

**In The
Supreme Court of the United States**

—◆—
MONTANA BOARD OF INVESTMENTS,

Petitioner,

v.

DEUTSCHE BANK SECURITIES, INC.,

Respondent.

—◆—
**On Petition For A Writ Of Certiorari
To The Court Of Appeals Of New York**

—◆—
**BRIEF OF THE COMMONWEALTH OF
VIRGINIA, 41 OTHER STATES, AND
PUERTO RICO AS AMICI CURIAE
IN SUPPORT OF THE PETITIONER**

—◆—
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QUESTION PRESENTED

In *Nevada v. Hall*, 440 U.S. 410 (1979), this Court held that the States were not immune from suit in the courts of another State. Should this aspect of *Hall* be overruled?

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INTEREST OF AMICI

The States' interest is clear – “An integral component of that ‘residuary and inviolable sovereignty’ retained by the States is their immunity from private suits.” *Federal Mar. Comm’n v. South Carolina State Ports Auth.*, 535 U.S. 743, 751 (2002). *See also* THE FEDERALIST No. 39, at 213 (James Madison) (“[T]he proposed government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects.”); THE FEDERALIST No. 81, at 455 (Alexander Hamilton) (“It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*.”) (emphasis original). Sovereign immunity does not exist solely in order to “preven[t] federal-court judgments that must be paid out of a State’s treasury,” *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994), but allows the States to avoid “the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.” *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (internal quotation marks omitted). Indeed, sovereign immunity bars suits against the States by Indian Tribes, *Blatchford v. Native Vill. of Noatak*, 501 U.S. 773, 782 (1991), foreign nations, *Principality of Monaco v. Mississippi*, 292 U.S. 313, 330-32 (1934), and corporations created by the National Government, *Smith v. Reeves*, 178 U.S. 436, 446, 449 (1900). Moreover, it applies to proceedings in state court, *Alden v. Maine*, 527 U.S. 706, 712 (1999), federal administrative proceedings, *Federal Mar. Comm’n*, 535 U.S. at 760, in admiralty, *In re New York*, 256 U.S. 490, 503 (1921), and in situations where the

State's treasury is not implicated. *See Doe v. Regents of the Univ. of California*, 519 U.S. 425, 431 (1997).

Yet, in *Nevada v. Hall*, 440 U.S. 410 (1979), this Court undermined “the sovereign immunity enjoyed by States as part of our constitutional framework.” *Federal Mar. Comm’n*, 535 U.S. at 753. Specifically, this Court held that, as a matter of constitutional law, the States were not immune from suit in the courts of another State.¹ *Hall*, 440 U.S. at 414-27. Rather, a State's immunity in the courts of another State turns on how the courts of the forum State interpret the principles of comity. As explained in more detail on pages 21-24 of the Petition, the state courts – even within the same State – often are inconsistent and ambiguous in their respective comity determinations. A State may find that it is immune in the courts of one State, but has no immunity in the courts of another State. There is no consistency or clarity.

This lack of consistency and clarity regarding an essential aspect of our constitutional framework is intolerable. Because of the paramount importance of sovereign immunity and because of the confusion, the States submit this Brief as Amici Curiae in support of the Petitioner – the Montana Board of Investments.



¹ This Court also held that the Full Faith and Credit Clause, U.S. Const. art. IV, § 1, did not require state courts to apply the law of another State when that law is in violation of the forum State's public policy. *Hall*, 440 U.S. at 422. There is no need for this Court to address this aspect of *Hall*. This holding – that the Full Faith and Credit Clause does not require a state court to apply law that is repugnant to the State's legitimate policy interests – respects and preserves the sovereignty of the States in the constitutional order.

ARGUMENT

Hall “was not correct when it was decided, and it is not correct today.” *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (discussing *Bowers v. Hardwick*, 478 U.S. 186 (1986)). This is so for three reasons. First, as subsequent decisions clearly demonstrate, *Hall* failed to recognize that the Constitution itself is the source of the States’ sovereign immunity. Second, *Hall* ignored the views of the Framing Generation, which are dispositive under this Court’s later decisions. Third, *Hall* mistakenly relied on dicta in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), to support its conclusion that each State could decide for itself whether to recognize the sovereign immunity of a sister State in the forum State’s courts. Because *Hall* is inconsistent with subsequent holdings, ignored the views of the Framing Generation, and mistakenly relied on dicta in *The Schooner Exchange*, *Hall* “ought not to remain binding precedent.” *Lawrence*, 539 U.S. at 578 (discussing *Bowers*). This Court should grant certiorari to revisit and overrule *Hall*.

I. THE CONSTITUTION ITSELF IS THE SOURCE OF THE STATES’ SOVEREIGN IMMUNITY

In *Hall*, this Court held that the sole source of the States’ sovereign immunity was the Eleventh Amendment and that the Eleventh Amendment was limited to claims in federal courts. *See Hall*, 440 U.S. at 420-21 (“But all of these cases, and all of the relevant debate, concerned questions of federal-court jurisdiction and the extent to which the States, by ratifying the Constitution and creating federal courts, had authorized suits against themselves in those courts.”). *Cf. Hall*, 440 U.S. at 430 (Blackmun, J., joined by Burger, C.J. & Rehnquist, J.,

dissenting) (“I would find that source not in an express provision of the Constitution but in a guarantee that is implied as an essential component of federalism.”); *id.* at 432 (Rehnquist, J., joined by Burger, C.J., dissenting) (“I cannot agree with the majority that there is no constitutional source for the sovereign immunity asserted in this case by the State of Nevada.”).

Yet, subsequent decisions of this Court have vindicated the dissenting Justices and held that there is a constitutional source for the States’ sovereign immunity in *all* courts. *See, e.g., Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 267-68 (1997); *Seminole Tribe v. Florida*, 517 U.S. 44, 55-56 (1996); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98-99 (1984). As this Court explained:

[T]he sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, 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 (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments.

Alden, 527 U.S. at 712-13. *See also id.* at 728 (There is “a settled doctrinal understanding, consistent with the views of the leading advocates of the Constitution’s ratification, that sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself.”). Adoption of the Constitution “did not

disturb States’ immunity from private suits, thus firmly enshrining this principle in our constitutional framework.” *Federal Mar. Comm’n*, 535 U.S. at 752. Indeed, “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.

This proposition – that the States’ sovereign immunity is derived from the structure of the Constitution – is demonstrated by the reaction to this Court’s decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), which held that private citizens from one State could sue another State.² *Id.* at 468 (Cushing, J.); 440 (Wilson, J.); 478-79 (Jay, C.J.); 450-53 (Blair, J.). Almost immediately, Congress passed and the States subsequently ratified the Eleventh Amendment, which effectively overturns *Chisholm*. See *Federal Mar. Comm’n*, 535 U.S. at 752; *Alden*, 527 U.S. at 721. While the text of the Eleventh Amendment is limited to “the specific provisions of the Constitution that had raised concerns during the ratification debates and formed the basis of the *Chisholm* decision,” *id.* at 723, the Eleventh Amendment confirms a much broader proposition – the States are immune from suit. *Hans v. Louisiana*, 134 U.S. 1, 15 (1890) (Federal jurisdiction over suits against unconsenting States “was not contemplated by the Constitution when establishing the judicial power of the United States.”). Cf. *Puerto Rico Aqueduct & Sewer Auth.*, 506 U.S. at 146 (“The Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign

² This Court has explicitly acknowledged that its decision in *Chisholm* was wrong. See *Federal Mar. Comm’n*, 535 U.S. at 752-53; *Alden*, 527 U.S. at 721-22.

immunity.”); *Blatchford*, 501 U.S. at 779 (“[W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms. . . .”). “Although the sovereign immunity of the States derives at least in part from the common-law tradition, the structure and history of the Constitution make clear that the immunity exists today by constitutional design.” *Alden*, 527 U.S. at 733. Given the groundswell of opposition to *Chisholm*, which involved a state being subjected to suit in federal court, surely this same understanding of sovereign immunity should be extended to cases brought in the courts of another State. “If the Framers were indeed concerned lest the States be haled before the federal courts – as the courts of a ‘higher’ sovereign,’ how much more must they have reprehended the notion of a State’s being haled before the courts of a sister State.” *Hall*, 440 U.S. at 431 (Blackmun, J., joined by Burger, C.J. and Rehnquist, J., dissenting). Indeed, the likelihood for local passion and bias would have been much stronger in a state court than it would have been with a life-tenured federal judge riding circuit over a broader geographic area.

Because subsequent decisions confirm that the States’ sovereign immunity has a constitutional source, this Court should revisit and overrule *Hall*. Certiorari should be granted.

II. THE FRAMING GENERATION UNDERSTOOD THE STATES WERE IMMUNE FROM SUIT IN THE COURTS OF ANOTHER STATE

In *Hall*, this Court acknowledged that the Framing Generation believed a State was immune in the courts of another State, but generally disregarded those views. *See*

Hall, 440 U.S. at 417-20. *Cf. id.* at 433-37 (Rehnquist, J., joined by Burger, C.J., dissenting) (emphasizing the importance of the Framing Generation).

Yet, subsequent decisions have vindicated the dissenting Justices with respect to the views of the Framing Generation. In assessing whether sovereign immunity applies to a particular proceeding, “we must examine [the nature of the proceedings at issue] to determine whether they are the type of proceedings from which the Framers would have thought the States possessed immunity when they agreed to enter the Union.” *Federal Mar. Comm’n*, 535 U.S. at 756. There is a presumption “that the Constitution was not intended to ‘rais[e] up’ any proceedings *against the States* that were ‘anomalous and unheard of when the Constitution was adopted.’” (emphasis added). *Id.* at 755. *See also Hans*, 134 U.S. at 18. Indeed, when confronted with the issue of whether sovereign immunity barred certain bankruptcy proceedings, both this Court and the dissenting Justices relied heavily on the experience of the Framing Generation. *Central Virginia Cmty. Coll. v. Katz*, 126 S. Ct. 990, 997-1003 (2006); *id.* at 1009-12 (Thomas, J., joined by Roberts, C.J., Scalia & Kennedy, JJ., dissenting). The issue of whether a State has sovereign immunity in the courts of another State depends upon settled law, as understood by the Framing Generation.

“The founding generation thought it ‘neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons.’” *Alden*, 527 U.S. at 748. *See also In re Ayers*, 123 U.S. 443, 505 (1887). Prior to the adoption of

the Constitution, Pennsylvania and Virginia agreed that Virginia could not be sued in the Pennsylvania courts. *See Nathan v. Virginia*, 1 U.S. (1 Dall.) 77 (Pa. 1781). *See also Hall*, 440 U.S. at 435 (Rehnquist, J., joined by Burger, C.J., dissenting) (The experience of *Nathan v. Virginia* “undoubtedly left an impression” on the Framers, “particularly on Virginians. . .”). Furthermore, Blackstone, “whose works constituted the preeminent authority on English law for the founding generation,” *Alden*, 527 U.S. at 715, stressed “no suit or faction can be brought against the king, even in civil matters, because no court can have jurisdiction over him. For all jurisdiction implies superiority of power. . .” 1 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 234-35 (1765). Similarly, Emmerich de Vattel, the leading international law scholar of the era, declared, “[o]ne sovereign cannot make himself the judge of the conduct of another. . . . It does not, then, belong to any foreign power to take cognizance of the administration of that sovereign, to set himself up for a judge of his conduct, and to oblige him to alter it.” 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 (T. & J.W. Johnson & Co. ed., 1863) (Book II, Ch. 4, § 55). *See also* Thomas H. Lee, *Making Sense of the Eleventh Amendment: International Law and State Sovereignty*, 96 Nw. U. L. Rev. 1027, 1061-66 (2002) (discussing the importance of Vattel’s treatise to the Framing Generation). Thus, “the Framers must have assumed that States were immune from suit in the courts of their sister States. . . .” *Hall*, 440 U.S. at 430-31 (Blackmun, J., joined by Burger, C.J., & Rehnquist, J., dissenting).

Of course, the historical reality is that *some* of the Framers believed that the States, by ratifying the Constitution, had surrendered their sovereign immunity. *See* 1 Phillip Kurland & Ralph Lerner (eds.), *THE FOUNDERS CONSTITUTION* 242-46 (Liberty Fund Edition 2005) (explaining the contrasting views of the Framers on the issue of the nature of federalism). *See also id.* at 246-97 (various letters, essays, and publications from the framing generation setting forth differing views on federalism). The four Justices in the *Chisholm* anti-immunity majority – Chief Justice Jay, Justice Cushing, Justice Wilson, and Justice Blair – played significant roles in the Constitutional Convention, the subsequent State Ratification Conventions, and in the authorship of *THE FEDERALIST*. *See* Kermit L. Hall (ed.), *OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 90, 244-45, 515-16, 1091-92 (2nd ed. 2005) (biographies of Justice Blair, Justice Cushing, Chief Justice Jay, and Justice Wilson). Yet, as the rapid adoption of the Eleventh Amendment in reaction to *Chisholm* demonstrates, the clear national consensus was that the States had *not* surrendered their sovereign immunity when they surrendered sovereign authority to the National Government. *See* David E. Kyvig, *EXPLICIT & AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776-1995* 113-14 (1996) (noting that the Eleventh Amendment overwhelmingly passed Congress and was ratified by the States within a year). It is this clear national consensus in favor of the States’ sovereign immunity, not the individual views of a distinct minority of Framers, which should control. *See Alden*, 527 U.S. at 727 (“[T]he 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.”).

Because subsequent decisions recognize the views of the Framing Generation as determinative and because the Framing Generation clearly believed a State had sovereign immunity in the courts of another State, this Court should revisit and overrule *Hall*. Certiorari should be granted.

III. HALL'S RELIANCE ON DICTA IN *THE SCHOONER EXCHANGE* WAS MISPLACED

In *Hall*, this Court, held that each State had the sovereign authority to reject the immunity of another States in its own courts. *See Hall*, 440 U.S. at 417. To reach this conclusion, the majority relied on dicta in *The Schooner Exchange* stating in dictum that the United States had the right to determine whether to recognize the immunity of a foreign nation in American courts. *See The Schooner Exchange*, 11 U.S. (7 Cranch) at 136. Because the National Government had such sovereign discretion, this Court assumed that the States must also have such sovereign discretion. *Hall*, 440 U.S. at 417 (“The 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.”) (footnote omitted).

The reliance on *The Schooner Exchange* dicta was misplaced.³ As Sixth Circuit Judge Rogers explained:

³ Of course, this Court is “not bound to follow our dicta in a prior case in which the point now at issue was not fully debated.” *Katz*, 126 S. Ct. at 996. *See also Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399-400 (1821) (“It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in

(Continued on following page)

[The] Court read *The Schooner Exchange* to support the proposition that if California and Nevada were independent and completely sovereign nations, then Nevada's assertion of immunity in California courts would depend solely on California law. The Court thus analogized Nevada's claim of immunity in California courts to France's claim of immunity in United States courts. The analogy does not hold, however, because California and Nevada courts are unlike those of the United States in *The Schooner Exchange* in one important respect: California courts are not truly domestic courts of California in the same sense that the United States Supreme Court is a domestic court of the United States. This is because the decisions of California's high court are appealable to a court that can require California to conform to interstate rules: the United States Supreme Court

....

But the Supreme Court is not subordinate to any international tribunal, and was not subordinate in 1811 when *The Schooner Exchange* was decided. Chief Justice Marshall was correct, therefore, in first finding sovereign immunity to be a part of the law of the United States before applying it in a court of the United States. Marshall's analysis does not imply, however, what the majority in *Nevada v. Hall* inferred: that sovereign immunity would not be binding internationally even if United States law were to the contrary. Under Marshall's analysis if United States law

which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.”).

conflicted with an international rule, the Supreme Court, as a court of the United States not subject to review, would apply domestic law in violation of international law. A state court, in contrast, is subject to review by a higher authority; the Supreme Court in fact exercised that authority in the *Nevada v. Hall* case itself. Thus a state court, unlike a domestic court not subject to review, must bring its law into conformity with a relevant higher law. *The Schooner Exchange* accordingly provides no basis for the majority's conclusion in *Nevada v. Hall* that interstate immunity exists only if found in the law of the forum state.

John M. Rogers, *Applying the International Law of Sovereign Immunity to the States of the Union*, 1981 Duke L.J. 449, 465-67 (1981) (footnotes omitted). In other words, there is a fundamental difference between this Court, relying on federal law, rejecting the immunity of a foreign nation and the highest court of a State, relying on state law, rejecting the immunity of another State. Under our Constitution, the ultimate authority to adjudicate the meaning of the Constitution, a federal statute, or an international treaty rests with this Court. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). *See also Cooper v. Aaron*, 358 U.S. 1, 18 (1958). This Court, as a matter of federal law, may ignore international law principles, *see Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2684-87 (2006), but the highest court of a State, as a matter of state law, may not ignore constitutional law. *See* U.S. Const. art. VI, § 2 (Supremacy Clause). Similarly, this Court's pronouncements on international law cannot be reviewed by international tribunals, *see Sanchez-Llamas*, 126 S. Ct. at 2684-85 (decisions of the International Court of Justice are not binding), but a state court's

pronouncements on constitutional law can be reviewed by this Court. *See Virginia v. Hicks*, 539 U.S. 113, 120-21 (2003) (This Court would review state court’s determination that trespass policy was unconstitutionally overbroad.).

As explained above, a State, as a matter of constitutional law, has sovereign immunity in the courts of another State. State law cannot justify disregard of this constitutional reality. Just as the “States, in ratifying the Constitution, did surrender a portion of their inherent immunity by consenting to suits brought by sister States or by the Federal Government,” *Federal Mar. Comm’n*, 535 U.S. at 752, the States also surrendered the ability of their courts to ignore the sovereign immunity of another State. *See Hall*, 440 U.S. at 437 (Rehnquist, J., dissenting) (“Yet, it is equally clear that the States that ratified the Eleventh Amendment thought that they were putting an end to the possibility of individual States as unconsenting defendants in foreign jurisdictions, for, as Mr. Justice Blackmun notes, they would have otherwise perversely foreclosed the neutral federal forums only to be left to defend suits in the courts of other States.”).

Because the reliance on dicta in *The Schooner Exchange* was misplaced, this Court should revisit and overrule *Hall*. Certiorari should be granted.



CONCLUSION

For the reasons stated above and in the Petition itself, the Petition for Certiorari should be GRANTED.

Respectfully submitted,

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