States should be subject to suit in other states

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In its decision on April 19, in *Franchise Tax Board of California v. Hyatt*, 133 S. Ct. 1277 (2016), the U.S. Supreme Court kept available an important way of holding state governments accountable: the ability to sue a state government in another state's courts. But the larger significance of the case is the reminder that Justice Antonin Scalia’s replacement has the chance to dramatically change the law of sovereign immunity and increase people’s ability to hold state governments accountable for their violations of law.

In *Nevada v. Hall*, 440 U.S. 410 (1979), the Supreme Court ruled that sovereign immunity does not protect a state from being sued in another state's courts. The court declared: “no sovereign may be sued in its own courts without its consent, but [sovereign immunity] affords no support for a claim of immunity in another sovereign’s courts.” One of the questions presented in *Franchise Tax Board* was whether the court should overrule *Nevada v. Hall*. The court split 4-4 on that issue, which means that *Nevada v. Hall* remains the law and states can be sued in the courts of other states.

The facts of *Franchise Tax Board* show the importance of allowing state governments to be sued. Gil Hyatt is an inventor who lives in Nevada. The California Franchise Tax Board opened an audit on Hyatt’s 1991 tax returns. That year, he lived in California for nine months before moving to Nevada. The board sent over 100 letters and demands for information to third parties including banks, utility companies, newspapers (to learn if Hyatt had subscriptions), medical providers, Hyatt’s attorneys, two Japanese companies that held licenses to Hyatt’s patent (inquiring about payments to Hyatt), and other individuals and entities that Hyatt had identified as contacts. Many, but not all, of the letters and demands for information contained Hyatt’s Social Security number or home address or both. Many interviews were conducted, especially of those with whom Hyatt did not have a good relationship.

Based on the 1991 audit, the Franchise Tax Board concluded that Hyatt did not move from California to Las Vegas in September 1991, as he had stated, but rather, that Hyatt had moved in April 1992. The board determined that Hyatt owed the state of California approximately $1.8 million in additional state income taxes and that penalties against Hyatt in the amount of $1.4 million were warranted.
The board audited Hyatt again in 1992, though he said that he never lived in California that year. Nonetheless, the board found that Hyatt owed the state of California over $6 million in taxes and interest for 1992.

Hyatt vehemently challenged the audits' conclusions by filing protests. That process took 11 years and then was challenged in the California courts.

While this was occurring, Hyatt filed a lawsuit in Nevada in 1998. He claimed that the Franchise Tax Board has committed numerous torts against him: invasion of privacy - intrusion upon seclusion, publicity of private facts - false light, intentional infliction of emotional distress, fraud, breach of confidential relationship, and abuse of process. The case ultimately made its way to the Supreme Court. In Franchise Tax Board of California v. Hyatt, 538 U.S. 488 (2003), the court held that Nevada did not need to apply California law giving immunity to California agencies.

Ultimately, Hyatt's case went to trial before a jury. The trial lasted approximately four months. The jury found in favor of Hyatt on all intentional tort causes of action and returned special verdicts awarding him damages in the amount of $85 million for emotional distress, $52 million for invasion of privacy, $1,085,281.56 as special damages for fraud, and $250 million in punitive damages. Ultimately, with damages, costs and interest, Hyatt was owed over $500 million. The Nevada Supreme Court overturned much of the damage judgment, but affirmed $1 million of the award (earmarked as compensation for fraud), and it remanded for a retrial on the question of damages for intentional infliction of emotional distress.

The Supreme Court granted review and split 4-4 over the question of whether to overrule Nevada v. Hall. But the court did hold that there is a limit on what a state can impose in damages against another state: it cannot impose more than that state would be liable for in its own courts. In other words, the court said that Nevada cannot award more in damages against California than the Nevada government would face in Nevada courts.

The case shows why it is so important that state governments be liable in suit. Hyatt was subjected to repeated, egregious abusive behavior by the California Franchise Tax Board, so much that a jury awarded him over $380 million. Those injured by a state government should be compensated and such liability is crucial to deterring wrongdoing.

Unfortunately, though the Supreme Court, in a series of 5-4 decisions, greatly limited the ability to sue state governments. In Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), the court held that Congress may authorize suits against state governments only if it is acting pursuant to Section 5 of the 14th Amendment and not under any other congressional power. Following that decision, the court said that state governments could not be sued for violations of federal law including patent infringements and statutes prohibiting age and disability discrimination. In Alden v. Maine, 527 U.S. 706 (1999), the court went even further and held that a state could not be sued in state court for violations of federal law.
No constitutional provision limits the ability of a person to sue his or her own state government to enforce federal law, such as the Constitution or a civil rights statute. The 11th Amendment says only that a state government cannot be sued in federal court where the basis for jurisdiction is diversity of citizenship and the suit is by a citizen of another state or of a foreign country. And nothing in the Constitution limits the ability to sue a state in its own state courts.

Nonetheless, the five conservative justices expanded the protection of state governments at the expense of enforcing the Constitution. If Justice Scalia were on the bench, the court surely would have overruled Nevada v. Hall, which preceded the expansion of sovereign immunity, and taken away one of the few remaining ways that state governments can be held liable.

But now, with the vacancy on the court, there is a chance for the law to move in a very different direction. Every case expanding state sovereign immunity in the last few decades was 5-4 with Scalia in the majority, always over strong dissents arguing that sovereign immunity is inconsistent with the text of the Constitution, the intent of its framers, and the essential need to hold government accountable. If Scalia is replaced by a Democratic president, whether Merrick Garland or someone else, it is likely that there will be five votes to overrule the earlier decisions and allow state governments to be sued for violating the Constitution and federal laws.

Sovereign immunity is derived from English law and the premise that "the king can do no wrong." But the government can inflict injuries, as California did to Gil Hyatt, and it should be held liable when it does.

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