

A TEST OF SOVEREIGNTY:
*FRANCHISE TAX BOARD
OF THE STATE
OF CALIFORNIA
V. GILBERT P. HYATT*

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INTRODUCTION

In *Franchise Tax Board of California v. Hyatt*,¹ the Supreme Court considers whether to overrule *Nevada v. Hall*,² a 1979 Supreme Court decision. *Hall* permitted a State to be haled into the court of another State without its consent. In 2016, an evenly divided Supreme Court affirmed *Hall* 4-4 when faced with the same question, and following a remand to the Nevada Supreme Court, the Court has granted certiorari on this question once again.

This Commentary contends that *Hall* was wrongly decided and should be overruled. The Constitution's ratification did not alter the status of common-law State sovereign immunity, leaving intact not only State sovereign immunity in a State's own court but also a State's immunity to suits in the courts of another State without consent. However, this case, in which the Petitioner has already appeared in the court of another State, is not the appropriate vehicle for overruling *Hall*. State sovereign immunity should be restored at the next possible opportunity, when the issue is properly brought before the Court.

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1. *Franchise Tax Bd. of Cal. v. Hyatt*, 407 P.3d 717 (Nev. 2017), *cert. granted*, 138 S. Ct. 2710 (argued Jan. 9, 2019) (No. 17-1299).

2. 440 U.S. 410 (1979).

I. FACTS & PROCEDURAL HISTORY

In 1993, an auditor for the California Franchise Tax Board (FTB), petitioner in this case, read a newspaper article discussing the considerable patent income of respondent and inventor Gilbert Hyatt.³ Reviewing Hyatt's 1991 return, the auditor found that Hyatt claimed to have lived in California during the first nine months of 1991 before moving to Nevada, where he spent the remainder of that year.⁴ However, the absence of any claimed moving expenses on Hyatt's 1991 return caused the FTB to audit Hyatt's 1991 state income tax return.⁵ The audit included more than one hundred letters and demands for information sent to various individuals and entities, a request for information and documents from the respondent directly, interviews with Hyatt's relatives, and auditor trips to both Hyatt's former California neighborhood and Las Vegas, Nevada.⁶

Although the FTB determined that Hyatt had rented a Nevada apartment, obtained a Nevada driver's license, insurance policy, and bank account, and also registered to vote, the FTB found that Hyatt had not actually moved to Nevada from California until April 1992.⁷ The FTB believed that Hyatt developed this elaborate scheme to avoid California state income tax liability on his patent-licensing income.⁸ It assessed \$4.5 million in taxes, penalties and interest against Hyatt for the 1991 tax year,⁹ as well as \$6 million in taxes and interest for not filing a California return in 1992.¹⁰ Hyatt filed protests with the FTB that would last over a decade.¹¹

While the protests were in progress, Hyatt filed suit against the FTB in Nevada in 1998 for, *inter alia*, invasion of privacy, intentional infliction of emotional distress, fraud, breach of confidential relationship, and negligence.¹² Acknowledging, however, that *Nevada v. Hall* established that a State court can assert jurisdiction over another State without that State's consent,¹³ California filed two

3. *Hyatt*, 407 P.3d at 725 (Nev. 2017).

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* at 726.

8. *See id.* ("FTB further concluded that Hyatt had staged the earlier move to Nevada . . . in an effort to avoid state income tax liability on his patent licensing.")

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 724.

13. *Franchise Tax Bd. of Cal. v. Hyatt*, 136 S. Ct. 1277, 1280 (2016).

petitions seeking immunity from the Nevada lawsuit on other grounds, “arguing that it was entitled to the complete immunity that it enjoyed under California law based on either sovereign immunity, the full faith and credit clause, or comity.”¹⁴ The Nevada Supreme Court found that even though these principles did not entitle the FTB to full immunity, the FTB should receive partial immunity to the same extent that a Nevada government agency would have received.¹⁵ This partial immunity shielded the FTB from the negligence claim but did not cover the suit’s intentional tort claims.¹⁶

In 2003, the Nevada Supreme Court’s petition rulings granting the FTB partial immunity were upheld by the United States Supreme Court.¹⁷ At trial, a Nevada jury awarded Hyatt more than \$380 million in damages for emotional distress, invasion of privacy, fraud, and punitive damages.¹⁸ The Nevada Supreme Court on appeal reduced the FTB’s compensatory damages liability to roughly \$1 million¹⁹ and affirmed the judgment for fraud.²⁰ The court declined to apply a Nevada statutory damages cap for state officials and upheld Hyatt’s intentional infliction of emotional distress (IIED) claim while reversing the IIED damage award.²¹ The court also reversed the punitive damage award, affording the FTB the same protection from punitive damages afforded Nevada government entities.²²

The Supreme Court granted certiorari to review whether *Nevada v. Hall* should be overruled and determine if the Nevada Supreme Court erroneously failed to apply Nevada agency statutory immunities to the Franchise Tax Board.²³ The Court affirmed Nevada’s exercise of jurisdiction over a California state agency 4-4

14. *See id.* at 727. The Nevada Supreme Court has defined comity as “a legal principle whereby a forum state may give effect to the laws and judicial decisions of another state based in part on deference and respect for the other state, but only so long as the other state’s laws are not contrary to the policies of the forum state.”). *Franchise Tax Bd. of Cal. v. Hyatt*, 407 P.3d 717, 729.

15. *Id.*

16. *Id.*

17. *Id.* (citing *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488 (2003)).

18. *Id.* at 728.

19. *See* Brief for Respondent at 7, *Franchise Tax Bd. of Cal. v. Hyatt*, 407 P.3d 717 (Nev. 2017), *cert. granted*, 138 S. Ct. 2710 (Nov. 15, 2018) (No. 17-1299) [hereinafter Brief for Respondent] (“[The Nevada Supreme Court] reduced the Board’s liability for compensatory damages to \$1 million on Hyatt’s fraud claim and remanded the case for a retrial on damages with respect to Hyatt’s intentional infliction of emotional distress claim.”).

20. *Id.*

21. *Id.* at 8–9.

22. *Id.* at 9.

23. *Franchise Tax Bd. of Cal. v. Hyatt*, 136 S. Ct. 1277, 1280 (2016).

and found that the Full Faith and Credit Clause²⁴ barred Nevada from awarding damages against a California agency greater than could be awarded against a Nevada agency in similar circumstances under Nevada law.²⁵

On remand, the Nevada Supreme Court directed the trial court to apply the Nevada government agency statutory damage cap of \$50,000 to the FTB.²⁶ Finally, two years after its 4-4 affirmance of *Nevada v. Hall*, the Supreme Court granted certiorari on the same question in June 2018.²⁷

II. LEGAL BACKGROUND

The question of a State's sovereign immunity in the courts of its fellow States of the union is currently governed by *Nevada v. Hall*, a 1979 decision affirmed 4-4 by the Supreme Court in 2016.²⁸ In *Hall*, a University of Nevada employee collided with a vehicle containing California residents on a California highway.²⁹ The injured California residents sued, *inter alia*, the State of Nevada in California court.³⁰ On appeal, the California Supreme Court found California law to permit suit of the State of Nevada in California court.³¹ After a California jury awarded the California residents over \$1 million in damages and the California Supreme Court declined review,³² the Supreme Court granted certiorari³³ to address for the first time "whether a State may claim immunity from suit in the courts of another State."³⁴ The Court determined there was no such immunity.³⁵

Nevada did not contend that the California Supreme Court had incorrectly interpreted California law.³⁶ Instead, Nevada argued that the Constitution implicitly required States to abide by the doctrine of sovereign immunity at the time of the Constitution's ratification.³⁷ The

24. U.S. CONST. art. IV, §1.

25. Franchise Tax Bd. of Cal. v. Hyatt, 136 S. Ct. at 1280.

26. Brief for Petitioner at 10, Franchise Tax Bd. of Cal. v. Hyatt, 407 P.3d 717 (Nev. 2017), *cert. granted*, 138 S. Ct. 2710 (Sept. 11, 2018) (No. 17-1299) [hereinafter Brief for Petitioner].

27. Franchise Tax Bd. of Cal. v. Hyatt, 138 S. Ct. 2710.

28. Franchise Tax Bd. of Cal. v. Hyatt, 136 S. Ct. at 1280.

29. *Nevada v. Hall*, 440 U.S. 410, 411 (1979).

30. *Id.* at 411–12.

31. *Id.*

32. *Id.* at 413.

33. *Nevada v. Hall*, 436 U.S. 925.

34. 440 U.S. at 414.

35. *See id.* at 426.

36. *Id.* at 418.

37. *Id.*

idea that a sovereign could not be sued without consenting, Nevada claimed, was commonly understood.³⁸ In deciding *Hall*, the Court examined both the “source and scope” of sovereign immunity doctrine, the doctrine’s impact on the Constitution, the Full Faith and Credit Clause, and constitutional limitations of sovereignty.³⁹

A. *The Sovereign Immunity Doctrine*

The sovereign immunity doctrine combines two concepts, “one applicable to suits in the sovereign’s own courts and the other to suits in the courts of another sovereign.”⁴⁰ The former, originating from the feudal system, has stood for centuries.⁴¹ Once the American colonies successfully rebelled against the king of England, they became sovereigns, thus inheriting sovereign immunity.⁴² Though United States law has not maintained the British “fiction that the King could do no wrong,” it has maintained the concept “that immunity from suit is an attribute of sovereignty.”⁴³ The latter concept, immunity in the courts of another sovereign, is less clear.

The Constitution’s drafters did not discuss whether comity would shield a State from being haled into the court of a fellow State without consent.⁴⁴ Although this may have been because the Framers assumed that comity would prevent the States from attempting to hale one another into court,⁴⁵ that assumption has not proven true. Instead, the States were “vitally interested” in potential liability in the new federal courts.⁴⁶ Thus, the Supreme Court’s 1793 finding in *Chisholm v. Georgia*⁴⁷ that States could be sued in federal court swiftly led to the passage of the Eleventh Amendment, limiting federal court power to hear suits against the States.⁴⁸ Yet the Eleventh

38. *Id.* at 414.

39. *Id.*

40. *Id.*

41. *Id.*

42. Brief of Indiana and 43 Other States as Amici Curiae in Support of Petitioner at 3, *Franchise Tax Bd. of Cal. v. Hyatt*, 138 S. Ct. 2710 (Sept. 18, 2018) (No. 17-1299), 2018 WL 4583704 at *3 [hereinafter Brief of Indiana].

43. *Nevada v. Hall*, 440 U.S. at 421–22.

44. *Id.* at 419.

45. *Id.*

46. *Id.* at 418.

47. *See* 2 U.S. 419, 452 (1793) (“[I]f sovereignty be an exemption from suit in any other than the sovereign’s own Courts, it follows that when a State, by adopting the Constitution, has agreed to be amenable to the judicial power of the United States, she has, in that respect, given up her right of sovereignty.”).

48. *Nevada v. Hall*, 440 U.S. at 420.

Amendment does not grant the federal judiciary the power to enforce interstate comity.⁴⁹

B. The Full Faith and Credit Clause

The Full Faith and Credit Clause “require[s] each State to give effect to official acts of other States.”⁵⁰ It sometimes requires one State’s court to apply another State’s statutory law, but not where doing so would violate the former’s “own legitimate public policy.”⁵¹ The *Hall* court found that denying California jurisdiction “would be obnoxious to [California’s] statutorily based policies of jurisdiction over nonresident motorists and full recovery,” declining to interpret the Full Faith and Credit Clause as requiring such a verdict.⁵²

C. Constitutional Limitations on Sovereignty

Relying on the inability of the States of the Union to tax each other’s goods, bar entry from one another and deny extradition, as well as the entitlement of each State’s citizens to the privileges and immunities of the other States, the *Hall* Court reasoned that the United States “is not a union of 50 wholly independent sovereigns.”⁵³ And while the Court noted its past presumption of States’ comity toward one another, it recognized that a State’s assertion of jurisdiction over another State clearly contradicted that presumption.⁵⁴

Acknowledging the potential wisdom of a system in which States give each other immunity, the *Hall* Court declined to infer such a requirement from the Constitution.⁵⁵ In fact, the Court held that denying California the ability to enforce its own policy would be the true intrusion on State sovereignty.

49. *Id.* at 421.

50. *Id.*

51. *Id.* at 421–22.

52. *Id.* at 424.

53. *Id.* at 425.

54. *Id.* at 425–26.

55. *Id.*

III. HOLDING

The Supreme Court’s 4-4 affirmation of *Nevada v. Hall*’s State sovereign immunity precedent prevented the Supreme Court of Nevada from having to directly reconsider this possible bar to California liability in Nevada court. On remand of *Franchise Tax Board of California v. Hyatt*, the Supreme Court of Nevada referred to *Nevada v. Hall*’s holding that a State “can open the doors of its courts to a private citizen’s lawsuit against another State . . . without the other State’s consent.”⁵⁶ Observing that Nevada would “consider” providing immunity to States brought into Nevada court, the Court commented that Nevada was not required to do so.⁵⁷

With *Hall*’s precedent still firmly in place, the Nevada court instead addressed more narrow questions of State sovereign immunity. Examination of these questions would have been obviated had the Supreme Court overruled *Hall*. Similarly, the Nevada Supreme Court’s 2014 *Hyatt* opinion (preceding the Supreme Court’s 4-4 *Hall* affirmation) examined the narrower issue of whether Nevada should extend its statutory discretionary function immunity to California.⁵⁸

IV. ARGUMENTS

A. *Petitioner’s Arguments*

The FTB contends that *Hall* was wrongly decided for two reasons.⁵⁹ It first argues that since *Hall*, the Supreme Court has acknowledged that the *Hall* majority was wrong to seek Constitutional support for interstate sovereign immunity.⁶⁰ Rather, the Court should have examined whether States were immune to suits in the courts of other States of the Union *prior* to the Constitution’s ratification.⁶¹ Petitioner relies on *Alden v. Maine*⁶² in asserting that “States continue to enjoy the immunity they possessed before the

56. *Franchise Tax Bd. of Cal. v. Hyatt*, 407 P.3d 717, 724 (Nev. 2017) (internal quotation marks omitted) (quoting *Franchise Tax Bd. of Cal. v. Hyatt*, 136 S. Ct. 1277, 1279–80) (2016).

57. *Id.* at 729.

58. *See generally* *Franchise Tax Bd. of Cal. v. Hyatt*, 335 P.3d 125 (Nev. 2014).

59. Brief for Petitioner, *supra* note 26, at 10.

60. *Id.*

61. *Id.* at 10–11.

62. 527 U.S. 706, 713 (1999).

ratification of the Constitution, unless the Constitution abrogated that immunity.”⁶³

Petitioner asserts that the historical record clearly shows that States enjoyed immunity from one another’s courts prior to the Constitution’s ratification, and the Framers did not intend to abrogate that immunity.⁶⁴ The outcry over *Chisholm*’s allowance of suits against States in federal courts leads to the logical conclusion that States also assumed they could not be sued by one another, as the prospect of trial in a neutral setting would have been far *less* threatening in comparison.⁶⁵

Petitioner argues that *The Schooner Exch. v. McFaddon*,⁶⁶ an 1812 case holding “[the fact] that a forum nation may choose whether to recognize another nation’s sovereign immunity in its courts—says nothing about whether States in a federal union are required to recognize each other’s sovereign immunity in their courts,” highlights the absence of a governing authority capable of forcing nations to provide each other sovereign immunity.⁶⁷ This is not the case regarding disputes between member States of the United States, Petitioner contends, as the Constitution endowed the Supreme Court with the power to force members of the United States to respect one another’s sovereign immunity.⁶⁸

Second, Petitioner argues that *Hall* “gave little consideration to the constitutional values that are protected by sovereign immunity.”⁶⁹ These include States’ dignitary interests and State citizens’ interests in self-government.⁷⁰ Petitioner points to the present case, still in litigation more than twenty years after its 1998 filing⁷¹ and one in which a Nevada court has intruded on “California’s conduct of one of

63. *Id.* at 17.

64. See Brief for Petitioner, *supra* note 26, at 11 (“The historical record shows beyond doubt that the States *did* enjoy immunity in each other’s courts in the pre-ratification era and that the Framers had no intention of abrogating that immunity.”).

65. See *id.* (“That understanding was confirmed by the outraged reaction to this Court’s decision in *Chisholm v. Georgia*, allowing States to be sued in the neutral federal courts—a reaction that would have made little sense had anyone thought States could be sued in the potentially more hostile courts of other States.”) (citation omitted).

66. 11 U.S. 116 (1812).

67. Brief for Petitioner, *supra* note 26, at 11.

68. *Id.* at 11–12.

69. *Id.* at 12.

70. *Id.*

71. *Franchise Tax Bd. of Cal. v. Hyatt*, 407 P.3d 717, 726 (Nev. 2017).

its core sovereign functions,” as a prime example of *Hall*’s abuse of these values.⁷²

Petitioner also argues that there are multiple reasons why *stare decisis* should not control here.⁷³ First, *Hall* is not in line with multiple post-*Hall* Supreme Court State sovereign immunity holdings.⁷⁴ Petitioner points to the Court’s statement in *Planned Parenthood v. Casey*, which advocates the overturn of precedent that has been left “a mere survivor of obsolete constitutional thinking.”⁷⁵ In 1993 the Court stated that Eleventh Amendment “accords the States the respect owed them as members of the federation,”⁷⁶ and in 1997 the Court observed that sovereign immunity protects “the dignity and respect afforded a State.”⁷⁷ Therefore, petitioner believes *Hall* to be such a “mere survivor.”⁷⁸

Hall was an outlier even in 1979, permitting States to be haled into each other’s courts without consent despite their immunity in their own courts and in federal court.⁷⁹ Since *Hall*, the Court has expanded, rather than contracted, State sovereign immunity, while at the same time leaving States vulnerable to court systems more likely to be hostile: those of other States.⁸⁰ Thus, Petitioner contends, overruling *Hall* will not threaten other precedents.⁸¹

Petitioner’s second argument against *stare decisis* is that *Hall* has not led to reliance by subsequent parties.⁸² As, practically speaking, only the Supreme Court can overturn Constitutional precedent,⁸³

72. See Brief for Petitioner, *supra* note 26, at 12 (“This suit—in which a California state agency has been subjected to astonishing burdens for two decades, and in which a Nevada judge and jury have passed judgment on California’s conduct of one of its core sovereign functions—exemplifies why *Hall* cannot be squared with the values the Court has recognized in later decisions.”).

73. *Id.*

74. See *id.* (“*Hall* is a poorly reasoned decision that is inconsistent with this Court’s subsequent precedents in numerous respects.”).

75. *Id.* at 40 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 857 (1992)).

76. *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993).

77. *Idaho v. Couer d’Alene Tribe of Idaho*, 521 U.S. 261, 268 (1997).

78. See Brief for Petitioner, *supra* note 26, at 40 (“*Hall* is also inconsistent with the Court’s recognition in more recent decisions of the values underlying the doctrine of sovereign immunity.”).

79. *Id.* at 40–41.

80. *Id.*

81. *Id.* at 43.

82. *Id.*

83. See *id.* (“In such cases, only the Court can correct the error of a prior decision, because ‘correction through legislative action is practically impossible.’”) (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)).

stare decisis is weakest when considering the Court's Constitutional interpretation.⁸⁴ Here, no parties have taken specific action assuming that *Hall's* precedent will stand,⁸⁵ lessening the potential impact of overturning it.

Finally, Petitioner points to *Hall's* harms, using the present case as an example.⁸⁶ Sovereign immunity should protect the dignity of States, particularly regarding taxation.⁸⁷ Yet here, ten years of litigation resulted in a State jury awarding a fellow State resident \$388 million in damages at the expense of the taxpayers of another State.⁸⁸ Any damage assessed against a State directly diminishes State spending that would benefit its taxpayers.⁸⁹ *Hyatt* has also done the State of California the indignity of having its conduct reviewed not just by the judiciary of another State, but by a jury of that State's citizens.⁹⁰ Petitioner also points to the fact that this suit is not even the only one of its type, as California now faces suit in the State of Washington as well.⁹¹ In fact, even Nevada, the very State that exercised jurisdiction over Petitioner, now seeks for *Hall* to be overruled.⁹²

B. Respondent's Arguments

Respondent argues that certiorari should be dismissed for two reasons. First, Respondent contends that case doctrine controls.⁹³ The evenly divided Court affirmation of *Hall* when the question was first presented constitutes a judgment on the merits.⁹⁴ Conceding that an evenly divided court has no precedential value, Respondent says that it is nonetheless binding on the parties here.⁹⁵

84. *Id.*

85. *See id.* at 43–44 (“Here, by contrast, no parties ‘have acted in conformance with existing legal rules in order to conduct transactions,’ or have otherwise conducted their lives in a manner that assumes the continuing vitality of a constitutional precedent.”) (quoting *Citizens United v. FEC*, 558 U.S. 310, 365 (2010)) (citation omitted)

86. *Id.* at 44.

87. *Id.* at 45.

88. *Id.* at 44.

89. *See id.* at 45 (“Such damages awards necessarily crowd out ‘other important needs and worthwhile ends’ that California’s public fisc must fund.”) (quoting *Alden v. Maine*, 527 U.S. 706, 751 (1999)).

90. Brief for Petitioner, *supra* note 26, at 45.

91. *Id.*

92. *See* Brief of Indiana, *supra* note 43 (listing Nevada as one of the Filing Parties).

93. Brief for Respondent, *supra* note 19, at 12.

94. *Id.* at 13.

95. *Id.* at 18.

Chief Justice John Marshall upheld this principle in *Etting v. United States*,⁹⁶ and it appeared again in *Durant v. Essex Co.*,⁹⁷ in which Durant sought a rehearing after the Supreme Court's tie vote affirmed the Circuit Court's ruling.⁹⁸ The Court held that, where a court is equally divided on a question of whether to "set aside or modify an existing judgment or order, the division operates as a denial of the application, and the judgment, or order, stands in full force"⁹⁹ Respondent also points to *Hertz v. Woodman*¹⁰⁰ and *Neil v. Biggers*¹⁰¹ as affirming this principle.¹⁰²

The law of case doctrine—that a court's ruling in a case governs that case's subsequent stages—allows parties to rely on a court's ruling.¹⁰³ Here, the Nevada Supreme Court has relied on the Supreme Court's prior affirmation of *Hall* in finding that the FTB could indeed be haled into Nevada court.¹⁰⁴ Hyatt himself has relied on the Court's prior decisions in this case, which has cost both parties "an enormous amount of time and money."¹⁰⁵ Overruling *Hall* would be particularly unjust, Respondent argues, given that Petitioner chose not to challenge *Hall* in the initial litigation.¹⁰⁶ Departing from case doctrine should be done sparingly, such as where the initial decision was clearly erroneous.¹⁰⁷ Here, *Hall* is certainly not clearly erroneous.¹⁰⁸

Second, Respondent argues that Petitioner's failure to initially raise this question constituted a waiver of its right to do so.¹⁰⁹ Respondent highlights that the FTB did not argue that *Hall* should be overruled when this case first reached the Supreme Court.¹¹⁰ Petitioner only raised this question following the Nevada Supreme Court's affirmance of "key aspects of liability and damages" on remand.¹¹¹ According to Respondent, "[t]he law is clear that if an

96. 24 U.S. 59, 78 (1826).

97. 74 U.S. 107 (1869).

98. *Id.* at 109 (1869).

99. *Id.* at 110.

100. 218 U.S. 205 (1910).

101. 409 U.S. 188 (1972).

102. Brief for Respondent, *supra* note 19, at 20.

103. *Id.* at 21.

104. *Id.* at 21–22.

105. *Id.* at 24.

106. *Id.*

107. *Id.* (citing *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988)).

108. *Id.* at 24.

109. *Id.* at 13–14.

110. *Id.* at 11.

111. *Id.* at 12.

argument is not raised in a petition for certiorari, it is deemed waived.”¹¹² Even State sovereign immunity can be waived.¹¹³

Respondent next lists several reasons to affirm *Hall*, first noting the presumption against overruling precedent.¹¹⁴ As the Court observed in 2006, *stare decisis* “avoids the instability and unfairness that accompany disruption of settled legal expectations.”¹¹⁵ The Court should only depart from *stare decisis* when there is a “compelling justification,”¹¹⁶ which the FTB has failed to present here.

Second, Respondent states that *Hall* protects the States’ Tenth Amendment power to protect their citizens.¹¹⁷ A State’s desire to provide a remedy for its injured citizens is legitimate.¹¹⁸ Here, a Nevada jury clearly found the FTB’s conduct against Hyatt outrageous, as it awarded nearly \$400 million in damages.¹¹⁹ Although Petitioner speaks of the dignity interest of States, it argues for the indignity of prohibiting States from protecting their own citizens.¹²⁰ No State is as interested as Nevada in protecting Nevada citizens. Upholding *Hall* would “affirm[] the dignity and autonomy of a State to be able to determine the jurisdiction of its courts”¹²¹

Hall has not resulted in frequent suits against out-of-state defendants, and multiple factors already limit liability where such suits occur. Respondents dismiss Petitioner’s claimed “harms” of *Hall* as “a relative handful of suits.”¹²² It was rare for States to be sued in the court of another State pre-*Hall* and remains rare today.¹²³ Furthermore, Respondent argues that Petitioner has made no showing that the few suits that have occurred lacked merit.¹²⁴ And even when

112. *Id.* at 26 (citing *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 75 n.13 (1996); *Tenn. Student Ass’n Corp. v. Hood*, 541 U.S. 440, 456 (2004) (Thomas, J., dissenting)).

113. *Id.* at 27 (citing *Clark v. Barnard*, 18 U.S. 436, 447 (1883)).

114. *Id.* at 28.

115. *Id.* (quoting *Randall v. Sorrell*, 548 U.S. 230, 248 (2006)).

116. *Id.* at 29 (quoting *Hilton v. S.C. Pub. Rys. Comm’n*, 502 U.S. 197, 202 (1991)).

117. *Id.*

118. *Id.* at 30 (citing *Rosenbloom v. Metromedia*, 403 U.S. 29, 64 (1971) (Harlan, J., dissenting)).

119. *Id.*

120. *See id.* (“The Board speaks of the ‘dignity’ interest of states in not being sued . . . but fails to recognize the dignity interest of a state in being able as a sovereign to determine the jurisdiction of its own courts and to protect its own citizens from harm.”) (citing Brief for Petitioner, *supra* note 26, at 38).

121. *Id.* at 32.

122. *Id.* at 33.

123. *Id.* at 33.

124. *Id.* at 49.

such suits occur, the Full Faith and Credit Clause limits liability to the amount permitted against the forum State by its own laws.¹²⁵ Although not required, comity may also play a role. Here, the Nevada Supreme Court recognized comity in prohibiting punitive damages against the out-of-state Petitioner.¹²⁶ And finally, States desiring to not be vulnerable to suits in one another's courts are not prohibited from freely entering into mutual immunity agreements.¹²⁷

Third, no new historical evidence has been uncovered post-*Hall* indicating that the *Hall* court was wrong. Facing similar facts, the *Hall* court found no historical support for State immunity in the court of another sovereign, relying on *Schooner v. McFaddon* in holding that sovereign immunity was not meant to extend so far.¹²⁸ In the absence of such a special justification, *Hall* should stand.¹²⁹ As *Schooner Exchange* “established the power of a state . . . to provide a remedy to its injured citizens against out-of-staters,” the Court was correct to rely on it despite Petitioner's objections that *Schooner Exchange* dealt not with State immunity but that of nations.¹³⁰

The Court correctly based *Hall* on three premises: the pre-Constitution States were independent sovereigns immune in each other's courts, sovereign nations were only immune in the courts of another nation with the consent of that nation, and the Constitution did not disturb that balance. Respondent cites the amicus brief of Professors Baude and Sachs, arguing that “[t]he Constitution left sister-state immunity alone.”¹³¹ Respondent also cites Petitioner's brief, which states that “[n]o State could be required to respect another's sovereign immunity” prior to the Constitution's ratification.¹³² Petitioner's reliance on *Alden v. Maine* in promulgating State sovereign immunity is an improperly broad extension.¹³³ *Alden v. Maine* shows that States may elect to be immune in their own

125. *Id.* at 34 (citing *Franchise Tax Bd. of Cal. v. Hyatt*, 136 S. Ct. 1277, 1281 (2016)).

126. *Id.*

127. *Id.* at 35 (citing *Nevada v. Hall*, 440 U.S. 410, 416 (1979)).

128. *Id.* at 37–38.

129. *See id.* at 36 (arguing that *Nevada v. Hall* was decided on the original understanding and a careful analysis of historical precedent).

130. *Id.* at 38–39.

131. *Id.* at 40 (citing Brief of Professors William Baude and Stephen E. Sachs as Amici Curiae in Support of Neither Party at 6, *Franchise Tax Bd. of Cal. v. Hyatt*, 138 S. Ct. 2710 (Sept. 18, 2018) (No. 17-1299), 2018 WL 4583702 at *6 [hereinafter Sachs Brief]).

132. Brief for Petitioner, *supra* note 26, at 31–32.

133. *See* Brief for Respondent, *supra* note 19, at 46.

courts, and *Nevada v. Hall* adds that States may elect to permit suit of other States in their own courts.¹³⁴

V. ANALYSIS

A. *Sister-state Sovereign Immunity, provided for in the common law, was left unaltered by the Constitution*

Prior to ratifying the Constitution, the States were sovereigns in every respect, and could not be forced into the courts of one another absent consent. The States today should retain sovereign immunity within their own courts. Petitioner asserts that States today have the same degree of sovereign immunity as they did pre-Constitutional ratification,¹³⁵ and surprisingly the Respondent concedes that the Constitution “left sister-state immunity alone.”¹³⁶ The States’ amici brief cites Alexander Hamilton’s observation: “‘there is no colour to pretend that the State governments would, by the adoption of [the Constitution], be divested’ of their immunity.”¹³⁷ Therefore, assuming the Constitution did indeed leave sister-state immunity untouched, States today should enjoy immunity in one another’s courts to the same extent that they did prior to joining the Union. The pre-Constitution status of inter-state immunity must therefore be dispositive.

Professors Baude and Sachs believe that *Hall* was correct in finding no constitutional sister-state immunity.¹³⁸ A guarantee of sister-state immunity is not found in the Constitution’s plain language.¹³⁹ But States retain every power “not delegated to the United States by the Constitution, nor prohibited by it to the States.”¹⁴⁰ The federal government is not empowered to abrogate sister-state immunity, which still exists in the common law today as it did prior to the Constitution.

134. *Id.* at 44.

135. See Brief for Petitioner, *supra* note 26, at 10.

136. See Brief for Respondent, *supra* note 19, at 40 (quoting Sachs Brief, *supra* note 131, at 6) (internal quotation marks omitted).

137. Brief of Indiana, *supra* note 43, at 5 (quoting THE FEDERALIST NO. 81 (Alexander Hamilton)).

138. Sachs Brief, *supra* note 131, at 2.

139. *Id.*

140. *Id.* at 3 (quoting U.S. CONST. amend. X).

B. When States choose to allow suit of another State without that State's consent, any judgment rendered is unenforceable

As a common-law provision, States are powerless to *force* other States to recognize their immunity.¹⁴¹ California cannot control which suits Nevada decides to bring in Nevada court. California could, of course, consent to be sued in Nevada, but if Nevada decides to proceed without that consent, California is powerless to prevent it from doing so. But a Nevada court's judgment against California may be unenforceable absent the respect of a federal court.¹⁴² Similarly, if the United States were to depart from international law in its assertion of jurisdiction, there would be no guarantee that foreign nations would recognize a resulting judgment.¹⁴³ This existing protection of sister-state immunity may be the reason that the Constitution did not address the issue.¹⁴⁴

Although the Full Faith and Credit Clause requires States to recognize judgments of other State courts, the *Hall* Court's invocation of the clause was limited to judgments "issued with 'jurisdiction over the parties.'"¹⁴⁵ Were the Court to uphold sister-state sovereign immunity, the Full Faith and Credit Clause would be inapplicable. Courts today decline to recognize State court judgments where the court in question lacked the power to render it.¹⁴⁶

C. Due to Respondent's voluntary appearance, Hall should be overturned at the next opportunity

Respondent had multiple alternative courses of action available to it in this proceeding. It could have stood its ground and refused to appear in Nevada court. Had Nevada proceeded to render a judgment

141. *See id.* at 16 ("Because sovereign immunity is a rule of common law and the law of nations, a State can abrogate it within its own courts, just as it can abrogate the common-law rules of coverture, burglary, or respondeat superior.").

142. *See id.* ("As nearly a century of history suggests, the original Constitution did not force state or federal courts to respect the judgment of a court which lacked power over the defendant under traditional jurisdictional principles. Sister-state immunity was just such a principle. Thus, a State which tries to abrogate that immunity may find its judgments without effect in other American courts.").

143. *See id.* at 18 ("[B]ut if the United States departs from accepted international practice, it cannot guarantee that its judgments will continue to be recognized abroad.").

144. *Id.* at 17.

145. *Id.* at 19 (quoting *Nevada v. Hall*, 440 U.S. 410, 421 (1979)).

146. *Id.* at 21 (citing *Thomas v. Wash. Gas Light Co.*, 448 U.S. 261, 282–83 (1980) (plurality opinion); *V.L. v. E.L.*, 136 S. Ct. 1017, 1020 (2016); *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 240–41 (1998)).

against the FTB, the FTB could then have chosen to default.¹⁴⁷ Alternatively, Respondent “could have filed an original action against Nevada” in the Supreme Court to obtain a declaration of its entitlement to immunity in the courts of Nevada.¹⁴⁸ As Professors Baude and Sachs note, the State of Nevada’s participation in an amicus brief asking for *Hall* to be overruled may indicate that it would consent to such an action.¹⁴⁹

However, the Court is confronted with a challenge to *Hall* in which the aggrieved State has already chosen to appear in sister-state court. As sister-state immunity consists of an immunity to suit without *consent* of the State haled into court, Respondent appears to have submitted to Nevada’s exercise of jurisdiction, failing to avail itself of the protection of sister-state immunity.

Due to the above reasons, the Court should not overrule *Hall* here, but should do so at the earliest appropriate opportunity to preserve an aspect of State sovereign immunity that existed before the Constitution and was not abrogated by it. In dismissing the writ as improvidently granted, the Court should signal similarly situated parties that it is prepared to overturn *Hall*, emboldening States in future actions to refuse to appear in a sister-state’s court. California’s apparent waiver of its immunity by appearing in Nevada court is logical, as it appeared with no expectation that its sovereign immunity would be respected in the era of the wrongly decided *Hall*. Were *Hall* to be overruled a similarly situated Respondent would indeed waive its right to suit in the State court of another without its consent by appearing at the proceeding. Although dismissing the writ of certiorari as improvidently granted will prolong the period in which States are wrongly forced into the courts of peers without their consent, that period should be short given the overwhelming number of States that joined together in filing an amicus brief in support of overruling *Hall*. This question will surely reach the Court again swiftly.

147. *See id.* at 23 (“States have a number of tools for resisting adverse judgments. The most obvious strategy is simply to default, as Georgia did in *Chisholm*, and to resist enforcement later on.”) (citation omitted).

148. *Id.* at 24.

149. *Id.*

D. Stare decisis is not compelling here

Although Respondent is correct in contending that the current volume of cases that offend sister-state sovereign immunity is not practically unworkable, that is not the bar that must be met here. It is sufficient that a significant State right that endured the first two hundred years of United States legal history intact was wrongly taken away in 1979. Even a single case forcing a sovereign State into the court of a peer is too many. Respondent points to the “almost 40-year-old precedent” of *Hall*.¹⁵⁰ Yet this period pales in comparison to the much longer precedent period during which State sovereign immunity was left untouched. Respondent does not see this deprivation of States’ rights as a compelling reason for overruling *Hall*. Respondent also fails to explain what instability and unfairness would be caused by doing so, while Petitioner has highlighted the lack of reliance interests present here. Petitioner has also pointed to the anomalous nature of *Hall*. *Hall* created a system in which States are immune both in their own courts and in federal courts but remain vulnerable in the courts most likely to be hostile to them: those of their peers.¹⁵¹ Overruling *Hall* will create a more uniform system.

CONCLUSION

Franchise Tax Board does not present the ideal set of facts on which to overrule *Hall*, as Respondent appears to have waived its immunity by appearing in Nevada court. That does not change the fact that *Hall* wrongly stripped States of an important aspect of State sovereign immunity provided in common law and unaltered by the Constitution. In doing so, *Hall* perpetrated an indignity on the United States’ member States and changed an aspect of the legal landscape that had stood for two centuries. That right should be returned at the next opportunity, when a State properly asks a federal court to enforce its common-law immunity from the courts of a sister State. Sovereigns should enjoy immunity not only in their own courts, but also in the courts of their peers.

150. Brief for Respondent, *supra* note 19, at 28.

151. Brief for Petitioner, *supra* note 26, at 40.