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 a Writ of Certiorari to the Supreme Court of Nevada

BRIEF IN OPPOSITION FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Nevada Supreme Court's interpretation of Nevada Revised Statutes § 41.032(2) – Nevada's discretionary function statute – raises an issue of federal law for this Court to review.

2. Whether the Full Faith & Credit Clause requires Nevada state courts to apply California's law of sovereign immunity, in whole or in part, to a matter over which Nevada has legislative jurisdiction.

3. Whether the doctrine of comity requires Nevada state courts to apply California's law of sovereign immunity, in whole or in part, when the Nevada courts have decided that it would be contrary to Nevada's sovereign interests to do so.

4. 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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STATEMENT

1. This state-law tort suit is one of several disputes between respondent and petitioner California Franchise Tax 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 respondent, a former California resident, became a permanent resident of Nevada. Respondent 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 respondent became a resident of Nevada in April 1992. The tax dispute remains the subject of ongoing proceedings in California.

The present suit, in turn, concerns certain tortious acts committed by the Board against respondent. 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 Mr. Hyatt. Referring to respondent, 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 respondent – much of it false – leading her former colleague to believe that the auditor had created a "fiction" about respondent. *See* 4/23/08 RT at 184:18-20; 4/24/08 RT at 42:4-43:8.

The auditor also sought out respondent's Nevada home, peering through his window and examining his mail and trash. *See* 4/24/08 RT at 62:16-24. After she had closed the audit, she boasted about having

"convicted" respondent and then returned to his Nevada home to take trophy-like pictures. *See* 85 Resp.'s App. ("RA") at 021011-13 (Nev. filed Dec. 21, 2009). The auditor's 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 respondent, including imposition of fraud penalties that were rarely issued in residency audits. *See* 4/24/08 RT at 28:6-13. To bolster this effort, she enlisted respondent's ex-wife and estranged members of respondent's family. *See*, *e.g.*, 80 RA at 019993-94; 83 RA at 020616-20, 020621-24, 020630-35. And she often spoke coarsely and disparagingly about respondent and his associates. *See* 4/23/08 RT at 171:13-172:8; 4/24/08 RT at 56:21-58:19.

The Board also repeatedly violated promises of confidentiality. Although Board auditors had agreed to protect information submitted by respondent in confidence, the Board bombarded people with information "Demand[s]" about respondent and disclosed his 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 respondent 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 respondent to respondent's patent licensees in Japan. *See* 84 RA at 020788, 020791.

The Board knew that respondent, like other private inventors, had significant concerns about privacy and security. *See* 83 RA at 020704. Rather than respect-

ing those concerns, however, the Board sought to use them as a way to pressure him into a settlement. One Board employee pointedly warned Eugene Cowan, an attorney representing respondent, 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 respondent understood the employee to be pushing for tax payments as the price for maintaining respondent's privacy. *See* 4/30/08 RT at 155:12-25; 5/12/08 RT at 73:23-74.23.

2. Respondent brought suit against the Board in Nevada state court, asserting both negligent and intentional torts. In response, the Board asserted that it was entitled to absolute sovereign immunity. Although a sovereign has no inherent sovereign immunity in the courts of a co-equal sovereign, *see Nevada v. Hall*, 440 U.S. 410 (1979), the Board argued that the Full Faith & Credit Clause required Nevada to give effect to California's own immunity laws, which allegedly would have given the Board full immunity against respondent'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 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 Bd. of California v. Hyatt*, Nos. 35549 & 36390, 2002 Nev. LEXIS 57, at *10 (Nev. Apr. 4, 2002) (judgment noted at 106 P.3d 1220 (table)), it noted that "Nevada provides its agencies with immunity for the performance of a discretionary function even if the discre-

tion is abused," *id.* It 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 respondent'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.*, citing *Falline v. GNLV Corp.*, 823 P.2d 888 (Nev. 1991). 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.*

This Court, in a unanimous opinion, affirmed. *Franchise Tax Bd. of California v. Hyatt*, 538 U.S. 488 (2003) ("*Hyatt I*"). Rejecting the Board's argument that the Full Faith & Credit Clause required Nevada courts to apply California's immunity laws, the Court reiterated the well-established principle that the Full Faith & 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." *Id.*

3. At trial, the jury found the Board liable for a variety of intentional torts, ranging from fraud to invasion of privacy. It awarded respondent a total of $139 million in compensatory damages and $250 million in punitive damages.

The Nevada Supreme Court, for the most part, reversed. In doing so, it reduced the Board's liability for compensatory damages to approximately $1 million (pending a retrial on damages with respect to respondent's intentional infliction of emotional distress claim). And it held that, as a matter of comity, the Board was immune from any award of punitive damages.

In its opinion, the Nevada Supreme Court first examined whether Section 41.032(2) of the Nevada Revised Statutes – which provides immunity to Nevada officials performing discretionary functions – applied to the commission of intentional or bad-faith

torts. Although the court had previously held in *Falline* that Section 41.032(2) did not provide Nevada officials with such immunity, it decided to reexamine the issue because a subsequent decision had adopted a discretionary function test drawn from the similarly worded Federal Tort Claims Act ("FTCA"). *See Martinez v. Maruszczak*, 168 P.3d 720 (Nev. 2007) (adopting the test derived from *Berkovitz v. United States*, 486 U.S. 531 (1988), and *United States v. Gaubert*, 499 U.S. 315 (1991)). After considering various decisions interpreting the FTCA, the court decided to "affirm [its] holding in *Falline* that NRS 41.032 does not protect a government employee for intentional torts or bad-faith misconduct, as such misconduct, 'by definition, [cannot] be within the actor's discretion.'" Pet. App. 24, quoting *Falline*, 823 P.2d at 891-92 (first alteration added). Given its determination that Section 41.032(2) did not give Nevada officials immunity for intentional torts, the court went on to conclude that it would "not extend such immunity to [the Board] under comity principles, as to do so would be contrary to the policy of this state." *Id.* at 25.

Proceeding to the merits, the Nevada Supreme Court set aside most of the judgment against the Board, finding that respondent had not established the necessary elements for various torts under Nevada law. *See id.* at 25-38. The 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 40. 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.* The court thus determined "that substantial evidence supports each of the fraud elements." *Id.* at 41.

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." Pet. App. 45-46. 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 45, quoting *Faulkner v. University of Tennessee*, 627 So. 2d 362, 366 (Ala. 1992). 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.*, quoting *Faulkner*, 627 So. 2d at 366. 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 respondent's intentional infliction of emotional distress claim, the Nevada Supreme

Court affirmed the jury's finding of liability – noting that respondent had "suffered extreme treatment" at the hands of the Board (*id.* at 50) – 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 51-62. It 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 65. 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.*

REASONS FOR DENYING THE PETITION

None of the issues raised by the petition merits further review. The Board's primary argument – that the Court should resolve a conflict regarding interpretation of the Federal Tort Claims Act – founders on the fact that the Nevada Supreme Court was interpreting a Nevada statute, Nev. Rev. Stat. § 41.032(2), not the federal Act. The state court's interpretation of state law presents no federal question for this Court to consider. As for the Board's arguments seeking application of California's immunity laws under the Full Faith & Credit Clause and the doctrine of comity, those arguments are squarely foreclosed by decisions of this Court establishing, first, that the Full Faith & Credit Clause does not

require courts with legislative jurisdiction to subordinate their own laws to the laws of other States, and, second, that the granting of immunity under the doctrine of comity lies wholly within the discretion of the forum State. Finally, the Board offers no good reason, let alone a compelling one, for disregarding principles of *stare decisis* and overruling *Nevada v. Hall*, 440 U.S. 410 (1979). The petition should be denied.[1]

1. The Proper Interpretation of Nevada Revised Statutes § 41.032(2) – Nevada's Discretionary Function Statute – Is a Question of State, Not Federal, Law.

The Board's flagship argument for review is that this Court needs to resolve a conflict among federal courts of appeals regarding the scope of discretionary function immunity under the Federal Tort Claims Act ("FTCA"). *See* Pet. 15-20; 28 U.S.C. § 2680(a) (FTCA). But this case has nothing to do with the FTCA. Respondent brought his tort claims against the Board pursuant to Nevada tort law, and the Board's assertion of discretionary function immunity was grounded in Nevada Revised Statutes § 41.032(2), not the federal act. Consequently, in holding that Nevada officials could not claim discretionary function immunity for intentional torts – and that out-

[1] There is also a serious question whether the Nevada Supreme Court's decision is "final." *See* 28 U.S.C. § 1257(a). Several of the Board's asserted grounds for review challenge the amount of compensatory damages that Nevada courts may award, *see* Pet. 21-26, even though damages for the intentional infliction of emotional distress claim are still to be determined on remand. The petition thus invites the sort of "piecemeal review of state court decisions" that Section 1257(a) was meant to protect against. *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159 (1973).

of-state officials could not either – the Nevada Supreme Court was interpreting the Nevada statute, not the FTCA. *See* Pet. App. 24 ("we conclude that *discretionary-function immunity under NRS 41.032* does not include intentional torts and bad-faith conduct") (emphasis added).

There is no reason for this Court to review that interpretation of Nevada law. The Court has often declared that state courts "have the final authority to interpret . . . that State's legislation," *Garner v. Louisiana*, 368 U.S. 157, 169 (1961), and that this Court is "bound by a state court's construction of a state statute," *Wisconsin v. Mitchell*, 508 U.S. 476, 483 (1993). As a result, "[n]either this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State." *Johnson v. Fankell*, 520 U.S. 911, 916 (1997).

The Board points out that, in the process of construing Section 41.032(2), the Nevada Supreme Court looked to decisions interpreting a similarly worded provision in the FTCA. *See* Pet. 18. But that commonplace practice does not turn state law into federal law. State courts routinely consult decisions from other jurisdictions – including federal courts – in order to arrive at the best interpretation of their own state law.[2] In the end, however, their interpretations of state law remain just that: interpretations of state law. Thus, "[e]ven if . . . [state] and federal

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[2] The Nevada Supreme Court followed the same practice elsewhere in the decision below, consulting cases from other jurisdictions to decide whether to recognize a false light invasion of privacy tort, *see* Pet. App. 29-32, and whether to require medical evidence as a prerequisite for an intentional infliction of emotional distress tort, *see id.* at 47-49.

statutes contain[] identical language . . . [,] the interpretation of the [state] statute by the [state] Supreme Court would be binding on federal courts." *Johnson*, 520 U.S. at 916.

Conversely, the Nevada Supreme Court's interpretation of discretionary function immunity under Section 41.032(2) has no effect on the scope of discretionary function immunity under the FTCA. The scope of immunity for federal officials under the FTCA *is* a question of federal law, and "in answering that question [a federal court is] not bound by a state court's interpretation of a similar – or even identical – state statute." *Johnson v. United States*, 559 U.S. 133, 138 (2010). Just as Nevada is free to decide that discretionary function immunity under Section 41.032(2) should be different from discretionary function immunity under the FTCA, this Court can choose a different standard for federal officials under the FTCA than Nevada has chosen for state officials under Section 41.032(2). The decision below is thus irrelevant to any "conflict" with respect to interpretation of the FTCA.

To support review here, the Board cites two cases, *see* Pet. 16 n.3, neither of which is on point. In *Michigan v. Long*, 463 U.S. 1032 (1983), the Michigan Supreme Court expressly decided an issue of federal law, holding that a vehicle search violated the Fourth Amendment. *See id.* at 1037 n.3.[3] Likewise, in *Three*

[3] The Michigan court also referred twice to the corresponding provision of the state constitution, *see* 463 U.S. at 1037 n.3, raising the question whether its decision rested upon an adequate and independent state ground. This Court concluded that it did not and that the Court thus had jurisdiction to review the Michigan court's resolution of the defendant's Fourth Amendment challenge to the search. *See id.* at 1044.

Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C., 467 U.S. 138 (1984), the North Dakota Supreme Court appeared to have determined that the federal Civil Rights Act of 1968 was "an affirmative bar to the exercise of jurisdiction" over a suit filed by an Indian tribe. *Id.* at 155. In this case, by contrast, the Nevada Supreme Court neither applied federal law (as in *Long*) nor treated federal law as "bar[ring]" the operation of any contrary state law (as in *Three Affiliated Tribes*). Rather, as it had done seven years earlier in *Martinez*, it simply "turn[ed] to federal decisions to aid in formulating a workable test for analyzing claims of immunity under NRS 41.032(2)." *Martinez v. Maruszczak*, 168 P.3d 720, 727 (Nev. 2007). *See id.* at 727 n.29 ("federal precedents are relevant in interpreting NRS 41.032(2)"); *id.* at 728 & n.32 (also reviewing immunity cases from state courts). Nothing in that reasoned approach transforms interpretation of Section 41.032(2) into an issue of federal law subject to this Court's review.

The Board's effort to convert Nevada law into federal law – solely because the Nevada Supreme Court discussed cases interpreting a similar federal statute – not only is incorrect on the merits, but, if successful, would severely diminish the authority and independence of state courts. Many state laws have analogous provisions in federal law, and it is entirely natural for state courts to consult federal decisions for guidance. Indeed, California itself made that point in a recent merits brief to this Court. *See* Reply Brief for Petitioner at 1-2, *Davis v. Ayala*, No. 13-1428 (U.S. filed Feb. 18, 2015) (arguing that "state court's discussion of federal cases" did not decide issue of federal law because "[c]ourts deciding novel issues

frequently consider how courts in other jurisdictions applying their own laws have addressed a question"). That is all that the Nevada Supreme Court did here. It construed the provisions of Nevada Revised Statutes § 41.032(2), not the Federal Tort Claims Act, and its interpretation of that state statute raises no question of federal law for this Court to review.

2. Neither the Full Faith & Credit Clause nor Principles of Comity Require a State To Subordinate Its Sovereign Interests to Those of Another State.

The Board argues that, by declining to impose a cap on compensatory damages in this case, the Nevada Supreme Court violated the Full Faith & Credit Clause and principles of comity. Neither argument justifies further review.

A. The Full Faith & Credit Clause.

According to the Board, the Full Faith & Credit Clause requires the Nevada courts "to apply the [sovereign] immunity granted by California," Pet. 23, at least "to the extent consistent with Nevada law" (i.e., the damages cap in Nev. Rev. Stat. § 41.035(1)), *id.* (emphasis deleted). But the Board's continued insistence on application of California's law of sovereign immunity – once in whole, now in part – reflects its continued misunderstanding of the Full Faith & Credit Clause. Because the Full Faith & Credit Clause is primarily concerned with recognition of judgments, not the laws of other States, this Court has stressed that the Full Faith & 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.'" *Franchise Tax Bd. of California v. Hyatt*,

538 U.S. 488, 494 (2003) ("*Hyatt I*"), quoting *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988) (other internal quotation marks omitted). That principle is controlling here. This Court has already held that the Nevada Supreme Court has legislative jurisdiction over the subject matter of this case. *See id.*

The Board tries to get around that problem by asserting that a State cannot exhibit "'hostility'" towards the laws of another State. Pet. 22, quoting *Hyatt I*, 538 U.S. at 499. But it is not "hostile" for a State to apply its own law – rather than the law of another State – to a matter over which it has legislative jurisdiction. "[T]he very nature of the federal union of states, to which are reserved some of the attributes of sovereignty, precludes resort to the full faith and credit clause as the means for compelling 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." *Pacific Emp'rs Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 501 (1939); *see Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 436 (1943) ("each of the states of the Union has constitutional authority to make its own law with respect to persons and events within its borders"). In applying Nevada law to this dispute, therefore, the Nevada Supreme Court was doing nothing more than the Constitution entitles it to do.[4]

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[4] Contrary to the Board's assertion, the Nevada Supreme Court did not "create[] an exception to its own law." Pet. 25 (emphasis deleted). The cap on damages is an integral part of Nevada's waiver of sovereign immunity in its own courts, and it thus applies, by its plain terms, only to Nevada officials. The law makes no mention of officials from other States because those States do not have sovereign immunity in Nevada courts. *See Nevada v. Hall*, 440 U.S. at 416.

In any event, the Court has also made clear that "the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy." *Nevada v. Hall*, 440 U.S. at 422. Here, the Nevada Supreme Court specifically explained why granting the immunity sought by the Board would undermine Nevada's interest in protecting its residents from deliberate attacks by other sovereigns. The court noted that, unlike officials from other States, Nevada officials "'are subject to legislative control, administrative oversight, and public accountability'" in Nevada. Pet. App. 45, quoting *Faulkner v. University of Tennessee*, 627 So. 2d 362, 366 (Ala. 1992). *See*, *e.g.*, Nev. Rev. Stat. § 284.385(1)(a) (authorizing dismissal or demotion of employees for "the good of the public service"); Nev. Admin. Code § 284.650(1), (4) (authorizing discipline for "[a]ctivity which is incompatible with an employee's conditions of employment" and for "[d]iscourteous treatment of the public . . . while on duty"). As a result, it noted, "'[a]ctions taken by an agency or instrumentality of this state are subject always to the will of the democratic process in [Nevada],'" while there is no comparable safeguard against state officials that "'operate[] outside such controls in this State.'" Pet. App. 45, quoting *Faulkner*, 627 So. 2d at 366.

The Board does not quarrel with this reasoning, nor could it reasonably do so. Nevada obviously has no control over the hiring and training of California tax officials, and it cannot exert influence over their apparent willingness to violate Nevada's tort laws. Consequently, it had no ability to rein in California tax officials once they embarked upon an offensive, and wholly inappropriate, personal campaign to "get" a Nevada resident. Instead, Nevada was left with

the after-the-fact option of awarding compensation for the harm caused by the Board's deliberate and malicious acts. The Nevada Supreme Court's decision to allow full compensation – rather than directly or indirectly giving priority to California's immunity laws – was well within the bounds of Nevada's own sovereign authority.

B. Comity.

As an alternative, the Board argues that Nevada was required to apply California's law of sovereign immunity – again, above the amount of the damages cap applicable to Nevada officials – as a matter of comity. *See* Pet. 23. But the Board cites no case in which this Court has ordered a state court to grant either partial or total immunity to another State as a matter of comity. That omission is hardly surprising. As this Court has long observed, the decision of one sovereign to grant immunity to a co-equal sovereign lies solely within its own discretion.

The authority on this point is clear and longstanding. Beginning in the early Nineteenth Century, this Court has stated repeatedly that a sovereign is under no legal obligation to grant immunity to other sovereigns in its own courts. In *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), for example, the Court declared that "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute," stressing that "[i]t is susceptible of no limitation not imposed by itself." *Id.* at 136. Since that time, the Court has consistently followed the basic principle that "foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983).

The Court has applied the same principle to relations between the individual States. In *Nevada v. Hall*, the Court rejected a claim that Nevada had inherent sovereign immunity in California's courts, noting that, unlike a sovereign's assertion of immunity in its own courts, "[s]uch a claim necessarily implicates the power and authority of a second sovereign." 440 U.S. at 416. Because "the Constitution did not reflect an agreement between the States to respect the sovereign immunity of one another," *Alden v. Maine*, 527 U.S. 706, 738 (1999), the source of any immunity for a State in the courts of another State "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 (emphasis added). It is thus for each State to decide, in its discretion, whether it would be consistent with its sovereign interests to grant immunity to a sister State. *See Hyatt I*, 538 U.S. at 498 (rejecting Board's attempt to "elevate California's sovereignty interests above those of Nevada").

Saying that the Nevada Supreme Court did not "sensitively" apply principles of comity, the Board urges this Court to invent a new *mandatory* principle of state-to-state comity, effectively granting all States the same immunity that forum States enjoy in their own courts. *See* Pet. 23. But the idea of "mandatory comity" is a contradiction in terms. Nothing in the Constitution tells a State how it must exercise its discretion in providing immunity to another State, any more than the Constitution tells the United States how much immunity it must extend to a foreign State. *See Verlinden B.V.*, 461 U.S. at 486. Thus, while state courts often use the immunity of their own officials as a "benchmark" for granting

immunity to officials from other States, they do so as a matter of grace, not obligation. As *Nevada v. Hall* firmly established, that "voluntary" decision is left to the sovereigns themselves, informed by mutual respect and a desire for advantageous reciprocity.

A newly fashioned doctrine of "mandatory comity" would also be wholly out of place in this context. Although the Board says that principles of comity should require a State to "'recognize another state's laws to the extent that they do not conflict with its own,'" Pet. 23, quoting Pet. App. 44, it would be strange indeed to impose that kind of binding obligation under the doctrine of comity when the Full Faith & Credit Clause – a constitutional provision directly addressing the extent to which one State must "recognize another state's laws" – imposes no such duty. *See* pages 13-16, *supra.* Of course, the Full Faith & Credit Clause *does* require a forum State to recognize another State's laws when the forum State lacks legislative jurisdiction, but that is not the case here. *See Hyatt I*, 538 U.S. at 494. Thus, under both the Full Faith & Credit Clause and principles of comity, a state court with proper authority over the subject matter may apply its own laws in preference to foreign laws when, in its judgment, application of the foreign laws would conflict with its sovereign interests.

Applying traditional principles of comity here, the Nevada Supreme Court in fact went to great lengths to "respect the dignity" of its neighboring State. Far from treating the Board "just as any other litigant," *Nevada v. Hall*, 440 U.S. at 427 (Blackmun, J., dissenting), the court shielded the Board from a wide range of liability that non-sovereign defendants would have faced for the same conduct. In particular, the court held that the Board should be absolutely

immune from liability for its negligent acts, and it relieved the Board of the obligation to pay any punitive damages, solely because of its status as a co-equal sovereign. And, in the one instance where the Nevada court departed from the "benchmark" of liability for its own officials, it explained just why it had decided to do so. That respectful treatment hardly shows a lack of "sensitiv[ity]" to the standing of a co-equal sovereign.[5]

Finally, we note the irony created by the Board's attempt to invoke (albeit, at second hand) the protection of a damages cap for Nevada officials under Nevada law. It may be recalled that, when the shoe was on the other foot in *Nevada v. Hall*, Nevada officials sought protection under the very same Nevada law in the California courts, only to be told by the California courts that they would not apply it. *See* 440 U.S. at 412-13 (discussing California proceedings). As a result, Nevada officials were exposed to unlimited damages in California for a claim of negligence. Here, of course, Nevada voluntarily accorded the Board complete immunity against negligence claims as a matter of comity, and the Board finds itself obligated to pay damages at all only because it went well beyond the bounds of simple negligence and undertook a calculated campaign aimed at causing harm to a Nevada resident. Given these circumstances, the Board's demand for additional immunity is particularly unjustified.

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[5] As a further sign of respect for the Board, the Nevada court reversed the jury's award of damages on the intentional infliction of emotional distress claim, finding that the trial court had improperly allowed consideration of issues that were being contested in the independent California tax proceedings. *See* Pet. App. 53-57.

3. There Is No Compelling Justification for Overruling *Nevada v. Hall*.

The Board concludes its list of issues for review by urging the Court to overrule *Nevada v. Hall*. The Court has declined this invitation on a number of previous occasions, including in this very case. *See* Petition for Certiorari at 9-26, *Montana Bd. of Invs. v. Deutsche Bank Sec., Inc.*, *cert. denied*, 549 U.S. 1095 (2006) (No. 06-291), 2006 WL 2519589; Petition for Certiorari at 9-13, *Illinois v. McDonnell*, *cert. denied*, 531 U.S. 819 (2000) (No. 99-1934), 2000 WL 34013543; *Hyatt I*, 538 U.S. at 497. It should do so again now.[6]

"Time and time again, this Court has recognized that 'the doctrine of *stare decisis* is of fundamental importance to the rule of law.'" *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991), quoting *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 494 (1987) (plurality). Indeed, just last Term, this Court again reaffirmed that it "does not overturn its precedents lightly." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014). Because "[a]dherence to precedent promotes stability, predictability, and respect for judicial authority," *Hilton*, 502 U.S. at 202, the Court has emphasized that it "will not depart from the doctrine of *stare decisis* without some compelling justification," *id. See also Bay Mills*, 134 S. Ct. at 2036 ("'[A]ny departure' from the doctrine 'demands special justification.'"), quoting *Arizona v. Rumsey*, 467 U.S.

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[6] The Board does not discuss its failure to raise this issue many years ago in *Hyatt I*. Even if sovereign immunity can be raised at any time, the Board's prior default makes its current 11th-hour plea a poor candidate for undoing well-established law.

203, 212 (1984). There is no compelling justification here.

Contrary to concerns expressed by the dissenters in *Nevada v. Hall*, the Court's decision in that case did not "open[] the door to avenues of liability and interstate retaliation that will prove unsettling and upsetting to our federal system." 440 U.S. at 427 (Blackmun, J., dissenting). To the contrary, suits against States in state court – rare before the decision in *Nevada v. Hall* – are still rare today. 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); pages 18-19, *supra*. The decision in *Nevada v. Hall* thus caused no problem that this Court needs to address.

Presumably for that reason, the Board stakes its claim for overruling *Nevada v. Hall* on doctrinal grounds. Relying heavily on *Alden v. Maine*, the Board argues that the law of sovereign immunity has changed significantly in recent years and that *Hall* is out of step with the new trend. *See* Pet. 28. But the Court in *Alden* expressly distinguished the absolute right of a sovereign to immunity in its own courts (the issue in *Alden*) from its lack of right to sovereign immunity in the courts of another sovereign (the issue in *Hall*). *See* 527 U.S. at 738-40. Taking its cue from (rather than questioning) *Hall*, the Court pointed out that a claim of immunity in another State "'necessarily implicates the power and authority of a second sovereign.'" *Id.* at 738, quoting 440 U.S. at 416. And it again declared that "the Constitution did not reflect an agreement between the States to

respect the sovereign immunity of one another." *Id.* *See also id.* at 739 (expressing "reluctance to find an implied constitutional limit on the power of the States").

The Board (and *amici* States) assert that, at the time of the Convention, independent sovereigns traditionally accorded immunity to other sovereigns in their courts. *See* Pet. 28-29; States' Br. 11-14. This adds nothing new. In *Nevada v. Hall* itself, this Court explicitly recognized the historical practice of granting immunity to other sovereigns. *See* 440 U.S. at 417. What the Court also pointed out, however, is that sovereigns extended this immunity, not as a matter of absolute right, but as a matter of comity. *See id.* at 416-18; *see also Bay Mills*, 134 S. Ct. at 2046-47 (Thomas, J., dissenting) ("Sovereign immunity is not a freestanding 'right' that applies of its own force when a sovereign faces suit in the courts of another."). That is still the case today. *See Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2255 (2014). Thus, both history and long experience squarely contradict the already-rejected theory that sovereigns may demand immunity in the courts of other sovereigns as a matter of absolute privilege.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

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[7] Of course, 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, *see* Petition for Certiorari, *Nevada v. City & Cnty. of San Francisco*, No. 14-1073 (U.S. filed Mar. 4, 2015), 2015 WL 981686, 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.

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