

## Immunity Boost? The Supreme Court Hears Argument (for the Third Time) Regarding Scope of State Sovereign Immunity

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On Jan. 9, 2019, in *Franchise Tax Board of California v. Hyatt*, the Supreme Court heard oral argument for the third time in a decades-long dispute between the Franchise Tax Board of California (FTB), a California agency charged with assessing personal income taxes, and Gilbert Hyatt. See *FTB v. Hyatt*, No. 17-1299. At issue was whether the Supreme Court should overturn its 1979 decision in *Nevada v. Hall*, which held that states are not immune from suit in the courts of sister states. See *Nevada v. Hall*, 440 U.S. 410 (1979).

### Background

In 1992, Hyatt, an inventor who lived in California, filed a California state income tax return indicating that he moved to Nevada on October 1, 1991. Brief for Petitioner at 4, *FTB v. Hyatt*, No. 17-1299 (U.S. Sept. 11, 2018) (Pet. Br.). Following an audit, the FTB determined that Hyatt remained a California resident until April 1992, and that, as a result, he owed millions of dollars in income taxes, plus penalties and interest. Following an over 20-year administrative appeal of the FTB's determination, the FTB's assessment for tax year 1991 was affirmed and Hyatt's appeal with respect to tax year 1992 was sustained. *Id.* at 5.

In January 1998, Hyatt commenced a Nevada state court action against the FTB alleging that the FTB engaged in tortious conduct in the course of its audit. *Id.* at 6. Among other things, Hyatt alleged the FTB freely discussed his personal information with third parties and "peered through his windows and examined his mail and trash." Brief for Respondent at 2, *FTB v. Hyatt*, No. 17-1299 (U.S. Nov. 15, 2018) (Res. Br.). Hyatt likely commenced suit in Nevada because California law immunizes California state agencies from suit for actions arising from tax assessments. See Pet. Br. 6-7 (citing Cal. Gov't Code §860.2).

The FTB moved for summary judgment, arguing that the Full Faith and Credit Clause mandated that Nevada give effect to the FTB's immunity under California law. The trial court rejected that argument. The Nevada Supreme Court agreed with the trial court, relying on, among other things, the holding in *Hall*. The FTB then sought Supreme Court review. *Id.*

In *FTB v. Hyatt*, 538 U.S. 488 (2003) (*Hyatt I*), the Supreme Court relied on *Hall* and affirmed the decision of the Nevada Supreme Court noting: "Petitioner [did] not ask us to reexamine [*Hall*], and we therefore decline the invitation of petitioner's amici States to do so." *Hyatt I*, 538 U.S. at 497 (internal citation omitted).

Over the next half-decade, the parties engaged in time-consuming and voluminous discovery, including taking 155 depositions and exchanging over 168,000 documents. Following a four-month trial, Hyatt obtained a \$492.5 million judgment, including a \$250 million punitive damage award. Pet. Br. 8-9. The FTB appealed.

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The Nevada Supreme Court affirmed in part and reversed in part. Although it held that the trial court did not err in declining to apply Nevada's \$50,000 statutory damages cap for Nevada state agencies, the Nevada Supreme Court determined that Nevada's law prohibiting punitive damage awards against state agencies was applicable to the FTB. The court also remanded for a new trial on the amount of emotional distress damages. *Id.* at 9. For the second time, the FTB sought Supreme Court review, this time asking that *Hall* be overturned.

In *FTB v. Hyatt*, 136 S. Ct. 1277 (2016) (*Hyatt II*), the Supreme Court split 4-4 on whether to overturn *Hall*. *Hyatt II*, 136 S. Ct. at 1281. Vacating the ruling below, the Supreme Court held the failure to apply California's immunity statute or Nevada's \$50,000 statutory cap, in favor of a "special rule of law applicable only in lawsuits against its sister States," violated the Full Faith and Credit Clause, and remanded the case for further proceedings. *Id.* at 1281-83.

On remand, the Nevada Supreme Court modified its earlier decision to reflect the Supreme Court's ruling in *Hyatt II*. The court also ruled that a new trial on emotional distress damages was no longer necessary because the evidence previously adduced supported a damages award of the \$50,000 maximum. Pet. Br. 10. For the third time, the FTB sought Supreme Court review.

### 'Hyatt III'

In *FTB v. Hyatt*, No. 17-1299 (*Hyatt III*), the Supreme Court is now considering the question that deadlocked the Court in *Hyatt II*, namely, whether to overturn *Nevada v. Hall*.

In briefings and at oral argument, both parties relied heavily on the notion of state sovereignty to support their respective positions. The FTB argued that the Founders considered immunity from private suit "central to sovereign dignity." *Id.* at 36 (quoting *Alden v. Maine*, 527 U.S. 706, 715 (1999)). The FTB also argued that state immunity promotes self-government by ensuring that a state's public affairs are not dictated by out-of-state courts. *Id.* at 37-38. *Hyatt*, in contrast, argued that a sovereign state had a "legitimate and substantial interest" in providing a forum and a remedy for its citizens when they are injured. Res. Br. 29 (quoting *Farmer v. United Bhd. of Carpenters & Joiners*, 430 U.S. 290, 302-04 (1977)).

Both parties also looked to the framework of the Constitution to support their arguments. The FTB argued that states' immunity from suits was "sufficiently fundamental to our federal structure" and "implicit[ly]" protected by the Constitution. Pet. Br. 16 (quoting *Hall*, 440 U.S. at 431 (Blackmun, J., dissenting)). The FTB noted that the outrage caused by the Supreme Court's 1793 decision in *Chisholm v. Georgia*, which held that a state may be sued in federal court, prompted the immediate passage of the Eleventh Amendment. *Id.* at 11, 16 (citing *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793)). Quoting Justice Blackmun's dissent in *Hall*, the FTB argued: "If the Framers were indeed concerned lest the States be haled before the federal courts ... how much more must they have reprehended the notion of a State's being haled before the courts of a sister State." *Id.* at 16 (quoting *Hall*, 440 U.S. at 431 (Blackmun, J., dissenting)). On this point, the FTB noted that 47 states—including Nevada—supported overturning *Hall*. See Transcript of Oral Argument at 22:5-6, *Hyatt III*, No. 17-1299 (U.S. Jan. 9, 2019) (Oral Arg. Tr.); see also Brief for Indiana and 43 Other States as *Amici Curiae* at 1, *Hyatt III*, No. 17-1299 (U.S. Sept. 18, 2018).

*Hyatt* argued that decisions about the Eleventh Amendment—which concern limits on *federal* courts—were inapposite. Because no Constitutional provision expressly addresses whether a state can hale another state into its courts without consent, *Hyatt* claimed this power was reserved to the states by virtue of the Tenth Amendment. See, e.g., Res. Br. 15-16; see also U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). Indeed, *Hyatt* argued that the Eleventh Amendment was limited to federal actions precisely because the states did not want to cede the power to redress injuries suffered by their citizens arising from acts committed by other states. Oral Arg. Tr. 33:14-34:10. *Hyatt* also raised procedural arguments with respect to the Supreme Court's ability to hear FTB's appeal, including arguing that the affirmance by an evenly divided court in *Hyatt II* was a decision on the merits. See Res. Br. 18-28.

At oral argument, the Justices raised pointed questions concerning Constitutional support for state immunity, and expressed concerns about the wisdom of overturning a 40-year-old precedent that had not proved unworkable. On the latter point, Justice Breyer wondered whether overruling *Hall* would undercut lawyers' ability to rely on precedent. Oral Arg. Tr. 51:12-52:6. Perhaps in response, Justice Alito asked whether it was better to "never ... admit we made a mistake," or to generally "stick to what we've done," but "when we look back and we think we made a big mistake ... to go back and correct it." Id. at 52:17-53:4.

The Supreme Court is expected to issue its opinion by the end of the 2018 Term.

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