No. 14-1175

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 FOR SOUTH CAROLINA STATE PORTS AUTHORITY AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The South Carolina State Ports Authority ("South Carolina Ports Authority" or "Ports Authority") is an instrumentality of the state of South Carolina that owns and operates seaport facilities in Charleston and Georgetown, South Carolina, and an inland port facility in Greer, South Carolina, for the purpose of handling intermodal container freight.[1] The Ports Authority's infrastructure and operations support and promote the commerce of South Carolina, as well as the interstate and foreign commerce of the United States. The Ports Authority handles intermodal and other cargoes with origins and destinations throughout the nation. The Ports Authority and the state of South Carolina have committed billions of dollars in capital investment dedicated to port-related infrastructure.

As an arm of South Carolina, the Ports Authority is entitled to sovereign immunity. It is not subject to private suit without the State's consent in South Carolina state courts, *see* S.C. CODE ANN. § 15-78-20; federal courts, *Ristow v. S.C. Ports Auth.*, 58 F.3d 1051, 1053-55 (4th Cir. 1995), *cert. den.*, 516 U.S. 987 (1995); and federal administrative tribunals, *Fed.*

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[1] Pursuant to Supreme Court Rule 37.3(a), all parties have consented to the filing of this brief. Petitioner filed a blanket consent to the filing of amicus curiae briefs, in support of either party or of neither party, with this Court on July 21, 2015. Respondent also filed a blanket consent to the filing of amicus curiae briefs, in support of either party or of neither party, with this Court on July 28, 2015. Pursuant to Supreme Court Rule 37.6, Amicus Curiae affirms that no counsel for a party authored this brief in whole or in part, and no one other than Amicus Curiae, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743 (2002). The risk that the Ports Authority might be subject to private suits in the courts of other States, under this Court's decision in *Nevada v. Hall*, 440 U.S. 410 (1979), is antithetical to the interests of the Ports Authority and the state of South Carolina.

The Constitution of the state of South Carolina precludes the obligation of monies from its treasury, except in appropriations made by law, and authorizes the General Assembly to enact laws establishing the manner in which claims against the State may be made. *See* S.C. CONST. art. X §§ 8, 10. The General Assembly of South Carolina has not consented to private suits brought in the tribunals of other States. *See* S.C. CODE ANN. § 15-78-20(e). Thus, the Ports Authority has a strong interest in reversing *Hall* and protecting the full scope of the Ports Authority's immunity from unconsented suit.

SUMMARY OF ARGUMENT

Sovereign immunity protects the fiscal integrity of the public purse at both the federal and state level. In the U.S. Constitution, the power of the purse lies with the legislative (not the judicial) branch, since no public monies may be expended, except by and with the consent of the people's elected representatives in Congress. *See* U.S. CONST. art. I, § 9, cl. 7. This principle (that the legislature, not the judiciary, determines how government money is spent) is equally present in state constitutions, including the constitution of the state of South Carolina in effect at the time of the ratification of the U.S. Constitution. *See* S.C. CONST. of 1778 art. XVI. Importantly for the present case, this principle protects public

treasuries from liability arising from unconsented suits by individual citizens.

Sovereign immunity, therefore, is rooted firmly in the design and structure of the nation's constitutional system of government. In *Hans v. Louisiana*, this Court explained the principle of sovereign immunity as being one and the same for both the States and the United States, applicable regardless of the forum. 134 U.S. 1 (1890). Further, this Court has consistently recognized the sovereign immunity of the United States no matter what the forum. *West v. Gibson*, 527 U.S. 212 (1999).

In *Alden v. Maine*, 527 U.S. 706 (1999), and more recently in *Federal Maritime Commission*, 535 U.S. 743, this Court broadly affirmed the application of the principle of state sovereign immunity in forums beyond the federal courts. These decisions command but one answer to the third question presented by the Petitioner in this case. Sovereign immunity "does not turn on the forum in which the suits [are] prosecuted." *Alden*, 527 U.S. at 733. As such, States *must* retain their right to immunity from private complaints filed *not only* in federal district courts, federal administrative proceedings, and their own state courts, but also in the courts of other States.

The preservation of sovereign immunity today is essential to the orderly and efficient operation of government. The federal government and state governments are investing billions of dollars of public money in infrastructure. That investment entails potentially enormous exposure. With their sovereign immunity intact, the federal government and state governments can manage that exposure in a manner that promotes

the public interest in those investments. The court's decision in *Nevada v. Hall* undermines the States' ability to manage that exposure.

Therefore, *Nevada v. Hall* should be overruled.[2]

I. THE DOCTRINE OF SOVEREIGN IMMUNITY IS ROOTED FIRMLY IN THE CONSTITUTIONAL STRUCTURE.

A. The Framers Intended to Preserve the Sovereignty of the States Against the Suit of an Individual Regardless of the Forum.

To address the question of the scope of a State's sovereign immunity, the Court must first look to the original understanding of the Constitution as indicated by the views of the Framers. *See Alden*, 527 U.S. at 741; *Printz v. United States*, 521 U.S. 898, 910 (1997) (noting that the Framers' views are "usually regarded as indicative of the original understanding of 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. Alexander Hamilton wrote:

> 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

[2] The Ports Authority submits this amicus brief to address the third Question Presented only. The Ports Authority does not take a position on the other question before the Court.

> 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, and the danger intimated must be merely ideal. . . .

THE FEDERALIST NO. 81, at 529-30 (Alexander Hamilton) (New York: Modern Library, 1941). James Madison agreed: "It is not in the power of individuals to call any state into court." 3 J. ELLIOTT, DEBATES ON THE FEDERAL CONSTITUTION 533 (2d ed. 1836) [hereinafter DEBATES], quoted in *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 70 n.12 (1996), and *Hans*, 134 U.S. at 14. Echoing Madison, future Chief Justice Marshall also recognized: "It is not rational to suppose that the sovereign power should be dragged before a court." DEBATES, at 555, quoted in *Hans*, 134 U.S. at 14.[3]

> [The] cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the constitution . . . . The suability of a state, without its consent, was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted.

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[3] "[T]his Court has consistently taken the views of Madison, Marshall, and Hamilton as capturing the true intent of the Framers." *Nevada v. Hall*, 440 U.S. at 436 (Rehnquist, J., dissenting) (citing *Edelman v. Jordan*, 415 U.S. 651, 660-62 (1974); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 323-30 (1934); *Hans*, 134 U.S. at 12-15).

Hans, 134 U.S. at 15-16. Therefore, "the States entered the federal system with their sovereignty intact." *Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 779 (1991).

At the time of the development of the Constitution, it was generally accepted that the States' sovereignty foreclosed suits against them brought in the courts of other States. *Nathan v. Virginia*, 1 U.S. (1 Dall.) 77 (Pa. Com. Pl. 1781). Nothing in the Constitution, as finally proposed and ratified, changed that expectation. To the contrary, the proposition that the liberties and privileges of a citizen of one State guaranteed under the Constitution should allow that citizen to move freely to another State and then initiate suit against his former State is too untenable to be recognized. The Framers did not design the Union to be abused in that fashion.

In fact, the original constitutional plan contemplated a surrender of the States' sovereign immunity (in exchange for joining the Union) in only two circumstances. *Monaco*, 292 U.S. at 329. First, the States waived their immunity from suits brought by the United States. *United States v. Mississippi*, 380 U.S. 128, 140-41 (1965). And second, the States waived their immunity in suits brought by other States. *South Dakota v. North Carolina*, 192 U.S. 286 (1904).

Despite the widespread understanding of the States' sovereign immunity, the Supreme Court in *Chisholm* held that Article III authorized a private citizen of South Carolina to sue the state of Georgia without its consent. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). The outrage following the Court's decision provoked the almost-immediate ratification of the Eleventh Amendment. *See, e.g.*, C. WARREN, THE

SUPREME COURT IN UNITED STATES HISTORY 96 (rev. ed. 1926) (*Chisholm* "fell upon the country with a profound shock"), quoted in *Alden*, 527 U.S. at 720. History teaches "that Congress acted not to change but to restore the original constitutional design" in enacting the Eleventh Amendment. *Alden*, 527 U.S. at 722. Thus, the Eleventh Amendment reflects "a consensus that the doctrine of sovereign immunity, for States as well as for the Federal Government, was part of the understood background against which the Constitution was adopted, and which its jurisdictional provisions did not mean to sweep away." *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 32 (1989) (Scalia, J., dissenting). The Eleventh Amendment, therefore, is not a source of state sovereign immunity; rather it is a remedial confirmation of it.

Even if one assumes that the Eleventh Amendment is a source of state sovereign immunity, as opposed to a remedial confirmation of it, allowing private suits in the courts of another State is incompatible with that immunity. It makes no sense whatsoever to allow a citizen of Georgia, for example, to file suit against the Ports Authority in state court in Georgia, but prohibit that same suit (in the first instance) in federal court. And because removal to a federal court can effect a waiver of immunity, *see Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613 (2002), the Ports Authority is effectively denied its Eleventh Amendment immunity if it seeks the benefit of an impartial federal forum.

History is telling. The promise that the States would not be subject to suits at the hands of private citizens was integral to their ratification of the Constitution, thereby creating the Federal Government and granting it "few and defined" powers. *Gregory v. Ashcroft*,

501 U.S. 452, 457-58 (1991) (quoting THE FEDERALIST NO. 45, at 292-93 (James Madison) (C. Rossiter ed. 1961)). The Framers' understanding of the doctrine of sovereign immunity, as applied to both the States and the United States, focused upon the "suability" of a sovereign, and not upon the forum in which the suit was brought. The constitutional debates certainly addressed Article III, but only because of the concern that Article III might subject non-consenting States to private suits. The idea that Article III granted such a power was rejected on the general understanding that the "suability of a state" by a private party "was a thing unknown to the law," *Hans*, 134 U.S. at 16, and the States' immunity would be preserved inviolate under the constitutional design, *Printz*, 521 U.S. at 918-19.

State sovereign immunity accords the States "the dignity that is consistent with their status as sovereign entities." *Fed. Mar. Comm'n*, 535 U.S. at 760 (citing *In re Ayers*, 123 U.S. 443, 505 (1887)). "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.'" *Id*. (quoting *Alden*, 527 U.S. at 748) (emphasis added). The Framers' concern to avoid an "impermissible affront to a State's dignity" has led this Court to recognize, in other contexts, that state sovereign immunity extends beyond the federal courts. *See, e.g., id*. The same rationale must be applied to the operation of state sovereign immunity in the courts of other States.

Because private party suits in any forum against non-consenting States were "anomalous" and "unheard-of proceedings" at the time of the Constitution's adoption, *see Alden*, 527 U.S. at 727 (quoting *Hans*, 134 U.S. at 18), this Court should presume that the States' immunity is preserved and that it protects the States from any and all such proceedings, regardless of the forum chosen by a private party. Further, the United States obtained its sovereignty from the States. Whatever principles are inherent in the federal government's sovereignty are necessarily inherent in the sovereignty of the States. *See Alden*, 527 U.S. at 749-50. Thus, if immunity principles preclude private complaints against the United States regardless of the forum, then the same must hold true for the States.

B. This Court's Jurisprudence Recognizes the Dual and Complementary Sovereignty of the States and the United States.

Against a historical backdrop that demonstrates the importance of the States' sovereign immunity to the founding generation, this Court has "recognized a '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*, 134 U.S. at 18). This Court has "often described the States' immunity in sweeping terms, without reference to whether the suit was prosecuted in state or federal court." *Id*. at 745. This Court also has recognized consistently that "under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *See, e.g.*, *Tafflin v. Devitt*, 493 U.S. 455, 458 (1990).

Thus, it is no surprise that since *Chisholm* was rejected by the Eleventh Amendment, this Court has consistently recognized the principle of sovereign immunity. Chief Justice Marshall recognized the application of sovereign immunity to the United States in dicta in both *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 411-42 (1821), and *United States v. Clarke*, 33 U.S. (8 Pet.) 436, 444 (1834). Chief Justice Taney also recognized it in *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1857). In 1868, Justice Davis, writing for a unanimous Court in *Nichols v. United States*, explained the importance of the operation of sovereign immunity. 74 U.S. (7 Wall.) 122, 126 (1868).

This Court also has upheld the States' immunity in various contexts falling outside the literal text of the Eleventh Amendment. In *Hans*, the Court held that the Eleventh Amendment confirms that a citizen cannot sue his own State even though the express language of the Amendment only appears to prohibit suits filed against States by citizens of another State or of a foreign state. 134 U.S. 1. The plaintiff in *Hans* argued that the Eleventh Amendment only prohibits the federal courts from exercising jurisdiction over the States in diversity cases, but not in cases arising under the Constitution, laws, or treaties of the United States (*i.e.*, federal question jurisdiction). *Id.* at 9-10. The Court reviewed the history of the Eleventh Amendment and noted the "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." *Id.* at 17. The Court explained the sovereign immunity enjoyed by the States as congruent with that of the United States in the following terms:

> "It may be accepted as a point of departure unquestioned," said Mr. Justice MILLER . . ., "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."

Id. (internal citation omitted; emphasis added). Therefore, the Court found that adhering to the "letter" of the Amendment would not serve the doctrine of sovereign immunity embodied in the Eleventh Amendment. *Id*. at 15.

In *Seminole Tribe*, the Court considered whether Congress had the power to abrogate the States' sovereign immunity in the Indian Gaming Regulatory Act, passed by Congress under the Indian Commerce Clause, U.S. CONST. art. I, § 8, cl. 3. 517 U.S. at 47-53. Earlier in *Union Gas,* a plurality of the Court held that the Interstate Commerce Clause in Article I of the Constitution granted Congress the authority to abrogate the States' immunity. *Union Gas*, 491 U.S. at 19. This Court in *Seminole Tribe* revisited the issue of the powers granted to Congress under Article I with respect to the States' immunity. The Court overruled *Union Gas* and held that Article I does not authorize Congress to abrogate the States' sovereign immunity. *Seminole Tribe*, 517 U.S. at 63-73.

Even though the statute at issue in *Seminole Tribe* only authorized prospective injunctive relief, the Court held that "the type of relief sought is irrelevant to whether Congress has power to abrogate States' immunity." *Id*. at 58. The Court recognized that a

State's sovereign immunity protects it not only from judgments paid out of its treasury, but also from the indignity of being hauled into court by a private party and having to defend itself. *Id*.

In *Alden*, the Court held that Article I does not grant Congress the authority to subject non-consenting States to private suits in their own courts. 527 U.S. at 712. In applying the doctrine of sovereign immunity to proceedings in state courts, this Court reasoned: "Private suits against nonconsenting States, however, present 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties,' . . . *regardless of the forum*." *Id*. at 749 (quoting *In re Ayers*, 123 U.S. at 505) (emphasis added). Significantly, the Court focused on the historical importance of the doctrine of sovereign immunity and not the forum in which it was asserted. *Id*. at 733 (sovereign immunity "does not turn on the forum in which the suits [are] prosecuted"). In analyzing the scope of the States' immunity, this Court expressly recognized that the United States enjoys sovereign immunity and that the States are "entitled to a reciprocal privilege." *Id*. at 749-50.

More recently, in *Federal Maritime Commission*, this Court affirmed that sovereign immunity precluded a federal administrative agency from adjudicating a private complaint against a non-consenting State. 535 U.S. 743. In that case, the Ports Authority noted that the sovereign immunity of the United States also precluded suit before a federal administrative agency. *See West v. Gibson*, 527 U.S. 212 (acknowledging that the sovereign immunity of the Federal Government applies in federal administrative proceedings). The Ports Authority asserted that the States were entitled to a "reciprocal privilege." *Alden*, 527 U.S. at 749-50.

Thus, when this Court considers the scope of the States' sovereign immunity, it honors the promise made to the States over 200 years ago and paints with a broad brush. *See Alden*, 527 U.S. at 745 (describing the States' sovereign immunity in "sweeping terms"); *Nevada v. Hall*, 440 U.S. at 438 ("When the State's constitutional right to sovereign immunity has been described, it has been in expansive terms.") (Rehnquist, J., dissenting). This Court's precedent establishes a tremendous respect for the sovereignty of both the United States and the States and makes no meaningful distinction between the two sovereigns when defining the scope and application of their sovereignty.

II. THE CONSTITUTIONAL STRUCTURE CONFIRMS THAT STATES ARE ENTITLED TO ASSERT THEIR SOVEREIGN IMMUNITY ON THE SAME TERMS AS THE UNITED STATES.

Both the United States and the States derive their immunity from the same source–the general understanding of the founding generation that a sovereign shall not be compelled to answer private suits against its will. While the Founders adopted this understanding from the English belief (memorialized by Sir William Blackstone) that the king was immune from suit, W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 241-44 (Thomas M. Cooley ed. 1872), it assumes a far greater significance under the constitutional design.

Just as the States are immune from private suits, this Court subscribes to the "universally received opinion . . . that no suit can be commenced or prosecuted against the United States." *Cohens*,

19 U.S. (6 Wheat.) at 411-12. Of course, the United States obtained its sovereign authority, and its very name, by assignment from the States, and whatever attributes of sovereignty are inherent in one must necessarily be inherent in the other. *See Gregory v. Ashcroft*, 501 U.S. at 457 (recognizing that the States adopted the Constitution which "created a Federal Government of limited powers" and retained the States' "numerous and infinite" powers). Thus, to the extent that the United States enjoys the benefits of sovereign immunity, it is only because it acquired that attribute of sovereignty from the States.

The sovereign immunity of the federal government itself is beyond question, even though there is nothing in the Constitution that provides specifically for it. This sovereign immunity of the federal government is derived not from any specific provision of the Constitution, but rather by the structure of the instrument itself. It is "informed by separation-of-powers, considerations that reflect the Constitution's express conferral to Congress of the power of appropriations and property disposition." U.S. Reply Br. 18 n.10, *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 2002 WL 221018 (U.S. Feb. 11, 2002) (No. 01-46). The Appropriations Clause of the U.S. Constitution states: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. CONST. art. I, § 9, cl. 7. Similarly, the South Carolina Constitution in effect at the time of the ratification of the U.S. Constitution provided that "no money be drawn out of the public treasury but by the legislative authority of the State." S.C. CONST. OF 1778 art. XVI. Thus, the principle of sovereign immunity is inherent in the constitutional design, at both the federal and state levels. There was no contemplation that the principle of sovereign immunity might be subject to

abrogation by private suit against a non-consenting State in any forum, and thereby might surrender control of the public purse contrary to the Constitution.

The spectacle of both of the States involved in this case, California and Nevada, seeking reversal of *Nevada v. Hall* in separate petitions belies the notion that sovereign immunity is merely incidental to the constitutional design. *See* Petition for Writ of Certiorari, *Franchise Tax Bd. of Cal. v. Hyatt*, 2015 WL 1346455 (U.S. Mar. 23, 2015) (No. 14-1145); Petition for Writ of Certiorari, *Nevada v. City & Cty. of S.F.*, 2015 WL 981686 (U.S. Mar. 4, 2015) (No. 14-1073). Rather, sovereign immunity is essential to the constitutional objectives that are primarily informed by separation of powers principles, namely the legislature's exclusive control over the power of the purse.

Throughout history, this Court has consistently described the constitutional system of the United States as one of dual sovereignty. *See, e.g., Tafflin*, 493 U.S. at 458. This Court often intermingles the case law addressing the sovereign immunity of one when analyzing the immunity of the other. *See United States v. Lee*, 106 U.S. 196, 206-07 (1882) (in analyzing whether the United States enjoyed immunity, the Court relied upon Justice Iredell's dissent in *Chisholm*, which involved a State's claim of sovereign immunity); *The Siren*, 74 U.S. (7 Wall.) 152, 156 (1868) (relying upon a Pennsylvania state court case defining the scope of Pennsylvania's immunity to support the federal government's immunity in a similar context); *Hans*, 134 U.S. at 16 (in addressing the scope of the States' sovereign immunity, the Court relied upon opinions on the suability of the federal government).

Thus, this Court implicitly recognizes that the principle of sovereign immunity is a general protection afforded to the United States and the States on comparable terms. "It is obvious that in our system of jurisprudence, the principle [of sovereign immunity] is as applicable to each of the states as it is to the United States." *Lee*, 106 U.S. at 206. Thus, "[i]t 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 . . . ." *Cunningham v. Macon & Brunswick R.R. Co.*, 109 U.S. 446, 451 (1883) (emphasis added). This is true because *"[e]very government* has an inherent right to protect itself from suits, and if, in the liberality of legislation, they are permitted, it is only on such terms and conditions as are prescribed by statute. The principle is fundamental, *applies to every sovereign power* . . . ." *Nichols*, 74 U.S. (7 Wall.) at 126 (emphasis added). "It is a familiar principle that *all governments* possess an immunity from suit, and it is only in a spirit of liberality, and to promote the ends of justice, that they ever allow themselves to be brought into court." *United States v. O'Keefe*, 78 U.S. (11 Wall.) 178, 182 (1870) (emphasis added).

Most recently, in *Alden*, this Court expressly stated that the States are entitled to assert their sovereign immunity on the same terms as the United States. 527 U.S. 706. In deciding whether the States enjoy immunity from suits in their own courts, this Court found it significant that the federal government enjoys immunity in its own courts. "In light of our constitutional system recognizing the essential sovereignty of the States," this Court recognized that the States are "entitled to a reciprocal privilege," *id*. at 749-50, thus granting the States sovereign immunity on the same terms as the United States enjoys its

immunity. This reciprocal symmetry is a recognition of the fact that the obligation of public monies is a legislative, not a judicial function, and that private suits cannot be prosecuted against a public treasury without consent. Therefore, as with the sovereign immunity of the federal government, the question of the forum in which a sovereign may be amendable to suit is properly a question of the terms of the sovereign's consent, and not the scope of the immunity itself. *See, e.g.*, 28 U.S.C. § 1491(a)(1).

III. THE PUBLIC'S INVESTMENT IN THE INFRASTRUCTURE OF THE NATION, WHETHER AT THE FEDERAL OR THE STATE LEVEL, IS ENTITLED TO THE PROTECTIONS AND BENEFITS OF SOVEREIGN IMMUNITY.

One of the public functions essential to the economic health of the nation is the investment in the infrastructure that the nation requires. In a challenging fiscal environment, it is critical that the nation be able to manage efficiently its public infrastructure investments, whether that investment is made at the federal or state level. The underfunding of transportation-related infrastructure has reached what has been described as a national "crisis." NAT'L SURFACE TRANSP. INFRASTRUCTURE FIN. COMM'N, U.S. DEP'T OF TRANSP., PAVING OUR WAY: A NEW FRAMEWORK FOR TRANSPORTATION FINANCE, Exec. Summ. (2009).[4]

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[4] *See also* ROBERT S. KIRK & WILLIAM J. MALLET, CONG. RESEARCH SERV., R42877, FUNDING & FINANCING HIGHWAYS & PUBLIC TRANSPORTATION (2015); ROGER C. ALTMAN, ET AL., THE HAMILTON PROJECT, DISCUSSION PAPER 2015-04, FINANCING U.S. TRANSPORTATION INFRASTRUCTURE IN THE 21ST CENTURY (2015).

For example, the federal government establishes, maintains, and operates a sophisticated air traffic control system for the benefit of air transportation services, in both interstate and foreign air transportation.[5] The potential exposure associated with these activities is enormous. The public's investment in and operation of that system is protected by the sovereign immunity of the United States, and it is managed through the enactment of limited and narrowly construed waivers of sovereign immunity. *See United States v. Nordic Village Inc.*, 503 U.S. 30, 34 (1991) (referencing the "traditional principle that the Government's consent to be sued 'must be construed strictly in favor of the sovereign' . . . and not 'enlarge[d] . . . beyond what the language requires.'") (internal citations omitted). Those protections are essential to the operation of the federal government and the orderly performance of its responsibilities.

The federal government, however, is not alone in providing the infrastructure necessary to support the commercial and economic interests of the United States. The States themselves share that function. For example, the state of South Carolina, through the Ports Authority, provides and operates port infrastructure for the benefit of both the interstate and foreign commerce of the United States. The Constitution of the state of South Carolina continues to vest in

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[5] The fact that these functions could also be performed by the private sector is of no moment. There have been many proposals to privatize air traffic control functions. *See* BART ELIAS, CONG. RESEARCH SERV., R43844, AIR TRAFFIC INC.: CONSIDERATIONS REGARDING THE CORPORATIZATION OF AIR TRAFFIC CONTROL (2015). Until these proposals become a reality, the function is entitled to the benefit of sovereign immunity.

its legislature the power of appropriations that is comparable to that of the U.S. Constitution. S.C. CONST. art. X, § 8. Further, it authorizes the General Assembly to direct by law in what manner claims against the State may be established and adjusted. S.C. CONST. art. X, § 10. Today, the legislature of the state of South Carolina manages the tort exposure related to its infrastructure and other activities in the same way Congress manages the exposure of the federal government, by enacting legislation establishing a limited waiver and consent to be sued. S.C. CODE ANN. § 15-78-10, *et seq*.[6] As such, the protection of sovereign immunity is as important to South Carolina's investment in its port infrastructure as it is to the federal government's investment in its own infrastructure.[7] In the ordinary course of port business, it is necessary for major public ports, including the Ports Authority, to have employees located in other states, raising the prospect of potential unconsented suit in those states. This Court's decision in *Nevada v. Hall* creates a loophole in a State's ability to manage that exposure that is

[6] In fact, a majority of States manage their exposure to private suit through limited statutory waivers of their sovereign immunity patterned on federal laws like the Federal Tort Claims Act. *See* Nat'l Conf. of State Legislatures, *State Sovereign Immunity & Tort Liability* (Sept. 2, 2015, 12:18 PM), *available at* http://www.ncsl.org/research/transportation/state-sovereign-immunity-and-tort-liability.aspx.

[7] In this regard, the Supreme Court of the state of South Carolina generally recognizes the sovereign immunity of its sister States and the terms of their consents to suit. *See*, *e.g.*, *Newberry v. Ga. Dep't of Industry & Trade*, 336 S.E.2d 464 (S.C. 1985) (non-consenting sister state could not be sued in tort in South Carolina); *Melton v. Crowder*, 452 S.E.2d 834 (S.C. 1995) (sister state was consenting state subject to suit in South Carolina).

neither consistent with, nor contemplated by, the framework of the U.S. Constitution.

CONCLUSION

At the time of the ratification of the Constitution, it was presumed that the States entered the Union with the principle of state sovereign immunity so well established that there was no thought that it could be altered without a specific clause in the U.S. Constitution to that effect. *Nevada v. Hall* and its conclusion that the Eleventh Amendment does not preclude suits against States in the courts of other States turns constitutional history on its head. It ignores the Eleventh Amendment's purpose–as remedial confirmation of the sovereign immunity of the States, rather than the source of such immunity. *Hall* is not only inconsistent with this Court's modern jurisprudence on the question of sovereign immunity, it is inconsistent with the historical record of the development of our republican constitutional system, and it is incompatible with the States' own expectations in the establishment of the infrastructure that is so important to their sovereign responsibilities. It is not, therefore, merely a reflection of a "settled doctrinal understanding" of the structure of the Constitution itself that confirms the sovereign immunity of the States, but also in recognition of the nature of the retained sovereignty of the States that, by and through their approval in the ratification process, made the U.S. Constitution, and our integrated Union, a reality.

For the foregoing reasons, and those set forth in Petitioner's brief, the Court should overrule *Nevada v. Hall*.

Respectfully submitted,

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