No. 02-42

IN THE SUPREME COURT OF THE UNITED STATES

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT AND THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
*Respondent*s.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

BRIEF OF THE STATES OF FLORIDA, ALASKA, COLORADO, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, INDIANA, MAINE, MARYLAND, MICHIGAN, MISSISSIPPI, MONTANA, NORTH DAKOTA, OHIO, UTAH, VERMONT, VIRGINIA, WEST VIRGINIA, and the COMMONWEALTH OF PUERTO RICO AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Richard E. Doran
Attorney General of Florida
Jonathan A. Glogau*
Special Counsel
PL-01, The Capitol
Tallahassee, Florida 32399-1050
(850) 414-3300

*Counsel of Record

(Additional counsel listed within)

Barbara J. Ritchie
Acting Attorney General
State of Alaska

Ken Salazar
Attorney General
State of Colorado

Richard Blumenthal
Attorney General
State of Connecticut

M. Jane Brady
Attorney General
State of Delaware

Thomas R. Keller
Acting Attorney General
State of Hawaii

James E. Ryan
Attorney General
State of Illinois

Steve Carter
Attorney General
State of Indiana

G. Steven Rowe
Attorney General
State of Maine

J. Joseph Curran, Jr.
Attorney General
State of Maryland

Jennifer M. Granholm
Attorney General
State of Michigan

Mike Moore
Attorney General
State of Mississippi

Mike McGrath
Attorney General
State of Montana

Wayne Stenejem
Attorney General
State of North Dakota

Betty D. Montgomery
Attorney General
State of Ohio

Anabelle Rodríguez
Attorney General
Commonwealth of Puerto Rico

Mark L. Shurtleff
Attorney General
State of Utah

William H. Sorrell
Attorney General
State of Vermont

Jerry W. Kilgore
Attorney General
State of Virginia

Darrell V. McGraw, Jr.
Attorney General
State of West Virginia

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

U.S. CONSTITUTION

OTHER AUTHORITIES

INTEREST OF THE *AMICI*

Whether private citizens may sue nonconsenting States is an issue of manifest importance to the States. The amici believe that the Constitution preserves the sovereign immunity of each State from suit against its will in the forum of a sister State. Because the issue in this case goes to jurisdiction of the courts of Nevada to subject the State of California to its legal processes, this Court has a duty to examine the jurisdictional question *sua sponte*, even if the parties in this case should fail to raise it. *See, e.g., Regents of the University of California v. Bakke*, 438 U.S. 265, 280 n.14 (1978) (noting Court's obligation to address jurisdictional questions raised only by the *amici*).

ARGUMENT

THE DECISION IN *NEVADA v. HALL* SHOULD BE OVERRULED

In 1979, this Court decided *Nevada v. Hall*, 440 U.S. 410 (1979), holding that the State of Nevada was amenable to suit in the courts of California without regard to a general claim of sovereign immunity. The *Hall* case arose out of a highway accident between residents of California and an employee of the State of Nevada, driving a vehicle owned by the State, while on State of Nevada business in California.

The case at bar involves the same two States, albeit with roles reversed. Hyatt, the plaintiff below, sued the State of California (through its Franchise Tax Board) and its individual agents. This case arose out of the efforts of California to collect taxes it claimed were due from Hyatt and the alleged tortious conduct of both the Tax Board itself and its agents. Suit was brought in Nevada state court because at least some of the allegedly tortious conduct occurred there. Based on the holding in *Hall*, the Nevada Supreme Court held that California was not immune from suit in Nevada courts and that Nevada was not required to give full faith and credit to the limits in California's

waiver of sovereign immunity statute.

Although the question presented to this Court is whether the Nevada Supreme Court correctly applied *Nevada v. Hall* and the Full Faith and Credit Clause, a necessary predicate issue is whether *Nevada v. Hall* was correctly decided. Over the past seven years, this Court has held that the Constitution preserves and protects the States' sovereign immunity from private suits in federal courts, in their own courts, and in federal administrative tribunals, even when Congress has attempted to abrogate that immunity under its Article I powers. *See Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *Alden v. Maine*, 527 U.S. 706 (1999); *Federal Maritime Comm'n v. South Carolina State Ports Authority*, 535 U.S. 743, 122 S. Ct. 1864 (2002) (*"FMC"*). In light of the reasoning underlying those decisions, it is necessary to reconsider whether the Constitution also protects the States' sovereign immunity from private suits brought in the courts of other States.

The answer, we submit, is that it does. The founding generation understood that a sovereign could not be sued without its consent and there is nothing in the ratification of the Constitution that can be construed as a surrender of this immunity with respect to suit in the courts of sister States. Any time a sovereign State is haled before the courts of another sovereign, either state or federal, without its consent, that State's sovereignty is impermissibly violated. *Nevada v. Hall* should now be overruled.

I.
THE ANALYSIS APPLIED IN *NEVADA V. HALL* DID NOT RECOGNIZE THAT THE IMMUNITY OF THE STATES DERIVES FROM THE STRUCTURE OF THE CONSTITUTION

1. In *Hall*, the Court held that a State is not constitutionally immune from suit in the courts of another State. The Court observed that the doctrine of sovereign immunity was an "amalgam of two quite different concepts, one applicable to suits in the sovereign's own courts and the other to suits in the courts of another sovereign." *Id.* at 414. While the first type of immunity "has been enjoyed as a matter of absolute right for centuries," *id.* at 414, this did not provide support "for a claim of immunity in another sovereign's courts." *Id.* at 415. The second type of immunity, the Court held, was based on comity. *Id.* at 416-18. Thus, although the Court recognized that such law of nations immunity surely would have been sustained had the case been brought in 1812, the power to recognize the immunity rested with the sovereign state, which could change its position on this question, as California had done. *Id.* at 417-18.

The Court in *Hall* dismissed the Framers' debate regarding sovereign immunity as irrelevant, for that debate "focused on the scope of the judicial power of the United States authorized by Article III." *Id.* at 419. Likewise, concluded the Court, the negative reception to *Chisholm v. Georgia*, 2 Dall. 419 (1793), and prompt adoption of the Eleventh Amendment have no bearing on a State's amenability to suit in a non-federal court. *Id.* at 420. The Court therefore turned to whether, as a matter of full faith and credit doctrine, California courts were required to respect Nevada's limitations on its own suability. *Id.* at 421-24. The Court concluded they were not.

2. The trilogy of *Seminole Tribe*, *Alden*, and *FMC* approached the issue of sovereign immunity in a very different manner. Based on their review of the pertinent history and understanding of the Framers, these decisions recognized that "sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself." *Alden*,

527 U.S. at 728. It did not matter, therefore, that the debates surrounding the adoption of the Constitution focused on States' immunity in Article III courts and that the Eleventh Amendment speaks only to the jurisdiction of such courts. "The Eleventh Amendment confirmed rather than established sovereign immunity as a constitutional principle; it follows 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 728-29. *See also*, *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322-23 (1934) ("Behind the words of the constitutional provisions are postulates which limit and control. . . . There is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of the convention.' ")

A proper analysis of whether States may be sued without their consent in the courts of other States must begin, therefore, with the "'presumption that no anomalous and unheard-of proceedings or suits were intended to be raised up by the Constitution – anomalous and unheard of when the constitution was adopted.'" *Alden*, 527 U.S. at 727 (quoting *Hans v. Louisiana*, 134 U.S. 1, 18 (1890)). This requires the Court to look to "'history and experience, and the established order of things,' . . . in determining the scope of the States' constitutional immunity from suit." 527 U.S. at 727 (quoting *Hans*, 134 U.S. at 13, 14). The Court invoked this "presumption" in *FMC* , 535 U.S. at ___ , 122 S. Ct. at 1872, where it "attribute[d] great significance to the fact that States were not subject to private suits in administrative adjudications at the time of the founding or for many years thereafter."

When this presumption is put to use it leads to a two-part analysis to determine whether States are immune from a particular suit:

(1) Whether the founding generation would have understood that the States were immune from such suits at the time of the framing and ratification of the Constitution or whether the particular proceeding against the State would have been

"anomalous and unheard of when the Constitution was adopted."; and

(2) Whether there is evidence showing an intent to surrender an existing immunity in the plan of the convention or in the explicit words of the Constitution.

Application of this inquiry reveals that the Constitution grants the States immunity from suits instituted by private parties in the courts of other States. By failing to recognize the presumption against subjecting States to "anomalous and unheard of" proceedings, and failing to undertake the concomitant two-part analysis, the *Hall* Court reached an erroneous conclusion.

II.
THE FOUNDING GENERATION WOULD HAVE UNDERSTOOD THAT STATES WERE IMMUNE FROM PRIVATE ACTIONS BROUGHT AGAINST THEM IN THE COURTS OF OTHER STATES

Just as the Framers understood that States were immune from private suits in federal court and in their own courts, so too did the Framers understand that States were immune from private suits brought in the courts of other States. This is evidenced by statements and actions of the Framers concerning sovereign immunity generally, and statements and actions of the Framers concerning the law of nations.

1. In *Alden*, the Court held that immunity from suit in a State's own courts is a fundamental aspect of sovereignty, retained by the States except as altered by the Constitution, and that Congress' Article I powers do not authorize it to abrogate that immunity. In reaching this conclusion, the Court looked to the Framers' understanding that "it was well established in English law that the Crown could not be sued without consent in its own courts." *Id.* at 715. That understanding was reflected in Justice Iredell's dissent in *Chisholm v. Georgia*, 2 Dall. 419, 437-46 (1793), in Blackstone, and in *The Federalist No. 81*, written by Alexander Hamilton. *Id.* at 715-17. Of particular relevance here, that understanding was expressed in terms that encompassed suits brought in the courts of other States.

For example, the Court, both in *Alden* and later in *FMC*, quoted Hamilton as follows:

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States.

Alden, 527 U.S. at 716-17 (quoting *The Federalist No. 81*) (emphasis in original); *FMC*, 535 U.S. at ___ , 122 S. Ct. at 1871 (same quotation). The Court in *Alden* went on to identify statements at the Virginia Convention that "echoed this theme," such as James Madison's statement that "[i]t is not in the power of individuals to call any state into court," and John Marshall's statement that "[i]t is not rational to suppose that the sovereign power should be dragged before a court." 3 ELLIOT'S DEBATES 533, 555-56, *quoted in Alden*, 527 U.S. at 717-18.

Not only do the ratification debates and the events leading to the adoption of the Eleventh Amendment reveal the original understanding of the States' constitutional immunity from suit, they also underscore the importance of sovereign immunity to the founding generation. Simply put, "The Constitution never would 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." *Alden*, 527 U.S. at 727 (quoting *Atascadero State Hospital v. Scanlon*, 473 U. S. 234, 239 n.2 (1985)).

2. The Framers' conception of international law was one which provided absolute immunity to foreign sovereigns.[1] This

---

[1] This case turns on the doctrine of absolute sovereign immunity understood at the time of the convention. *Amici*, however,

understanding can be gleaned from Chief Justice Marshall's decision in *The Schooner Exchange v. McFaddon*, 7 Cranch 116 (1812). The case involved the protection of an armed vessel in the services of a friendly sovereign. In the absence of a foreign sovereign's consent, the Court held that American courts cannot adjudicate any controversy to which a foreign sovereign is a necessary party. The Court further held that no power resided in Congress or in the courts to require a foreign sovereign to become a party defendant in any action. Although *The Schooner Exchange* involved a ship of war, this Court later rejected an attempt to differentiate between commercial and war vessels of governments. *See Berizzi Bros. Co. v. The Pesaro*, 271 U.S. 562 (1926).

The case of *Nathan v. Virginia*, 1 Dall. 77 (1781), confirms that this was the understanding of the Framers. In that case, the Pennsylvania Court of Common Pleas held that Virginia's sovereign immunity rendered it immune from legal process issued by Pennsylvania. The Virginia delegates to the Confederation Congress, which included James Madison, objected to Nathan's suit against Virginia, arguing that "the property of the State of Virginia cannot be arrested or detained by process issuing from any of the Courts or Magistrates of Pennsylvania or any other State in the Union, and that for Virginia to submit to the jurisdiction of the Pennsylvania courts would be to abandon its Sovereignty by descending to answer before the Tribunal of another Power."[2] Pennsylvania Attorney

---

understand that under the modern or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (jure imperii) of a state, but not with respect to private acts (jure gestionis). 26 Dept. State Bull 984 (1952) (the "Tate letter"). The Foreign Sovereign Immunities Act (FSIA), 28 U.S.C.A. § 1602 *et seq.*, codifies this modern restrictive theory of sovereign immunity.

[2] Letter from Virginia delegates to Supreme Executive Council of Pennsylvania dated 7/9/1781, reprinted in 3 THE PAPERS

General Bradford responded: "We are all of Opinion that the Commonwealth of Virginia being an independent & Sovereign power, cannot be compelled to appear or answer in any Court of Justice within this State. That all process directed against the person of a Sovereign or against his Goods is absolutely void . . . and that all concerned in issuing or serving such process are guilty of a violation of the laws of nations. . . ."[3]

3. The Court in *Nevada v. Hall* acknowledged that absolute immunity of foreign sovereigns was the understanding at the time of the convention. Stated the Court, "[i]t is fair to infer that if the immunity defense Nevada asserts today had been raised in 1812 when *The Schooner Exchange* was decided, or earlier when the Constitution was being framed, the defense would have been sustained by the California courts." 440 U.S. at 417. The Court, however, ascribed this immunity to comity among nations and assumed that such immunity among nations at peace can be unilaterally revoked by the forum sovereign.

According to the majority in *Hall*, therefore, "[t]he opinion in *The Schooner Exchange* makes clear that if California and Nevada were independent and completely sovereign nations, Nevada's claim of immunity from suit in California's courts would be answered by reference to the law of California." 440 U.S. at 417 (footnote omitted). After concluding that California, like the United States, was free to determine whether to recognize law of nations immunity for sister States as a matter of comity, the majority found nothing in the Constitution that raised law of nations immunity to the level of a constitutional requirement. *Id.* at 418-26.

The Court erred in its reliance on *The Schooner Exchange* in two critical respects. First, there is no evidence that the Framers and ratifiers of the Constitution believed that law-of-nations immunity was merely a matter of comity, rather than a

---

OF JAMES MADISON, 184 (William T. Hutchinson, *et al.*, eds., 1963).

[3] 3 PAPERS OF JAMES MADISON, *supra*, at 187 n.2.

fundamental tenet of international law based on mutual understanding and agreement that a sovereign was not free to disregard unilaterally. The leading international law treatise of the day, Vattel's LAW OF NATIONS, provided that law of nations immunity was an immutable principle of international law:

> *One sovereign cannot make himself the judge of the conduct of another.* The sovereign is he to whom the nation has intrusted the empire and the care of the government: she has invested him with her rights; she alone is directly interested in the manner in which the conductor she has chosen makes use of his power. It does not, then, belong to any foreign power to take cognisance of the administration of that sovereign, to set himself up for a judge of his conduct, and to oblige him to alter it.[4]

Vattel's treatise, published in both French and English, was widely available to the Framers and ratifiers,[5] and it was cited both in the debates in the federal convention and in the state

---

[4] 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 (1863 reprint) (Book II, Ch. 4, § 55) (emphasis added).

[5] *See* Thomas H. Lee, *Making Sense of the Eleventh Amendment: International Law and State Sovereignty*, 96 Nw. U. L. Rev. 1027, 1061-66 (2002) (discussing widespread dissemination and use of Vattel's treatise in America). Benjamin Franklin wrote in 1775 to a Swiss sympathizer who had sent him several copies of Vattel's treatise: "I am much obliged by the kind present you have made us of your edition of Vattel. . . . [T]hat copy which I kept . . . has been continually in the hands of the members of our Congress now sitting." *Id.* at 1062 (footnote omitted).

ratifying conventions.[6]

Not even Edmund Randolph, "the foremost champion of state suability" in federal courts,[7] thought that a State could be sued in the courts of a sister State. To the contrary, in his 1790 Report to the House of Representatives, Randolph wrote:

> [A]s far as a particular state can be a party defendant, a sister state cannot be her judge. Were the states of America unconfederated, they would be as free from mutual controul as other disjoined nations. Nor does the federal compact narrow this exemption; but confirms it, by establishing a common arbiter in the federal judiciary, whose constitutional authority may administer redress.[8]

As a matter of historical interpretation, therefore, Justice Blackmun was certainly correct when he wrote in his dissent in *Nevada v. Hall* that "the Framers must have assumed that States

---

[6] *E.g.*, 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 436 (Max Farrand, ed., 1911) (Luther Martin, of Maryland, citing Vattel's LAW OF NATIONS during the federal convention); 4 J. Elliot, ed., THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787 at 278 (1836) (Charles Pinckney, citing Vattel's LAW OF NATIONS during the South Carolina ratifying convention); 2 Elliot's DEBATES 453 (James Wilson, citing Vattel during the Pennsylvania ratifying convention); *see also* 29 Library of Congress, *Journals of the Continental Congress 1774-1789* 887 (1933) (reprinting 1785 letter from John Jay relying on *Vattel* for recognizing the United States' obligation to receive the Consul General of Great Britain).

[7] 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES at 600 (Maeva Marcus, ed., 1994).

[8] 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES at 130 (Maeva Marcus ed., 1992).

were immune from suit in the courts of their sister States. . . . The only reason why this immunity did not receive specific mention is that it was too obvious to deserve mention." *Id.* at 430-31. The only incorrect aspect of Justice Blackmun's statement was that this immunity *did* receive specific mention, as the excerpts above demonstrate.

Second, unlike the United States at the time of *The Schooner Exchange*, the several States consented at the time they ratified the Constitution to a limited waiver of their law-of-nations immunity. Article III, Section 2, specifically provided this Court with original jurisdiction in suits between States. As one ratifier explained, such jurisdiction was "necessary to secure impartiality in decisions, and preserve tranquility among the states. It is impossible that there should be impartiality when a party affected is to be judge."[9] It is inconceivable that the Framers and ratifiers expressly consented to a limited waiver of the States' law of nations immunity for original action suits between States in the neutral forum of the Supreme Court, while silently believing all along that a State could be haled into the courts of a sister State at the latter's whim. The Framers shared the background understanding that the law of nations barred one State from exercising jurisdiction over another and they viewed the newly created Supreme Court as a mutually agreed upon forum in which controversies between States could be fairly and impartially resolved. Allowing one State to determine that it can exercise jurisdiction over a sister State is flatly inconsistent with this constitutional plan.

As Nevada argued in *Hall*, "the Constitution implicitly establishes a Union in which the States are not free to treat each other as unfriendly sovereigns, but must respect the sovereignty of one another. While sovereign nations are free to levy

---

[9] 4 J. Elliot's DEBATES, *supra* at 159 (statement of William Davie in the North Carolina convention), *quoted in Nevada v. Hall*, 440 U.S. at 435 (Rehnquist, J., dissenting); *see also Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 475 (1794) (Jay, C.J.); *South Carolina v. Regan*, 465 U.S. 367, 396 (1984) (O'Connor, J., concurring).

discriminatory taxes on the goods of other nations or to bar their entry altogether, the States of the Union are not. Nor are the States free to deny extradition of a fugitive when a proper demand is made by the executive of another State. And the citizens in each State are entitled to all privileges and immunities of citizens in the several States." 440 U.S. at 424-25 (footnotes omitted) (setting forth argument of Nevada). Nations at peace simply did not attempt to subject foreign sovereigns to the jurisdiction and compulsion of foreign courts. The unilateral assertion of such jurisdiction would have been "destructive of the independence, the equality, and dignity of the sovereign." *The Schooner Exchange v. McFaddon*, 11 U.S. 116, 123 (1812). The relationship among the States of the Union demand the same mutual respect for dignity and sovereignty.

III.
THE STATES DID NOT SURRENDER THEIR IMMUNITY FROM SUIT IN THE COURTS OF OTHER STATES IN THE PLAN OF THE CONVENTION

Both the structure of the Constitution and its framing and ratification suggest not that the pre-constitutional immunity was surrendered, but rather the opposite – that to the extent it was considered, the intent was to maintain all existing state immunities from suit. The structure of the Constitution supports this conclusion by its treatment of the States as equal sovereigns. As this Court recently held:

> States, upon ratification of the Constitution . . . entered the Union "with their sovereignty intact." *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991). An integral component of that "residuary and inviolable sovereignty," The Federalist No. 39, p. 245 (C. Rossiter ed. 1961) (J. Madison), retained by the States is their immunity from private suits.

FMC, 122 S. Ct. at 1870.

The delegation of certain types of disputes to a neutral federal forum also evidences a constitutional design which eschews resort to state courts for interstate disputes. This Court is granted original jurisdiction over disputes between States. Diversity cases and, where the Eleventh Amendment is not a bar, cases between a State and a citizen of another State may be brought in the lower federal courts. This design avoids the provincialism rampant in the period under the Articles of Confederation. *Hall*, 440 U.S. at 434 (Rehnquist, J. dissenting) (litigants were left to the state courts and to the provincialism that proved the bane of this country's earliest attempt at political organization). It defies logic to assume that this history led to the possibility that States, under the new federal system, would be amenable to suit in the courts of other States.

The passage of the Eleventh Amendment in response to the decision in *Chisolm v. Georgia* is consistent with this evidence. As both dissents in *Hall* pointed out, it also defies logic to assume that the States, by ratifying the Eleventh Amendment, would remove an entire class of cases from the neutral federal forum only to allow themselves to be sued in the courts of other States. *Hall*, 440 U.S. at 431 (Blackmun, J., dissenting); *id*. at 437 (Rehnquist, J., dissenting). "The Eleventh Amendment is thus built on the postulate that States are not, absent their consent, amenable to suit in the courts of sister States." *Id*. at 437 (Rehnquist, J., dissenting). *See also Paulus v. South Dakota*, 227 N.W. 52, 55 (N.D. 1929) (In light of the States' Eleventh Amendment immunity from suit in federal court, "[m]uch less would it be consistent with any sound conception of sovereignty that a state might be haled into the courts of a sister sovereign state at the will or behest of citizens or residents of the latter.").

Furthermore, during the debates leading up to the ratification of the Constitution, the immunity of states from private suit was a topic of much discussion. As discussed in Part II, *supra*, although much of discussion centered on the proposed power of the federal judiciary, the language of the debates is absolute in character – and evinced no suggestion that the States

were surrendering any pre-existing immunity from suits in other States' courts. For example, in addition to the statements of Marshall and Madison quoted, *supra*, at 6, Edward Pendleton expressed this view at the Virginia Convention: "The impossibility of calling a sovereign state before the jurisdiction of another sovereign state, shows the propriety and necessity of vesting this tribunal with the decision of controversies to which a state shall be a party." 3 Elliot's DEBATES 549. Such declarations leave little doubt that the Framers were not surrendering their pre-existing immunity in other States' courts by ratifying the Constitution.

Finally, Justice Iredell's dissent in *Chisholm* provides still more evidence that the States did not surrender their immunity at the Convention.[10] Justice Iredell concluded that a "State is altogether exempt from the jurisdiction of the courts of the United States, *or from any other exterior authority,* unless in the special instances where the general government has power derived from the constitution itself." 2 Dall. at 448 (emphasis added). He had earlier expressed the same view – which is utterly inconsistent with the notion that the States surrendered their immunity at the Convention – in *Farquar's Executor v. Georgia*, Cir. Ct. D. Ga. 1791 (Iredell, J.): "The Constitution therefore seems to provide, that in cases where a State is a Party, the Supreme Court shall have original jurisdiction. . . . It may also fairly be presumed that the several States thought it important to stipulate that so awful & important a Trial should not be cognizable by any Court but the Supreme." Reprinted in 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES 148, 153-54 (Maeva Marcus, ed., 1994).

[10] The Court in *Alden* stated that "the views expressed by Hamilton, Madison, and Marshall during the ratification debates, and by Justice Iredell in his dissenting opinion in *Chisholm*, reflect the original understanding of the Constitution." 527 U.S. at 727.

IV.

RECOGNIZING STATES' IMMUNITY FROM PRIVATE SUITS BROUGHT IN THE COURTS OF OTHER STATES WOULD SERVE THE CORE INTERESTS UNDERLYING THE DOCTRINE OF SOVEREIGN IMMUNITY

In *Alden*, the Court observed that private money damages suits against nonconsenting States "may threaten the financial integrity of the States" and impose "substantial costs to the autonomy, the decisionmaking ability, and the sovereign capacity of the States." 527 U.S. at 750. Private suits against States in the courts of other States are no exception.

The threat to the States' fisc by private damages actions brought in sister States' courts is manifest. In this very case, respondent seeks compensatory damages, unspecified punitive damages, and attorney's fees against the State of California. A States' control of the public fisc is a core aspect of sovereignty. Any award of damages against a nonconsenting State infringes on the ability of that State's legislature to perform its basic function of managing the public treasuries.

Similarly, suits such as Hyatt's threaten the "more subtle risks" of subjecting state government "'to the mandates of judicial tribunals . . . and in favor of individual interests.'" *Alden*, 527 U.S. at 750 (quoting *In re Ayers*, 123 U.S. 443, 505 (1887). As the Court elaborated in *Alden*:

> While the judgment creditor of a State may have a legitimate claim for compensation, other important needs and worthwhile ends compete for access to the public fisc. Since all cannot be satisfied in full, it is inevitable that difficult decisions involving the most sensitive and political of judgments must be made. If the principle of representative government is to be preserved by 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 mandated by the

> Federal Government and invoked by the private citizen.

527 U.S. at 751. Those concerns fully apply to suits brought in the courts of other States (and to suits not mandated by the Federal Government).

Lastly, subjecting States to suits filed by private parties is inconsistent with "the dignity that is consistent with their status as sovereign entities." *FMC*, 535 U.S. at ___, 122 S. Ct. at 1874. In determining whether a State has sovereign immunity from suit in a particular forum, the Court has compared the "indignity" a nonconsenting State would suffer from being sued in that forum against the indignity suffered from suit in federal court. Thus, in *FMC*, the Court found that the "affront to a State's dignity does not lessen when an adjudication takes place in an administrative tribunal as opposed to an Article III court." *Id.* at 1874 (footnote omitted). Nor does it lessen when the adjudication takes place in another State's courts. *See also Alden*, 527 U.S. at 749 ("Private suits against nonconsenting States . . . present the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties . . . regardless of the forum.") (internal quotations and citations omitted).

V.

PRINCIPLES OF *STARE DECISIS* ARE NOT A BARRIER TO OVERRULING *NEVADA V. HALL*

This Court has recognized three considerations as being particularly relevant when deciding whether to overrule one of its precedents: (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"; and (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." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 854-55 (1992). These

considerations strongly militate in favor of overruling *Nevada v. Hall*.

Starting at the end (with the third consideration), the prior sections of this brief have demonstrated that *Nevada v. Hall* cannot be reconciled with the reasoning of *Seminole*, *Alden*, and *FMC*. *Hall* placed far too much weight on the literal words of the Eleventh Amendment and on the Framers' particular focus on the jurisdiction of the federal courts. *Seminole*, *Alden*, and *FMC* confirmed that the States possess an immunity from private suit that derives from the Constitution's structure – which itself derives from the Framers' understandings of the States' absolute immunity from private suits.

Nor can *Nevada v. Hall* even be reconciled with decisions predating it, which (unlike *Hall*) spoke about the States' sovereign immunity in broad terms that went well beyond the literal words of Eleventh Amendment. *See, e.g.*, *Beers v. Arkansas*, 20 How. 527, 529 (1858) ("It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, *or in any other*, without its consent and permission"); *Cunningham v. Macon & Brunswick R. Co.*, 109 U.S. 446, 451 (1883) ("It may be accepted as a point of departure unquestioned, that neither a State nor the United States can be sued as defendant *in any court in this country* without their consent, except in the limited class of cases in which a State may be made a party in the Supreme Court of the United States by virtue of the original jurisdiction conferred on this court by the Constitution").

Turning to the second consideration, it is doubtful that many (if any) private citizens have relied on their own States' willingness to entertain an action against another State. This Court has little need for concern that, due to reliance interests, overruling *Nevada v. Hall* will impose "a special hardship" or "inequity." It would certainly impose no more hardship than did overturning *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), in *Seminole*.

Finally, *Nevada v. Hall* has proven to be very impractical to implement. As discussed in the Amicus Brief of Oregon, *et al.*

supporting the petition for a writ of certiorari (at 7-9), state courts have construed *Hall* – particularly footnote 24 – in conflicting ways. Moreover, *Hall* rekindled the very tit-for-tat provincialism that concerned Justice Rehnquist in his dissent. 440 U.S. at 434. *See, e.g. Erlich-Bober v. University of Houston*, 404 N.E. 2d 726, 730 (Ct. App. N.Y. 1981) (New York's nonstatutory policy of preserving its status as the "pre-eminent commercial and financial nerve center of the Nation and the world" overrode Texas's statutory waiver of immunity which required suits against state agencies to be brought in certain counties even though New York statutes provided the same protection); and *K.D.F. v. Rex*, 878 S.W. 2d 589, 594 (Tex. 1994) ("We suppose that the courts of New York, applying this rationale, would not necessarily consider it appropriate for any state other than New York to exercise jurisdiction over another sovereign in a commercial dispute.").

Nevada v. Hall imposes considerable financial and dignitary costs upon the States that cannot be justified by the Constitution. It was wrong when decided, has not stood the test of time, and should be overruled.

CONCLUSION

The judgment of the Nevada Supreme Court should be reversed.

Respectfully submitted,

Richard E. Doran
Attorney General of Florida

Jonathan A. Glogau
Special Counsel
Counsel of Record

PL-01, The Capitol
Tallahassee, FL 32399-1050
(850) 414-3300