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 Petition for Writ of Certiorari to the Supreme Court of Nevada

BRIEF OF THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The International Municipal Lawyers Association (IMLA) is a non-profit, professional organization that has been an advocate and resource for local government attorneys since 1935. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters. IMLA collects and disseminates information to its membership across the United States and Canada and helps governmental officials prepare for litigation and develop new local laws. Every year, IMLA's legal staff provides accurate, up-to-date information and valuable counsel to hundreds of requests from members. IMLA also provides a variety of services, publications, and programs to help members who are facing legal challenges.

IMLA is committed to protecting its members' discretion under state and federal law to make policy decisions without the threat and cost of prolonged litigation, which would significantly—if not prohibitively—impede both functionality and ingenuity. The decision below, however, adopts an unduly narrow interpretation of the discretionary function immunity that would leave the multitude of policymaking decisions of municipal actors open to suit as long as the complainant makes any claim that includes an element of subjective intent. This approach is not only flatly inconsistent with

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[1] No counsel for any party to these proceedings authored this brief in whole or in part. No entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution for the preparation or submission of this brief. Petitioner and Respondent have consented to the filing of this brief. Letters reflecting such consent have been filed with the Clerk.

precedent from the majority of courts across the Nation but also would expose municipalities to years upon years of ceaseless litigation—as occurred in this case—at costs of potentially billions of dollars. IMLA has a strong interest in ensuring that local governments and their officials are protected from suit for decisions made in their official capacity based on the legitimate budgetary, administrative, and enforcement concerns that animate local bodies.

INTRODUCTION AND SUMMARY

In a seventeen-year-old suit alleging tortious conduct by the California Franchise Tax Board, the Nevada Supreme Court held that a governmental body may be sued by any aggrieved individual and subject to civil common law tort liability for any decision the body makes in its official capacity so long the individual merely alleges that the decision was made with improper "intent" or in "bad faith." This decision directly contradicts a host of federal appellate cases recognizing that, under the so-called "discretionary function exception," 28 U.S.C. § 2680(a), governmental bodies and their officials are entitled to immunity from suit for actions taken in their official capacities, regardless of subjective intent.

The discretionary function immunity, grounded on the principle of separation of powers, shields discretionary judgments made by government actors from civil tort liability. Removing an entire category of torts—those framed as "intentional" or involving "bad faith"—from its protection provides incentive for litigants to characterize claims in these terms merely to avoid a valid immunity defense. This result would defeat the very purpose of the immunity, which is

recognized by both federal statute and laws in a majority of states.

The decision below especially threatens the functionality of municipal governments, which provide a broad range of services and interact with individuals on a frequent and personal level. Both the nature and scope of local government responsibilities generate substantial bases for tort claims. Moreover, the denial of immunity for all intentional torts results in particularly harsh consequences due to the protracted litigation and extensive discovery required to probe subjective intent. For these reasons, both the monetary and nonmonetary costs (*e.g.*, chilling of discretionary action, distraction from official duties, and deterrence of entry into public service) are amplified—and unacceptable for governments whose functionality is required to serve the public interest.

ARGUMENT

I. NARROWING THE SCOPE OF THE DISCRETIONARY FUNCTION IMMUNITY WILL IMPEDE THE FUNCTIONALITY OF LOCAL GOVERNMENTS AND HARM THE PUBLIC INTEREST.

The decision below puts at risk thousands of discretionary municipal decisions that span an extremely broad scope of activities. Given the close relationship between local government responsibilities and the community, many of these municipal activities can give rise to tort claims. A narrow interpretation of the discretionary function immunity of the type adopted by the court below threatens the policymaking capacity and functionality of these entities as well as the critical services they provide.

1. Municipal decision-making touches upon countless aspects of every citizen's life. To name just a few, municipalities and local governments regulate and supervise sanitation, water systems, street construction and maintenance, fire departments, ambulances, health departments, public transportation, utilities (*e.g.*, gas, electricity, cable television), public schools, law enforcement, and housing inspections. These services encompass everything from transporting books between public libraries to maintaining local parks. Municipalities tackle large-scale decisions like whether to fund a low-income housing project as well as the detailed minutiae of how many part-time school crossing guards to employ.

Yet, municipal activities cover much more than this abbreviated list of public services. Structuring and administering a tax system to, among other things, support these services is a significant responsibility. Local governments also manage urban planning and zoning, the issuance of licenses and permits, and even emergency responses to floods and forest fires.

The nature and scope of municipal activities make these entities particularly vulnerable to intentional tort claims. As one example, these governments are in charge of many local safety measures that involve decisions that could easily give rise to a tort claim, such as an injury resulting from an insufficient earthquake response or the absence of a stop sign. A sample of intentional tort claims—assault, battery, conversion, false imprisonment, trespass to land, intentional infliction of emotional distress, fraud, and invasion of privacy—when viewed in light of the multitude of municipal responsibilities, demonstrates how easily an individual could plead such a claim. Local government activities touch upon the lives of all

community members to some extent, often through both frequent and personal interactions, and could easily generate hundreds if not thousands of tort suits.

In addition, municipal decisionmaking is not always suited for thorough analysis and debate. Judgment calls may sometimes need to be made quickly, such as a response to an unanticipated crisis. Unfortunately, the potential for injury and the consequent risk of tort liability may be much higher—understandably so—for these types of decisions.

Any expansion of tort liability will significantly impede the functionality, flexibility, and ingenuity of local governments. Given the scope and nature of municipal responsibilities, these consequences are of great public concern. Local governments require exactly these qualities to provide effective services, whether it is maintaining roads or providing shelter to the homeless in inclement weather.

2. The danger of the decision below to the functionality of local governments has several dimensions: (a) increase in lawsuits filed; (b) protracted and costly litigation; (c) distraction of officials from government responsibilities; (d) limits on discretion to avoid liability; (e) deterrence of entry into public service; and (f) judicially-created administrative standstill through direct or indirect means (*i.e.*, injunctive or monetary relief, respectively).

First, the exception for subjective intent in the decision below invites gamesmanship in the characterization of claims to bypass the traditional protection for discretionary functions. Given the large-scale and often personal relationships between

municipal governments and community members, it would be relatively easy to frame an injury as a result of, for example, the intentional infliction of emotional distress or invasion of privacy. Litigants have greater incentive to bring these claims, regardless of the merits, because more pressure is brought to bear on government when the immunity is not available.

Second, while all discretionary function challenges impose some monetary costs on government, claims that rely on a subjective element are uniquely costly given the nature and amount of discovery required. As the Court noted in *Harlow v. Fitzgerald*, "questions of subjective intent so rarely can be decided by summary judgment" and "also frame a background in which there often is no clear end to the relevant evidence." 457 U.S. 800, 816-17 (1982).[2] The case at hand provides ample support for the Court's conclusions: litigation began more than seventeen years ago in January 1998 and includes several rounds of appeal to the Nevada Supreme Court and one appeal to this Court.

The rationale for the discretionary function immunity is apparent in exactly these situations that call up questions of subjective intent. "There are special costs to 'subjective' inquiries of this kind" because "the judgments surrounding discretionary

[2] In the context of qualified immunity, the Court in *Harlow* concluded that "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery." 457 U.S. at 817-18. The Court dispensed with the subjective element of the good faith defense and held instead that government officials' discretionary functions are shielded from civil liability under an objective test: as long as the "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818.

action almost inevitably are influenced by the decisionmaker's experiences, values, and emotions." *Harlow*, 457 U.S. at 816. Attempting to disentangle these "experiences, values, and emotions" from other decisionmaking criteria, some of which may also be subjective, would prove a very difficult, if not impossible, task—and at least a lengthy one.[3] Meanwhile, for situations where the challenged decision was made not by a single actor but by a government entity comprised of numerous individuals, these challenges will be multiplied by a large factor.

Third, lawsuits that require a showing of subjective intent impose weighty nonmonetary costs in the form of distraction from official duties, the chilling of discretionary action, and deterrence of entry into public service. *Harlow*, 457 U.S. at 816-17; *see also Richardson v. McKnight*, 521 U.S. 399, 407-08 (1997) (purpose of discretionary function immunity is "protecting government's ability to perform its traditional functions by providing immunity where necessary to preserve the ability of government officials to serve the public good or to ensure that talented candidates were not deterred by the threat of damages suits from entering public service.") (internal quotation marks omitted). Protracted litigation and extraordinary discovery costs will force local governments to divert significant resources and pull personnel from other duties to meet the

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[3] An order denying a claim of discretionary function immunity, unlike qualified immunity, has not been held to constitute a "final decision" subject to interlocutory appeal under 28 U.S.C. § 1291. *Mitchell v. Forsyth*, 472 U.S. 511 (1985). Therefore, the government could not head off litigation at an earlier stage unless a particular exception otherwise applied. *See* 28 U.S.C. § 1292.

associated demands, deter individuals from entering public service, or encourage them to leave due to fear of or frustration with these processes.

In the alternative—or, worse, in addition—local governments will dramatically constrain officials' discretion in order to limit liability. Tying the hands of local government in this way would adversely affect entire communities that require quick or creative action to address unanticipated or novel local issues. In a society that wants the best and brightest to join its ranks, and wishes its state and local governments to function flexibly and innovatively as laboratories of democracy, any limits on discretionary action must be narrowly tailored, not categorical.

Furthermore, discovery in these suits is not just different in degree but in kind; it results in particularly harsh chilling effects due to the "broad-ranging discovery and the deposing of numerous persons . . . [that] can be peculiarly disruptive of effective government." *Harlow*, 457 U.S. at 817. To establish subjective intent, the parties may question colleagues, close friends, and family members to probe the mental state of the government actor. While the humiliation or embarrassment of the individual official may not warrant consideration, the chilling of his or her actions certainly does. *See Scheuer v. Rhodes*, 416 U.S. 232, 242 (1974) ("The concept of immunity assumes [that officials may err] and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all."), *overruled on other grounds*, *Davis v. Scherer*, 468 U.S. 183 (1984). This type of discovery deters entry to, and discretionary action in, government service—in addition to its prohibitive impact on functionality due to distraction from official duties.

Finally, the concrete relief granted in such cases would restrict officials' discretion and thus local governments' functionality. Monetary relief, particularly punitive damages if available for intentional government torts,[4] diverts resources and constrains action both directly (*i.e.*, insufficient funding) and indirectly (*i.e.*, deterrence). Injunctive relief would directly limit government action and could have especially far-reaching effects depending on its scope and duration.

The total discard of immunity for subjective intent tort claims imposes costs that are much too high. The extensive discovery, ease and threat of litigation, and potentially wide-ranging judicial relief will deter individuals from choosing to serve in government and constrain those that do. Even if particular individuals may derive some remedial benefit in the event of a victory, the government—and, perhaps more importantly, the public—can ill afford these costs.

II. THE DECISION BELOW CONTRADICTS THE VIEW OF A MAJORITY OF CIRCUITS THAT SUBJECTIVE INTENT IS IRRELEVANT TO THE DISCRETIONARY FUNCTION IMMUNITY INQUIRY.

The decision of the Nevada Supreme Court departs from this Court's precedent as well as decisions from the majority of other circuits recognizing that subjective intent is irrelevant to discretionary function immunity. Although the Second Circuit has previously held otherwise, its decisions—like the decision below—rest on a fundamental

[4] In this case the jury awarded respondent $250 million in punitive damages, although the Nevada Supreme Court reversed this award on principles of comity.

misunderstanding of the basis of the discretionary function exception.

1. This Court has repeatedly said that the discretionary function exception is intended "to prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Berkovitz v. United States*, 486 U.S. 531, 536-37 (1988). The immunity applies "whether or not the discretion involved be abused" and is grounded "on a concern for separation of powers." 28 U.S.C. § 2680(a); *Owen v. City of Independence*, 445 U.S. 622, 648 (1980). It covers government conduct that (1) "involves an element of judgment or choice" and (2) is "of the kind that the discretionary function exception was designed to shield," meaning "governmental actions and decisions based on considerations of public policy." *Berkovitz*, 486 U.S. at 536-37; *see also United States v. Gaubert*, 499 U.S. 315, 325 (1991). The immunity is broadly construed: it is not limited to policymaking and planning decisions but can shield conduct at the implementation stage as long as discretionary judgment is exercised. *Gaubert*, 499 U.S. at 325. The Court has also noted that "the focus of the inquiry is not on the agent's subjective intent in exercising the discretion . . . but on the nature of the actions taken and on whether they are susceptible to policy analysis." *Id.*

The majority of circuit courts have recognized, in light of this Court's precedent, that subjective intent is not relevant in the discretionary function analysis. Four circuit courts that have directly addressed this question have concluded, in line with *Gaubert*, that subjective intent is immaterial in assessing whether the discretionary function exception applies.

Reynolds v. United States, 549 F.3d 1108, 1112 (7th Cir. 2008); *Franklin Sav. Corp. v. United States*, 180 F.3d 1124, 1137 (10th Cir. 1999); *Irving v. United States*, 162 F.3d 154, 167 (1st Cir. 1998) (en banc); *Fisher Bros. Sales v. United States*, 46 F.3d 279, 286 (3d Cir. 1995) (en banc). In addition to these, decisions in the Fourth, Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits agree that the immunity inquiry under *Gaubert* looks only at the objective nature of the conduct. Pet. for Cert. 17 n.4. The Fourth, Ninth, and D.C. Circuits have also rejected the argument that intentional torts are categorically exempt from the discretionary function immunity. *Medina v. United States*, 259 F.3d 220, 226 (4th Cir. 2001); *Gasho v. United States*, 39 F.3d 1420, 1435 (9th Cir. 1994); *Gray v. Bell*, 712 F.2d 490, 507 (D.C. Cir. 1983).

2. But, the Second Circuit has taken a contrary position and held that the immunity does not apply if the injury was a result of carelessness or laziness, as these do not constitute policy-based judgments. *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 475 (2d Cir. 2006) (per curiam); *Coulthurst v. United States*, 214 F.3d 106, 111 (2d Cir. 2000). Adopting this reasoning, the Seventh Circuit has also concluded that this "type of carelessness would not be covered by the discretionary function exception." *Palay v. United States*, 349 F.3d 418, 432 (7th Cir. 2003) (reversing order of dismissal of particular claims because further factual development was necessary to determine if discretionary function exception applied); *see also Keller v. United States*, 771 F.3d 1021, 1025-26 (7th Cir. 2014) (seeing no evidence in the record to contradict claims of prison guards' laziness or inattentiveness and reversing grant of summary judgment on basis of discretionary

function exception). Although neither court went so far as to find that all bad-faith or intentional acts are exempt from the discretionary function immunity,[5] their decisions do invite inquiry into a government actor's mental state, which often requires further factual development to determine if the immunity applies. *See, e.g.*, *Keller*, 771 F.3d at 1025-26 (reversing grant of summary judgment); *Triestman*, 470 F.3d at 476 (reversing order of dismissal); *Palay*, 349 F.3d at 432 (reversing order of dismissal); *Coulthurst*, 214 F.3d at 111 (reversing order of dismissal).

These decisions have revealed the subjective intent issue as an unsettled question and provided precedent that has already generated and will generate more contrary caselaw from other courts. While the Second Circuit decisions could be read more narrowly to only except claims of laziness or carelessness from the discretionary function immunity,[6] these opinions have opened the door to questions regarding the mental state of government actors and given rise to much broader limitations on the immunity. The decision below, holding that all intentional or bad-faith tort claims are categorically

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[5] In fact, in 2008, after *Palay* but before *Keller*, the Seventh Circuit expressly stated in *Reynolds* that allegations of "malicious and bad faith conduct" do not defeat a discretionary function immunity defense because "subjective intent is irrelevant to [the] [immunity] analysis." 549 F.3d at 1112.

[6] Both Second Circuit cases were brought by *pro se* litigants, and the court acknowledged its "policy of liberally construing *pro se* submissions" as part of its "obligation . . . to make reasonable allowances to protect *pro se* litigants from inadvertent forfeiture of important rights because of their lack of legal training." *Triestman*, 470 F.3d at 475; *see also id.* (court read a negligent guard theory into the *pro se* complaint in *Coulthurst*).

excluded from the immunity, is merely one example of a very expansive reading based on these decisions. Another court could find that the immunity does not apply to tort claims alleging reckless or consciously indifferent conduct, as not "of the kind that the discretionary function exception was designed to shield." *Berkovitz*, 486 U.S. at 536. But, these readings miss the point: the immunity applies not to a particular action taken but to all general conduct of a "nature" that is "susceptible to policy analysis." *Gaubert*, 499 U.S. at 325; *see also* 28 U.S.C. § 2680(a) (immunity applies "whether or not the discretion involved be abused"). Mental state is irrelevant; the purpose of the immunity derives from the need to protect the functionality of governments, even if that sometimes means relief is unavailable for an individual who suffers an injury.

The danger of incorrect and overbroad interpretations cannot be overlooked in light of the scope of the federal statute as well as the number of states—more than half—that recognize a discretionary function exception,[7] many with language identical to that in 28 U.S.C. § 2680(a).

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[7] *See, e.g.*, Alaska Stat. § 09.50.250; Ariz. Rev. Stat. Ann. § 12-820.01(B); Cal. Gov't Code § 820.2; Del. Code Ann. tit. 10, §§ 4001, 4011; Ga. Code Ann. § 50-21-24(2); Haw. Rev. Stat. § 662-15(1); Idaho Code Ann. § 6-904(1); Ind. Code § 34-13-3-3(7); Iowa Code § 669.14(1); Kan. Stat. Ann. § 75-6104(e); Me. Rev. Stat. tit. 14, § 8104-B(3); Mass. Gen. Laws ch. 258, § 10(b); Minn. Stat. Ann. § 3.736(3)(b); Miss. Code Ann. § 11-46-9(1)(d); Neb. Rev. Stat. § 81-8,219(1); Nev. Rev. Stat. § 41.032(2); N.H. Rev. Stat. Ann. § 541-B:19(I)(c); N.J. Stat. Ann. § 59:2-3; N.D. Cent. Code § 32-12.2-02(3)(b); Okla. Stat. tit. 51, § 155(5); Or. Rev. Stat. § 30.265(6)(c); 42 Pa. Cons. Stat. Ann. § 8524(3); S.C. Code Ann. § 15-78-60(5); Tex. Civ. Prac. & Rem. Code Ann. § 101.056; Utah Code Ann. § 63G-7-201(4)(a); Vt. Stat. Ann. tit. 12, § 5601(e)(1).

Without further clarification from the Court, the discretionary function immunity is at risk of sweeping limitations which will exacerbate the current circuit split and severely restrict the discretion exercised by federal, state, and municipal governments.

CONCLUSION

For the foregoing reasons, and those set forth in the petition for writ of certiorari, the petition should be granted and the judgment of the Nevada Supreme Court should be reversed.

Respectfully submitted,

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