

IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 53264

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA

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Appellant/Cross-Respondent,

v.

GILBERT P. HYATT,

Respondent/Cross-Appellant

APPEAL FROM JUDGMENT – EIGHTH JUDICIAL DISTRICT COURT
STATE OF NEVADA, CLARK COUNTY
HONORABLE JESSIE WALSH, DISTRICT JUDGE

**APPELLANT’S SUPPLEMENTAL OPENING BRIEF
FOLLOWING MANDATE FROM THE
SUPREME COURT OF THE UNITED STATES**

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Rules

NRAP 3618

I. INTRODUCTION.

In 2002, this Court held that it would grant immunity to Appellant Franchise Tax Board of the State of California (“FTB”) against Respondent Gilbert Hyatt’s tort claims to the same extent a Nevada government agency would be similarly protected. In 2003, the United States Supreme Court approved of this approach, finding that “[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.” *Franchise Tax Bd. of Calif. v. Hyatt* (“*Hyatt I*”), 538 U.S. 488, 499 (2003).

In 2014, this Court did not live up to its commitment of equal treatment to a sister State. *See Franchise Tax Bd. of Calif. v. Hyatt* (“2014 Opinion”), 130 Nev. Adv. Op. 71, 335 P.3d 125 (2014). On April 19, 2016, the Supreme Court of the United States issued an opinion that deemed the 2014 Opinion of this Court unconstitutional because it was based on “a special rule of Nevada law that is hostile to its sister States.” *Franchise Tax Bd. of Calif. v. Hyatt* (“*Hyatt II*”), 136 S.Ct. 1277, 1283 (U.S. 2016). The Supreme Court vacated the judgment of this Court and remanded the case “for further proceedings not inconsistent” with the Supreme Court’s opinion. The mandate from the Supreme Court issued on May 23, 2016.

Read in conjunction, *Hyatt I* and *Hyatt II* unequivocally outline a constitutional duty to treat FTB, a California government agency, no differently than this Court would treat a Nevada government agency. The Full Faith and Credit Clause commands this Court to evaluate Hyatt’s claims against FTB—liability, damages, and defenses—no worse than if FTB were a home-state government agency. The Court did not do so in its 2014 Opinion.

For example, in the 2014 Opinion, this Court reaffirmed its previous decision in *Falline v. GNLV*, 107 Nev. 1004, 823 P.2d 888 (1991), which expressly held that a claim for intentional infliction of emotional distress was not available against Nevada government agencies. *Id.* at 1013, 823 P.2d at 894. As this Court explained, “this particular tort would, at least in many instances, embrace conduct that would support a claim for punitive damages and we have held that such damages are unavailable in the type of action presented by the instant case[.]” *Id.* Yet, against a multitude of admitted legal and evidentiary errors, this Court upheld a finding of liability against FTB on Hyatt’s claim for intentional infliction of emotional distress (“IIED”).

In addition, this Court upheld a finding of fraud against FTB based upon standard representations contained in a statutorily required notice of audit sent to Hyatt, nearly identical to those issued by Nevada’s own taxing authorities. The Court did so even though no opinion of this Court has ever allowed a fraud claim

to advance against any Nevada government agency. This Court also affirmed the fraud verdict without examination of the evidence under a clear and convincing standard and without requiring Hyatt to overcome the presumption of good faith afforded to Nevada government agencies in the performance of statutorily required actions. Finally, in determining whether to grant discretionary function immunity, require exhaustion of administrative remedies, or evaluate whether the district court's multitude of legal and evidentiary errors were prejudicial or harmless, this Court needed to imagine FTB as Nevada's taxing authority. But the Court did not.

FTB respectfully submits that numerous aspects of this Court's 2014 Opinion were tainted by the sister-state hostility that the Supreme Court struck down as unconstitutional. Recognizing that the same constitutional defect may have pervaded all of this Court's findings and conclusions as to liability, defenses and damages, the Supreme Court vacated the 2014 Opinion in its entirety so that it carries no further legal force or effect. The Supreme Court's remand, therefore, requires this Court to review the record through a full faith and credit lens to ensure that it treats FTB the same as a Nevada agency. In so doing, FTB submits, this Court can reach no other conclusion than that, as a matter of law, FTB cannot be liable for fraud or IIED and should dismiss those claims.

II. JURISDICTIONAL STATEMENT

This Court has been re-vested with jurisdiction over this case following remand from the Supreme Court of the United States. The Supreme Court's mandate issued on May 23, 2016.

III. ROUTING STATEMENT

This case involves as a principal issue Nevada's compliance with the Full Faith and Credit Clause of the United States Constitution. The Supreme Court of the United States remanded the case to this Court. For that reason, retention of the case by this Court is required.

IV. STATEMENT OF THE ISSUES

- The Supreme Court vacated the 2014 Opinion because this Court violated the United States Constitution's Full Faith and Credit Clause by discriminating against a sister state. To comply with the Supreme Court's mandate and ensure constitutional compliance, must this Court revisit every discriminatory aspect of its previous decision against FTB and conclude that FTB is entitled to judgment as a matter of law on all of Hyatt's claims?
- Where, as a matter of law, FTB cannot be liable to Hyatt on any claims because no Nevada agency could be similarly liable, must all monetary awards to Hyatt, including damages, fees, costs and interest, be vacated?

V. STATEMENT OF THE CASE.

A. The California Administrative Proceedings.

Hyatt is a former California resident who received hundreds of millions of dollars in licensing fees on certain technology patents he purported to own. *Hyatt I*, 538 U.S. at 490-91. FTB conducted residency audits of Hyatt for the 1991 and 1992 tax years and concluded that Hyatt did not move from California to Nevada before October 1991, as he had claimed, but remained a California resident until April 1992. Hyatt protested the 1991 and 1992 audits through an administrative procedure internal to FTB. The protests were resolved against Hyatt. In December 2008, Hyatt filed for administrative review of those protests with the California State Board of Equalization. *See* 92 AA 22939-45. That administrative review is ongoing and has not been resolved.

B. Hyatt I from USSC.

Just after the administrative proceedings began in California, Hyatt filed suit against FTB in the Eighth Judicial District Court of Nevada seeking declaratory relief concerning his residency and alleging various tort claims concerning FTB's residency audits.

On the tort claims, FTB moved the district court for summary judgment on the ground that it was entitled to complete immunity from suit as it would be in California. Under California law, no public entity can be held liable for any injury

caused by “instituting any judicial or administrative proceeding or action for or incidental to the assessment or collection of a tax,” or by any “act or omission in the interpretation or application of any law relating to a tax.” Cal. Gov’t Code §860.2. FTB argued that the Full Faith and Credit Clause, along with principles of sovereign immunity and comity, required the Nevada courts to grant FTB that complete immunity. *Hyatt I*, 538 U.S. at 491-92.

The district court denied the motion, and FTB petitioned this Court for a writ of mandamus to order dismissal of the case. *Id.* at 492. Ultimately, this Court acknowledged, under comity, that “FTB should be granted partial immunity **equal to the immunity a Nevada government agency would receive[.]**” 2014 Opinion, 335 P.3d at 133 (emphasis added). The Court ordered the district court to dismiss Hyatt’s claim for negligent misrepresentation but allowed his intentional tort claims to proceed.

FTB filed a petition for certiorari in the United States Supreme Court, arguing that the Full Faith and Credit Clause required Nevada to apply the California statute granting FTB complete immunity. The Supreme Court granted certiorari and affirmed. The Supreme Court acknowledged, however, that “States’ sovereignty interests are not foreign to the full faith and credit command.” *Hyatt I*, 538 U.S. at 499. The Full Faith and Credit Clause prohibits “a State [from] exhibit[ing] a ‘policy of hostility to the public Acts’ of a sister State.” *Id.* (quoting

Carroll v. Lanza, 349 U.S. 408, 413 (1955)). Because this Court had held it would grant FTB the same protections that a Nevada agency would enjoy under similar circumstances—thereby placing FTB on an equal footing with Nevada government agencies—the Supreme Court concluded that full faith and credit was afforded California under this Court’s proposed approach. *Id.* Relying on the representations made in this Court’s 2002 holding, the Supreme Court considered this Court to have “sensitively applied principles of comity” by “relying on the contours of Nevada’s own sovereign immunity from suit.” *Id.*

C. Trial.

Following the Supreme Court’s decision in *Hyatt I*, the case returned to the district court. After lengthy discovery, pretrial proceedings and trial involving a multitude of errors, as acknowledged by this Court, the jury found for Hyatt on all his claims, awarding him just over \$1 million on his fraud claim, \$52 million for invasion of privacy, \$85 million for emotional distress, and \$250 million in punitive damages. The district court added over \$2.5 million in costs and \$102 million in prejudgment interest to the jury verdict, for a total judgment against FTB of over \$490 million.

D. Appeal and 2014 Opinion from NSC.

FTB appealed the district court’s numerous errors, including that FTB should have been afforded discretionary function immunity; Hyatt’s tort claims

failed as a matter of law; the district court made prejudicial evidentiary and instructional errors; and other errors. In an opinion entered on September 18, 2014, this Court affirmed in part and reversed in part. *See* 2014 Opinion, 335 P.3d at 157.

1. Discretionary function immunity.

In the 2014 Opinion, the Court concluded that FTB was not entitled to the discretionary function immunity analysis that Nevada had expressly adopted in *Martinez v. Maruszczak*, 123 Nev. 433, 446, 168 P.3d 720, 729 (2007) and its progeny, on the basis that “[d]iscretionary-function immunity does not apply to intentional and bad-faith tort claims.” 2014 Opinion, 335 P.3d at 157 (citing and affirming *Falline*, 107 Nev. at 1009 & n. 3, 823 P.2d at 892 & n. 3).

2. Tort claims.

The Court held that Hyatt’s claims for invasion of privacy, abuse of process, and breach of a confidential relationship failed as a matter of law. However, the Court affirmed the jury’s verdict that found FTB liable for IIED and fraud. Although the Court embraced *Falline* for the proposition that there is no discretionary function immunity for intentional or bad-faith conduct, the Court did not apply to FTB the language in *Falline* that prohibited, as a matter of law, an IIED claim against a Nevada government agency. As the *Falline* court emphasized, “this particular tort would, at least in many instances, embrace

conduct that would support a claim for punitive damages and we have held that such damages are unavailable in the type of action presented by the instant case[.]” 107 Nev. at 1012, 823 P.2d at 894.

Even though no Nevada decision has ever found fraud against a Nevada government agency, this Court also concluded that there was sufficient evidence for the jury to find fraud based on a document that FTB provided Hyatt at the outset of his audit explaining what Hyatt should expect from the process. Notably, this Court did not evaluate the sufficiency of the evidence under the required clear and convincing standard. *Clark Sanitation v. Sun Valley Disposal*, 87 Nev. 338, 341, 487 P.2d. 337, 339 (1971). The document that the Court held contained the representations giving rise to the fraud claim, FTB Form 1015, was developed by FTB pursuant to the legislative directive found in Cal. Revenue & Tax. Code §21007. Form 1015 informed Hyatt that he could expect “[c]ourteous treatment by FTB employees,” “[c]onfidential treatment of any personal and financial information,” and “[c]ompletion of the audit within a reasonable amount of time.” 54 AA 13401. Even though Hyatt offered no evidence concerning creation or issuance of that form document required by California statute, in the Court’s view a reasonable jury could conclude these were “fraudulent representations,” FTB “knew [they] were false,” and FTB “intended for Hyatt to rely on [them].” 2014 Opinion, 335 P.3d at 144.

3. Damages.

Having affirmed the IIED and fraud verdicts, the Court refused to apply to FTB the statutory damages cap applicable to a Nevada government entity. At the same time, however, the Court held that “[b]ecause punitive damages would not be available against a Nevada government entity,” FTB was immune from punitive damages. *Id.* at 154. The Court therefore struck the punitive damages award but upheld the more than \$1 million in damages against FTB for fraud (before prejudgment interest) and remanded for retrial on IIED damages, citing evidentiary and jury-instruction errors. *Id.* at 157.

E. Hyatt II from USSC.

After issuance of the 2014 Opinion, FTB petitioned the United States Supreme Court for certiorari. The Supreme Court granted certiorari and vacated this Court’s judgment as unconstitutionally discriminatory against a sister State. *Hyatt II*, 136 S.Ct. at 1283. The Supreme Court held,

The Nevada Supreme Court has ignored both Nevada’s typical rules of immunity and California’s immunity-related statutes ... Instead, it has applied a special rule of law that evinces a ‘policy of hostility’ toward California ... Doing 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.’ *Id.* at 1281, quoting *Hyatt I*, 538 U.S. at 499 and U.S. Const. Art. IV §1.

As noted by the Supreme Court when describing *Hyatt I*:

Nevada had permitted Hyatt to sue California in Nevada courts... Nevada’s courts recognized that California’s law of complete

immunity would prevent any recovery in this case. The Nevada Supreme Court consequently did not apply California law. It applied Nevada law instead. We upheld that decision as consistent with the Full Faith and Credit Clause. *Id.* at 1281 (internal citations omitted).

The Supreme Court rejected the 2014 Opinion, however, as “a critical departure from [the Nevada Supreme Court’s] earlier approach.” *Id.* at 1282.

Nevada has not applied the principles of Nevada law ordinarily applicable to suits against Nevada’s own agencies. Rather, it has applied a special rule of law applicable only in lawsuits against its sister states, such as California. *Id.*

The Supreme Court took particular issue with this Court’s stated rationale for its “discriminatory hostility” against a sister State:

Such an explanation, which amounts to little more than a conclusory statement disparaging California’s own legislative, judicial, and administrative controls, cannot justify the application of a special and discriminatory rule. Rather, viewed through a full faith and credit lens, a State that disregards its own ordinary legal principles on this ground *is* hostile to another state. *Id.* at 1282 (emphasis in the original).

Because this Court discriminated against California when failing to apply Nevada’s own rules, the Supreme Court vacated the judgment and remanded the case “for further proceedings not inconsistent with this opinion.” *Id.* at 1283. FTB submits that this Court’s “discriminatory hostility” towards California pervaded the entire 2014 Opinion. This supplemental opening brief is filed pursuant to this Court’s Order Directing Supplemental Briefing issued on June 24, 2016.

VI. STATEMENT OF FACTS

Because the underlying facts were addressed in the previous briefs, in the interest of brevity, FTB simply incorporates those here by reference.

VII. SUMMARY OF THE ARGUMENT

In *Hyatt II*, the Supreme Court held that this Court's rule of law targeted specifically at California violated the Constitution because it demonstrated hostility to a sister state. To comply with the Full Faith and Credit Clause, the Supreme Court instructed this Court to treat FTB no differently than it would a Nevada agency. In other words, this Court needed to view the actions of FTB through a home-state lens, reviewing the facts and applying the law as if FTB were Nevada's taxing authority.

The Supreme Court did not confine the application of this holding to any particular conduct by this Court. To the contrary, the Supreme Court made the sweeping statement that **“insofar as the Nevada Supreme Court has declined to apply California law in favor of a special rule of Nevada law that is hostile to its sister States, we find its decision unconstitutional.”** *Hyatt II*, 136 S.Ct. at 1283 (emphasis added). Similarly, the Supreme Court did not vacate only specific parts of the 2014 Opinion. Instead, it vacated this Court's judgment in its entirety such that, as to those aspects of the 2014 Opinion adverse to FTB, this Court's judgment no longer has any legal effect.

Based on the Supreme Court’s general vacatur and broad remand instructions, this Court must now take a fresh look at every aspect of its previous decision against FTB to ensure constitutional compliance. In concluding that FTB can be liable for fraud and IIED, the Court did not hold FTB to the same legal standards as FTB’s Nevada counterparts. The Court also did not apply its precedents in the same manner it has to Nevada agencies. And this Court did not review the entire record as if FTB were an arm of Nevada government.

FTB respectfully submits that when the Court follows the Supreme Court’s directive, it can come to no other conclusion than that FTB is entitled to judgment as a matter of law on all of Hyatt’s claims.

VIII. ARGUMENT

- A. The Scope of the Supreme Court’s Opinion Requires This Court to Reconsider its Denial of Judgment as a Matter of Law on Hyatt’s Fraud and IIED Claims.
 1. The Supreme Court’s Remand Order Should Be Read to Encompass Any Part of the 2014 Opinion That Might Be Tainted by Sister-State Hostility.

Where the Supreme Court intended that no unconstitutional aspect of the 2014 Opinion survive remand, this Court should revisit those findings and conclusions that are inconsistent with the manner in which this Court would treat a Nevada agency. “[A] lower court is bound to respect the mandate of an appellate tribunal and cannot reconsider questions which the mandate has laid at rest.” *Fed.*

Commc'ns Comm'n v. Pottsville Broad. Co., 309 U.S. 134, 140 (1940). On remand, the lower court must tailor its new judgment to conform to any matter that the Supreme Court has disposed of either expressly or impliedly. *See Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 169 (1939); *Kashner Davidson Sec. Corp. v. Mscisz*, 601 F.3d 19, 24 (1st Cir. 2010). The lower court “must follow both the specific dictates of the remand order as well as the broader spirit of the mandate.” *In re Coudert Bros. LLP*, 809 F.3d 94, 99 (2d Cir. 2015) (internal quotations and citations omitted).

Interpretation of this appellate mandate does not take place in a vacuum; it must be harmonized with all previous appellate opinions that continue to have legal effect. *See Exxon Chem. Patents, Inc. v. Lubrizol Corp.*, 137 F.3d 1475, 1483 (Fed. Cir. 1998). Thus, to comply with the Supreme Court’s mandate, this Court should read *Hyatt II* in light of the principles embedded in *Hyatt I*. *See Exxon Chem.*, 137 F.3d at 1483; *United States v. Shipp*, 644 F.3d 1126, 1129 (10th Cir. 2011).

Reading *Hyatt I* and *Hyatt II* together, it is clear that the Supreme Court’s mandate requires more than simply a reduction in the damages award to Nevada’s statutory cap. The Court likewise must revisit its liability determinations against FTB that were equally impermissible under the Full Faith and Credit Clause.

Hyatt I established the judicial baseline in this case, in which the Supreme Court commanded this Court to avoid hostility to California and to sensitively apply principles of comity by “relying on the contours of Nevada’s own sovereign immunity from suit as a benchmark for its analysis.” 538 U.S. at 499. In other words, the Supreme Court held, treat FTB no differently than a similarly situated Nevada agency. *Hyatt II* simply reaffirms this approach by rejecting this Court’s “special rule of Nevada law that discriminates against its sister States.” 136 S.Ct. at 1282. The letter and the spirit of *Hyatt I* and *Hyatt II* require that this Court analyze every previous determination against FTB to ensure that its findings and conclusions are free from sister-state hostility. No amount of disparate treatment for a California agency is allowed.

2. The Supreme Court’s Vacatur of the 2014 Opinion Requires This Court to Revisit Its Previous Legal Conclusions Against FTB to Ensure Constitutional Compliance.

Because the Supreme Court vacated the 2014 Opinion in its entirety, the Court should now enter a new judgment that complies with the Full Faith and Credit mandate in all respects. Wholesale vacatur of a judgment “divest[s] the lower court’s judgment of its binding effect.” *United States v. M.C.C. of Florida, Inc.*, 967 F.2d 1559, 1561-62 (11th Cir. 1992) (citing *Johnson v. Bd. of Educ.*, 457 U.S. 52, 53-54 (1982)). The lower court to whom the case is remanded after a general vacatur may only adopt those parts of the vacated judgment that are

“unaffected” by the Supreme Court’s decision. *Id.* at 1562. “The critical limiting factor [in determining whether parts of a vacated judgment can survive after vacatur and remand] is of course that the error or defect must not have infected the merits of the very determination sought to be reinstated.” *Hill v. W. Elec. Co.*, 672 F.2d 381, 388 (4th Cir. 1982).

After describing how this Court’s special rule of law for California was unconstitutional, the Supreme Court vacated the 2014 Opinion in its entirety:

[I]nsofar as the Nevada Supreme Court has declined to apply California law in favor of a special rule of Nevada law that is hostile to its sister States, we find its decision unconstitutional. **We vacate its judgment and remand the case for further proceedings not inconsistent with this opinion.**

Hyatt II, 136 S.Ct. at 1283 (emphasis added). The Supreme Court did not simply vacate the damages award. *See id.* It also did not simply state that the damages award was unconstitutional. *See id.* Instead, it employed sweeping language directed at every aspect of the 2014 Opinion that may have been infected by this Court’s sister-state hostility. *See id.*

3. *Hyatt I and II* Bar All of the Anti-California Hostility Embodied in the 2014 Opinion.

The Supreme Court held that this Court cannot establish specific laws directed solely at a sister state but rather must treat a sister-state agency and a Nevada agency as co-equals under the law. *Hyatt I*, 538 U.S. at 499; *Hyatt II*, 136

S.Ct. at 1281-82. This rule, as enunciated in *Hyatt I and II*, has universal applicability and is not limited in scope.

The 2014 Opinion is fraught with violations of this equal treatment mandate because, in multiple respects, this Court established a special rule of law for FTB that differed from the standard rules applied to Nevada agencies. First, the Court concluded that FTB could be liable for IIED when its precedent directs that, like punitive damages, an IIED claim will not lie against a Nevada government actor. *See Falline*, 107 Nev. at 1013, 823 P.2d at 894. Second, the Court upheld the jury's fraud finding based on legislatively mandated statements found in FTB's audit notice to Hyatt, when (a) the Court has held that courts cannot make "determinations of fact-based legal issues under the tax statutes" but must instead defer to the state's Department of Taxation and (b) Nevada's equivalent statements, found in the Taxpayers' Bill of Rights, cannot form the basis of fraud-based claims. *See Int'l Game Tech., Inc. v. Second Jud. Dist. Ct.*, 122 Nev. 132, 157-59, 127 P.3d 1088, 1106 (2006).

Third, the Court did not apply discretionary function immunity to FTB as it has to a Nevada agency or afford FTB the immunity given to Nevada's taxing authority. *See, e.g., City of Boulder City v. Boulder Excavating, Inc.*, 124 Nev. 749, 752, 191 P.3d 1175, 1177 (2008); NRS 372.670, NRS 375B.370. Fourth, the Court did not require Hyatt to exhaust his administrative remedies as a plaintiff

who seeks to challenge Nevada governmental action must first do before commencing legal proceedings. *See Malecon Tobacco v. State, Dep't of Taxation*, 118 Nev. 837, 839, 59 P.3d 474, 475-76 (2002). Based on these examples, which are discussed in more detail below, FTB respectfully contends the sister-state hostility disallowed by the Supreme Court infected the entirety of the 2014 Opinion and must be rectified.

B. The Court Did Not Apply *Falline* to Dismiss Hyatt's IIED Claim as a Matter of Law, a Right That a Nevada Government Agency Would Have Enjoyed.

On appeal, FTB contended that *Falline* had been implicitly overruled by *Martinez* and its progeny. *See* Appellant's Opening Brief ("AOB") at 35:2-4 and 52:12-55:18. This Court rejected that contention and re-affirmed *Falline*. 2014 Opinion, 335 P.3d at 139. To the extent the Court embraced *Falline*, it had a constitutional obligation to apply the *Falline* case to FTB in the same manner it did to a Nevada government agency. *See Hyatt II*, 136 S.Ct. at 1282-83.

In *Falline*, the Court summarily dismissed the IIED claim because no such claim could be brought against a government agency:

[T]his particular tort would, at least in many instances, embrace conduct that would support a claim for punitive damages and we have held that such damages are unavailable in the type of action presented by the instant case. Moreover, recognizing a cause of action for emotional distress in [an administrative] context raises the specter of "almost every emotion-based case turning up as some kind of tort suit."

Id. at 1013, 823 P.2d at 894, *quoting* The Law of Workmen's Compensation § 68.34(a) at 13–116 (1987 & Supp.1990).

There is no reason why this general principle would not apply to FTB. *See id.* Yet as to FTB, the Court not only declined to dismiss Hyatt's IIED claim as a matter of law, but it held that FTB's admittedly routine audit procedures constituted extreme and outrageous conduct. *See* 2014 Opinion, 335 P.3d at 148-49. The Court's failure to apply *Falline in toto* to FTB constituted disparate treatment that the Supreme Court confirmed is constitutionally prohibited. *See Hyatt II*, 136 S.Ct. at 1282-83.

C. The Evidence That the Court Deemed Sufficient to Support Hyatt's Fraud Claim Against FTB Would Not Have Sufficed to Demonstrate Fraud Against a Nevada Government Agency.

There is no precedent in Nevada to hold a Nevada government agency liable for fraud. What's more, there is no precedent in Nevada to hold a Nevada government agency liable for any tort based upon the statements that the State Legislature requires a Nevada government agency to make. Yet, as another example of anti-California hostility, that is precisely the basis on which this Court affirmed the jury's fraud verdict.

In his operative complaint, Hyatt alleged that FTB represented to him that it would conduct an unbiased, good-faith audit and maintain the confidentiality of the information he disclosed to FTB. 2014 Opinion, 335 P.3d at 131. At trial, Hyatt

relied upon a mission statement as the source of FTB's alleged misrepresentation, but he reversed course before this Court when FTB demonstrated he never actually received FTB's mission statement. 3 AA 569, 573; 28 AA 6854; 38 AA 9300 (3-5); 93 AA 23181

Hyatt then pointed to a 1991 notice of audit. In the 2014 Opinion, this Court embraced the 1991 notice of audit to Hyatt as being the source of FTB's alleged fraudulent misrepresentations. 2014 Opinion, 335 P.3d at 145. The audit notice is mandated by California's Legislature. Calif. Revenue & Tax. Code §21007. Having been developed and distributed to taxpayers by legislative mandate, the FTB employee who provided Hyatt with the notice of audit was merely performing an act required by California's Legislature and cannot be deemed to have intended to defraud Hyatt by sending the mandatory notice. *See Bartmettler v. Reno Air, Inc.*, 114 Nev. 441, 446-47, 956 P.2d 1382, 1386 (1998) (requiring as an essential element of a fraud claim, which must be proved by clear and convincing evidence, that the defendant knew or believed that his or her representation was false or had insufficient information to make the representation).

Like California, Nevada's Legislature has set certain standards by which the Department of Taxation must treat taxpayers. *See* NRS 360.291. This is known as the Taxpayers' Bill of Rights. *See* NRS 360.2905. Included within the Taxpayers' Bill of Rights is the requirement that "officers and employees of the Department

[treat the taxpayer] with courtesy, fairness, uniformity, consistency and common sense.” NRS 360.291(1)(a). This is precisely the type of representation that the Court deemed sufficient to support the jury’s fraud verdict against FTB. *See* 2014 Opinion, 335 P.3d at 144-45.

There is no authority that would make the Nevada Department of Taxation liable for fraud based on the statements contained in the Taxpayers’ Bill of Rights. Indeed, in Nevada and elsewhere, courts have long held that government actors are presumed to be acting in good faith in the performance of their required acts. *See. e.g., In re Lietz Constr.*, 47 P.3d 1275, 1289 (Kansas 2002); *Whitehead v. Nevada Com’n on Judicial Discipline*, 110 Nev. 874, 921, 878 P.2d 913, 942 (1994); *Niklaus v. Miller*, 66 N.W.2d 824, 828 (Neb. 1954); *State Civil Serv. Com’n v. Hoag*, 293 P. 338, 342 (Colo. 1930). Pursuant to *Hyatt I* and *II*, California government agents should be afforded the same presumption when they are sued in Nevada, and *Hyatt* made no showing to rebut that presumption.

D. This Court Did Not Give FTB the Immunity That Would be Afforded Nevada’s Taxing Authority.

1. The Court’s Analysis of Discretionary Function Immunity Differed Against FTB Than Against Nevada Government Agencies.

In every single case since *Martinez* but this one, this Court has looked past the labels a plaintiff assigned to his or her claims to examine the actual conduct of the defendant government agency within the paradigm of the *Berkovitz-Gaubert*

test. *See City of Boulder City*, 124 Nev. at 752, 191 P.3d at 1177 (after liability for intentional tort claims was established at trial, Nevada Supreme Court analyzed facts of government conduct to find discretionary function immunity applied); *Ransdell v. Clark County*, 124 Nev. 847, 854-58, 192 P.3d 756, 761-64 (2008) (analyzing immunity on summary judgment by requiring plaintiff to produce evidence of non-immune conduct even though intentional torts had been alleged); *ASAP Storage, Inc. v. City of Sparks*, 123 Nev. 639, 656, 173 P.3d 734, 745 (2007) (deciding discretionary function immunity issue in context of summary judgment motion after intentional torts were alleged); *Seiffert v. City of Reno*, unpublished disposition, Case No. 60046, 2014 WL 605863 at *1 (Feb. 13, 2014)¹ (evaluating discretionary function immunity within the context of summary judgment to conclude that plaintiff failed to show disputed issue of material fact as to whether defendant’s “conduct was entitled to immunity under the *Martinez* test”); *Gonzalez v. Las Vegas Metro. Police Dep’t*, unpublished disposition, Case No. 61120, 2013 WL 7158415 at *2-3 (Nov. 21, 2013) (holding that the subjective intent of the government actor does not matter when evaluating governmental immunity and applying discretionary function immunity on summary judgment, despite allegations of an intentional tort in complaint); *Warner v. City of Reno*,

¹ Although recent amendments to NRAP 36 allow citations to unpublished decisions issued on or after January 1, 2016 for “their persuasive value,” FTB cites to unpublished decisions before that date simply to show the Court’s disparate treatment of FTB, not as precedent.

unpublished disposition, Case No. 52728, 126 Nev. 767 at *2, 367 P.3d 832 (Sept. 28, 2010) (applying discretionary function immunity in the context of a summary judgment motion after intentional torts were alleged in complaint). Unlike its disparate treatment of FTB, as to Nevada government agencies, this Court has found discretionary function immunity even when the plaintiff pleaded intentional torts and even when a judge or jury found liability for intentional torts after trial.

For example, *City of Boulder City v. Boulder Excavating, Inc.* involved claims against a Nevada public entity for defamation, intentional/malicious interference with contractual relationships, and conspiracy—all intentional torts. 124 Nev. at 752, 191 P.3d at 1177. At trial, the district court expressly found that the government employee had intentionally interfered with a contract, violated Nevada statutes, and violated the plaintiff’s due process rights. The trial judge “found an intentional tort,” and this Court observed that the assertion of liability “was entirely based upon the alleged intentional, arbitrary, and capricious conduct of [the employee].” *Id.* at 757, 191 P.3d at 1180. Nonetheless, this Court found that the defendant government entity was entitled to discretionary function immunity. *Id.* at 755-60, 191 P.3d at 1180-82.

The *Boulder City* court applied the *Berkovitz-Gaubert* test to evaluate the City’s conduct, notwithstanding that all of the plaintiff’s claims were based upon “alleged intentional, arbitrary, and capricious conduct.” 124 Nev. at 752, 191 P.3d

at 1180. Although the plaintiff pleaded and proved at trial the claim of “intentional interference with contractual relationship” against the Nevada government entity, this Court concluded under the *Berkovitz-Gaubert* test that the City was entitled to discretionary function immunity because the acts at issue were discretionary and based upon policy determinations. *Id.* at 1181-82.

Similarly, in *Ransdell*, the plaintiff’s complaint included claims against a Nevada public entity for trespass to property, conversion, nuisance, and violations of his constitutional rights. Although these claims are “intentional” torts, this Court nevertheless evaluated immunity based on the facts of the case, not the label of “intentional” given the claims by plaintiff’s counsel. 124 Nev. at 854-58, 192 P.3d 761-64. In resolving the appeal of the summary judgment order, this Court applied the *Berkovitz-Gaubert* test to hold that the defendants were entitled to discretionary function immunity, despite the intentional nature of the torts alleged in the complaint. *Id.* at 761-762. The Court applied the test to all of the government conduct complained of, irrespective of causes of action pled, to conclude that Clark County was entitled to complete discretionary function immunity for all claims, including the intentional tort causes of action. *Id.* at 764.

As these cases show, the *Berkovitz-Gaubert* test, as adopted in *Martinez*, requires this Court to analyze the facts of any given case within the law of discretionary function immunity, no matter what stage in the proceedings the case

below reached. The Court has also taken this same approach for other types of governmental immunity in claims against Nevada government entities. *See Palmieri v. Clark County*, 131 Nev. Adv. Op. 102, 367 P.3d 442 (2015) (“in the qualified immunity context, bare allegations of malice are insufficient to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery”) (internal quotation omitted); *see also Fox v. State*, unpublished disposition, Case No. 54137, 2011 WL 2225000 at *2 (Jan. 18, 2011) (citing *Butler v. Bayer*, 123 Nev. 450, 466, 168 P.3d 1055, 1066 (2007) and *Martinez* to dismiss an intentional tort claim based on qualified immunity after looking to the undisputed facts in a motion for summary judgment – not the allegations of the complaint).

In Hyatt's operative complaint each of his intentional torts had a common allegation: FTB allegedly trumped up its audit conclusions to extort a settlement from him. Every claim Hyatt alleged was premised on that common allegation. *See* 14AA 3257-3300. It is that allegation that allowed Hyatt to survive a motion to dismiss by invoking *Falline*. At trial, however, Hyatt presented no evidence of extortion, and Hyatt's own experts admitted they found no evidence of either extortion or trumped-up audit conclusions. *See, e.g.*, 44 AA 10846 (130), 33 AA 8060 (67), 33 AA 8060 (69) – 8061 (73). Indeed, Hyatt's attorneys also conceded at trial that they were not pursuing a bad faith claim, that their case was not a bad-

faith case, and that no element of any claim required a showing of bad faith. *See* 51 AA 12502 (79), 12507 (99) (100), 12511 (110-111). At their urging, the district court did not give any jury instructions for bad faith. 53 AA 13218-50; 54 AA 251-87.

On appeal, FTB urged the Court to utilize the same analysis used in *City of Boulder* and *Ransdell*; that is, in reviewing for discretionary function immunity for FTB, the Court should apply the same analysis applied to Nevada government entities to look past the labels and examine the actual evidence presented at trial and the admissions made by Hyatt's counsel and expert witnesses. AOB at 52:19-53:3. Although this Court did that in *City of Boulder*, *Ransdell*, and other decisions involving Nevada government agencies, as to FTB the Court did not, thereby depriving FTB of any genuine evaluation of discretionary function immunity protections. In other words, the Court treated California differently than Nevada's home-state agencies.

2. The Evidentiary and Instructional Errors This Court Deemed Harmless as to FTB Would Have Entitled Nevada's Taxing Authorities to Immunity.

Because the Nevada Department of Taxation is immune from suit for audits, according to *Hyatt I* and *II*, so too is FTB. Yet the district court allowed Hyatt to try FTB's audit process and conclusions to a Nevada jury. Among its duties, the Nevada Department of Taxation has the general power to conduct audits. NRS

360.232. With respect to out-of-state audits, the Nevada legislature has provided the Tax Department specific statutory authority to ensure that Nevada taxes are collected:

Persons employed by the Department may be assigned to stations, offices or locations selected by the Executive Director both within the state and in other states where in the judgment of the Executive Director it is necessary to maintain personnel to protect, investigate and collect revenues to which the State is entitled. NRS 360.140(3) (emphasis added).

In order to fully exercise this authority, the Nevada Legislature has extended immunity to the Nevada Department Taxation when it conducts an audit:

No injunction, writ of mandate or other **legal or equitable process** may issue **in any suit**, action or proceeding in any court **against this state or against any officer of the state** to prevent or enjoin the collection under this chapter of any tax or any amount of tax required to be collected. NRS 372.670 (emphasis added); *see also* NRS 375B.370.

By this statute, the Nevada Legislature cloaks the state's Department of Taxation with immunity against interference with Nevada's tax process, even expecting that immunity would be respected in the courts of other states. *See id.* This is consistent with federal law, by which "... no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person..." 26 U.S.C. §7421(a).

Nearly a century before the enactment of NRS 372.670, this Court recognized the general common law rule that the tax process is shielded by each respective sovereign's immunity:

It is upon taxation that the several states chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public. *Wells Fargo and Co. v. Dayton*, 11 Nev. 161, 168 (1876), *citing Dows vs. The City of Chicago*, 78 U.S. 108, 110 (1870).

In the 2014 Opinion, even when this Court recognized that the district court impermissibly allowed Hyatt to try the tax audit to the jury and instructed the jury that it could “consider[] the appropriateness or correctness of the analysis conducted by the FTB employees in reaching its residency determination and conclusion,” it did not extend the same immunity to FTB that Nevada law grants to Nevada's own taxing authorities. 2014 Opinion, 335 P.3d at 151. Similarly, this Court noted numerous instances in which Hyatt made assertions to the jury that could not be made “without contesting the audits' conclusions and determining that they were incorrect, which Hyatt was precluded from doing.” *Id.* at 153. Where the immunity afforded Nevada's Department of Taxation would have rendered these errors prejudicial, so too should the Court conclude that Nevada law

immunized FTB from any liability to Hyatt. *See Wells Fargo*, 11 Nev. at 168; NRS 372.670.

Similarly, the protective order that Hyatt obtained in this litigation (“Nevada Protective Order”) obstructed FTB from carrying out its statutorily-mandated duties to review Hyatt’s protest and caused delays in the process. *See* AOB 23:3-27:9 and record citations therein. In the 2014 Opinion, this Court cited the “delayed resolution of Hyatt’s protests for 11 years” as evidence to support its conclusion that “Hyatt suffered extreme treatment from FTB.” 2014 Opinion, 335 P.3d at 148. Yet at trial, the district court prohibited FTB from giving examples of how or why Hyatt’s responses to document requests in the protest proceedings were defective, thereby preventing FTB from fully defending against Hyatt’s charge of undue delay. 27 AA 6509-10 (order granting motion to exclude after-acquired evidence). Under Nevada law, Hyatt’s interference with FTB’s tax collection and enforcement procedures was prohibited. *See Wells Fargo*, 11 Nev. at 168.

Rather than recognize FTB’s immunity from Hyatt’s collateral attack on the state’s administrative process, as it would FTB’s Nevada counterpart, this Court allowed the Hyatt-caused delays in that administrative process to serve as the basis for IIED liability. 2014 Opinion, 335 P.3d at 148. According to *Hyatt I* and *Hyatt II*, this Court could not reach that conclusion. Where the immunity afforded

Nevada’s Department of Taxation would have rendered the district court’s errors prejudicial as to any liability finding, so too should this Court conclude that Nevada law immunized FTB from any liability to Hyatt.

E. By Allowing Hyatt to Try the Audit Conclusions as Intentional Torts and Deeming the District Court’s Errors “Harmless,” this Court Deprived FTB of the Deference Afforded Nevada Government Agencies.

To the extent this Court continues to hold steadfast that Hyatt’s intentional tort labels preclude total immunity for FTB (notwithstanding that Hyatt simply hid behind those labels to challenge FTB’s audit and protest procedures and conclusions), at a minimum, the Full Faith and Credit Clause required this Court to give FTB the same deference that it gives Nevada agencies.

[S]tate law entrusts the primary responsibility for making factual evaluations under, and legal interpretations of, the revenue statutes to the expertise of Nevada’s Department of Taxation.

* * *

[T]he determinations of fact-based legal issues under the tax statutes should not be made by the courts; rather, those determinations are “best left to the Department of Taxation, which can utilize its specialized skill and knowledge to inquire into the facts of the case.” Further, we have repeatedly recognized the authority of agencies, like the tax department and Tax Commission, to interpret the language of a statute that they are charged with administering; as long as that interpretation is reasonably consistent with the language of the statute, it is entitled to deference in the courts.

Int’l Game Tech., 122 Nev. at 138, 157-58, 127 P.3d at 1093, 1106 (quoting *Meridian Gold v. State, Dep’t of Taxation*, 119 Nev. 630, 636–37, 81 P.3d 516,

520 (2003) and *Malecon Tobacco*, 118 Nev. at 841 & 842 n.15, 59 P.3d at 477 & n.15. Indeed, in *Malecon*, the Court recognized that, in light of the fact-based constitutional questions raised by the taxpayers' lawsuit, should this Court "address the Taxpayers' claims without the benefit of the Department of Taxation's expertise, we would usurp the Department's role as well as contravene the Supreme Court's directive to give deference to an agency's reasonable interpretation of the law and facts at issue." 118 Nev. at 841 & 842 n.15, 59 P.3d at 477 & n.15. Deference, not the jury's second guessing, should have been afforded to FTB.

1. Deference to FTB Would Have Rendered the District Court's Evidentiary Errors Prejudicial

In this case, this Court correctly recognized multiple instances of improperly admitted evidence that the jury heard and saw on the topic of whether FTB came to the right conclusion concerning FTB's audits of Hyatt and the amount of tax and penalties he owed to California. 2014 Opinion, 335 P.3d at 150. This included: (1) "evidence challenging whether FTB made a mathematical error [\$24 million] in the amount of income that it taxed"; (2) "whether an auditor improperly gave credibility to certain interviews of estranged family members"; (3) whether an auditor "appropriately determined that certain information was not credible or not relevant"; and (4) other evidence identified by the opinion that "challenged various aspects of the fraud penalties." *Id.* From the opening statement to closing

argument at trial, Hyatt's counsel claimed it was the jury's job to review FTB's conclusion and act as a "check and balance" against FTB's audit determinations made against Hyatt. 52 AA 12837 (90).

On this same inadmissible topic, this Court held that the district court erred by improperly admitting Hyatt's expert testimony, **which "went to the audits' determinations and had no utility in showing any intentional torts"** 2014 Opinion, 335 P.3d at 150. (emphasis added). The jury heard nearly two full days of testimony from Hyatt's expert Malcolm Jumelet, who expressed expert opinions critical of how FTB analyzed and weighed information obtained in the audits. *Id.* at 150; 44 AA 10814-10946. Hyatt's trial attorneys then relied heavily on Jumelet's testimony in their closing arguments.

In his initial closing argument, Hyatt's counsel referred the jury dozens of times to Jumelet's testimony that FTB had reached the wrong result concerning Hyatt's tax liability. *See, e.g.*, 52 AA 12835-36, 12853, 12893, 12894, 12901, 12905, 12910, 12912, 12915, 12923. Hyatt's counsel expressly asked the jury to tie Jumelet's testimony to the IIED claim. 52 AA 12894(28-29) (counsel discusses Jumelet's testimony, immediately followed by: "The FTB certainly knew how to inflict the emotional distress on Mr. Hyatt.") In the rebuttal closing argument, Hyatt's counsel again referred the jury to Jumelet's testimony numerous times. *See, e.g.*, 53 AA 13166-67, 13169, 13172, 13176.

The inadmissible expert testimony from Malcolm Jumelet “is precisely what this case was not allowed to address.” 2014 Opinion, 335 P.3d at 150. As a result, the Court held that the district court abused its discretion by admitting this evidence. *Id.* at 157 n.14. Although this improper evidence might readily have impacted jury deliberations on the first two essential elements of IIED (whether FTB’s conduct was extreme and outrageous, and whether FTB employees intended to cause emotional distress), the Court’s 2014 Opinion deemed it harmless error. 2014 Opinion, 335 P.3d at 157. This result violated the full faith and credit mandate of *Hyatt I* and *II* because it affirmed liability determinations made by a Las Vegas jury, not the agency statutorily charged with making factual findings and legal conclusions as to Hyatt’s tax liability, as required by Nevada law. *See Int’l Game Tech*, 122 Nev. at 138, 157-58, 127 P.3d at 1093, 1106. Had this Court treated FTB the same as a Nevada agency, it would not have deemed these errors harmless. *See id.*; *Malecon*, 118 Nev. at 841 & 842 n.15, 59 P.3d at 477 & n.15.

Other district court errors likewise failed to afford FTB the deference due a Nevada agency:

- a. The district court prohibited FTB from explaining to the jury the delay in Hyatt’s protest (caused by Hyatt himself). 27 AA 6509-10;
- b. The district court prohibited FTB from offering evidence to rebut the spoliation inference regarding FTB’s email system. 50 AA 12398 (133)-

12403 (150); 53 AA 13131 (97) – 13133 (105); *see* AOB 98:20-100:18 and citations therein.

- c. The district court improperly excluded evidence related to Hyatt’s residency that proved he had not established Nevada residency in September or October of 1991, as he claimed. 27 AA 6509-10. Worse, the jury was not provided California statutory, regulatory, and case law required to determine, if in fact, FTB properly analyzed and weighed the evidence consistent with that jurisprudence. 46 AA 11297 (79) – 11299 (87); 53 AA 13218-50; 54 AA 13251-87. Allowing the jury to second guess FTB’s discretionary conduct is hostile to a sister state in and of itself, but to permit the jury to do this without the benefit of all the evidence or any of the law applicable to these actions was severely prejudicial to FTB.
- d. Hyatt asserted that FTB erred in calculating his 1992 taxable income by improperly including \$24 million in its calculation, and that FTB’s failure to correct that error was tortious. 21 AA 5081-5082. FTB determined that no such error occurred. 93 AA 23182-23231. The district court allowed the jury to take on the role of an appellate court regarding this tax-calculation issue. 35 AA 08567 (99-101); 44 AA 10830 (69) – 32 (75); 52 AA 12890 (11-13). The question of whether

FTB committed any error in calculating Hyatt's tax assessments, or in weighing the evidence associated with this issue, went to the heart of the propriety of FTB's tax determinations. Not only was this issue outside the jurisdiction of Nevada's courts (2 AA 420-421), but it is one further example of this Court's failure to afford FTB's fact finding the same deference owed to a Nevada agency.

By affirming the jury's second guessing of FTB's audit procedures and conclusions, this Court ran afoul of the full faith and credit mandate of *Hyatt I* and *Hyatt II*.

2. Deference to FTB Would Have Rendered the District Court's Instructional Errors Prejudicial.

In addition to holding that the district court committed numerous evidentiary errors, this Court also held that the district court erred by giving a jury instruction that improperly allowed the jury to consider the "appropriateness and correctness of the analysis conducted by the FTB employees in reaching its residency determination and conclusion." 2014 Opinion, 335 P.3d at 151. As the Court noted, this instruction "violated the jurisdictional limit that the district court imposed in this case." *Id.*

In his rebuttal closing argument, Hyatt's counsel specifically drew this prohibited instruction to the jury's attention. 53 AA 13166(21)-13167(23). Hyatt's counsel quoted both of the two sentences that this Court highlighted as

erroneous. *Id.* at (22-23). After reading the erroneous instruction, Hyatt’s counsel immediately followed with: **“And, Ladies and Gentlemen, that’s exactly what we’ve been talking about through the entire trial.”** *Id.* at (23) (emphasis added).

This Court appropriately held that Hyatt’s focus on the audit conclusion—which included expert testimony, and which culminated in the erroneous jury instruction and closing argument—was error. 2014 Opinion, 335 P.3d at 149-50. Yet the Court deemed this error harmless, thereby affording FTB none of the deference it would have extended to a Nevada government agency. *See Int’l Game Tech*, 122 Nev. at 138, 157-58, 127 P.3d at 1093, 1106. If, under Nevada law, the state’s taxing authority has “primary responsibility for making factual evaluations under, and legal interpretations of, the revenue statutes,” the errors identified in the 2014 Opinion could not be harmless. *Id.*

This Court has never allowed a taxpayer to launch a collateral attack on the Nevada Department of Taxation’s fact finding and legal conclusions by instituting a tort action. Such an action would lead to economic chaos in Nevada’s tax-collecting functions. In light of the deference owed to FTB, the district court’s instructional and evidentiary errors that allowed Hyatt to convert his trial into an attack on the audit findings can be nothing other than prejudicial. *See id.* As the Supreme Court made clear in *Hyatt I* and *Hyatt II*, this Court needed to treat FTB

as one of its own and give FTB the same deference that would be afforded a Nevada agency.

F. This Court Discriminated Against FTB Relative to Similarly Situated Nevada Government Agencies When It Allowed Hyatt to Pursue This Case Before Exhausting His Administrative Remedies in California.

The Court's disparate treatment of FTB is also demonstrated by the Court allowing Hyatt to pursue his Nevada action before exhausting his administrative remedies in California. For many years, the Court has vindicated the doctrine of administrative exhaustion by applying it to cases that involve the Nevada Department of Taxation. *See Malecon*, 118 Nev. at 839, 59 P.3d at 475-76 (2002) ("Ordinarily, before availing oneself of district court relief from an agency decision, one must first exhaust available administrative remedies."); *see also State Dep't of Taxation v. Masco Builder*, 129 Nev. Adv. Op. 83, 312 P.3d 475, 478 (2013) ("[T]he exhaustion doctrine provides that, before seeking judicial relief, a petitioner must exhaust any and all available administrative remedies, so as to give the administrative agency an opportunity to correct mistakes and perhaps avoid judicial intervention altogether."); *County of Washoe v. Golden Road Motor Inn, Inc.*, 105 Nev. 402, 404, 777 P.2d 358 (1989) ("If a statutory procedure exists either for recovery of taxes collected erroneously or for disputing an excessive assessment, that procedure must be followed.").

Indeed, on the very day that the Court issued its 2014 Opinion, it recognized that Nevada courts grant considerable deference to the Nevada Department of Taxation in evaluating exhaustion of administrative remedies:

While facial constitutional challenges may bypass the administrative exhaustion requirement, we have held that as-applied constitutional challenges hinging on factual determinations cannot. In making that determination, we reasoned that given an agency's expertise in the area of the dispute, it is in the best position to make the factual determinations necessary to resolve that dispute.

Deja Vu Showgirls v. State, Dep't of Taxation, 130 Nev. Adv. Op. 73, 334 P.3d 392, 397 (2014). The Court dismissed the *Deja Vu* plaintiff's as-applied challenge to a Nevada statute because the company failed to exhaust its administrative remedies. In other words, the Court confirmed that a plaintiff must overcome this substantial hurdle before it can sue a Nevada agency in a Nevada state court. *See id.*

Less than a year later, in the case of *Benson v. State Engineer*, the Court reaffirmed the importance of applying the exhaustion doctrine to protect Nevada agencies. 130 Nev. Adv. Op. 78, 358 P.3d 221 (2015). In that case, the Court declined to hear a challenge to the State Engineer's decision to cancel a water permit because the petitioner failed to exhaust her administrative remedies and could not otherwise prove that administrative review would provide her "no relief at all." *Id.* at 226. The Court correctly noted that the exhaustion doctrine serves vital policy purposes for both Nevada agencies and courts alike:

[T]his stricter standard [that the administrative review would provide no relief at all] will provide the district court with a fully developed record and administrative decision, including factual findings by an administrative body with expertise in water appropriation. This will place the district court in a better position, acting in an appellate capacity, to determine issues such as whether a party has proved adequate grounds for having a permit restored with its original appropriation date. Lastly, the stricter standard will provide the State Engineer with the opportunity to correct its mistakes and protect judicial resources.

Id.; see also *Mesagate Homeowner's Ass'n v. City of Fernley*, 124 Nev. 1092, 1099, 194 P.3d 1248, 1252-53 (2008) (explaining that the exhaustion doctrine's purpose is to permit agencies to correct their mistakes and conserve judicial resources).

Reading the cases in harmony, it is clear that the Court has historically granted considerable deference to Nevada agencies when applying the doctrine of administrative exhaustion. The Court did not give FTB this same deference. By failing to hold Hyatt to the same exhaustion standards, the Court acted with hostility to its sister State.

During briefing before this Court, FTB argued that the exhaustion doctrine was a jurisdictional limit prohibiting Hyatt from introducing evidence about “any issues that were the subject matter of the administrative tax proceedings between FTB and Hyatt in California.” AOB at 58:6-7. FTB noted the district court inappropriately considered Hyatt's claims and empaneled a jury to act as an appellate review body while the California Board of Equalization (“BOE”) was

conducting administrative proceedings regarding Hyatt's claims. *See id.* at 58:15-28. Indeed, FTB's evidence collection methods during Hyatt's tax audit and the analysis flowing from that collection are the very issues that the BOE is reviewing administratively. *See id.* at 59:3-10. Thus FTB argued that the district court inappropriately considered these issues, many of which went to the very core of Hyatt's tort claims in this case. *See id.* at 59:10-12.

Despite the Court's consistent application of the exhaustion doctrine to cases involving Nevada government agencies, the Court failed to apply the doctrine here as a jurisdictional limit that benefits FTB. Instead, the Court characterized FTB's argument as evidentiary, subject to an abuse of discretion standard. *See* 2014 Opinion, 335 P.3d at 149. Although there may be tangential benefits to FTB from the exclusion of evidence, characterizing FTB's argument as evidentiary and not as a jurisdictional limit misses the importance of the exhaustion doctrine. By declining to apply the exhaustion doctrine as it has to a Nevada government agency, the Court put FTB in a position that the Nevada Department of Taxation has never occupied.

To treat FTB the same as the Court has historically treated the Nevada Department of Taxation and other Nevada government agencies, and to comply with the Supreme Court's prohibition against discriminatory treatment of a sister

State, the Court should stay or dismiss Hyatt's case until such time as he has exhausted his administrative remedies in California.

IX. CONCLUSION.

FTB respectfully contends that this Court's hostility towards a sister State, which the Supreme Court deemed unconstitutional, infected the entirety of the 2014 Opinion. Essentially, the Supreme Court agreed when it vacated the entirety of this Court's 2014 Opinion. In affirming the fraud and IIED verdicts and analyzing the immunity and exhaustion doctrines, this Court did not treat FTB as it would FTB's Nevada counterpart. To correct the disparate treatment towards FTB that pervades the now-vacated 2014 Opinion, the Court should do more than apply the damages cap of NRS 41.035; it must review the jury's verdict from the perspective that FTB is a Nevada government agency. To ensure compliance with the Supreme Court's remand instructions, FTB respectfully requests that the Court grant FTB judgment as a matter of law on Hyatt's fraud and IIED claims.

Dated this 22nd day of August, 2016.

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AFFIRMATION

Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

Dated this 22nd day of August, 2016.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point font, Times New Roman style. I further certify that this brief complies with the type-volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 9679 words.

Pursuant to NRAP 28.2, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that this brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 22nd day of August, 2016.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of McDonald Carano Wilson LLP and on the 22nd day of August, 2016, I certify that I electronically filed the foregoing with the Clerk of the Court by using the ECF system which served the following parties electronically:

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