No. 17-1299

In The
Supreme Court of the United States

FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,

Petitioner,

v.

GILBERT P. HYATT,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Nevada

BRIEF IN OPPOSITION FOR RESPONDENT

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QUESTION PRESENTED

Whether petitioner has shown a compelling justification for setting aside principles of stare decisis and overruling *Nevada v. Hall*, 440 U.S. 410 (1979).

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BRIEF IN OPPOSITION FOR RESPONDENT

Respondent Gilbert P. Hyatt respectfully opposes the Petition for a Writ of Certiorari by the Franchise Tax Board of the State of California in this case.

STATEMENT

This is the continuation of litigation that has been going on for over a quarter of a century and it is back in this Court for the third time. *Franchise Tax Board v. Hyatt* (*Hyatt I*), 538 U.S. 488 (2003); *Franchise Tax Board v. Hyatt* (*Hyatt II*), 136 S.Ct. 1277 (2016).

The Underlying Facts

This is a state-law tort suit brought in Nevada state courts and is one of several disputes between Gilbert P. Hyatt and petitioner California Franchise Tax Board ("the Board"). The original dispute arose out of a residency tax audit initiated by the Board with respect to the 1991 and 1992 tax years. The principal issue in the tax matter involves the date that Hyatt, a former California resident, became a permanent resident of Nevada. Hyatt contends that he became a Nevada resident in late September 1991, shortly before he received significant licensing income from certain patented inventions. The Board has taken the position that Hyatt became a resident of Nevada in April 1992. The tax dispute remains the subject of ongoing proceedings in California. *See*, *e.g.*, *Hyatt v. Yee*, 871 F.3d 1067 (9th Cir. 2017) (holding that Hyatt could not

enjoin Franchise Tax Board proceedings based on constitutional violations and the lengthy delay in the proceedings).[1]

This lawsuit concerns tortious acts committed by the Board and its employees against Hyatt. The evidence at trial showed that Board auditor Sheila Cox, as well as other employees of the Board, went well beyond legitimate bounds in their attempts to extract a tax settlement from Hyatt. Referring to Hyatt, the auditor declared that she was going to "get that Jew bastard." *See* 4/23/08 Reporter's Tr. ("RT") at 165:15-20; 4/24/08 RT at 56:15-20. According to testimony from a former Board employee, the auditor freely discussed personal information about Hyatt – much of it false – leading her former colleague to believe that the auditor had created a "fiction" about Hyatt. *See* 4/23/08 RT at 184:18-20; 4/24/08 RT at 42:4-43:8.

The auditor also went to Hyatt's Nevada home, peered through his windows and examined his mail and trash. *See* 4/24/08 RT at 62:16-24. After Cox had closed the audit, she boasted about having "convicted" Hyatt and then returned to his Nevada home to take trophy-like pictures. *See* 85 Resp.'s App. ("RA") at 021011-13 (filed Dec. 21, 2009). The auditor's

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[1] At a final hearing in August 2017, the California State Board of Equalization found five out of six tax issues in favor of Hyatt including that his Nevada residency began on October 20, 1991. The Franchise Tax Board has petitioned for rehearing with the California Office of Tax Appeals, a matter which is still pending. In the Matter of the Appeals of Gilbert P. Hyatt, California Office of Tax Appeals Case Nos. 435770 and 446509.

incessant discussion of the investigation conveyed the impression that she had become "obsessed" with the case. *See* 4/23/08 RT at 184:16-20; 4/24/08 RT at 134:1-12. Within her department, Ms. Cox pressed for harsh action against Hyatt, including imposition of fraud penalties that are rarely issued in residency audits. *See* 4/24/08 RT at 28:6-13. To bolster this effort, she enlisted Hyatt's ex-wife and estranged members of Hyatt's family against him. *See*, *e.g.*, 80 RA at 019993-94; 83 RA at 020616-20, 020621-24, 020630-35. Cox often spoke coarsely and disparagingly about Hyatt and his associates. *See* 4/23/08 RT at 171:13-172:8; 4/24/08 RT at 56:21-58:19.

The Franchise Tax Board also repeatedly violated promises of confidentiality. Although Board auditors had agreed to protect information submitted by Hyatt in confidence, the Board bombarded people with information "[d]emand[s]" about Hyatt and disclosed his home address and social security number to third parties, including California and Nevada newspapers. *See*, *e.g.*, 83 RA at 020636-47; 4/24/08 RT at 41:17-24. Demands to furnish information, naming Hyatt as the subject, were sent to his places of worship. *See* 83 RA at 020653-54, 020668-69, 020735-36. The Board also disclosed its investigation of Hyatt to Hyatt's patent licensees in Japan. *See* 84 RA at 020788, 020791. The Board knew that Hyatt, like other private inventors, had significant concerns about privacy and security. *See* 83 RA at 020704. Rather than respecting those concerns, the Board sought to use them as a way to coerce him into a settlement.

One Board employee pointedly warned Eugene Cowan, an attorney representing Hyatt, about the necessity for "extensive letters in these high profile, large dollar, fact-intensive cases," while simultaneously raising the subject of "settlement possibilities." *See* 5/22/08 RT at 80:3-81:2. Both Cowan and Hyatt understood the Board employee to be pushing for tax payments as the price for maintaining Hyatt's privacy. *See* 4/30/08 RT at 155:12-25; 5/12/08 RT at 73:23-74:23.2.

The Initial Litigation

Hyatt brought suit against the California Franchise Tax Board in Nevada state court, asserting both negligent and intentional torts, including for invasion of privacy and the intentional infliction of emotional distress. In response, the Board asserted that it was entitled to absolute sovereign immunity. Although it is clearly established that a state does not have sovereign immunity when sued in the courts of another state, *see Nevada v. Hall*, 440 U.S. 410 (1979), the Board argued that the Full Faith and Credit Clause required Nevada to give effect to California's own immunity laws, which allegedly would have given the Board full immunity against Hyatt's state-law claims. The Nevada Supreme Court rejected the Board's argument that it was obligated to apply California's law of sovereign immunity. Nevertheless, the Nevada Supreme Court extended significant immunity to the Board as a matter of comity. While the court found that "Nevada has not expressly granted its state agencies immunity for all negligent acts," *Franchise Tax Board of California v.*

Hyatt, Nos. 35549 and 36390, 2002 Nev. LEXIS 57, at *10 (Nev. Apr. 4, 2002) (judgment noted at 106 P.3d 1220 (table)), it explained that "Nevada provides its agencies with immunity for the performance of a discretionary function even if the discretion is abused." Id. The court thus concluded that "affording Franchise Tax Board statutory immunity [under California law] for negligent acts does not contravene any Nevada interest in this case." Id.

The Nevada Supreme Court declined, however, to apply California's immunity law to Hyatt's intentional tort claims. The court first observed that "the Full Faith and Credit Clause does not require Nevada to apply California's law in violation of its own legitimate public policy." Id. at *8. It then determined that "affording Franchise Tax Board statutory immunity for intentional torts does contravene Nevada's policies and interests in this case." Id. at *11. The court pointed out that "Nevada does not allow its agencies to claim immunity for discretionary acts taken in bad faith, or for intentional torts committed in the course and scope of employment." Id. (citation omitted). Against this background, the court declared that "greater weight is to be accorded Nevada's interest in protecting its citizens from injurious intentional torts and bad faith acts committed by sister states' government employees, than California's policy favoring complete immunity for its taxation agency." Id.

Supreme Court Review: *Hyatt I*

This Court, in a unanimous opinion, affirmed the decision of the Nevada Supreme Court. *Franchise Tax Board of California v. Hyatt*, 538 U.S. 488 (2003) ("*Hyatt I*"). Rejecting the Board's argument that the Full Faith and Credit Clause required Nevada courts to apply California's immunity laws, the Court reiterated the well-established principle that the Full Faith and Credit Clause does not compel "a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." Id. at 494 (internal quotation marks omitted). Applying that test, the Court found that Nevada was "undoubtedly 'competent to legislate' with respect to the subject matter of the alleged intentional torts here, which, it is claimed, have injured one of its citizens within its borders." Id. The Court noted that it was "not presented here with a case in which a State has exhibited a 'policy of hostility to the public Acts' of a sister State." Id. at 499, quoting *Carroll v. Lanza*, 349 U.S. 408, 413 (1955). To the contrary, the Court noted, "[t]he Nevada Supreme Court sensitively applied principles of comity with a healthy regard for California's sovereign status, relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis." 538 U.S. at 499.

The Trial, Verdict, and Review in the Nevada Supreme Court

On remand from this Court, a trial was held and the jury found the Board liable for a variety of intentional

torts, ranging from fraud to invasion of privacy to intentional infliction of emotional distress. The jury awarded Hyatt a total of $139 million in compensatory damages and $250 million in punitive damages.

The Nevada Supreme Court reversed in part, affirmed in part, and remanded. *Franchise Tax Board of California v. Hyatt*, 335 P.2d 125 (Nevada 2014). In doing so, it reduced the Board's liability for compensatory damages to approximately $1 million (pending a retrial on damages with respect to Hyatt's intentional infliction of emotional distress claim). Proceeding to the merits, the Nevada Supreme Court set aside most of the judgment against the Board, finding that Hyatt had not established the necessary elements for various torts under Nevada law.

The Nevada Supreme Court, however, affirmed the portion of the judgment based on fraud. The court noted evidence that, despite its promises of confidentiality, the Board had "disclosed [respondent's] social security number and home address to numerous people and entities and that [the Board] revealed to third parties that Hyatt was being audited." Id. at 144. The court also pointed to evidence that "the main auditor on Hyatt's audit, Sheila Cox, . . . had made disparaging comments about Hyatt and his religion, that Cox essentially was intent on imposing an assessment against Hyatt, and that [the Board] promoted a culture in which tax assessments were the end goal whenever an audit was undertaken." Id. at 145. The court thus determined "that substantial evidence supports each of the fraud elements." Id.

Having upheld liability on the fraud claim, the Nevada Supreme Court next considered whether it should apply a statutory damages cap applicable to Nevada officials – a condition on Nevada's waiver of sovereign immunity – to the Board. *See* Nev. Rev. Stat. § 41.035(1). The court decided that "comity does not require this court to grant [the Board] such relief." The court pointed out that officials from other states are not similarly situated to Nevada officials with respect to intentional torts because Nevada officials "'are subject to legislative control, administrative oversight, and public accountability in [Nevada].'" Id. at 147 (citation omitted). As a result, "'[a]ctions taken by an agency or instrumentality of this state are subject always to the will of the democratic process in [Nevada],'" while out-of-state agencies like the Board "'operate[] outside such controls in this State.'" Id. (citation omitted).

Considering this lack of authority over other states' agencies, the court concluded that "[t]his state's policy interest in providing adequate redress to Nevada citizens is paramount to providing [the Board] a statutory cap on damages under comity." Id. With respect to Hyatt's intentional infliction of emotional distress claim, the Nevada Supreme Court affirmed the jury's finding of liability – noting that Hyatt had "suffered extreme treatment" at the hands of the Board (id. at 148) – but it reversed the award of damages. Finding errors with respect to the introduction of evidence and instructions to the jury, the court determined that the

Board was entitled to a new trial to determine the proper level of damages. Id. at 159-63.

The court remanded the case to the trial court for that purpose. Finally, as a matter of comity, the Nevada Supreme Court reversed the award of punitive damages. The court stated that, "under comity principles, we afford [the Board] the protections of California immunity to the same degree as we would provide immunity to a Nevada government entity as outlined in NRS 41.035(1)." Id. at 153. The court then added: "Because punitive damages would not be available against a Nevada government entity, we hold that under comity principles [the Board] is immune from punitive damages." Id.

Supreme Court Review: *Hyatt II*

This Court granted review on two questions: whether *Nevada v. Hall*, 440 U.S. 410 (1979), which held that a state government may be sued in the courts of another state, should be overruled; and whether the Nevada Supreme Court erred by failing to apply to the Franchise Tax Board the statutory immunities that would be available to Nevada agencies in Nevada courts. *Franchise Tax Board of California v. Hyatt* (*Hyatt II*), 136 S.Ct. 1277, 1280 (2016).

After briefing and oral argument, the Court said that it was evenly divided, 4-4, on the question of whether *Nevada v. Hall* should be overruled. As to the second question, this Court held that the Constitution does not permit "Nevada to award damages against

California agencies under Nevada law that are greater than it could award against Nevada agencies in similar circumstances." Id. at 1281. The Court concluded that "[d]oing so violates the Constitution's requirement that Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State."

The Case on Remand to the Nevada Supreme Court

The case was remanded to the Nevada Supreme Court. After additional briefing, the Nevada Supreme Court ruled that the Franchise Tax Board is entitled to the benefit of Nevada's statutory damages cap. The Nevada Supreme Court concluded that Hyatt was entitled to $50,000 in damages for his fraud claim under Nevada law. App. 107a. The Court also decided that Hyatt was entitled to $50,000 in damages for his claim of intentional infliction of emotional distress. Id. at 121a-22a. The case was remanded for determination of costs and attorneys' fees.

In response to a petition for rehearing, the Nevada Supreme Court issued a revised opinion. App. 4a. The court reaffirmed its earlier holdings and also said that the statutory damages cap includes prejudgment interest.

REASON FOR DENYING THE WRIT

THERE IS NO COMPELLING JUSTIFICATION FOR OVERRULING *NEVADA V. HALL*

The sole issue presented in this case is whether this Court should overrule its almost 30-year-old precedent in *Nevada v. Hall*.

"The Court has said often and with great emphasis that 'the doctrine of *stare decisis* is of fundamental importance to the rule of law.'" *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (citations omitted). The Court has emphasized "that *stare decisis* promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. . . . *Stare decisis* thereby avoids the instability and unfairness that accompany disruption of settled legal expectations." *Randall v. Sorrell*, 548 U.S. 230, 248 (2006). Stare decisis "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986).

Because "[a]dherence to precedent promotes stability, predictability, and respect for judicial authority," this Court has emphasized that it "will not depart from the doctrine of stare decisis without some compelling justification." *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991).

Petitioner and its *amici* offer no such compelling justification for overruling *Nevada v. Hall*. The decision is almost 30 years old and yet Petitioner and its *amici* point to only a relatively small number of cases against state governments in the courts of other states and document little burden on state governments from such litigation. *See* Brief of Indiana and 44 Other States as *Amici Curiae* in Support of Petitioner, pp. 8-10. Suits against states in state court – rare before the decision in *Nevada v. Hall* – are still rare today. *See* Jeffrey W. Stempel, "*Hyatt v. Franchise Tax Board of California*: Perils of Undue Disputing Zeal and Undue Immunity for Government Inflicted Injury," 18 Nev. L.J. 61, 83 (2018) ("According to the *Nevada v. Hall* critics, states have sometimes been sued for conduct causing injury in other states, placing legal and financial pressure on the states. But the empirical burden of such litigation is far from clear and hardly seems oppressive."). Furthermore, in those infrequent instances when such suits have been filed, state courts have typically relied on the voluntary doctrine of comity to extend broad protections to their sister states, as the Nevada Supreme Court did here. *See*, *e.g.*, *Cox v. Roach*, 723 S.E.2d 340 (N.C. Ct. App. 2012); *Sam v. Sam*, 134 P.3d 761 (N.M. 2006).

The primary argument advanced by Petitioner and its *amici* is that *Nevada v. Hall* is inconsistent with principles of sovereign immunity. *See* Petition for a Writ of Certiorari at 11-19. But Petitioner ignores the key distinction that has been drawn from the earliest days of American history and that underlies *Nevada v.*

Hall: the difference between a state's sovereignty in its own courts and its sovereignty in the courts of another sovereign. To reach the conclusion that *Nevada v. Hall* was wrongly decided, this Court would not only have to eliminate this distinction, but it would have to revisit the myriad precedents that depend upon it.

Nevada v. Hall was the mirror image of this case. Nevada plaintiffs sued the State of Nevada in California state court on a claim that could not have been brought in Nevada. The plaintiffs had been seriously injured in a car accident caused by an employee of the University of Nevada.

This Court expressly rejected Nevada's claim that sovereign immunity protected it from suit in California state court. The Court reviewed the history of sovereign immunity and concluded that it protects a state from being sued in its own courts without its consent. The Court explained that sovereign immunity means that "no sovereign may be sued in its own courts without its consent, but it affords no support for a claim of immunity in another sovereign's courts. Such a claim necessarily implicates the power and authority of a second sovereign; its source must be found either in an agreement, express or implied, between the two sovereigns, or in the voluntary decision of the second to respect the dignity of the first as a matter of comity." *Nevada v. Hall*, 440 U.S. at 416.

Relying on precedent from the earliest days of American history – Chief Justice John Marshall's decision in *The Schooner Exchange v. McFaddon*, 11 U.S.

(7 Cranch) 116 (1812) – the Court in *Nevada v. Hall* concluded that sovereign immunity was never meant to protect a state from suits in another state's court. Id. *The Schooner Exchange* has been seen as establishing the principle throughout American history that a sovereign is under no legal obligation to grant immunity to other sovereigns in its own courts. Simply put, a state's sovereign immunity in its own courts is a function of its sovereignty there; but that does not give it sovereign immunity when it is sued in the courts of another sovereign. *See*, *e.g.*, *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 352 (1822). *See* William Baude, "Sovereign Immunity and the Constitutional Text," 103 Virginia L. Rev. 1, 23-24 (2017) ("Immunity in one's own courts, the Court wrote, 'has been enjoyed as a matter of absolute right for centuries,' while immunity in another sovereign's courts was a matter of mutual agreement or comity.").

Nevada v. Hall was based on three basic and unassailable premises. First, prior to formation of the Union, the states were independent sovereign nations and had the same immunity in each others' courts as other sovereign nations had in the courts of foreign nations. Second, that, before the founding of the United States (as now), sovereign nations could not assert immunity as of right in the courts of other nations, but enjoyed immunity only with the consent of the host nation. Third, that nothing in the Constitution or formation of the Union altered that balance among the still-sovereign states, giving priority to the rights of visiting states at the expense of host states.

This is why Petitioner is wrong in its assertion that *Alden v. Maine*, 527 U.S. 706 (1999) is inconsistent with *Nevada v. Hall*. Petition for a Writ of Certiorari at 13-19. *Alden v. Maine* is about the ability of a state to be sued in its own state courts, something this Court said was precluded by an immunity that has existed throughout American history. But a state's sovereignty in its own courts tells nothing about its immunity in the courts of another state. In fact, as this Court noted in *Alden v. Maine*, "*the Constitution did not reflect an agreement between the States to respect the sovereign immunity of one another*." 527 U.S. at 738 (emphasis added).

In *Alden v. Maine*, the Court reaffirmed the basic distinction between suing a state in its own state courts and suing a state in the courts of another state. The Court stated: "In fact, the distinction drawn between a sovereign's immunity in its own courts and its immunity in the courts of another sovereign, as well as the reasoning on which this distinction was based, are consistent with, and even support, the proposition urged by respondent here – that the Constitution reserves to the states a constitutional immunity from private suits in their own courts which cannot be abrogated by Congress." Id. at 739-40.

Petitioner and its *amici* stress state sovereignty, but they ignore that keeping a state from hearing suits is itself a significant limit on state prerogatives. Indeed, in *Nevada v. Hall*, this Court stressed that preventing a state court from hearing suits against other states would be inconsistent with a concern for state

sovereignty. The Court declared: "It may be wise policy, as a matter of harmonious interstate relations, for States to accord each other immunity or to respect any established limits on liability. They are free to do so. But if a federal court were to hold, by inference from the structure of our Constitution and nothing else, that California is not free in this case to enforce its policy of full compensation, that holding would constitute the real intrusion on the sovereignty of the States – and the power of the people – in our Union." *Nevada v. Hall*, 440 U.S. at 426-27.

Petitioner and its *amici* do not cite a single word showing that, at the time of the writing and ratification of the Constitution, either the Framers or representatives of the states addressed a state's immunity from suit in another state's courts. Nothing in the text of the Constitution or its history supports giving a state sovereign immunity protection when it is sued in another state's courts. To be sure, there were many declarations about the immunity of a state government from suit, but none said that this includes *constitutional* protection from suit in the courts of another state.

This does not mean that states are without protection from suit in other state courts. As this Court held when this case was last before the Court, the Full Faith and Credit Clause means that a state court cannot hold another state liable for more than the liability that would be allowed for the forum state in its own courts. This matters in protecting state governments. In this case, the jury's award of $139 million in

compensatory damages and $250 million in punitive damages now has been reduced to $100,000.

Also, state courts can and do accord comity to other states. In this case, the Nevada Supreme Court ruled that punitive damages are not available against the Board because of considerations of comity.

Moreover, the states need not rely exclusively on the doctrine of comity in their quest for greater immunity in other states' courts. If both California and Nevada believe that expanded immunity is appropriate, the two states are free to enter into an agreement to provide immunity in each other's courts, *see Nevada v. Hall*, 440 U.S. at 416, or to join in a broader agreement with all states sharing similar views. Because such voluntary agreements would not aggregate state power at the expense of the federal government, they would not require Congress's approval. *See Cuyler v. Adams*, 449 U.S. 433, 440 (1981).

Thus, this Court should deny the Petition for a Writ of Certiorari that asks it to reconsider an almost 30-year-old precedent that was based on decisions from the earliest days of American history. As this Court has noted: "[A]n argument that we got something wrong – even a good argument to that effect – cannot by itself justify scrapping settled precedent." *Kimble v. Marvel Entertainment, LLC*, 135 S.Ct. 2401, 2409 (2015). Rather, "[t]o reverse course, we require as well what we have termed a 'special justification' – over and above the belief 'that the precedent was wrongly decided.'"

Id. (citations omitted). No such "special justification" exists to warrant reconsideration of *Nevada v. Hall*.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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