4 Mr. Waxman in his brief points to this
5 Court's sovereign immunity decisions, but
6 they're quite distinguishable. Most of them
7 have been about the Eleventh Amendment and the
8 power of the federal courts. And, of course,
9 that's quite different than whether or not the
10 Constitution prohibits a state from hearing
11 suits brought by citizens of another state.

12 Alden versus Maine is quite
13 distinguishable because it involved whether
14 Congress could force a state to have suits
15 against itself. In Alden versus Maine, this
16 Court explicitly drew a distinction between
17 sovereign immunity court, a state in its own
18 courts, as opposed to the ability to sue
19 another -- citizens of another state to sue in
20 state court. Alden versus Maine very clearly
21 said that it was consistent with Nevada versus
22 Hall.

23 And so, in that sense, there is
24 nothing that is changed since this was argued
25 to this Court in 1979. And there's no

1 compelling reason for overturning stare
2 decisis.

3 Finally, I would argue to you that, at
4 the very least, the law of the case doctrine is
5 controlling in this case.

6 JUSTICE KAVANAUGH: Just on the stare
7 decisis question --

8 MR. CHEMERINSKY: Yes, please.

9 JUSTICE KAVANAUGH: -- wouldn't --
10 wouldn't it be relevant, though, that the case
11 law that's developed subsequent to Nevada
12 versus Hall seems quite inconsistent with the
13 principles in the majority opinion and more
14 consistent with the principles in Justice
15 Rehnquist's dissent and the series of cases
16 that you describe?

17 In other words, if we were five years
18 after Nevada v. Hall being asked to overrule
19 it, that might have been a harder hill to
20 climb, but now that you have all these other
21 cases, that might leave Nevada versus Hall
22 seeming an outlier.

23 How do you respond to that argument?

24 MR. CHEMERINSKY: I -- I disagree. I
25 think that all of the subsequent cases were in

1 a very distinguishable context. Primarily,
2 they were about Congress's authority to
3 authorize suits against states. They're about
4 whether or not federal courts can enter suits
5 against states. Alden versus Maine was whether
6 or not Congress can require that a state court
7 hear suits against the state.

8 None of them involved the Tenth
9 Amendment question presented in this case: Is
10 there anything in the Constitution that
11 prohibits a state from exercising jurisdiction?

12 But I'd especially direct you to the
13 language in Alden versus Maine at 527 at 738.
14 The Constitution did not reflect an agreement
15 on the states to respect the sovereign immunity
16 of one another. The same decision, Alden
17 versus Maine, pages 739 and 740, says a
18 distinction is drawn between a sovereign's
19 immunity in its own courts and its immunity in
20 the courts of another sovereign.

21 And so we're asking you not simply to
22 adhere to Nevada versus Hall but also to adhere
23 to what this Court said in Alden versus Maine.
24 And so, in that sense, Justice Kavanaugh,
25 nothing has changed since 1979 in the

1 jurisprudence of this Court that would cast
2 doubt upon the holding in Nevada versus Hall.

3 JUSTICE KAGAN: How -- how should we
4 think about the fact that 47 or 45 or whatever
5 it is states have joined in this amicus brief,
6 indicating that they think that their sovereign
7 immunity power is a good deal more important
8 than the power that you've referenced to
9 protect their own citizens in their own courts?

10 MR. CHERMERINSKY: The attorney
11 generals of those states filed a brief saying
12 they don't want to have to defend suits. And I
13 am sure the attorney generals of those states
14 would like to see you overrule Nevada versus
15 Hall, but I don't think you can equate a brief
16 filed by state attorney generals with the
17 position of state governments, either state
18 legislatures or state judiciaries.

19 Indeed, if states cared so deeply, not
20 only could they amend the Constitution, as
21 Justice Sotomayor said, but as I said to Chief
22 Justice Roberts, they could enter into compacts
23 with one another to protect themselves from
24 suit.

25 CHIEF JUSTICE ROBERTS: Well, it's a

1 pretty --

2 JUSTICE KAGAN: Have there been
3 attempts --

4 CHIEF JUSTICE ROBERTS: It's a pretty
5 remarkable assertion that we shouldn't
6 understand representations of the states'
7 attorneys general to represent the views of the
8 state. I mean, each of the states have
9 apparatus of their own if they don't think the
10 attorney general -- and I don't know who you're
11 speaking of, whether it's a legislature or the
12 governor -- to direct the attorney general to
13 -- I guess it varies from state to state, but,
14 certainly, you would expect the attorney
15 generals' views to reflect the views of the
16 states.

17 MR. CHERMERINSKY: Your Honor, the
18 attorney general is an officer of the state,
19 but I don't necessarily know that in filing the
20 brief in this Court, it's reflecting the views
21 of the state legislatures or the judiciaries.
22 The question is, do those state governments
23 want to give up the power to define the
24 jurisdiction of their courts and provide
25 remedies?

1 CHIEF JUSTICE ROBERTS: Should we
2 regard the submissions of the Solicitor General
3 here as reflecting the views of the United
4 States or simply the Solicitor General?

5 MR. CHEMERINSKY: The Solicitor
6 General is representing the United States
7 Government. That doesn't necessarily mean that
8 Congress will agree with the position of the
9 Solicitor General.

10 I'm not saying you should discard the
11 brief of the attorney general, but, in answer
12 to Justice Kagan, I was simply saying I
13 wouldn't necessarily assume, because the
14 attorney generals of the states don't want to
15 be sued, that the state governments want to
16 give up their sovereign power under the Tenth
17 Amendment, what we're talking about here today.

18 JUSTICE KAGAN: Have there been
19 attempts by the states to -- to enter into
20 agreements of this sort?

21 MR. CHEMERINSKY: Not that I'm aware
22 of, Your Honor, but I think that probably
23 reflects this isn't a serious problem. It
24 doesn't arise all that often.

25 For example, if you look at the brief

1 of those 44 states referred to, if you look at
2 page 13, they identify a total of nine cases
3 since 1979 where state governments have been
4 sued in other state courts.

5 And I would think that states would
6 want, if another state comes in and violates
7 the rights of its citizens, as happened here,
8 to be able to provide a remedy.

9 JUSTICE BREYER: Would the 47 states
10 that don't like this rule make an effort to
11 find things that has -- have happened to their
12 citizens in this state caused by Nevada, and so
13 they all start suing Nevada in their own
14 courts, perhaps Nevada's attitude would change.

15 (Laughter.)

16 MR. CHEMERINSKY: It might, Your
17 Honor, but the fact that that hasn't happened
18 in 40 years --

19 JUSTICE BREYER: Not a problem?

20 MR. CHEMERINSKY: -- since Nevada
21 versus Hall leads one to the conclusion it's
22 not a problem. We can certainly hypothesize
23 states could begin retaliating against other
24 states, but it just hasn't happened. And if it
25 does, states have the mechanism for protecting

1 themselves. And states are protected already.

2 On the other hand, in a situation like
3 this, a citizen like Mr. Hyatt has no other
4 remedy but the ability to sue in state court
5 when he's injured by another state.

6 JUSTICE SOTOMAYOR: I'm sorry, he
7 could have gone to the California courts.

8 MR. CHEMERINSKY: No, he couldn't have
9 gone to the California courts because
10 California gives sovereign immunity to itself
11 and has a statute that gives broad protection.
12 In fact, Hyatt won --

13 JUSTICE SOTOMAYOR: There's no --
14 there's no administrative process against the
15 -- the tax assessment that was laid against
16 him?

17 MR. CHEMERINSKY: Well, there was an
18 administrative proceeding with regard to the
19 tax assessment, something that's been pending
20 since the 1990s. But in terms of --

21 JUSTICE SOTOMAYOR: That -- that
22 actually is a factual question I had. Did --
23 was that ever adjudicated?

24 MR. CHEMERINSKY: Yes, Your Honor. In
25 August of 2017, the California State Board of

1 Equalization overturned the Franchise Tax
2 Board's findings against Mr. Hyatt both with
3 regard to residency and fraud for 1991 and '92.
4 That is now on appeal in the California Office
5 of Tax Assessment.

6 But what's quite important, Your
7 Honors, that was about his tax liability in
8 California. This is a suit about the torts
9 that were committed against him by California
10 officials within the State of Nevada. For
11 that, he had no remedy in California courts.

12 In fact, Hyatt I, the first time this
13 case was before the court, was all about
14 whether or not Nevada, under full faith and
15 credit, had to accord sovereign immunity to
16 California, as it would have had in the
17 California courts.

18 JUSTICE SOTOMAYOR: Could the Nevada
19 court have adjudicated the actual premises?
20 Could he have brought some sort of suit in
21 Nevada to adjudicate whether he was a resident
22 of California or not or to find that he had no
23 tax liability?

24 MR. CHEMERINSKY: I think a challenge
25 to tax liability would be different, in part

1 because of the Tax Injunction Act, and also
2 because of a different principle of comity
3 under Fair Assessment in Real Estate versus
4 McNary. What's crucial about this case is it's
5 not about tax liability. It's about torts, the
6 invasion of property rights, the defamation,
7 the invasion of privacy rights that occurred.

8 CHIEF JUSTICE ROBERTS: Counsel, what
9 do you do about the Petitioner's argument that
10 it's incongruous that Indian tribes have this
11 sort of immunity while states don't? The --
12 the -- Chief Justice Marshall, who we've heard
13 about, described the tribes, of course, as
14 quasi-sovereigns, yet the states are recognized
15 as -- as sovereigns. So we have the
16 quasi-sovereigns enjoying immunity but the
17 actual sovereigns not under your position.

18 MR. CHEMERINSKY: Two responses, Your
19 Honor.

20 First, this Court has never decided
21 whether state courts can hear tort claims
22 against Indian tribes. In fact, in Michigan
23 versus Bay Mills Indian Community, in Footnote
24 8, the Court specifically said that was an open
25 question.

1 There's actually a cert petition on
2 that question now pending before you. It's
3 Wilkes versus PCI Gaming. The Alabama Supreme
4 Court held that Indian tribes could be sued in
5 tort in the cert petition before you.

6 CHIEF JUSTICE ROBERTS: So your answer
7 is throw the Indian tribes under the bus? Well
8 --

9 MR. CHEMERINSKY: No, Your Honor, I'm
10 saying that it's an unresolved question. But
11 there is a second point that may answer the
12 comment that you just made. Congress has
13 plenary power over Indian tribes. This has
14 been understood since the founding to exclude
15 state interference with Indian affairs.

16 In fact, this Court in the Kiowa Tribe
17 of Oklahoma versus Manufacturing Technology
18 case said that tribal immunity is a subject of
19 federal law and is not subject to diminution by
20 the states. The relationship of Congress to
21 the Indian tribes is quite different than the
22 relationship of Congress to the states.

23 And so Congress can limit state court
24 jurisdiction with regard to Indian affairs in a
25 way that Congress can't limit state court

1 jurisdiction under the Tenth Amendment. So
2 it's quite distinguishable.

3 JUSTICE ALITO: The doctrine of stare
4 decisis serves many valuable purposes. So
5 which one would you say most strongly, or which
6 ones would you say most strongly, supports your
7 argument here? Is there any reliance here?
8 And if not, what other stare decisis factors
9 would you cite?

10 MR. CHEMERINSKY: Well, I'd go back to
11 this Court's decision in the Hilton versus
12 South Carolina case, and this Court there said
13 adherence to precedent promotes stability,
14 predictability, and respect for judicial
15 authority.

16 And this was a case about overturning
17 precedent in the area of constitutional law.
18 This is about stability of law. For 40 years,
19 this has been the law. It's about
20 predictability. People have relied upon this
21 in filing their suits.

22 But it's also about respect for
23 judicial authority. This Court overturning its
24 own precedents inherently undermines that
25 respect for judicial authority.

1 So I would say, in terms of all of the
2 values that are identified in Hilton, stare
3 decisis is important here. And it was in
4 Hilton that the Court said there has to be a
5 compelling reason. And there is no compelling
6 reason. There's nothing that's been argued
7 today that couldn't have been presented to this
8 Court and wasn't in 1991.

9 JUSTICE KAVANAUGH: That -- that's
10 often --

11 JUSTICE BREYER: I want to follow that
12 up, because this is a general question I have
13 and I'd like to call on your knowledge on this,
14 is this imaginary or not, what I'm about to
15 say, that every time we overrule a case, it's
16 like a little chink in an armor, and because
17 lawyers have to use our cases to talk to
18 clients, and the client doesn't like what he's
19 hearing. Can we do anything about it, whatever
20 the field? And the more cases we overrule, the
21 harder it is for the lawyer to say no.

22 And, therefore, in many areas, people
23 start to ask us to overrule cases because, from
24 my point of view, there are many wrong cases.
25 And that's true of every judge and law

1 professor.

2 And once you start down the road, you
3 have to be careful for that reason in part. Is
4 that true, or am I making it up out of my
5 imagination?

6 MR. CHEMERINSKY: Yes, Your Honor.

7 JUSTICE BREYER: I thought that would
8 be your answer.

9 (Laughter.)

10 JUSTICE BREYER: Yes, I'm making it up
11 out of my imagination or it's true?

12 MR. CHEMERINSKY: No. Yes, it is
13 true, Your Honor, I totally agree with what you
14 said about the importance of stare decisis, in
15 fact, that --

16 JUSTICE ALITO: Well, Mr. Chemerinsky,
17 do you think that the public would have greater
18 respect for an institution that says, you know,
19 we're never going to admit we made a mistake,
20 because we said it and we decided it, we're
21 going to stick to it even if we think it's
22 wrong, or an institution that says, well, you
23 know, we're generally going to stick to what
24 we've done, but we're not perfect, and when we
25 look back and we think we made a big mistake,

1 we're going to go back and correct it.

2 Which kind of institution would they
3 respect more?

4 MR. CHEMERINSKY: Of course, this
5 Court should overrule precedent at times. We
6 all agree that Brown versus Board of Education
7 needed to overrule Plessy versus Ferguson. But
8 we also all agree that stare decisis matters.
9 This is just what Justice Breyer was
10 expressing.

11 And that's why I think this Court in
12 Hilton got it exactly right. Precedent should
13 be overruled only where there is a compelling
14 reason for doing so.

15 And what I keep saying --

16 JUSTICE KAVANAUGH: But then the
17 question is how we figure out what the
18 compelling reason is, and that's very
19 difficult.

20 And you say nothing has changed.
21 That's true in a lot of cases where the court
22 has nonetheless overruled a prior decision.
23 And so how are we supposed to think about it?

24 Is it enough, for example, if we think
25 it's egregiously wrong and the prior decision

1 has severe practical consequences and there's
2 no real reliance interest at stake? Is that
3 enough? How to apply that to a particular case
4 is hard, but what -- what I just said in terms
5 of egregiously wrong, severe practical
6 consequences, no real reliance, is that enough
7 in your view to overrule?

8 MR. CHEMERINSKY: I think egregiously
9 wrong, no practical consequence to overruling
10 precedent, certainly go a long way to
11 indicating there is a compelling reason for
12 doing so. But I'd also start always by asking:
13 Is there anything today that's before the Court
14 that it didn't have when the earlier case was
15 decided?

16 JUSTICE KAVANAUGH: Well, if we
17 applied that strictly, a lot of cases that
18 everyone agrees should be overruled would not
19 have been overruled. And so I think -- I'm
20 questioning that particular factor.

21 MR. CHEMERINSKY: But I think it's a
22 starting point in the analysis. And then I am
23 comfortable with the adverbs you use, like
24 egregiously wrong.

25 And what I've argued here today is

1 that Nevada versus Hall not only was not
2 egregiously wrong but it was correctly decided.
3 But I would emphasize in conclusion that this
4 case is decided by the law of the case
5 doctrine.

6 Here, in the second time the case was
7 before you, you said you were affirming the
8 judgment by a four to four decision. A four to
9 four split is a decision on the merits.

10 It's argued in the reply brief that we
11 waived this by not raising the brief in
12 opposition. But, if you look at Rule 15.2 from
13 the Supreme Court, and key language that was
14 left out on page 3 of Petitioner's reply brief,
15 it says: Any objection to consideration of a
16 question presented based on what occurred in
17 the proceedings below -- those are the words
18 that are omitted in the reply brief -- if the
19 objection does not go to jurisdiction may be
20 waived and called to the court's attention in
21 the brief in opposition.

22 No one in this litigation, not
23 Petitioner or Respondent, questions anything
24 that went on in the proceedings below. This is
25 entirely a question for this Court, whether to

1 overrule Nevada versus Hall.

2 I would then conclude as I began. In
3 Nevada versus Hall, this Court ended its
4 decision by saying that the real intrusion on
5 states were to keep them from exercising their
6 sovereign power to define their jurisdiction to
7 provide a remedy for their citizens when
8 they're injured by another state. The Court
9 said that would be a diminution of the powers
10 of the people of the United States.

11 Thank you, Your Honor.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Four minutes, Mr. Waxman.

15 REBUTTAL ARGUMENT OF SETH P. WAXMAN
16 ON BEHALF OF THE PETITIONER

17 MR. WAXMAN: Thank you, Mr. Chief
18 Justice.

19 In McCulloch versus Maryland, Chief
20 Justice Marshall announced for the Court the
21 constitutional principle, the atextual
22 constitutional principle of intergovernmental
23 immunity because, as he explained, the power of
24 one sovereign to tax another is the power to
25 destroy.

1 Today, Hall versus Nevada stands as
2 the only thing that states can do to each
3 other, the power to render judgments against
4 states that when they entered the union were
5 effectively bankrupt. They were loaded with
6 Revolutionary War debt.

7 The power to subject sovereign
8 treasuries to judgments of other sovereign's
9 courts is very much the power to destroy. And
10 had anyone thought at the framing that, by
11 forming a more perfect union, that these states
12 burdened with this debt were subjecting
13 themselves to suits in other state courts, the
14 Constitution would never have been adopted.

15 The notion that Chisholm's mistake was
16 not suing Georgia in the state courts of his
17 home state, South Carolina, would have been
18 considered an absurdity.

19 Now, as to stare decisis, this really
20 is a case where Hall is a "survivor of obsolete
21 constitutional thinking."

22 The question was, you know, what has
23 changed? What have we done? Recall that the
24 number of cases this Court has decided in the
25 sovereign immunity area, we're talking, you

1 know, not just Seminole Tribe but Union Gas,
2 Welch, Kiowa, all of those cases, and the
3 reasoning of those cases is the South Carolina
4 Ports Authority case, all long followed this
5 Court's decision.

6 And the basis for this Court's
7 decision in Nevada versus Hall, both of which
8 have been repudiated by this Court's later
9 jurisprudence, are, number one, the Court said
10 there's nothing explicit in the Constitution
11 and we're not going to read a -- an immunity
12 that is not explicit in the Constitution.

13 This Court in at least a dozen cases
14 has subsequently held over and over again that
15 what matters for the protection of sovereign
16 immunity was the framers' understanding at the
17 time of the framing and the postulates that
18 underlie the principles of the consequences of
19 giving up the wild west law of nations for a
20 more perfect union in which states won't
21 retaliate against each other by saying, well,
22 now we're going to -- you know, we're going to
23 allow everybody to sue other states in our
24 court and we're going to do this and we're
25 going to do that.

1 The -- the other thing that is
2 different is, in Nevada versus Hall, this Court
3 identified one interest supported by the
4 principle of state sovereign immunity, and that
5 was the state's fiscs, which, of course, was
6 overwhelmingly important at the time of the
7 framing.

8 But, since then, this Court has said
9 in at least a half a dozen cases that the
10 dignity of states and their self-government
11 autonomy are, as the -- as Justice Thomas
12 explained for the Court in the Federal Maritime
13 Commission case, the paramount interests to be
14 protected by principles of sovereign immunity.

15 Neither of those two principles that
16 have since been elucidated by the Court were
17 referenced or acknowledged in Nevada versus
18 Hall.

19 Thank you, Mr. Chief Justice.

20 CHIEF JUSTICE ROBERTS: Thank you, Mr.
21 Waxman, counsel. The case is submitted.

22 (Whereupon, at 11:01 a.m., the case was
23 submitted.)

24

25

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<p style="text-align: center;">\$</p> <hr/> <p>\$100,000 [2] 23:16 31:8 \$250 [1] 29:17</p> <hr/> <p style="text-align: center;">1</p> <hr/> <p>10 [2] 18:7 24:7 10:03 [2] 1:15 3:2 100 [1] 12:13 11:01 [1] 59:22 13 [1] 45:2 130 [1] 7:18 15.2 [1] 55:12 150 [1] 27:13 17-1299 [1] 3:4 19 [1] 25:11 1961 [1] 25:12 1979 [4] 39:2,25 41:25 45:3 1990s [1] 46:20 1991 [2] 47:3 51:8</p> <hr/> <p style="text-align: center;">2</p> <hr/> <p>200 [2] 5:11 25:7 2017 [1] 46:25 2019 [1] 1:11 27 [1] 2:7 29 [1] 38:5</p> <hr/> <p style="text-align: center;">3</p> <hr/> <p>3 [2] 2:4 55:14 31 [1] 32:6 32 [1] 32:6</p> <hr/> <p style="text-align: center;">4</p> <hr/> <p>4 [1] 14:21 40 [2] 45:18 50:18 40-year-old [1] 38:21 44 [2] 21:21 45:1 45 [1] 42:4 47 [3] 22:8 42:4 45:9 472 [1] 14:22</p> <hr/> <p style="text-align: center;">5</p> <hr/> <p>527 [1] 41:13 56 [1] 2:10</p> <hr/> <p style="text-align: center;">7</p> <hr/> <p>738 [1] 41:13 739 [1] 41:17 740 [1] 41:17</p> <hr/> <p style="text-align: center;">8</p> <hr/> 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