No. 17-1299

IN THE

# Supreme Court of the United States

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA
*Petitioner*,

v.

GILBERT P. HYATT,
*Respondent*.

**On Writ of Certiorari to the Supreme Court of Nevada**

**BRIEF OF INDIANA AND 43 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER**

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## QUESTION PRESENTED

Whether *Nevada v. Hall*, 440 U.S. 410 (1979), which permits a sovereign State to be haled into another State's courts without its consent, should be overruled.

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## INTEREST OF THE *AMICI* STATES

The States of Indiana, Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming respectfully submit this brief as *amici curiae* in support of petitioner. The *amici* States have a strong interest in protecting their sovereign immunity by overturning *Nevada v. Hall,* 440 U.S. 410 (1979). *Hall* is—and always has been—irreconcilable with the Court's larger body of sovereign immunity decisions, and the *amici* States urge this Court to overturn it.

## SUMMARY OF THE ARGUMENT

Forty years ago in *Nevada v. Hall*, 440 U.S. 410 (1979), this Court held that States could be subject to suit in the courts of their sister States. Petitioners along with 44 *amici* States now urge this Court to overrule *Hall*.

*Nevada v. Hall* was wrongly decided because state sovereign immunity is not limited to the text of the Eleventh Amendment. At common law, sovereign immunity, even in the courts of another sovereign, was assumed. The States did not relinquish that immunity when they ratified the Constitution. Instead, the framers understood the Constitution to preserve the traditional sovereign immunity of the States. The Eleventh Amendment was enacted not to outline the boundaries of state sovereign immunity, but to restore its common law understanding. *Hall*'s holding that state sovereign immunity is not protected in the courts of other States contravenes both this history and the Court's precedents.

Moreover, the numerous suits brought against States in other States' courts in the decades since *Hall* are an insult to state sovereignty. This insult is particularly harmful in the tax context, which goes to the core of state police power. *Hall* undermines the administrative review processes that States have set up to protect their sovereignty with respect to this important state function.

Finally, *stare decisis* should give way to overruling *Hall*. Not only was *Hall* wrongly decided, but no reliance interests weigh against reconsideration, as private plaintiffs do not structure their decisions or interests around the vulnerability of States to lawsuits in the courts of other States.

## ARGUMENT

### I. *Nevada v. Hall* Was Wrongly Decided

Nearly forty years ago, in *Nevada v. Hall*, 440 U.S. 410, 426–27 (1979), the Court held that the Constitution does not bar lawsuits against a State in the courts of another State. In doing so, it relied on the proposition that nothing "in Art. III authorizing the judicial power of the United States, or in the Eleventh

Amendment limitation on that power, provide any basis, explicit or implicit, for this Court to impose limits on the powers of" state courts to exercise jurisdiction over their sister States. *Id.* at 421. But that holding contravenes both the history of the Eleventh Amendment and this Court's subsequent decisions on state sovereign immunity.

### A. State sovereign immunity is not limited to the text of the Eleventh Amendment

The Court has long held that "the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment." *Alden v. Maine*, 527 U.S. 706, 713 (1999). On the contrary, "the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments." *Id.* Sovereign immunity predates the Eleventh Amendment and, indeed, the Constitution itself.

1. Common law sovereign immunity originated in feudal England: "no lord could be sued by a vassal in his own court, but each petty lord was subject to suit in the courts of a higher lord." *Nevada v. Hall*, 440 U.S. 410, 414–15 (1979). Only the king was completely immune from suit because "there was no higher court in which he could be sued." *Id.* at 415. When the American colonies rebelled against the king, each State became a sovereign in its own right, and thus inherited sovereign immunity. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996).

At common law and at the time of the founding, a sovereign's immunity from suit, even in the courts of another sovereign, was assumed. William Blackstone explained that "no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him." 1 William Blackstone, Commentaries *235. Similarly, the leading treatise on international law at the time stated that "[o]ne sovereign cannot make himself the judge of the conduct of another." Emmerich de Vattel, The Law of Nations or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns 155 (Book II, Ch. 4, § 55) (J. Chitty ed., 1883).

Such was the prevailing understanding of sovereign immunity under the Articles of Confederation, as demonstrated by the decision of the Pennsylvania Court of Common Pleas in *Nathan v. Virginia*, 1 U.S. (1 Dall.) 77 (Pa. Ct. Com. Pl. 1781). There, a citizen of Pennsylvania sued the Commonwealth of Virginia in Pennsylvania state court over property located in Philadelphia Harbor. *Id.* at 77–78. The Attorney General of Pennsylvania weighed in, arguing "[t]hat a sovereign, when in a foreign country, is always considered by civilized nations, as exempt from its jurisdiction, privileged from arrests, and not subject to its laws." *Id.* at 78. The Virginia delegates to the Confederation Congress, led by James Madison, similarly argued that the case should be dismissed because it required Virginia to "abandon its Sovereignty by descending to answer before the Tribunal of another Power." James Madison, Letter from Virginia Delegates to Supreme Executive Council of Pennsylvania

(July 9, 1781), *reprinted in* 3 The Papers of James Madison 184 (William T. Hutchinson et al. eds., 1963). The court agreed and held that Virginia was immune from suit. *Nathan,* 1 U.S. (1 Dall.) at 80.

2. The States did not relinquish their sovereign status when they ratified the Constitution. "The leading advocates of the Constitution assured the people in no uncertain terms that the Constitution would not strip the States of sovereign immunity." *Alden*, 527 U.S. at 716. Writing in support of ratification, Alexander Hamilton observed that "[i]t is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without its consent*." The Federalist No. 81 (Alexander Hamilton). He argued that "there is no colour to pretend that the State governments would, by the adoption of [the Constitution], be divested" of their immunity and concluded that "to ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the State governments, a power which would involve such a consequence, would be altogether forced and unwarrantable." *Id.*

Even those Federalists that believed Article III abrogated state sovereign immunity in federal court did not go so far as to conclude that States could be sued in the courts of other States. Edmund Pendleton argued before the Virginia Convention that "[t]he impossibility of calling a sovereign state before the jurisdiction of another sovereign state[] shows the propriety and necessity of vesting [a federal] tribunal with the decision of controversies to which as state shall be a party." 3 Elliot's Debates 549.

Such episodes establish that "the Constitution was understood, in light of its history and structure, to preserve the States' traditional immunity from private suits." *Alden*, 527 U.S. at 724. Attorney General Edmund Randolph specifically recognized this principle in his report on the judiciary to the House of Representatives, delivered shortly after ratification: "as far as a particular state can be a party defendant, a sister state cannot be her judge." 4 The Documentary History of the Supreme Court of the United States, 1789–1800 130 (Maeva Marcus, ed., 1992). Indeed, as the Court has recognized, "[t]he Constitution would never have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 n.2 (1985).

3. Notwithstanding the prevailing understanding of the framers, the Court held in *Chisholm v. Georgia*, 2 U.S. 419, 420 (1793), that a citizen of one State could invoke federal diversity jurisdiction against another State because such suits were permitted by the literal text of Article III. Justice Iredell dissented, "relying on American history, English history, and the principles of enumerated powers and separate sovereignty." *Alden*, 527 U.S. at 720 (internal citations omitted).

The *Chisolm* decision "'fell upon the country with a profound shock.'" *Id.* (quoting 1 C. Warren, The Supreme Court in United States History 96 (rev. ed. 1926)). Just one day after the decision, the House of Representatives introduced a proposal to amend the

Constitution. *Id.* at 721. After a short recess, each chamber spent only one day discussing the Amendment before passing it. *Id.*

Congress enacted the Eleventh Amendment "not to change but to restore the original constitutional design." *Id.* at 722. Moreover, "it is doubtful that if Congress meant to write a new immunity into the Constitution it would have limited that immunity to the narrow text of the Eleventh Amendment." *Id.* at 723. For this reason, the Court has long held that "the scope of the States' immunity from suit is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design." *Id.* at 729.

The Court's post-Eleventh Amendment decision in *Hans v. Louisiana*, 134 U.S. 1 (1890), confirmed that understanding. In *Hans*, the Court held that sovereign immunity prevents individuals from asserting federal question jurisdiction against States, even though it is not specifically prohibited by the text of the Amendment. *Id.* at 14–15. *Hans* specifically relied on "the presumption that no anomalous and unheard-of proceedings or suits were intended to be raised up by the constitution." *Id.* at 18. And the court has "since acknowledged that the *Chisholm* decision was erroneous." *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 753 (2002). That is to say, "the Eleventh Amendment does not define the scope of the States' sovereign immunity; it is but one particular exemplification of that immunity." *Id.*

### B. *Hall* contravenes this Eleventh Amendment history

*Nevada v. Hall* rests on the flawed premise that state courts may assert jurisdiction over their sister States unless some Constitutional text expressly limits such jurisdiction. 440 U.S. 410, 421 (1979). But that rationale has not survived the Court's more recent observations that sovereign immunity is not limited to the text of the Eleventh Amendment. *See, e.g.*, *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 753 (2002); *Alden v. Maine*, 527 U.S. 706, 730 (1999); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267–68 (1997); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996).

The very purpose of Article III was to ensure the foreclosure of interstate conflicts that had plagued the nation by establishing a neutral forum to adjudicate these disputes. Richard H. Pierson, *Constitutional Law—State Sovereign Immunity—Nevada v. Hall, 440 U.S. 410 (1979),* 56 Wash. L. Rev. 289, 297 (1981). At the time of the Constitutional Convention, every State recognized the sovereign immunity of its sisters and the *in personam* jurisdiction of a state court was accordingly confined to its own citizens and residents. *Id.* at 298. Thus, the appropriate inference is that the inquiry should be whether anything in the Constitution *allows* jurisdiction of state courts over their sister States—not whether anything *forbids* it.

*Hall's* expectation that "prevailing notions of comity would provide adequate protection against the unlikely prospect of an attempt by the courts of one State to assert jurisdiction over another," *id.* at 419, has proved illusory. *Hall* has "encourage[d] state courts to deny respect to the sovereign immunity of defendant sister states, in circumstances where such denial is at best questionable." Donald Olenick, *Sovereign Immunity in Sister-State Courts: Full Faith and Credit and Federal Common Law Solutions*, 80 Colum. L. Rev. 1493, 1498 (1980). Attempts by States to apply *Hall* have led to decisions that are "highly discriminatory" and "inconsistent with the traditional federal-system principles that the states are coequals and that the sovereignty of each state limits the powers of all others." *Id.* at 1499. The Eleventh Amendment was enacted in order to preclude suits in any forum without the consent of the defendant State, Pierson, 56 Wash. L. Rev. at 298, a proposition this Court recognized in *New Hampshire v. Louisiana*, 108 U.S. 76, 91 (1883) (stating that federal jurisdiction under Article III is the exclusive remedy available to a citizen of another State).

Nothing in the Constitution allows state courts to exercise jurisdiction over their sister States. The very idea denies States "the dignity that is consistent with their status as sovereign entities." *Fed. Mar. Comm'n*, 535 U.S. at 760. *Hall*'s holding otherwise was erroneous.

### C. Later cases are in tension with *Hall*

Sovereign immunity cases since *Hall* have established what *Hall* rejected—sovereign immunity is derived from the history and structure of the Constitution and is antecedent to the text of both Article III and the Eleventh Amendment. *Cf. Hall*, 440 U.S. at 426–27.

In *Seminole Tribe of Florida v. Florida*, the Court, overturning *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), said that "we long have recognized that blind reliance upon the text of the Eleventh Amendment is to strain the Constitution and the law to a construction never imagined or dreamed of." 517 U.S. 44, 69 (1996) (internal citations omitted). For this reason, the Court held that "the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area . . . that is under the exclusive control of the Federal Government." *Id.* at 72.

The very next year, in *Idaho v. Coeur d'Alene Tribe of Idaho* the Court again emphasized that the "recognition of sovereign immunity has not been limited to the suits described in the text of the Eleventh Amendment." 521 U.S. 261, 267 (1997). Based on this principle, the Court held that a lawsuit brought by an Indian tribe against the State was barred by the Eleventh Amendment.

Later, in *Alden v. Maine*, 527 U.S. 706 (1999), the Court elaborated: "The generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity." *Id.* at 715. The Eleventh Amendment was adopted "not to change" the Constitution "but to restore the original constitutional design." *Id.* at 722. For this reason, "the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment." *Id.* at 713. Ultimately, "as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today." *Id.*

Finally, in *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002), the Court held that sovereign immunity barred the Federal Maritime Commission from adjudicating a private complaint against the South Carolina State Ports Authority, even though the text of the Eleventh Amendment applies only to Article III courts. The Court explained that "the Eleventh Amendment does not define the scope of the States' sovereign immunity; it is but one particular exemplification of that immunity." *Id.* at 753.

*Seminole Tribe*, *Coeur d'Alene*, *Alden*, and *Federal Maritime Commission* represent a fundamental course correction in the law of sovereign immunity—one that respects constitutional history and structure in a way that several earlier decisions, including not only *Union Gas* but also *Hall*, did not. Yet *Hall* remains as a vestige of the discarded doctrine, one that starkly contradicts other governing sovereign immunity precedents. The Court should overturn it.

## II. State Sovereign Immunity Includes Immunity from Suits Brought in other States' Courts

### A. Suits against States in other States' courts insult state sovereignty

The Court has held that "[t]he preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities." *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002). Allowing States to be sued in the courts of other States contravenes that purpose.

First, it would be illogical to interpret the Eleventh Amendment to prohibit all non-consensual lawsuits against States in federal court, *see Hans v. Louisiana*, 134 U.S. 1, 18 (1890), yet allow those "anomalous and unheard-of" suits in state court. *Id.* Indeed, allowing a State to be sued in another State's court would be a *greater* insult to state sovereignty than allowing a similar lawsuit in federal court. Federal courts were designed by the framers of the Constitution to provide a neutral forum. *Nevada v. Hall*, 440 U.S. 410, 437 (1979) (Rehnquist, J., dissenting).

Second, allowing state courts to exercise jurisdiction over sister States "would place unwarranted strain on the States' ability to govern in accordance with the will of their citizens." *Alden v. Maine*, 527 U.S. 706, 750–51 (1999). Lawsuits, especially those for money damages, implicate the "allocation of scarce resources among competing needs and interests" which "lies at the heart of the political process." *Id.* at 751. If the courts of other States are allowed to make such decisions, they will essentially decide what policy goals the defendant State should pursue and how it should pursue those goals. "If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree" of another State's court. *Id.*

This threat to state sovereignty is not merely hypothetical. At least five other tax cases have been brought against one State in a court of another State, including another lawsuit against California filed in Nevada, *see* Compl., *Schroeder v. California*, No. 14-2613 (D. Nev. Dec. 18, 2014), and yet another against California in Washington. *See* Compl., *Satcher v. California Tax Franchise Bd.*, No. 15-2-00390-1 (Wash. Super. Ct., Skagit Cty. June 17, 2015); Status Report, *Satcher*, No. 16-2-00194-0 (July 30, 2018). Massachusetts is currently being sued in Virginia state court over a recently promulgated sales and use tax regulation. Mass. Comm'r of Revenue's Mem. of Points and Auths. in Supp. of his Mot. to Dismiss for Lack of Personal Jurisdiction at 4, *Crutchfield Corp. v. Harding*, No. CL17001145-00 (Va. Cir. Ct. Feb. 15, 2018). Similarly, Ohio has an appeal pending in the Kentucky Supreme Court concerning a commercial activity tax assessment. Motion to Transfer of Defs./Appellants State of Ohio & Joseph W. Testa, Tax Comm'r of Ohio at 1, *Great Lakes Minerals, LLC v. Ohio*, No. 2018-SC-000161-T (March 26, 2018) (granted unanimously, June 14, 2018). And South Dakota has been sued in both North Dakota *and* Minnesota over a tax audit. Compl., *Agvise Labs., Inc. v. Gerlach*, No. 18-2018-CV-00460 (N.D. D. Ct. Mar. 26, 2018); Compl., *Agvise Labs., Inc. v. Gerlach*, No. 76-CV-18-80 (Minn. D. Ct. Mar. 7, 2018). Finally, Connecticut was sued in Texas state court by a taxpayer. Pls.' Original Pet., Req. for Declaratory J., Req. for Injunctive Relief & Req. for Disclosure, *Hendrick v. Conn. Dep't of Revenue Servs.*, No. DC 13-08568 (Tex. D. Ct. Aug. 6, 2013).

Outside the tax arena, Ohio also is a defendant in an Indiana state court case arising out of a motor vehicle collision. Order Denying Summ. J., *Chilton v. Ohio Dept. of Transp.*, No. 15D01-1404-CT-019 (Ind. Sup. Ct. Dec. 19, 2016). North Dakota is currently defending against a contract dispute in Minnesota state court. Compl., *Rosewood Hospitality, LLC v. N.D. Dept. of Soc. Servs.*, No. 62-CO-18-538 (Minn. D. Ct. Feb. 27, 2018). Rhode Island has a family law case in Connecticut state court. Compl., *Reale v. R.I.*, No. WWM-CV18-5008257-S (Conn. Sup. Ct. Nov. 17, 2017). And Texas recently defended a medical malpractice case in New Mexico state court. *Montano v. Frezza*, 339 P.3d 700 (N.M. 2017).

Every case brought against one State in a court of another State undermines the defendant State's sovereignty, both in terms of the insult to sovereign dignity and in terms of the required expenditure of sovereign resources to litigate the matter. *See Alden v. Maine*, 527 U.S. 706, 751 (1999). States must use scarce resources to meet a number of competing policy goals, and "it is inevitable that difficult decisions involving the most sensitive and political of judgments must be made." *Id.* Sovereign immunity "assures the states . . . from unanticipated intervention in the processes of government." *Id.* at 750 (quoting *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 53 (1944)). In all cases, a limitation of immunity "carries with it substantial costs to the autonomy, the decisionmaking ability, and the sovereign capacity of the States." *Id.*

### B. The insult to state sovereignty is particularly harmful in the tax context

While any case brought against a State against its will is an insult to its sovereignty, the Court has also recognized that vitiating sovereign immunity when the power to tax is at stake is particularly harmful, as "the power to promulgate and enforce income tax laws is an essential attribute of sovereignty." *Franchise Tax Bd. of Cal. v. Hyatt* (*Hyatt I*), 538 U.S. 488, 498 (2003). "[T]axes," the Court has recognized, "are the life-blood of government, and their prompt and certain availability an imperious need." *Franchise Tax Bd. of Cal. v. U.S. Postal Serv.*, 467 U.S. 512, 523 (1984) (quoting *Bull v. United States*, 295 U.S. 247, 259–60 (1935)).

The taxing power of States is so important that Congress has limited the ability of the federal judiciary to restrain it. The Tax Injunction Act of 1937 prevents federal district courts from "enjoin[ing], suspend[ing] or restrain[ing] the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. The purpose of the

Act is "to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 522 (1981). It "has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations." *Tully v. Griffin, Inc.*, 429 U.S. 68, 73 (1976). Such a substantive limit on the power of federal courts demonstrates the core status of the taxing power to the States.

For their part, States often limit the processes their own taxpayers may use to challenge assessments and audits. Of the forty-three States that have some form of income tax, many have an administrative review process that taxpayers must complete before seeking judicial review of an audit or assessment. *See, e.g.*, Ind. Code § 6-8.1-5-1. Many States require a final administrative decision to be appealed to a special tax court, rather than a court of general jurisdiction. *See, e.g.*, Ind. Code § 33-26-3-1; Ala. Code § 40-29-90. *See generally* All St. Tax Guide (RIA). For sales and use taxes, similarly, many States require administrative review before challenging an audit or assessment in state court. In Indiana, for example, a taxpayer must first file a protest with Indiana Department of Revenue before appealing to the Indiana Tax Court. Ind. Code § 6-8.1-5-1. In Illinois, to take another example, the taxpayer has the option of either filing a protest with the Department of Revenue, 35 Ill. Comp. Stat. 120/5, paying the tax and then filing a claim for a credit with the Department, 35 Ill. Comp. Stat. 735/3-2, or paying the tax under protest and then filing an action in state court, 30 Ill. Comp. Stat.

230/1. *See generally* Am. Bar Ass'n, *Sales & Use Tax Deskbook* (30th ed. 2016–17). *See also* Am. Bar Ass'n, *Property Tax Deskbook* (22nd ed. 2017) (showing specialized administrative review procedures for property tax assessments).

Channeling tax claims into administrative review or specialized courts is one way States safeguard core taxation authority. Accordingly, in Nevada and California—the two States with direct ties to this case—bypassing administrative review and immediately seeking judicial review of an audit (or the tactics used during an audit) is not permitted. In Nevada, a taxpayer must complete administrative review *and* pay the tax bill before seeking judicial review of an audit. Nev. Rev. Stat. § 360.395. In California, a taxpayer may either: (1) file an appeal with the Office of Tax Appeals (without paying the underlying tax), but only after filing a protest of the audit assessment with the Franchise Tax Board and the denial of that protest, or (2) first pay the tax (except in a residency case) and then file a claim with the Franchise Tax Board for a refund. *See* Cal. Gov't Code § 15677; Cal. Rev. & Tax. Code § 19381. If the Franchise Tax Board denies the claim or does not act within six months, the taxpayer may file a suit for a refund in the Superior Court. Cal. Rev. & Tax. Code § 19381.

California law also prevents "instituting any judicial or administrative proceeding or action for or incidental to the assessment or collection of a tax," or for any "act or omission in the interpretation or application of any law relating to a tax." Cal. Gov't Code

§ 860.2. By suing California's tax authorities in Nevada courts while his administrative appeal remains pending, however, Hyatt has circumvented California's restrictions.

*Hall* thus undermines these administrative processes and the federal Tax Injunction Act by providing an end-run for plaintiffs around a State's tax enforcement system without requiring plaintiffs to abide by the carefully-crafted administrative procedures established by the taxing State. It also undermines the exercise of core state functions such as taxation, assessment, and audit by permitting a court from another State to overrule a State's policymaking and enforcement decisions. *Hall*, 440 U.S. at 425–27. By exercising jurisdiction over the taxation authority of another State, a forum-state court may make decisions that effectively determine what revenue goals the defendant State should pursue and how it should pursue them. Such lawsuits "place unwarranted strain on the States' ability to govern in accordance with the will of their citizens," and inject another State's courts into "the heart of the political process" of a State. *Alden*, 527 U.S. at 750–51.

Worse still, the courts of the other State may be tempted to rule in a manner that benefits their own State's citizens, treasuries, and policy priorities. *See, e.g.*, *Franchise Tax Bd. of Cal. v. Hyatt* (*Hyatt II*), 136 S. Ct. 1277, 1279 (2016). As noted above, this case has already inspired other lawsuits in Nevada courts against FTB, which may force FTB to alter its enforcement policies.

To be sure, the Court in *Hyatt I* struggled to find a "principled distinction between [a State's] interest in tort claims arising out of its university employee's automobile accident, at issue in *Hall*, and [a State's] interests in tort claims . . . arising out of its tax collection agency's residency audit." 538 U.S. at 498. But that only means that the Court should not create different standards for different types of claims. The point remains that this case demonstrates the degree to which *Hall* opened the door not only to suits that seek compensation for other States' seemingly ordinary torts, but also for suits challenging other States' core policy and enforcement determinations that the courts of the forum State may find objectionable.

## III. *Stare Decisis* Should Not Prevent the Court from Overruling *Hall*

Where, as here, the Court must consider whether to overrule a prior decision, it must also grapple with the principle of *stare decisis*. However, "the rule of stare decisis is not an 'inexorable command,' and certainly it is not such in every constitutional case." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992). Instead, the Court's reconsideration of a prior holding must be "informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law," including (1) "whether the rule has proven to be intolerable simply in defying practical workability;" (2) "whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation;" (3) "whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine;" and (4) "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." *Id.*

First, the sheer number of lawsuits against States in the courts of other States demonstrates the practical unworkability of *Hall*, particularly as it belies the sufficiency of the "comity" expectation articulated in *Hall*. *See supra* Parts I.A and II.A. This case alone represents the culmination of over twenty years of litigation and three trips to the Supreme Court. And it is far from the only case of its type. The State of Nevada—the very State whose courts chose to exercise jurisdiction in this case—both joined other States urging the Court to take this case to revisit *Hall* the last time around, Brief of Amici Curiae State of West Virginia and 39 Other States in Support of Petitioner, *Franchise Tax Bd. v. Hyatt*, 136 S. Ct. 1277 (2016) (No. 14-1175), *and* recently filed its own cert. petition asking the Court to overrule *Hall*. Petition for Writ of Certiorari, *Nevada Dep't of Wildlife v. Smith*, No. 17-1348 (Mar. 21, 2018). The States' nearly uniform opposition to *Hall* illustrates the need for a different outcome.

Second, *Hall* implicates no reliance interests. "The inquiry into reliance counts the cost of a rule's repudiation as it would fall on those who have relied reasonably on the rule's continued application." *Casey*, 505 U.S. at 855. As should be obvious, potential plaintiffs do not structure their personal or economic interests or choices on the ability to sue another State in the courts of their home State. Who contemplates the possibility of having a tort claim against a State where they do not live, let alone strategizes where they would bring such a hypothetical claim? Nobody. Similarly, States do not structure their court systems around the ability to entertain suits against other States, and they do not enact tort claim procedures with other States in mind. Indeed, after *Hyatt II*, state courts may not afford other States less protection from claims than they afford their home States. 136 S. Ct. at 1281. So, even if state courts wished to take specific account of how they would handle suits against other States in reliance on *Hall*, it is not clear what actions they could take.

Third, *Hall* is a "remnant of the abandoned doctrine" that the Eleventh Amendment defines the outer limits of state sovereign immunity. *See* Part I.C *supra*. The Court has long "recognized that blind reliance upon the text of the Eleventh Amendment is to strain the Constitution and the law to a construction never imagined or dreamed of." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 69 (1996) (internal citations omitted). Overruling *Hall* is necessary to bring state immunity from suit in the courts of other States in line with the rest of this Court's sovereign immunity doctrine.

Finally, although the facts and reasons underlying state sovereign immunity have not changed, the numerous lawsuits against States in other States' courts has demonstrated the extent of *Hall*'s insult to state sovereignty. The "prevailing notions of comity" that the Court invoked in *Hall* to protect States from such suits are insufficient. 440 U.S. at 419.

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Just as the Court in *Seminole Tribe* overruled *Union Gas* because it was a "solitary departure from settled law, 517 U.S. at 66, so too should the Court overrule *Hall*. "[N]one of the policies underlying stare decisis require [this Court's] continuing adherence to its holding." *Id.* *Hall* "depart[s] from our established understanding of the Eleventh Amendment and undermine[s] the accepted function of Article III." *Id.* Consequently, the time has come for this Court to overrule *Hall*.

**CONCLUSION**

The judgment should be reversed.

Respectfully submitted,


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