IN THE SUPREME COURT OF THE STATE OF NEVADA
Case No. 80884

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA

Appellant

v.

GILBERT P. HYATT

Respondent

On Appeal from the Eighth Judicial District Court, Clark County
Case No. A382999
THE HONORABLE TIERRA JONES, District Judge, Department X

APPENDIX TO RESPONDENT'S BRIEF ON BEHALF OF GILBERT P. HYATT - VOLUME 15 OF 17

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1	Court Minutes re: case remanded, dated September 3, 2019	1	RA000001
2	Plaintiff Gilbert P. Hyatt's Brief in Support of Proposed Form of Judgment That Finds No Prevailing Party in the Litigation and No Award of Attorneys' Fees or Costs, filed October 15, 2019	1, 2, 3, 4	RA000002-RA000846
3	Exhibits 14-34 to Plaintiff Gilbert P. Hyatt's Brief in Support of Proposed Form of Judgment That Finds No Prevailing Party in the Litigation and No Award of Attorneys' Fees or Costs to Either Party, filed October 15, 2019	4, 5, 6, 7, 8	RA000847-RA001732
4	Exhibits 35-66 to Plaintiff Gilbert P. Hyatt's Brief in Support of Proposed Form of Judgment That Finds No Prevailing Party in the Litigation and No Award of Attorneys' Fees or Costs to Either Party, filed October 15, 2019	8, 9, 10, 11, 12	RA001733-RA002724
5	Exhibits 67-82 to Plaintiff Gilbert P. Hyatt's Brief in Support of Proposed Form of Judgment That Finds No Prevailing Party in the Litigation and No Award of Attorneys' Fees or Costs to Either Party, filed October 15, 2019	12, 13, 14, 15, 16	RA002725-RA003697
6	Exhibits 83-94 to Plaintiff Gilbert P. Hyatt's Brief in Support of Proposed Form of Judgment That Finds No Prevailing Party in the Litigation and No Award of Attorneys' Fees or Costs to Either Party, filed October 15, 2019	16, 17	RA003698-RA004027

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of HUTCHISON & STEFFEN, PLLC, and that on this 1st day of October, 2020, I caused the above and foregoing document entitled **APPENDIX TO RESPONDENT'S BRIEF ON BEHALF OF GILBERT P. HYATT - VOLUME 15 OF 17** to be served by the method(s) indicated below:

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STATUTORY APPENDIX

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U.S. Const. art. III

Section 1.

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;— between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction,

both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3.

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

U.S. Const. art. IV

Section 1.

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2.

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section 3.

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more

States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section 4.

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence.

U.S. Const. amend. XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

EXHIBIT 76

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 Writ of Certiorari to the Supreme Court of Nevada

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether States have immunity as of right – rather than immunity as a matter of comity – in the courts of other States.

2. Whether petitioner has shown a "special justification" for setting aside principles of stare decisis and overruling *Nevada v. Hall*, 440 U.S. 410 (1979).

3. Whether the Full Faith and Credit Clause requires Nevada state courts to apply California's laws of sovereign immunity to a matter over which Nevada has legislative jurisdiction.

4. Whether the voluntary doctrine of comity requires Nevada state courts to apply California's laws of sovereign immunity when the Nevada courts have decided that it would be contrary to Nevada's sovereign interests to do so.

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INTRODUCTION

Now that this case has returned to the Court, the Board's principal argument turns out to be one that it did not even bother to make on the first go-round: that States have complete immunity as a matter of right in other States' courts. But the history of immunity among independent sovereigns – as the States once were and largely are today – flatly contradicts that theory. The relevant history shows unmistakably that, at the time of the Founding, sovereigns were not entitled to immunity as of right in other sovereigns' courts, but received immunity only as a matter of comity (i.e., with the consent of the home sovereign). *See Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). Nothing in the Constitution or plan of the Convention altered that preexisting balance between different sovereigns. Furthermore, the Court has already rejected the Board's immunity-as-of-right argument in *Nevada v. Hall*, 440 U.S. 410 (1979), relying on the careful analysis of competing sovereign interests set forth in *Schooner Exchange*, and the Board offers no "special justification" for suddenly dispensing with that established precedent. Thus, whether the Court now reexamines the States' immunity as an original matter or simply adheres to *Hall* under traditional principles of stare decisis, the result is the same: States do not have immunity as of right in other States' courts. The States are free to obtain that immunity through mutual agreement, but they have no right to insist upon immunity over the objection of the forum sovereign.

The Board's alternative argument, a convoluted attempt to exploit a Nevada law capping damages for Nevada officials, is similarly unavailing. Although

the Board has modified its previous position that Nevada courts must apply California law granting total immunity to the Board – limiting it now to awards above the amount of the Nevada cap – its new argument, like the old one, runs head-on into the controlling Full Faith and Credit Clause standard, which permits a State to apply its own law whenever it is "competent to legislate" about the subject matter of the suit. *See Franchise Tax Bd. of California v. Hyatt*, 538 U.S. 488, 494 (2003) ("*Hyatt I*") (internal quotations omitted). The Court has already found that Nevada satisfies that standard in this case, *see id.*, and it is undisputed that Nevada law does not limit damages for out-of-state officials. Furthermore, the Board offers no authority for the illogical proposition that federal courts can *order* States to give "equal treatment" to other States as a matter of comity. It has been understood for centuries that granting comity is a voluntary act on a sovereign's part, and that doctrine thus provides no basis for the Board to forcibly elevate its own sovereignty over that of Nevada. The judgment below should be affirmed.

STATEMENT

1. The issues in this case arise out of a state-law tort suit, one of several disputes between respondent and petitioner California Franchise Tax Board. The original dispute stemmed from 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 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." JA259, 265. 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. JA261, 263-65.

The auditor also sought out respondent's Nevada home, peering through his window and examining his mail and trash. JA267. After she had closed the audit, she boasted about having "convicted" respondent and returned to his Nevada home to take trophy-like pictures. JA253-55. The auditor's incessant discussion of the investigation conveyed the impression that she had become "obsessed" with the case. JA261, 267-68.

Within her department, Ms. Cox pressed for harsh action against respondent, including rarely issued fraud penalties. JA263. To bolster this effort, she enlisted respondent's ex-wife and estranged members of respondent's family. *E.g.*, JA208-09, 213-23. And she often spoke coarsely and disparagingly about respondent and his associates. JA259-61, 265-67.

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. *E.g.*, JA224-45, 263. Demands to furnish information, naming respondent as the subject, were sent to his places of worship. JA238-41, 243-45. The Board also disclosed its investigation to respondent's patent licensees in Japan. JA247-51.

The Board knew that respondent, like many inventors, had significant concerns about privacy and security. JA242. Rather than respecting those concerns, however, the Board sought to use them 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." JA277-78. Both Cowan and respondent himself understood the employee to be pushing for tax payments as the price for maintaining respondent's privacy. JA272, 274-75.

2. Respondent brought suit against the Board in Nevada state court, alleging both negligent and intentional torts. In response, the Board asserted that it was entitled to absolute sovereign immunity. Although this Court had held that 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 and Credit Clause required Nevada to give effect to California's own immunity laws, which allegedly gave 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. JA167-68. 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," JA168, it noted that "Nevada provides its agencies with immunity for the performance of a discretionary function even if the discretion is abused," JA169. 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." JA168.

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." JA167. It then determined that "affording Franchise Tax Board statutory immunity for intentional torts does contravene Nevada's policies and interests in this case." JA169. 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." JA166 & n.10, 169, 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." JA169.

This Court, in a unanimous opinion, affirmed. *See Hyatt I.* Rejecting the Board's argument that the Full Faith and Credit Clause required Nevada courts to apply California's immunity laws, the Court reiterated the well-established principle that the Full Faith and 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." 538 U.S. at 494 (internal quotations 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 one claim). And it held that, as a matter of comity,

the Board was immune from any award of punitive damages.

Reviewing the merits, the Nevada Supreme Court determined that respondent had not established necessary elements for various torts under Nevada law. *See* Pet. App. 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 establish 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.*

SUMMARY OF ARGUMENT

I. The States do not have immunity as of right in the courts of other States. This Court so held in *Nevada v. Hall*, 440 U.S. 410 (1979), and the relevant historical evidence shows that its decision was correct.

A. This Court has given great weight to "history and experience, and the established order of things, . . . in determining the scope of the States' constitutional immunity from suit." *Alden v. Maine*, 527 U.S. 706, 727 (1999) (internal quotations omitted). Here, an examination of that "history and experience" reveals three critical facts: *first*, that, prior to formation of the Union, the States had the status of independent nations and thus had the same sovereign immunity in each others' courts as other nations had in the courts of foreign nations; *second*, that the immunity enjoyed by one nation in the courts of another nation was *not* an immunity as of right, but an immunity that depended on the express or implied consent of the home sovereign; and, *third*, that, insofar as sovereign immunity among the States was concerned, the Formation did not change either the scope or the nature of that preexisting immunity.

The idea that immunity between sovereigns depends on the consent of the home sovereign is anything but novel. To the contrary, it has been understood for centuries that immunity among different sovereigns is grounded in, and derived from, fundamental principles of sovereignty itself. *See Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). As Chief Justice Marshall explained in *Schooner Exchange*, "[t]he jurisdiction of [a] nation within its own territory is necessarily exclusive and absolute" and "is susceptible of no limitation not imposed by itself." *Id.*

at 136. It would be directly contrary to that understanding for a foreign sovereign to unilaterally grant itself immunity from the jurisdiction of the home sovereign and its tribunals. It follows, therefore, that "[a]ll exceptions . . . to the full and complete power of a nation within its own territories must be traced up to the consent of the nation itself." *Id.* And that consent, having been given, can be withdrawn, at least with suitable notice, at any point in the future. *See id.* at 146.

The Board repeatedly disregards this critical principle, failing even to mention *Schooner Exchange*. To make its argument, the Board first assumes that sovereigns had universal immunity as of right in pre-Formation times and then asserts that formation of the Union left that immunity unchanged. But that gets matters backwards. Because the States did not have immunity as of right during their time as independent sovereigns, the proper question is whether formation of the Union *granted* them such immunity, thereby diminishing the States' preexisting "exclusive and absolute" jurisdiction over their own territory.

The clear answer is that it did not. To begin with, it is well-recognized that formation of the Union did not strip the States of their sovereign status. Although the States necessarily ceded some of their powers to the federal government, they nevertheless "entered the federal system with their sovereignty intact." *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991). That residual sovereignty, in turn, left the States with broad powers to govern with respect to persons and events within their territory. Given how jealously the States guarded their sovereign powers, it is highly unlikely that the States would

have surrendered part of those powers – without saying a word about it – in favor of allowing other States to operate with impunity within their borders.

The Board does not, in fact, claim that the States engaged in any such surrender. Rather, having committed to its States-always-had-immunity-as-of-right theory, the Board tries to shore up that position by relying on general statements by various founding fathers and on dicta in 19th Century cases, all of which broadly declare that sovereigns are not amenable to suit even in courts of other sovereigns. But none of the Board's quoted material directly addresses the critical issue: whether immunity between sovereigns existed as of right or was dependent on consent of the home sovereign. Moreover, if the various statements are taken to mean that sovereigns have (and always have had) immunity as of right wherever they go, then those statements would be in direct conflict with the principles of sovereignty recognized in *Schooner Exchange*, one of this Court's seminal decisions. Despite its newfound willingness to urge overruling of cases, even the Board does not suggest that *Schooner Exchange* should be cast aside.

The Framers' remarks about sovereign immunity were also directed to a very different issue: whether the States would have immunity in the new federal courts. The States, of course, had good reason to be concerned about lack of such immunity. Not only did the language of Article III suggest that the States would be subject to suit, but, because the federal government was to be established as a *superior* sovereign, the States could not count on the mutuality of self-interest that was (and is) the bedrock of comity-based immunity among equal sovereigns. In setting up this new government, therefore, the States

wanted the same immunity that they enjoyed in their own courts – i.e., immunity as of right – and that is the subject the Framers were addressing. There is no comparable indication that the States were willing, or indeed felt any need, to trade part of their sovereignty for the same immunity in the courts of other States. That immunity remained a matter of comity on the part of the home State.

B. The historical evidence, properly understood, demonstrates that the States did not, and do not, have immunity as of right in each others' courts. But, even if the evidence were less certain, the Court should reach the same conclusion as a matter of stare decisis. The decision in *Hall* rejected the very same argument the Board makes here, and the Board has offered no "special justification" for overruling it. *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015) (internal quotations omitted).

The Board's attack on *Hall* – in addition to being wrong – is noticeably thin. First of all, it is remarkable that the Board makes no effort to confront the core principles set forth in *Schooner Exchange*, even though *Schooner Exchange* was the principal authority on which *Hall* rested. Furthermore, to the extent the Board questions the reasoning of *Hall*, it mostly walks in the tracks of Justice Rehnquist's dissent in that case, relying heavily on the same Framers' statements and case citations that Justice Rehnquist discussed. And, while the Board purports to find an inconsistency between *Hall* and this Court's post-*Hall* decisions, the notion that those cases undermined *Hall* founders on the fact that none of the decisions even discussed, let alone disavowed, the principles of *Schooner Exchange*. That is hardly surprising given that none of the cases required the

Court to assess the competing interests of two equal sovereigns.

The Board also offers little evidence that *Hall* has caused grave problems for the States. Although lawsuits against States in state courts arise occasionally, they remain infrequent and are often dismissed on the basis of comity between States. Indeed, as a telling sign that such cases are of minimal concern, the Board did not even bother to challenge *Hall* on its previous trip to this Court. There is little reason to think, therefore, that overruling *Hall* is critical, or even particularly important, to effective operation of state governments.

The need to overrule *Hall* is also diminished by the fact that the States have other, more effective ways to gain sovereign immunity in each others' courts. Unlike the typical "constitutional" decision, *Hall* leaves the States free to obtain expanded immunity through normal political channels. In particular, the States can enter into agreements to provide immunity on a reciprocal basis, as various *amicus* briefs indicate that States are willing to do. Because such voluntary agreements would not aggregate state power at the expense of the federal government, they would not require Congress's approval. *See Cuyler v. Adams*, 449 U.S. 433, 440 (1981). And the process of full discussion among the States would allow all branches of state governments to participate in the politically sensitive decision to surrender part of the States' sovereignty (and their citizens' right to secure relief) in exchange for guarantees of greater immunity in other States' courts.

Voluntary agreements among the States would also give the States an opportunity to define the scope of immunity they want to obtain and provide. Indeed,

one of the distinct oddities of the Board's position is that the immunity it seeks – total immunity for any and all actions, no matter what kind or how destructive – bears almost no resemblance to modern sovereign immunity. Thus, for example, the United States, which once granted other nations almost complete immunity for their actions in this country, now provides broad exceptions to that immunity for, among other things, commercial activities and certain torts. Agreements among the States would allow them to consider similar exceptions for state-to-state immunity, rather than accepting the across-the-board immunity that would result from overruling *Hall*. Thus, whether reaffirmed on its own terms or simply given respect as a matter of stare decisis, the decision in *Hall* should stand.

II. The Board's less sweeping submission – that Nevada should be ordered to apply its state-law damages cap to California officials – fails as well. Although the Board makes a roundabout argument that, under the Full Faith and Credit Clause, the Nevada courts had to apply *California's* law of total immunity to damages greater than *Nevada's* cap, this argument, apart from being a strange mishmash of California and Nevada law, is foreclosed by the governing Full Faith and Credit Clause standard. That standard provides, in simple terms, that a State may apply its own law to matters about which it is "competent to legislate." *Hyatt I*, 538 U.S. at 494 (internal quotations omitted). The Court has already found that the Nevada courts can apply Nevada law in this case, and it is undisputed that Nevada law does not provide a damages cap for out-of-state officials.

The Board tries to get around that problem by insisting that Nevada cannot exhibit "hostility" to California law. But that argument suffers from its own flaws. To begin with, it cannot be "hostile" as a constitutional matter for Nevada to do exactly what the Constitution permits it to do: apply its own law where it has legislative jurisdiction. Furthermore, the Board's attempt to add a "no hostility" test to the current Full Faith and Credit Clause standard would be a practical disaster, embroiling the Court in repeated, largely standardless inquiries into whether an otherwise constitutional choice-of-law decision crossed some unidentifiable "hostility" threshold. Finally, and in any event, it is pure hyperbole to say that the Nevada courts were hostile to California law (or even to California itself), when the Nevada Supreme Court granted the Board complete immunity for its negligent actions, prohibited any award of punitive damages against the Board, reversed the damages award on one tort claim because it rested on matters properly left to California's tax proceeding, and even carefully explained why it had decided not to limit compensatory damages for injuries caused by the Board's abusive actions. Far from showing hostility, the Nevada court took full and respectful account of the Board's sovereign status at every step.

The Board's attempt to create a federal doctrine of "mandatory state-to-state comity" is even less convincing. As has been true for centuries, comity is a *voluntary* doctrine, and the decision by one sovereign to grant comity to another sovereign ultimately lies within its discretion. It is thus entirely unsurprising that the Board cites no case – not one – saying that federal courts can tell state courts how to apply the doctrine of comity. Recognition of such a

power in the federal courts would, in fact, be a wholly inexplicable transfer of power from the States to the federal government.

Finally, the Board tries to fashion an equal-treatment argument out of principles of "equal sovereignty," suggesting that, by not applying the Nevada damages cap to California officials, Nevada somehow denied California its right to constitutionally based equality. In doing so, however, the Board has wrenched the "equal sovereignty" principle from its proper moorings. In its true form, the doctrine of equal sovereignty operates to assure that each State has the same powers within *its* territory as other States have within *their* territory. The doctrine does not mean – and could not mean without lapsing into incoherency – that every State has the same powers in *other* States as the home State does. The Board's continuing attempt to import its own sovereignty into Nevada thus falls of its own weight.

ARGUMENT

I. States Do Not Have Sovereign Immunity as of Right in the Courts of Other States.

A. The Historical Evidence Shows That Immunity Between Sovereigns Depends Upon Consent of the Home Sovereign.

This Court has traditionally looked to "'history and experience, and the established order of things,' . . . in determining the scope of the States' constitutional immunity from suit." *Alden v. Maine*, 527 U.S. 706, 727 (1999), quoting *Hans v. Louisiana*, 134 U.S. 1, 14 (1890). To undertake that inquiry properly, however, it is essential to identify the precise form of sovereign immunity at issue. As we discuss, the history underlying a sovereign's immunity in its own courts is different from, and grounded in less complex consider-

ations than, the history of a sovereign's immunity in the courts of another independent sovereign. It is the latter immunity, not the former, that is at issue here.

The history of immunity among independent sovereigns makes quite clear that States do not have immunity as of right in the courts of other States. That conclusion follows from three basic points: *first*, that, prior to formation of the Union, the States were independent sovereign nations and had the same immunity in each others' courts as other sovereign nations had in the courts of foreign nations; *second*, that, before the Formation (as now), sovereign nations could not assert immunity as of right in the courts of other nations, but enjoyed immunity only with the consent of the host nation; and, *third*, that nothing in the Constitution or formation of the Union altered that balance among the still-sovereign States, giving priority to the rights of visiting States at the expense of host States. As a result, the Board does not have sovereign immunity as of right in Nevada's courts.

1. Prior to Formation of the Union, the States Were Independent Sovereign Nations.

This Court has frequently recognized that, following the Declaration of Independence, the States had the status of independent sovereign nations. In *McIlvaine v. Coxe's Lessee*, 8 U.S. (4 Cranch) 209 (1808), for example, the Court observed that "the several states which composed this union, so far at least as regarded their municipal regulations *became entitled*, from the time when they declared themselves independent, *to all the rights and powers of sovereign states*." *Id.* at 212 (emphases added). Thus, "each of them was a sovereign and independent

state, that is, . . . each of them had a right to govern itself by its own authority, and its own laws, without any control from any other power on earth." *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 224 (1796). Many years later, the Court again confirmed that the States "were then sovereign states, possessing, unless thus restrained [i.e., by the Articles of Confederation], all the rights and powers of independent nations over the territory within their respective limits." *Wharton v. Wise*, 153 U.S. 155, 166 (1894).

Both the Declaration of Independence and the Articles of Confederation set forth the States' sovereignty in plain terms. For its part, the Declaration of Independence stated "[t]hat these United Colonies are, and of Right ought to be Free and Independent States." Declaration of Independence para. 4 (1776). Article II of the Articles of Confederation then provided that "[e]ach state retains its sovereignty, freedom, and independence, . . . which is not by this confederation expressly delegated to the United States." Art. of Confederation, art. II (1781). And, while the Articles of Confederation did "delegate[]" a portion of the States' newly asserted sovereignty to "the United States," the Articles did not address, and did nothing to alter, the nature of the immunity that the States, as independent nations, had in each others' courts.

The Board does not question the historical status of the States as independent nations. *See* FTB Br. 30 (acknowledging such independence). Nor does it argue that, during their existence as independent nations, the States were entitled to *greater* sovereign immunity than other nations. The Board's immunity claim depends entirely on the proposition that, during the period after the Declaration of Independence and before formation of the Union, independent

nations had immunity as of right in the courts of other nations. As we discuss next, that proposition is simply incorrect.

2. Independent Sovereigns Enjoy Immunity in Other Sovereigns' Courts Only with the Consent of the Home Sovereign.

In the late 18th Century, independent nations did not have immunity as of right in the courts of other sovereigns. To the contrary, they enjoyed immunity only with the consent of the host nation.

This Court set forth that fundamental principle in *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). In that case, two citizens of the United States filed an action against the Schooner Exchange – a French ship of war – claiming they were the rightful owners of the ship and demanding its return. At the time of the action, the warship was docked in the port of Philadelphia, having encountered severe weather and needing repairs. *See id.* at 118 (Statement). The plaintiffs' suit thus directly raised the question whether France, in order to protect its ship from seizure, was entitled to claim sovereign immunity in the courts of the United States.

Recognizing that the case raised a potential conflict between two sovereigns, Chief Justice Marshall carefully examined the authority of the United States as the host sovereign and of France as the visiting sovereign. Relying on "general principles" and "a train of reasoning," *id.* at 136, the Chief Justice explained how the competing sovereign interests were to be reconciled. Importantly for present purposes, he first set forth the guiding principle that "[t]he jurisdiction of [a] nation within its own territory is necessarily exclusive and absolute" and "is susceptible

of no limitation not imposed by itself." *Id.* Given that background understanding, it followed that a foreign nation could not unilaterally claim immunity from the home nation's jurisdiction, because that restriction, "deriving validity from an external source, would imply a diminution of [the home nation's] sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power [i.e., the foreign nation] which could impose such restriction." *Id.* In the Court's view, that proposition was incompatible with the inherent nature of sovereignty itself.

The Court then announced a second critical principle, one that proceeded from the first: that any immunity enjoyed by a foreign nation must stem from the consent of the home nation. As the Court stated, "[a]ll exceptions . . . to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself." *Id.* That consent could be either express or implied, and was presumed to be freely given, *id.*, but it remained the prerogative of the home sovereign to withdraw that consent – with suitable notice (*see id.* at 137) – if its own sovereign interests so dictated. *See id.* at 146.

The principles set forth in *Schooner Exchange* have long been the foundation of sovereign immunity among nations. Just a decade after that decision, this Court, speaking through Justice Story, emphasized its rejection of the "notion that a foreign sovereign had an absolute right, in virtue of his sovereignty, to an exemption of his property from the local jurisdiction of another sovereign, when it came within his territory; for that would be to give him sovereign power beyond the limits of his own empire." *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 352 (1822).

The Court reiterated that the immunity of a foreign sovereign, and of his property, within the territory of an independent sovereign "stands upon principles of public comity and convenience, and arises from the presumed consent or license of nations, that foreign public ships coming into their ports, and demeaning themselves according to law, and in a friendly manner, shall be exempt from the local jurisdiction." *Id.* at 353. And it made clear that, "as such consent and license is implied only from the general usage of nations, it may be withdrawn upon notice at any time, without just offence, and if afterwards such public ships come into our ports, they are amenable to our laws in the same manner as other vessels." *Id.*

In the ensuing centuries, this Court has repeatedly reaffirmed the basic principle that immunity in another sovereign's courts depends upon the latter's consent. In *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983), the Court stated plainly 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." *Id.* at 486. Subsequently, in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), the Court, after noting that *Schooner Exchange* "is generally viewed as the source of our foreign sovereign immunity jurisprudence," *id.* at 688, confirmed that "the jurisdiction of the United States over persons and property within its territory 'is susceptible of no limitation not imposed by itself,' and thus foreign sovereigns have no right to immunity in our courts," *id.*, quoting *Schooner Exchange*, 11 U.S. (7 Cranch) at 136. Insofar as foreign sovereigns enjoy immunity in United States courts, therefore, they do so "as a matter of comity," *id.*, not

absolute entitlement. *See also Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2255 (2014).

Far from seeking to discredit or explain away the principles of *Schooner Exchange*, the Board does not even refer to that decision. For supporting case law, it relies instead on a pre-Formation Pennsylvania Court of Common Pleas decision declining to hear a suit against the Commonwealth of Virginia. *See Nathan v. Virginia*, 1 U.S. (1 Dall.) 77 (1781). But *Nathan* is entirely consistent with *Schooner Exchange*'s view that immunity among independent sovereigns is a matter of comity. There, Pennsylvania's Attorney General, acting at the direction of the Supreme Executive Council of Pennsylvania, urged the state court to accord immunity to Virginia, much as attorneys for the United States urged this Court to accord immunity to France in *Schooner Exchange*. *See* 11 U.S. (7 Cranch) at 120-26, 132-35 (Statement). That intercession not only preserved Virginia's dignity by removing the need for it to make an appearance but, importantly, expressly signified Pennsylvania's consent to Virginia's claim of immunity.

3. Formation of the Union Did Not Change the Nature of the States' Immunity in Each Others' Courts.

The historical evidence thus demonstrates that, prior to formation of the Union, the States did not have immunity as of right in the courts of other States. Like other independent nations, they were entitled to immunity only with the express or implied consent of the host sovereign. The remaining question, then, is whether the Formation altered that allocation of authority among sovereigns, stripping the host sovereign of its power to withhold consent if it deemed immunity to be incompatible with its own

sovereign interests. The short answer is that it did not.

The Board, in fact, does not even advance such an argument. Putting all its eggs in the States-already-had-immunity-as-of-right basket, the Board makes no attempt to show that, even if that hypothesis is wrong, the formation of the Union subsequently eliminated the need for the home sovereign's consent. That reticence is for good reason: there is no historical evidence to show that any such reduction in state sovereignty took place.

a. To begin with, formation of the United States did not extinguish the States' sovereign powers within their own borders. On the contrary, the States "entered the federal system with their sovereignty intact." *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991). Although the States necessarily subordinated some of their authority to the new federal government, they nonetheless retained "'a residuary and inviolable sovereignty.'" *Printz v. United States*, 521 U.S. 898, 918-19 (1997), quoting The Federalist No. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961). *See also Alden*, 527 U.S. at 713-14. As this Court has noted, "the founding document 'specifically recognizes the States as sovereign entities,'" *Alden*, 527 U.S. at 713, quoting *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 71 n.15 (1996), "reserv[ing] to them a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status," *id.* at 714.

The Tenth Amendment reflects that understanding, expressly declaring that "[t]he 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." U.S. Const. amend. X. The States' "reserved" powers thus are directly traceable to the powers that the States had originally possessed as independent sovereign nations. "'These powers . . . remain, after the adoption of the constitution, *what they were before*, except so far as they may be abridged by that instrument.'" *Cook v. Gralike*, 531 U.S. 510, 519 (2001), quoting *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 193 (1819) (emphasis added).

The States' residual sovereignty was not merely ceremonial: it left each State with broad authority over persons and events within its borders. As this Court long ago observed, "the jurisdiction of a state is coextensive with its territory, coextensive with its legislative power." *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 733 (1838) (internal quotations omitted). Thus, "[i]t is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority." *Printz*, 521 U.S. at 928. That sovereignty necessarily encompasses "the power to enforce laws against all who come within the sovereign's territory, whether citizens or aliens," *Duro v. Reina*, 495 U.S. 676, 685 (1990); *see Munaf v. Geren*, 553 U.S. 674, 694-95 (2008).

The right of a sovereign to govern within its own territory, in turn, has important consequences for the relations between States in our federal system. This Court has noted the general rule that "[e]very sovereign has the exclusive right to command within his territory." *Suydam v. Williamson*, 65 U.S. (24 How.) 427, 433 (1860). Conversely, it has acknowledged, again as a general rule, that "[n]o law has any effect, of its own force, beyond the limits of the sovereignty

from which its authority is derived." *Hilton v. Guyot*, 159 U.S. 113, 163 (1895). In light of these fundamental principles, it would be highly unusual for States to invert the traditional rules of sovereignty – surrendering authority over their own territory by allowing other States to disregard local laws – and courts should infer that kind of submissive intent only upon the most unambiguous evidence. As the Court recently observed, "States rarely relinquish their sovereign powers, so when they do we would expect a clear indication of such devolution, not inscrutable silence." *Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2133 (2013).

b. That clear indication is lacking here. The Board does not cite a single word showing that, at the time of the Formation, either the Framers or representatives of the States specifically addressed the States' immunity in one another's courts and declared that, contrary to the prevailing rule before the Formation, such immunity would henceforth exist as of right and not as a matter of comity.

The most the Board offers is a collection of broad, highly generalized statements to the effect that sovereigns are not amenable to suit by individuals in any court (with an occasional reference to other States' courts). *See* FTB Br. 31-36. But, despite the stature of speakers like Hamilton and Madison, there are serious problems with relying on such authority in this context. First of all, if those declarations are taken to establish that, in the late 18th Century, sovereigns enjoyed immunity as of right wherever they went, regardless of the home sovereign's consent, that view would mean that *Schooner Exchange*, one of this Court's historic decisions, was in error. Even the Board does not make *that*

argument.[1] Moreover, unlike Chief Justice Marshall's detailed reasoning in *Schooner Exchange*, none of the statements cited by the Board (including Marshall's own, *see* FTB Br. 34) actually discussed whether immunity in another sovereign's courts depended on the consent of the host sovereign. To the extent the Board's cited material fails to undertake the critical "dual sovereign" analysis of *Schooner Exchange*, therefore, the latter is more precise and more persuasive.

Furthermore, and relatedly, the Board does not distinguish between the historical *fact* of sovereign-to-sovereign immunity and the *basis* for that immunity. It is certainly correct that, at the time of the Formation, sovereign nations were expected to, and did, extend immunity to each other as a matter of custom. Thus, Hamilton could properly ground his view of universal sovereign immunity in "the general sense and the general practice of mankind." The Federalist No. 81, at 487. But neither a "general sense" nor a "general practice" of consent-based immunity covertly transforms a host sovereign's voluntary act into an indefeasible right, exercisable without regard to the home sovereign's consent. Custom notwithstanding, a sovereign retains the sovereign power to decide, based upon its own sovereign interests, not to grant further immunity in the future. *See Santissima Trinidad*, 20 U.S. (7 Wheat.) at 353.

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[1] The same problem arises with occasional dicta in decisions of this Court stating that a sovereign can never be sued in the courts of another sovereign. *See* FTB Br. 37-38 (citing cases). If those statements are read to say that sovereigns enjoy immunity as of right in other sovereigns' courts, they are directly at odds with the reasoning of *Schooner Exchange*.

In addition, the contemporary statements cited by the Board were addressed to a very different issue: whether the States would have immunity in the *federal* courts. The language of Article III suggested they might not, and the heavily indebted States, not surprisingly, wanted assurance they would. That question, however, had an unusual twist: although the new United States would be an independent sovereign – and thus traditionally would need to give its consent to any immunity sought by the States – it was a sovereign the States themselves were directly involved in forming. Consequently, the States were in unique position to decide at the time of creation whether they would have the same immunity in the federal courts that they enjoyed in their own courts. That is the question that Hamilton, Madison, and others were actually debating, not the States' immunity in each others' courts.

The Board seems to believe that, because the States sought immunity as of right in the federal courts, they would have demanded it in the courts of other States as well. But the two situations are not the same. The comity-based custom of immunity among independent nations was grounded in, and traditionally depended on, the equal stature of the various sovereigns. Although comity is ultimately a matter of grace and discretion, *see* pages 50-52, *infra*, it has proved effective over the centuries because it is backed by each sovereign's powerful regard for mutuality and "reciprocal self-interest." *National City Bank of New York v. Republic of China*, 348 U.S. 356, 362 (1955). In practical terms, each sovereign has a strong incentive to grant immunity to other similarly situated sovereigns in order to secure a corresponding grant of immunity when the roles are reversed. That do-unto-others principle governed the relations

among the States both as independent nations and, subsequently, as equal sovereigns within the newly formed United States.

That same state of equilibrium did not exist, however, between the States and the new federal government. Quite the opposite, in fact. Under traditional principles of sovereign immunity, the federal government (a superior sovereign) would be entitled to immunity as of right in the courts of the States (inferior sovereigns). Given that hierarchy, the United States had no reason to be concerned that, if it denied immunity to the States, they would respond by denying immunity in return, and the States could not readily assume that federal courts would follow the practice among equal sovereigns of granting immunity as a matter of comity. The States thus sought the same immunity – immunity as of right – that they had in their own courts.[2]

The Board tries to turn the Framers' silence regarding state-to-state immunity into a positive, suggesting that the right to immunity among sovereigns was "'too obvious to deserve mention.'" FTB Br. 40, quoting *Hall*, 440 U.S. at 431 (Blackmun, J., dissenting). That argument just ducks the pivotal question: whether nation-to-nation – and hence state-to-state – immunity was a matter of comity or of absolute privilege. Because it was the accepted custom that sovereigns would voluntarily extend immunity to one another under the doctrine of

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[2] Insofar as the *federal* government was concerned, moreover, a State did not have "exclusive and absolute" jurisdiction over its territory. *See Schooner Exchange*, 11 U.S. (7 Cranch) at 136. Thus, the usual rules of consent-based immunity – which depended on principles of territorial autonomy – would not naturally apply.

comity, it was undoubtedly the assumption, especially after the decision in *Nathan*, that the States would do so as well. It is one thing, however, for the States to expect immunity as a matter of comity, quite another for them to replace that voluntary practice with binding law. *See, e.g.*, *Altmann*, 541 U.S. at 694-95 (distinguishing "a justifiable expectation [of immunity] as a matter of comity" from a "'right' to such immunity").

To be sure, every sovereign *prefers* to have immunity in other sovereigns' courts, provided that the immunity comes without cost. But immunity between sovereigns is a two-way street. As the Court made clear in *Schooner Exchange*, the act of granting immunity to another sovereign inevitably means that the home sovereign is yielding control over persons and events within its territory. *See* 11 U.S. (7 Cranch) at 136 (discussing "diminution of [home nation's] sovereignty"). Thus, to gain immunity in other States, each State must give up sovereignty in return. That trade-off may or may not be one worth making, but the Board offers no historical evidence to demonstrate the States affirmatively chose to make it.

It has been argued (though not by the Board or its *amici*) that the grant of Judicial Power in Article III – extending jurisdiction over "Cases . . . between a State and Citizens of another State" – extinguished the States' preexisting power to deny immunity to other States. *See* Ann Woolhandler, *Interstate Sovereign Immunity*, 2006 Sup. Ct. Rev. 249 (2006). According to this theory, formation of the Union "meant that future development of interstate immunity law would occur in the Supreme Court and was no longer left primarily to state decision makers." *Id.*

at 262. But this explanation is based on just the kind of inference by "inscrutable silence" that the Court has warned against. *See Tarrant Reg'l Water Dist.*, 133 S. Ct. at 2133. Article III does not explicitly oust the state courts of jurisdiction over citizen-State cases, and implicit displacement of state jurisdiction would necessarily follow only if this Court's jurisdiction were *exclusive*. By its plain terms, however, Article III does not provide for exclusive jurisdiction in citizen-State cases.

The theory is also incomplete. The central question is not whether this Court could apply federal "interstate immunity law" requiring States to give each other immunity, but whether there *is* such federal law. The answer is no. Whether examined at the time of the Formation or in the years since, federal law has had nothing to say about the States' immunity in each others' courts. In particular, while the Eleventh Amendment confirmed that the States had immunity as of right in the federal courts, and left untouched the States' preexisting immunity in their own courts, *see Alden*, 527 U.S. at 712-30, it did not address, much less purport to overturn, the historical principle that immunity among equal sovereigns depends on consent of the home sovereign.

In short, the Board cannot show what it needs to show: that the States have immunity as of right in the courts of other States. At most, it has shown that, like sovereign nations in general, States have granted immunity to each other as a matter of custom. *See id.* at 749 (noting that "the immunity of one sovereign in the courts of another has often depended in part on comity or agreement"). That is not enough. Furthermore, assuming that a sovereign must give prior notice before departing from that custom – as

Schooner Exchange suggested, *see* 11 U.S. (7 Cranch) at 137 – the Board cannot show lack of notice either. Well before the events in this case, the Nevada Supreme Court made clear that other States could not expect to receive absolute sovereign immunity in Nevada's courts as a matter of comity. *See Mianecki v. Second Judicial Dist. Court*, 658 P.2d 422 (Nev. 1983).[3] Thus, the Board's attempt to claim immunity as of right in Nevada's courts falls short on all fronts.

B. This Court Should Adhere to the Holding of *Nevada v. Hall* as a Matter of Stare Decisis.

Even if the historical evidence were less compelling, principles of stare decisis should lead to the same conclusion: States do not have immunity as of right in the courts of other States. The Court said so in *Hall*, and the Board provides no good reason for overruling that decision now.

1. Respect for Precedent Is Central to the Rule of Law.

"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 reemphasized that "[o]verruling precedent is never a small matter. *Stare decisis* . . . is 'a foundation stone of the rule of law.'" *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409

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[3] That view of immunity can hardly have surprised California agencies, given that the California Supreme Court had previously held that other States enjoyed no immunity as of right in the California courts. *See Hall v. University of Nevada*, 503 P.2d 1363 (Cal. 1972).

(2015), quoting *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014).

The principles of stare decisis are important as both an institutional and a practical matter. As the Court has noted, stare decisis "'promotes the even-handed, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" *Id.*, quoting *Payne v. Tennessee*, 501 U.S. 808, 827-28 (1991). *See also Hilton*, 502 U.S. at 202 ("Adherence to precedent promotes stability, predictability, and respect for judicial authority."). In particular, the doctrine "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986).

Stare decisis also allows the Court to develop a body of settled law without the need for perpetual reexamination. As Justice (then-Judge) Cardozo once noted, "[t]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him." Benjamin N. Cardozo, *The Nature of the Judicial Process* 149 (1921). Stare decisis provides an essential buffer against that prospect, "reduc[ing] incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation." *Kimble*, 135 S. Ct. at 2409.

The Court thus has set a demanding standard for overruling its prior decisions. "[A]n argument that

we got something wrong – even a good argument to that effect – cannot by itself justify scrapping settled precedent." *Id.* Rather, "[t]o reverse course, we require as well what we have termed a 'special justification' – over and above the belief 'that the precedent was wrongly decided.' *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2407 (2014)." *Id.* (parallel citation omitted). *See also Hilton*, 502 U.S. at 202. The Board has not come close to showing a "special justification" here.

2. The Board Has Failed To Show a "Special Justification" for Overruling *Nevada v. Hall*.

The Board's attack on *Hall* – and its corresponding plea to set aside stare decisis – suffers from numerous problems. We have already discussed the fact that the Board's analysis depends upon a false premise, i.e., that States had immunity as of right in courts of other States prior to formation of the Union. *See* pages 16-31, *supra*. The Court in *Hall* correctly recognized the fact that, as independent nations, States enjoyed immunity only as a matter of comity, basing its decision on Chief Justice Marshall's thoughtful analysis in *Schooner Exchange*. *See* 440 U.S. at 416-17. As a result, *Hall* was not "wrongly decided" at all.

The Board also fails to deal with *Hall* squarely. Given the importance of stare decisis to development of the law, it seems remarkable that a litigant would urge the overruling of a prior decision as "[p]oorly [r]easoned," FTB Br. 26, without attempting to rebut the principal authority on which that decision rested. But the Board accomplishes that feat, indeed goes it one better, by not even *mentioning* this Court's holding in *Schooner Exchange*. By neglecting to

address *Hall*'s reasoning on its own terms, the Board is hardly in good position to criticize the *Hall* opinion as "difficult to fathom." *Id.* at 29.[4]

In any case, the Board brings forth little that is new. Most of the Board's arguments – and the bulk of its historical material – were previously considered in *Hall*. Indeed, the Board's submission here bears a striking resemblance to Justice Rehnquist's dissent in *Hall*. Again and again, the Board puts emphasis on the same case citations and statements by the Framers – in particular, those of Hamilton, Madison, and Marshall – that Justice Rehnquist featured in his dissenting opinion. *Compare* FTB Br. 33-34 (Hamilton) and *Hall*, 440 U.S. at 436 (Rehnquist, J., dissenting) (same); FTB Br. 34 (Madison) and 440 U.S. at 436 n.3 (same); FTB Br. 34 (Marshall) and 440 U.S. at 436 n.3 (same); FTB Br. 30-31 (*Nathan v. Virginia*) and 440 U.S. at 435 (same); FTB Br. 37 (*Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1858)) and 440 U.S. at 437 (same); FTB Br. 37 (*Cunningham v. Macon & B.R.R. Co.*, 109 U.S. 446, 451 (1883)) and 440 U.S. at 437-38 (same); FTB Br. 38 (*Western Union Tel. Co. v. Pennsylvania*, 368 U.S. 71, 80 (1961)) and 440 U.S. at 438 (same); FTB Br. 37-38 (*Hans v. Louisiana*) and 440 U.S. at 439-40 (same). This Court already denied one petition for rehearing in *Hall*, *see* 441 U.S. 917 (1979), and, in its current filing, the Board is essentially asking the Court just to reshuffle the deck.

Apart from the repetitive historical material, the Board relies heavily on various sovereign immunity

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[4] Justice Blackmun, in his *Hall* dissent (joined by Chief Justice Burger and Justice Rehnquist), saw no such difficulty, calling the Court's work a "plausible opinion." 440 U.S. at 427 (Blackmun, J., dissenting).

decisions since *Hall*. *See* FTB Br. 42-50 (discussing cases). Contrary to the Board's apparent view, however, the lesson of those cases is not that States always have sovereign immunity everywhere but that the States' right to sovereign immunity derives from its historical origins. *See, e.g.*, *Alden*, 527 U.S. at 712-30; *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 751-61 (2002). Thus, in examining the States' immunity in each others' courts – a situation that "'necessarily implicates the power and authority of a second sovereign,'" *Alden*, 527 U.S. at 738, quoting *Hall*, 440 U.S. at 416 – it is critical to look at the specific history identifying, and properly explaining, how immunity among independent sovereigns was established. None of the post-*Hall* decisions explored that history, for the simple reason that the Court was addressing quite different questions about the States' immunity in federal tribunals and their own courts. Indeed, none of the decisions addressing the States' immunity so much as refers to *Schooner Exchange*, the landmark decision regarding one sovereign's immunity in an equal sovereign's courts.

The Board likewise fails to show that *Hall* has led to serious financial consequences for the States. Although Justice Blackmun feared that the Court's decision would "open[] the door to avenues of liability and interstate retaliation that will prove unsettling and upsetting for our federal system," 440 U.S. at 427 (Blackmun, J., dissenting), no such upheaval has taken place. Suits against States in state courts – rare before the decision in *Hall* – remain few and far between. Furthermore, in those infrequent instances when such suits have been filed, state courts have commonly relied on the 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, 346 (N.C. Ct. App. 2012); *Greenwell v. Davis*, 180 S.W.3d 287, 297 (Tex. Ct. App. 2005).

There have been no dramatic political repercussions either. To state the obvious, the decision in *Hall* hardly provoked a *Chisholm*-like reaction.[5] *See Alden*, 527 U.S. at 720 (*Chisholm* "decision fell upon the country with a profound shock") (internal quotations omitted). Apart from filing a few *amicus* briefs saying that *Hall* should be overruled, the States have taken no active measures since *Hall* to obtain greater immunity in other States' courts. Indeed, the Board itself was so unconcerned about the *Hall* decision that it did not bother to challenge it on its first trip to this Court, *see Hyatt I*, 538 U.S. at 497, and then largely disclaimed opposition to it at oral argument, JA177-79. This steadfastly passive approach strongly suggests that immunity as of right in other States' courts is of little importance to effective operation of state governments.

The Board suggests that stare decisis should apply less vigorously because *Hall* was a "constitutional decision." FTB Br. 56. But that argument is conspicuously out of place in this context. The usual reason that constitutional decisions are subject to more liberal reexamination – that only this Court can undo the consequences of its prior decision (*see, e.g.*, *United States v. Scott*, 437 U.S. 82, 101 (1978)) – does not apply to a ruling that allows the political branches, both state and federal, to alter the decision at will. Here, that door is wide open. As we discuss next, nothing in *Hall* prevents the States from agreeing to provide immunity in each others' courts or from

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[5] *See Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).

asking Congress to require such immunity. Although stare decisis is not an "inexorable command," *Payne*, 501 U.S. at 827-28, the States' own inertia is not a substantial reason for setting it aside.

3. States Can Achieve Their Objective of Reciprocal Immunity Through Voluntary Agreements and Other Political Means.

The Board rests much of its anti-stare decisis argument on dire speculation that, absent full immunity, state courts will subject their sister States to widespread, large-dollar judgments. The Board does not cite any real-life examples of such judgments – apart from the lower court decision here, which was almost totally reversed by the Nevada Supreme Court – so the Board is left to mount a generalized assault on the effectiveness of comity principles. *See* FTB Br. 55-56. Even on its own terms, that attack is open to considerable doubt: after all, civilized nations have relied on the doctrine of comity for hundreds of years. But, putting comity aside for the moment, it is clear that the States have other more expedient, and effective, ways to obtain the immunity they seek.

The most obvious solution to the States' claimed problem is for the States to enter into bilateral or multilateral agreements to provide immunity in each others' courts. For example, the only two state-to-state immunity cases reaching this Court have involved lawsuits in the neighboring States of California and Nevada, both of which now claim to support absolute immunity as of right in state courts. *See* West Virginia et al. Br. 2-32 (joined by Nevada). If that is what California and Nevada are truly seeking, it should be a relatively simple matter for the two States to achieve that end by mutual agreement.

The States need not, however, proceed two by two in order to gain greater immunity. The *amicus* briefs in this case indicate that as many as 45 States believe that States should have immunity as of right in each others' courts. *See id.*; South Carolina State Ports Authority Br. 2-21. That goal, however, lies entirely within their own reach. If the States are willing to exchange part of their sovereignty at home for broadened immunity in other States, they can enter into a single expansive agreement making mutually binding commitments to that effect. And, as a not insignificant side-benefit, that process of open give-and-take would allow all branches of state government (as well as affected citizens) to be involved in deciding whether States should part with a portion of their internal sovereignty in order to obtain greater immunity outside their borders.

Such voluntary agreements among the States are not only permitted but specifically contemplated. The Constitution, of course, expressly provides for compacts and agreements through which the States, with the approval of Congress, can advance their shared interests. *See* U.S. Const. art. I, § 10, cl. 3. But the States are also free to enter into agreements without congressional approval. As this Court has noted, "[w]here an agreement is not 'directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States,' it does not fall within the scope of the [Compact] Clause and will not be invalidated for lack of congressional consent." *Cuyler v. Adams*, 449 U.S. 433, 440 (1981), quoting *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 468 (1978).

Applying that standard, there is no reason that Congress would need to approve an agreement among the States granting themselves immunity in each others' courts. Agreements among States to provide reciprocal immunity would not "interfere with the just supremacy of the United States." *Id.* (internal quotations omitted). If anything, the effect would be the reverse. Rather than expanding the collective power of the States, the agreements would *reduce* each signatory State's sovereignty in return for expanded immunity. That is just the kind of state-to-state readjustment that can, and should, be left to the States themselves.

Equally important, discussions among the States would not be limited to addressing immunity on an all-or-nothing basis. In asking this Court to overrule *Hall*, the Board is seeking a ruling that would give every State total immunity as a matter of right, regardless of the nature of the defendant State's actions and regardless of the impact on the home State's sovereignty. That is an extraordinary proposal. By taking up the question themselves, however, the States could tailor the terms of voluntary agreements to extend as much or as little immunity as they deemed appropriate. For instance, the States could agree to grant immunity for all acts by other States – including commercial activities – or provide immunity just for certain kinds of governmental actions. Or the States could decide to allow specified suits against themselves but impose a ceiling on recoverable damages.

It is striking, in fact, that the Board is asking this Court to impose the kind of sweeping immunity that is all but obsolete among sovereigns in modern times. For example, the United States – which once extend-

ed almost complete immunity to foreign sovereigns – has substantially narrowed its grant of immunity to reflect current circumstances. In keeping with that revised approach, the Foreign Sovereign Immunities Act first sets forth a broad grant of immunity but then carves out significant exceptions for commercial activities and torts, as well as certain acts of terrorism. *See, e.g.*, 28 U.S.C. § 1605(a)(2) (commercial activities), (a)(5) (tortious acts and omissions); *id.* § 1605A(a)(1) (acts of terrorism).

The States, however, are asking this Court for much more: immunity that would allow them to enter another State and do as they please without being held to account under that State's laws. If that immunity had been in place years ago, it would have meant that the plaintiffs in *Hall* – who were severely injured by a Nevada official driving in California (440 U.S. at 411) – would have been left to bear their injuries without any redress at all, even though California law expressly entitled them to compensation. And, on a going-forward basis, state officials would apparently be free to target citizens in other States for physical assaults, to invade their privacy, or to destroy their property, without giving any regard to state laws providing relief for those destructive acts.

Given the potentially drastic consequences of total immunity, it seems far from certain that the States, if they entered into voluntary agreements, would actually abandon all their authority to accord relief to their citizens. Be that as it may, however, the process of negotiating voluntary agreements would at least allow the States to confront the question for themselves, rather than simply accept a one-size-fits-all solution handed down by this Court. That is a far better course than the overruling of a decision that

has led to little practical difficulty and that was, in fact, entirely correct.

4. Congress Can Legislate To Provide the States with Expanded Immunity.

The States have other means of gaining immunity as well. In particular, the second sentence of the Full Faith and Credit Clause contains an express grant of power to Congress to declare the "effect" of public acts in state courts. *See Sun Oil Co. v. Wortman*, 486 U.S. 717, 729 (1988). If the States elected to do so, therefore, they could seek federal legislation directing States to apply the immunity laws of their sister States, the ruling that the Board unsuccessfully sought, as a constitutional matter, in *Hyatt I*. As the national legislative body, Congress would be well-positioned to consider the competing interests of all States, including (but not limited to) the interest of defendant States in avoiding burdens on their government operations. *See generally Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). Moreover, unlike a constitutional holding that would freeze the rights of both forum and defendant States, any congressional legislation addressing inter-State immunity could thereafter be amended, if and when circumstances so dictated.

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In short, the States have shown no entitlement to immunity as of right in the courts of other States. The Board's claim is unsupported by history and blocked by the decision in *Hall*. The Court should again reject the Board's request to elevate its sovereignty over the sovereignty of its sister State.

II. Neither the Full Faith and Credit Clause nor Principles of Comity Require Nevada's Courts To Apply California Law, in Whole or in Part, to a Matter About Which Nevada Is Competent To Legislate.

The Board's alternative argument is that, by declining to apply Nevada's cap on compensatory damages in this case, the Nevada Supreme Court violated the Full Faith and Credit Clause and principles of comity. According to the Board, the Nevada courts were obliged to apply the damages cap to California officials as a matter of "equal treatment." FTB Br. 17-25. But, however useful the idea of equal treatment may be as a "benchmark" for dealing with other sovereigns, *Hyatt I*, 538 U.S. at 499, there is no provision of federal law requiring it. Indeed, the Board is unable to identify *any* recognized legal basis for its theory, relying almost entirely on an over-reading of two passing remarks by this Court in *Hyatt I* and a thoroughly inapt invocation of the term "equal sovereignty." That sparse authority is nowhere near enough to justify the unprecedented ruling that the Board seeks.

A. The Full Faith and Credit Clause Allows Nevada To Apply Its Own Law to This Suit.

1. States May Apply Their Own Law to Matters About Which They Are Competent To Legislate.

This Court has made clear that the Full Faith and Credit Clause places only modest restrictions on the States' authority to apply their own laws to lawsuits in their courts. "Whereas the full faith and credit command 'is exacting' with respect to '[a] final judgment . . . rendered by a court with adjudicatory authority over the subject matter and persons governed

by the judgment,' it is less demanding with respect to choice of laws." *Hyatt I*, 538 U.S. at 494, quoting *Baker ex rel. Thomas v. General Motors Corp.*, 522 U.S. 222, 233 (1998) (citation omitted; alterations in original). The Board's efforts to rewrite that principle were found wanting before, *see id.* at 495-99, and are no more impressive now.

The governing rule regarding choice of law under the Full Faith and Credit Clause is simple and straightforward: a State may apply its own laws to "'a subject matter concerning which it is competent to legislate.'" *Id.* at 494, quoting *Sun Oil*, 486 U.S. at 722; *Baker*, 522 U.S. at 232. Thus, to determine whether a state court applying its own law has acted within constitutional bounds, the Court need ask only whether the State had legislative jurisdiction over the subject matter of the lawsuit. The Court, of course, has already answered that question in this case. In *Hyatt I*, the Court specifically found that Nevada was "competent to legislate" with respect to the torts in question. *See* 538 U.S. at 494.

The Nevada courts were thus constitutionally entitled to apply Nevada law to this case. By its plain terms, Nevada law provides no immunity – total or partial – for a foreign sovereign, leaving such immunity to be decided on a case-by-case basis as a matter of comity. Nevada does impose a cap on damage awards against *Nevada* officials, *see* Nev. Rev. Stat. § 41.035(1), but that cap is a condition on Nevada's waiver of sovereign immunity in its own courts and clearly does not apply to officials of other States. Application of Nevada law thus provides no immunity to the Board.

Faced with this obstacle, the Board suggests that the Nevada damages cap is unconstitutional if it

applies to Nevada officials but not to officials of other States. *See* FTB Br. 44. But the Board offers no credible authority for that proposition. Its purported legal support consists of one Commerce Clause case, *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988), that, to say the least, has nothing to do with the scope of immunity among sovereigns. And, insofar as the Board is relying on the concept of "equal sovereignty," its argument runs directly counter to cases making clear that the States do not have "equal" sovereign powers in the territories of other States. *See* pages 52-54, *infra*.

2. The Board's Attempt To Add a "No Hostility" Requirement to the Constitutional Test Is Unsupported and Unwarranted.

The finding that Nevada has legislative jurisdiction should be the end of the constitutional inquiry under the Full Faith and Credit Clause. Although the Board advances a jerry-built argument based on a mixture of Nevada and California law – saying that Nevada had to apply *California's* law of absolute immunity above the amount of *Nevada's* cap on damages for *Nevada* officials – that argument falls at the first hurdle because it ignores the dispositive Full Faith and Credit Clause standard. Given that Nevada is "competent to legislate" with respect to the subject matter of this lawsuit, *Hyatt I*, 538 U.S. at 494, the Clause does not require its courts to apply California law at all, let alone a non-existent California law designed to mirror an inapplicable Nevada law.

The Board nonetheless argues that Nevada, in making its choice-of-law decision, cannot exhibit "hostility" to California law. FTB Br. 21-22. But this argument has its own defects. To start with, it

cannot be "hostile" for a State to do nothing more than apply its own law to a matter over which it has legislative jurisdiction: that is precisely what the Constitution allows it to do. As this Court has said, "the 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 Employers 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").

The Board's two-step inquiry would also entangle the Court in endless, time-consuming inquiries regarding application of a State's own law. Instead of just conducting the uncomplicated inquiry now required by the Full Faith and Credit Clause – i.e., "does the forum State have legislative jurisdiction?" – the Court would need to undertake a second constitutional inquiry to decide whether a state court's otherwise permissible decision to apply its law should be regarded as "hostile" to the law of another State (something that aggrieved litigants will routinely claim). In every case, therefore, the Court would have to examine the law of two or more States and try to determine whether the home forum had overstepped some unidentified bounds of "hostility" in choosing its own law. That inquiry, by its very nature, would be largely standardless and, even more important, untethered to any recognized principles of full faith and credit.

To make matters worse, it is all but certain that the end result of applying an expansive, ill-defined "hostility" test would be a return to the long-abandoned days of "weighing" competing state interests. After all, the underlying premise of the Board's proposal is that this Court should promote California's interest in claiming immunity over Nevada's interest in compensating its injured residents. There is no principled way to measure those kinds of competing state interests, and the Court sensibly ended its efforts to do so. *See Pacific Employers*, 306 U.S. at 501 (limiting *Bradford Electric Light Co. v. Clapper*, 286 U.S. 145 (1932), to its facts). As the Court observed in this very case, "the question of which sovereign interest should be deemed more weighty is not one that can be easily answered. Yet petitioner's rule would elevate California's sovereignty interests above those of Nevada." *Hyatt I*, 538 U.S. at 498.

To support its "no hostility" requirement, the Board relies on a single case, *Carroll v. Lanza*, 349 U.S. 408 (1955), cited (though not actually discussed) in *Hyatt I*. *Carroll* offers no help to the Board, however, because the Court in that case specifically found that "Arkansas, the State of the forum, [was] *not* adopting any policy of hostility to the public Acts of Missouri." *Id.* at 413 (emphasis added). Rather, as the Court observed, the State was simply "choosing to apply its own rule of law to give affirmative relief for an action arising within its borders." *Id.* That, of course, is exactly what happened in this case: Nevada, the forum State, "cho[se] to apply its own rule of law to give affirmative relief for an action arising within its borders." The holding of *Carroll* makes clear, therefore, that a forum's basic choice of

its own law is not a hostile action in any constitutionally meaningful sense.[6]

In any event, it goes well beyond exaggeration to say that the Nevada courts exhibited hostility to California law or, for that matter, to California as a sovereign. *See* FTB Br. 23 (decision below "clearly failed to display a 'healthy regard for California's sovereign status'"), quoting *Hyatt I*, 538 U.S. at 499. Although the Nevada Supreme Court did not grant every conceivable wish that the Board had, it still went to great lengths to respect the dignity of its neighboring State. Far from treating the Board "just as any other litigant," *Hall*, 440 U.S. at 427 (Blackmun, J., dissenting), the court applied traditional principles of comity to shield the Board from a wide range of liability that non-sovereign defendants would have faced for the same conduct. In particular, the court applied California law to give the Board absolute immunity for its negligent acts and to free it from any obligation to pay punitive damages – while also barring interference with the California tax proceedings – precisely because of its status as a co-equal sovereign. *See* JA168 (negligence); Pet. App. 65 (punitive damages); *id.* at 53-57 (non-interference).

Furthermore, in the one instance where the Nevada court departed from the "benchmark" of liability for

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[6] The Court in *Carroll* distinguished two earlier cases, neither of which involved the basic choice-of-law question, i.e., what substantive law should govern the rights of the respective parties. Rather, both decisions involved situations "where the State of the forum [sought] to exclude from its courts actions arising under a foreign statute." 349 U.S. at 413. As a result, the state courts were not simply applying their own "rule[s] of law" to the events at issue, but were closing their courthouses to foreign causes of action entirely. Nothing of the sort occurred here.

Nevada officials, it 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 challenge this analysis as a factual matter, nor could it reasonably do so. Nevada obviously has no control over the hiring and training of California tax officials, and it had no ability to rein in those officials once they embarked upon an offensive, bias-tainted campaign to "get" a Nevada resident. And, while the Board claims that Nevada has no legitimate interest in deterring its misconduct – asserting that "exercising control over non-Nevada government actions is hardly a constitutionally valid objective" (FTB Br. 24) – that argument just reflects the Board's self-centered view of state sovereignty. What California does with respect to its own citizens

within its own territory is concededly not a matter of concern to Nevada, but the injuries in this case occurred precisely because California did *not* confine its unlawful acts to its own territory. Instead, it reached into Nevada in order to commit intentional torts against a Nevada citizen, actions that constituted a direct intrusion on Nevada's interests as an independent sovereign. [7]

Finally, we note the Alice-in-Wonderland quality of the Board's attempt to invoke Nevada's damages cap for Nevada officials. It may be recalled that, when the shoe was on the other foot in *Hall*, Nevada officials sought protection under the same Nevada law in the California courts, only to be told that California would not apply it. *See Hall*, 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 accorded the Board complete immunity against negligence claims as a matter of comity, and the Board finds itself liable for damages only because it went well beyond the bounds of simple negligence and undertook a calculated campaign aimed at harming a Nevada resident.

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[7] Although the Board complains that "the Nevada jury below was happy to side with a fellow Nevadan," FTB Br. 52, one hardly needs to be a Nevada citizen to be troubled by tax officials who announce an intent to "get that Jew bastard," become "obsessed" with that goal, create an entire "fiction" about the taxpayer, and try to use his legitimate concerns about privacy to force him into a settlement. *See* pages 3-4, *supra*. Of course, we cannot know how a California jury would feel about the same conduct – assuming that the Board would treat in-state taxpayers the same way – because the Board has absolute immunity in its home State.

Given these circumstances, the Board's demand for even greater immunity is particularly unjustified.

B. There Is No Federal Law Dictating What State Courts May Do as a Matter of Comity.

The Board also argues that the Nevada courts were required to apply California's law of immunity (above the amount of the Nevada damages cap) as a matter of comity. But the Board cites no case in which this Court has ordered a state court to grant comity to another State. That omission is hardly coincidental. As this Court has observed, "'[t]he comity . . . extended to other nations is no impeachment of sovereignty. It is the *voluntary act* of the nation by which it is offered, and is inadmissible when contrary to its policy, or prejudicial to its interests.'" *Hilton*, 159 U.S. at 165-66, quoting *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 589 (1839) (emphasis added). Given the voluntary nature of comity, it remains within the discretion of a forum sovereign to decide whether to grant comity to another sovereign and, if so, to what extent.

Disregarding this basic principle, the Board asks the Court to oversee state courts' application of comity to other States, in order to assure that the doctrine is being "'sensitively'" applied. FTB Br. 22, quoting *Hyatt I*, 538 U.S. at 499. This call for expanded *federal* supervision is an especially odd request from the Board, given that it purports to be trumpeting the cause of *state* sovereignty. Whatever the exact contours of state sovereignty may be, they are obviously diminished by transferring final decisionmaking authority from state courts to federal courts. In any event, however, the Board presents no legal basis for the notion that federal courts can tell

state courts how to make their comity decisions, presumably because no one has ever viewed the role of the federal courts as encompassing a power to mandate what States may do under the voluntary doctrine of state-to-state comity.[8]

That fundamental understanding was not altered by this Court's observation in *Hyatt I* that the Nevada Supreme Court had "sensitively" applied principles of comity to this case. 538 U.S. at 499. In *Hyatt I*, the Board had complained about the refusal of the Nevada Supreme Court to accord it full immunity, and this Court merely pointed out that the state court had gone out of its way to treat the Board as a true sovereign. That passing, and entirely correct, observation is hardly enough to launch a counter-intuitive "mandatory comity" doctrine that would override centuries of established law.

It is true, of course, that some provisions of the Constitution make mandatory what, prior to formation of the Union, was simply a matter of comity. For example, the Full Faith and Credit Clause unquestionably imposed enforceable obligations on the States, requiring them to honor the judgments of other States and, to a very limited extent, to apply other States' laws. *See Baker*, 522

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[8] The Board claims that respondent himself endorsed a link between comity and mandatory equal treatment. *See* FTB Br. 18. It is thus worth pointing out that, during oral argument in *Hyatt I*, counsel for respondent stated no fewer than *five* times that there are no enforceable principles of federal law requiring state courts to give equal treatment to other States. *See* JA180 ("I don't think there is a federally enforceable law of state comity"), 186 ("just a matter [of comity]"; "not federal [sic] enforceable"), 187 ("there's no federally enforceable state law of comity"; rejecting suggestion of "federal component" for state-to-state comity).

U.S. at 232 (noting that the "animating purpose of the full faith and credit command" was to make the States "integral parts of a single nation") (internal quotations omitted). As we have just discussed, however, the Full Faith and Credit Clause does not require Nevada to apply California's immunity laws here. *See* pages 42-50, *supra*. It would be highly anomalous, therefore, for this Court to impose a binding choice-of-law obligation under the doctrine of comity when a constitutional provision directly addressing that very question imposes no such duty.

The Privileges and Immunities Clause likewise places limits on the States' authority to act as independent sovereigns. But the plain language of that Clause rules out its application here. The Clause provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States," U.S. Const. art. IV, § 2, cl. 1, and the States themselves are not "Citizens" of a State. As the sovereigns they are, the States must rely on voluntary principles of comity instead.

C. The Board's "Equal Sovereignty" Argument Rests Upon a Misunderstanding of Equal Sovereignty.

Finally, the Board tries to support its claim to equal treatment by invoking the concept of "equal sovereignty." But its argument totally misconstrues the import of that term. The fact that the States are equal sovereigns does not mean that a State has the same sovereign authority within the territory of another State as the latter State does. Rather, it means that each State has the same sovereign powers within *its* borders as other States have within *their* borders. The States' sovereignty is equal, but it is not overlapping.

The cases cited by the Board make that distinction very clear. In *Coyle v. Smith*, 221 U.S. 559 (1911), the Court relied upon principles of equal sovereignty to hold that Oklahoma had the right to determine the location of its state capital. But no one would think that Oklahoma has a voice, let alone an equal voice, in choosing the state capital of Kansas or Arkansas. Similarly, in *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215 (2012), the Court recognized that, under the equal-footing doctrine, Montana owned title to the riverbeds within its territory. Again, however, it would make little sense – indeed would turn the reasoning of *PPL Montana* on its head – to conclude that Montana has an equal right to riverbeds in other States.[9]

Even as a matter of pure policy, a strict equal-treatment-from-equal-sovereignty theory would have notable shortcomings. In particular, it would often lead to very *unequal* treatment between different States. Thus, if State A extends no immunity to its officials, while State B grants its officials complete immunity, the Board's "equal treatment" theory would mean that State B's officials would face unlimited liability in State A, even though State A's officials would have no liability whatsoever in State B. That lopsided result hardly fits the picture of perfect equality that the Board claims to be advancing.

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[9] The primacy of each State's sovereignty within its territory is reflected in various longstanding state practices. To take one example, most States exempt income from their own bonds from taxation, while levying taxes on income from bonds issued by other States. *See Department of Revenue of Kentucky v. Davis*, 553 U.S. 328 (2008); *Bonaparte v. Tax Court*, 104 U.S. 592 (1882).

In sum, nothing in federal law provides a basis for recasting the traditional law of state-to-state comity. The Nevada Supreme Court gave full consideration to the Board's status as the agency of a separate sovereign, and it applied principles of comity to grant the Board extensive protection. The Board may be unhappy that it did not get even more, but that grievance is not one of constitutional dimension.

CONCLUSION

The judgment of the Nevada Supreme Court should be affirmed.

Respectfully submitted,

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EXHIBIT 77

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 Writ of Certiorari to the Supreme Court of Nevada

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

This suit, in which a private citizen has haled the sovereign taxing authority of California into Nevada state court against its will, has dragged on for seventeen years, imposing untold financial and dignity costs upon California. There is no end in sight—unless this Court reaffirms or reestablishes key principles of sovereign immunity.

Hyatt thoroughly abandons the equal-treatment principle he successfully advocated in *Hyatt I*. He now claims that Nevada is completely unfettered by federal law in deciding whether to give out-of-state sovereigns immunity in Nevada courts. Even as to core sovereign concerns as to which Nevada completely immunizes its sovereign actors, a sister State can be fully opened up to damages awards. Such a regime, with one State entirely at the mercy of another, seems purpose-built to produce the precise kind of friction among States that the Constitution was designed to eliminate. If that is truly what the law provides under *Nevada v. Hall*, 440 U.S. 410 (1979), then *Hall* cannot stand.

Hall should be overruled. The issue decided there is simply too fundamental to our constitutional design to tolerate an erroneous result that is irreconcilable with more recent, better-reasoned precedents. Hyatt concedes that, before the Framing, the States possessed sovereign immunity from suit in each others' courts. And he does not suggest that the ratification of the Constitution affirmatively destroyed that sovereign immunity. Instead, he posits a dichotomy between sovereign immunity "as a matter of comity" and sovereign immunity "as of right" and suggests that States possessed only the former in each

others' courts before the founding. But that is a false dichotomy. Outside a sovereign's own court system, what Hyatt terms sovereign immunity "as of right" could only exist *after* sovereigns joined together in a constitutional union. Such immunity "as of right" in each others' courts could not have pre-existed the founding, any more than State sovereign immunity "as of right" from suit in federal court could have pre-existed the Union. Thus, when this Court refers to States' retaining their pre-existing "sovereign immunity" and not being subject to suit in federal court unless the Constitution takes that sovereign immunity away, it is talking about what Hyatt tries to dismiss as sovereign immunity "as of comity."

Moreover, it is clear from Hyatt's conception of comity as entirely voluntary that, in his view, States now have no enforceable sovereign immunity in each others' courts whatsoever. None. Hyatt thus suggests that in joining together in a constitutional union designed to eliminate sources of friction among them, the States effectively sacrificed their sovereign immunity and created a dynamic where one State can allow its citizens to hale other States into its courts, thus guaranteeing friction.

Hyatt offers no explanation why a Nation sent into profound shock by the prospect of Georgia's being haled *into this Court* by a South Carolina citizen would have permitted Georgia to be haled into the decidedly less neutral *South Carolina* courts. If South Carolina had allowed such a suit and attempted to enforce a judgment against Georgia, the Union might not have survived its first decade. The far better view is that bedrock principles of sovereign immunity, preserved

by the plan of the Convention and enforceable by this Court, would bar such a suit.

Hyatt likewise offers almost no response to this Court's post-*Hall* sovereign immunity jurisprudence. Those more recent decisions undercut almost every pillar of *Hall*'s analysis. Even *Hall* acknowledged that a federal rule of law implicit in the Constitution would require a different result. The Court's post-*Hall* precedents recognize just such a rule.

Hyatt suggests that *Hall* does not interfere with the operation of State governments. But some 45 States—including Nevada itself—beg to differ. This case proves the point. While Hyatt lauds the decision below as a paragon of evenhandedness, it took FTB sixteen years (and untold taxpayer money) to obtain a decision that still leaves it (and California taxpayers) on the hook for $1 million with the prospect of retrial on a claim that previously netted Hyatt $85 million.

Finally, Hyatt suggests that States can attempt to recreate sovereign immunity through an elaborate multistate compact. But there already is a multistate compact that fully protects State sovereign immunity under these circumstances: the Constitution. That compact certainly allows the States to make mutual agreements to waive their sovereign immunity, but it does not obligate them to recreate what the plan of the Convention never took away.

ARGUMENT

I. A State May Not Refuse Sister States Haled Into Its Courts The Same Immunities It Enjoys In Those Courts.

Hyatt's view of the protection that federal law provides FTB underscores that his vision of sovereign immunity "as a matter of comity" is no sovereign immunity at all. Hyatt contends that neither comity, full faith and credit, nor equal sovereignty principles *require* Nevada to grant a sister sovereign involuntarily haled into Nevada courts the same immunities Nevada enjoys. Instead, Hyatt offers an effectively limitless rule: So long as a forum State is "'competent to legislate'" concerning a suit's subject matter, it is under no federal-law obligation to provide *any* immunity to a sister sovereign. Hyatt Br.43-44. And given the States' plenary power to legislate, Hyatt's proposed rule means that sovereign immunity "as a matter of comity" is sovereign immunity "in name only." Indeed, Hyatt emphasizes (at 50-52) that comity is entirely voluntary. Thus, under Hyatt's view, an out-of-state sovereign has no enforceable federal right to even a jot of immunity. That cannot be the law.

Despite having advocated an equal-treatment principle in *Hyatt I*, *see* J.A. 186, 195, 289, Hyatt now disparages it as a "jerry-built argument" seeking application of "*California's* law of absolute immunity above the amount of *Nevada's* cap on damages for *Nevada* officials." Hyatt Br.44. But FTB does not seek "to apply California's law of immunity," *id.* at 50; it seeks equal treatment through application of

Nevada's law of immunity, which includes a cap on compensatory damages.

Hyatt half-heartedly asserts that there is "no credible authority" to support FTB's proposed equal-treatment rule. *Id.* at 43-44, 46. But given the pre-*Hall* consensus that sovereign immunity precluded suits of this type altogether, it is a bit much to ask for deeply-entrenched precedent reflecting an equal-treatment limit on such suits. And, of course, this Court's sole relevant post-*Hall* decision, *Hyatt I*, embraced such a principle at Hyatt's urging. The equal-treatment rule is likewise supported by the Commerce Clause's non-discrimination principle and the Equal Footing Doctrine. FTB Br.19-20, 24.

Hyatt attempts to minimize *Hyatt I*'s distinction between permissible equal treatment and an impermissible "'policy of hostility'" toward a sister State. *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488, 499 (2003). Hyatt would limit a "policy of hostility" to States' "closing their courthouses to foreign causes of actions entirely." Hyatt Br.47 & n.6. But *Hyatt I* embraced a broader concept of "hostility" that Nevada had avoided by acting "sensitively" and "rel[ying] on the contours of [its] own sovereign immunity from suit as a benchmark for its analysis." 538 U.S. at 499. Moreover, *Hyatt I* and sovereign immunity more generally are principally concerned about the sovereign *as defendant*, not whether the courthouse door is open to foreign causes of action or the sovereign *as plaintiff*.

Hyatt's concerns about administrability are misplaced. FTB's rule would not engender "endless, time-consuming inquiries" or introduce a need to

weigh competing state interests. Hyatt Br.45-46. It is a simple test: just take the home forum's well-developed law of sovereign immunity for home-state entities and extend it equally to out-of-state sovereigns. This case illustrates the simplicity of the equal-treatment rule. Nevada law capped compensatory damages against Nevada's agencies at $50,000, yet the Nevada Supreme Court refused to apply that cap to a California agency. Under an equal-treatment rule, Nevada must extend the cap to California agencies. Nothing more is required.

Nor does this bright-line rule mean that the Court must become a federal overseer of State comity decisions. *Id.* at 50-51. Once this Court firmly establishes the equal-treatment rule, there is no reason to think that state courts will not apply it faithfully. And to the extent a State occasionally strays, this Court's review has far more to recommend it than Hyatt's alternative, which all but guarantees simmering hostility between States.

Hyatt contends (at 53) that an equal-treatment rule would give each State a "voice" in determining the laws of every other State. Hyatt is mistaken. Under an equal-treatment rule, each State makes its own determination about the scope of sovereign immunity available in its own courts. Equal treatment means only that *if* a State decides to give immunity to its own officials and agencies, then a sister State haled into its courts receives at least that *same* immunity. The home State is in the driver's seat.[1]

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[1] Since California law would plainly provide immunity from Hyatt's suit, this Court can leave for another day whether a defendant sovereign that has waived its sovereign immunity in

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Hyatt's effort to defend the Nevada Supreme Court's failure to "rely[] on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis," *Hyatt I*, 538 U.S. at 499, only underscores that the rule he advocates provides out-of-state sovereigns no protection whatsoever. Hyatt emphasizes that the Nevada court's departure from Nevada's own benchmark immunity law was justified because California's officials are not "subject to legislative control, administrative oversight, and public accountability *in Nevada*." Hyatt Br.47-48 (emphasis added) (quotation marks omitted). But a sister sovereign's agencies will never be subject to substantial legislative control and oversight *in Nevada*, so the decision below is a recipe for never providing comparable immunity to a sister sovereign. That is hardly the "healthy regard" for sister sovereigns envisioned in *Hyatt I*.[2]

At bottom, if *Hall* is to remain the law, there must be some federally-enforceable protection for

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its own courts would nonetheless receive the benefit of a host sovereign's more generous sovereign immunity rule. Equal sovereignty principles suggest that the answer is yes, so that a plaintiff who wants the benefit of a more generous waiver must sue that sovereign in its home courts. But there is no need to answer that question.

[2] Hyatt attempts to justify the Nevada Supreme Court's refusal to accord FTB equal treatment by emphasizing FTB's allegedly "bias-tainted campaign" against him. Hyatt Br.48; *see also id.* at 3-4, 49 n.7. But Hyatt's key witness on these points was a former FTB employee who had charged FTB with wrongful termination, subsequently provided "consultant services" to Hyatt's team, and backtracked on her inflammatory testimony. J.A.265, 268-270, 283-288.

sovereigns involuntarily haled into the courts of their sister sovereigns. The regime Hyatt champions—in which a defendant State receives only the immunity the forum State offers it as a matter of grace, no matter how much immunity the forum State reserves for itself—is no protection at all. Both common sense and well-established principles of equal treatment and equal sovereignty demand that a sister sovereign be treated at least as well as the home sovereign. Fealty to even more fundamental constitutional principles demands the overruling of *Hall*.

II. *Nevada v. Hall* Was Wrongly Decided And Should Be Overruled.

A. Hyatt Concedes that States Possessed Sovereign Immunity in the Courts of Other States at the Framing, and His False Dichotomy Between Types of Sovereign Immunity Is Unavailing.

1. Hyatt does not dispute that, at the Framing, the States possessed sovereign immunity from suit in the courts of other States. *See, e.g.*, Hyatt Br.26 (conceding the "fact of sovereign-to-sovereign immunity" at the Framing). Nor could he, for every shred of historical evidence confirms that proposition. The leading case so held. *See Nathan v. Virginia*, 1 U.S. (1 Dall.) 77, 78, 80 (1781) (dismissing case against Virginia in Pennsylvania courts because "all sovereigns are … exempt from each other's jurisdiction"). The Framers recognized the principle. *See* FTB Br.32-33. And the swift passage of the Eleventh Amendment confirmed it. A populace shocked by the prospect of Georgia's being haled into this Court by a South Carolina citizen did not think

the South Carolina courts could entertain the action. *See id.* at 35-37. Hyatt does not question this straightforward proposition and, except for one passing reference, does not mention the Eleventh Amendment *at all*.

Given that the States plainly possessed sovereign immunity in other States' courts at the founding, Hyatt must show that States were dispossessed of this immunity "by the plan of the Convention or certain constitutional amendments." *Alden v. Maine*, 527 U.S. 706, 713 (1999). But Hyatt does not even attempt to make this showing. And all the available evidence—again, unrebutted by Hyatt—points firmly in the opposite direction. As Edmund Randolph explained, the Constitution "'confirms'" the pre-existing prohibition on States' entertaining suits against other States. FTB Br.33. Article III provided a neutral federal forum for suits between States and between an individual and another State because, as Randolph explained, to the extent "'a particular state can be a party defendant, a sister state cannot be her judge.'" *Id.* When the Eleventh Amendment withdrew that federal forum for individual suits against States, it reinforced that such disputes could not proceed in any forum—not in a neutral federal forum and, *a fortiori*, not in the less-neutral courts of the citizen's home State. *Id.* at 46-47; *New Hampshire v. Louisiana*, 108 U.S. 76, 91 (1883) ("The evident purpose of the amendment, so promptly proposed and finally adopted, was to prohibit all suits against a state by or for citizens of other states[.]").

2. Forced to concede both the fact of interstate sovereign immunity at the Framing and that the plan

of the Convention only confirmed that immunity, Hyatt essentially concedes his case. Undeterred, he attempts to deprive those concessions of their fatal sting by positing that there are two variants of sovereign immunity—immunity "as a matter of comity" and immunity "as of right"—and that, in each others' courts, States only ever enjoyed, and the Constitution only preserved, the former. This convoluted theory is profoundly misguided.

To begin with, Hyatt's proposed dichotomy between immunity "as a matter of comity" and immunity "as of right" is spurious. At best, it confuses questions of how sovereign immunity is enforced with whether and "what type" of sovereign immunity exists. To be clear: sovereign immunity from suit is an inherent attribute of sovereignty; all sovereigns possess it. *See Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2039 (2014); *Sossamon v. Texas*, 131 S. Ct. 1651, 1657 (2011). And before the plan of the Convention was ratified, the States clearly possessed this sovereign immunity from suit, including immunity from suit in the courts of their sister sovereigns, and not just some junior-varsity variant of sovereign immunity.

If, before ratification, South Carolina had allowed one of its citizens to hale Georgia into South Carolina court over Georgia's objection, there is no question that action would have violated Georgia's sovereign immunity. No one would have said that South Carolina did not violate Georgia's sovereign immunity because Georgia enjoyed only "sovereign immunity as of comity" and South Carolina declined to extend comity. Putting to one side what Georgia would do in

response to that obvious affront to its sovereignty and dignity, there is no question that South Carolina's action would have been understood to violate Georgia's sovereign immunity. Every member of the Framing generation would have recognized as much.

Thus, speaking of whether States possessed "sovereign immunity as of right" or "sovereign immunity as a matter of comity" at the Framing is inapt. The States possessed sovereign immunity—full stop. But the problem with Hyatt's suggested dichotomy runs deeper still. Hyatt appears to demand that FTB demonstrate that States enjoyed "sovereign immunity as of right" *before* the Framing. But, as to any courts but a sovereign's own, the very notion of "sovereign immunity as of right" presupposes a binding legal relationship among sovereigns that only the Constitution could provide. Independent nations must rely on comity, whereas States within the Constitution can demand that certain aspects of their sovereignty be protected as a matter of right. By demanding that States demonstrate pre-ratification "sovereign immunity as of right" in each others' courts, Hyatt quite literally demands the impossible. He might as well demand a unicorn. If his conception of what a State must demonstrate to have an enforceable federal right to sovereign immunity were correct, then no State would enjoy any enforceable right to sovereign immunity in any courts but its own, yet a host of this Court's cases are to the contrary.

Indeed, the impossibility of pointing to immunity "as of right" that pre-existed the Constitution is even more obvious with respect to the States' immunity in the federal courts. Because the Constitution created

those federal courts, demanding proof of a pre-existing immunity from suit in those courts would demand the impossible. And since federal courts are courts of a distinct, superior sovereign, any analogous pre-constitutional sovereign immunity States possessed would necessarily be what Hyatt terms sovereign immunity "as a matter of comity." Thus, when this Court's cases ask whether a State enjoyed sovereign immunity from comparable suits at or before the Framing, they do not demand sovereign immunity "as of right." Sovereign immunity "as a matter of comity"—or, more to the point, sovereign immunity *simpliciter*—suffices to shift the burden to the plaintiff to show that the sovereign immunity was eliminated by the plan of the Convention (a burden Hyatt does not even try to carry).

Hyatt's demand for pre-existing sovereign immunity "as of right" also would mean that States have no enforceable federal protection against being sued by their sister States in state court. If, before the Framing, Massachusetts purported to sue New York in Massachusetts court, every Framer would have recognized it as a violation of New York's sovereign immunity. But that sovereign immunity would not have been "as of right." New York would have needed to depend on Massachusetts to recognize New York's undoubted sovereign immunity.[3] Thus, under Hyatt's logic, if Massachusetts files such a suit today, New

[3] Put differently, Massachusetts had the raw power to disregard New York's sovereign immunity, but not the right to do so. And the raw power to deny immunity and provoke a diplomatic crisis with a sister State is not a power that is compatible with the plan of the Convention.

York just has to hope Massachusetts voluntarily extends sovereign immunity. That is nonsense. It is plain that New York has an enforceable federal right to insist that Massachusetts respect its sovereign immunity and bring an original action in this Court or no action at all. The same would have been true before the Eleventh Amendment if Chisholm had sued Georgia in South Carolina state court. At a minimum, Georgia could have insisted that the suit be brought in this Court or not at all. And when the Eleventh Amendment eliminated the possibility of bringing the suit here, it did not somehow eliminate Georgia's undoubted immunity from being haled into South Carolina court by Chisholm.

3. At bottom, Hyatt conflates the means of enforcing sovereign immunity and the existence of sovereign immunity in the first place. While the latter is what matters, Hyatt's vision of how States' "sovereign immunity as of comity" would actually be enforced only underscores his argument's flaws. Before the States joined together in the Union, they could redress a violation of their sovereign immunity through the tools available to independent sovereigns. Thus, South Carolina's hypothetical affront to Georgia's sovereignty and dignity would have precipitated diplomatic negotiations, enforcement of treaties, or outright war. *See, e.g.*, James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 Cal. L. Rev. 555, 583 & n.105 (1994). The States largely agreed to cede those diplomatic and military options as part of the plan of the Convention. *See* U.S. Const. art. 1, §10 (prohibiting States from entering into treaties, imposing import duties, or engaging in war). Thus,

Hyatt's position leads to the untenable conclusion that the States have no meaningful ability to prevent a sister sovereign from blatantly disregarding their core sovereign immunity and cannot stop that sister sovereign from entering a judgment against them at the behest of a private citizen.

Hyatt conveniently omits any discussion of how a judgment entered in obvious derogation of a State's sovereign immunity would be enforced. Pre-ratification, one option for Georgia in responding to the hypothetical South Carolina state-court judgment would be to dare South Carolina to try to enforce it. But even post-ratification, there is no obvious mechanism for enforcement. It is inconceivable that the Framers, dedicated to eliminating the unenforceable judgments and simmering disputes that bedeviled the Articles of Confederation, *see generally* Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 Harv. L. Rev. 1817 (2010), would have sanctioned a variant of sovereign immunity that all but guaranteed unenforceable judgments and long-simmering disputes. A vision of the "Union" in which one State seizes the neighboring State university's team bus during a football game to satisfy an unpaid judgment is not a happy one, and it was not the Framers' vision. The Framers envisioned that the States' pre-existing sovereign immunity from suit in each others' courts would be enforced the same way as all other aspects of State sovereign immunity that survived the plan of the Convention: as a federal right enforceable in this Court. *See, e.g.*, *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 747 (2002); *Alden*, 527 U.S. at 712.

4. Hyatt relies heavily—indeed, almost exclusively—on *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), and subsequent law-of-nations decisions by this Court. But those cases do not help him. *Schooner Exchange* and later decisions hold that, under law-of-nations doctrine, there are circumstances in which one independent sovereign can exercise jurisdiction over another independent sovereign. The problem for Hyatt, however, is that none of those circumstances is present here, and even Hyatt's own cases acknowledge the existence of core intrusions upon sovereign immunity that constitute violations of the law of nations justifying diplomatic or military response. *See, e.g.*, *id.* at 143. And at the Framing, one State's exercise of jurisdiction at the behest of one of its citizens over another State indisputably *was* considered one of those core affronts to sovereignty. *See Nathan*, 1 U.S. (1 Dall.) at 77 (agreeing that "every kind of process, issued against a sovereign, is a violation of the laws of nations; and is in itself null and void."); FTB Br.32-33.[4]

What is more, the law-of-nations principles that govern relationships among fully independent sovereigns have little relevance to how the States' sovereign immunity is to be protected post-ratification. All concede that States had sovereign

[4] Hyatt notes (at 22) that the Pennsylvania Attorney General supported Virginia's claim of immunity in *Nathan*, which no doubt reflects the reality that with independent nations, the executive branch bears the brunt of the diplomatic affront caused by the courts' disregard of another sovereign's immunity. Post-ratification, state executive officials no longer have diplomatic duties, but it is telling that Nevada's Attorney General supports FTB's claim of immunity.

immunity from suits like this pre-ratification, and no one thinks that enforcement of that sovereign immunity post-ratification is guided by law-of-nations principles, such that California can withdraw diplomats or declare war. As Justice Iredell recognized in his dissent in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), later vindicated by the Eleventh Amendment: "No part of the Law of Nations can apply to this case … since unquestionably the people of the United States had a right to form what kind of union, and upon what terms they pleased, without reference to any former examples." *Id.* at 449.

Schooner Exchange, which addressed relations between the United States and France, obviously had no need to address any of these considerations unique to the States at the Framing. And it certainly did not address whether the Constitution permits one State to involuntarily hale another State into its courts. That is why, for nearly two hundred years after the Framing—and notwithstanding *Schooner Exchange*—state courts and this Court universally believed that the Constitution prohibited this practice. *See* FTB Br.37-39. And that is why, in the 167 years between *Schooner Exchange* and *Hall*, *not one decision* in state or federal court cited *Schooner Exchange* as even relevant to the issue. Only in *Hall* did this Court abruptly change course by—like Hyatt—erroneously relying on *Schooner Exchange*.[5]

Finally, even *Hall* conceded that "when *The Schooner Exchange* was decided, or earlier when the

[5] No party nor any of the lower-court decisions in *Hall* cited *Schooner Exchange*. *See* FTB Br.42, 48 & nn.13 & 15.

Constitution was being framed," one State could not be involuntarily haled into the courts of another State. 440 U.S. at 417. *Hall* admitted that if there were "a federal rule of law implicit in the Constitution" requiring adherence to that Framing-era "sovereign-immunity doctrine," the States would be bound by it and could not exercise jurisdiction over each other in their courts. *Id.* at 418. Thus even if Hyatt were correct about the relevance of *Schooner Exchange* to the question, that only gets him so far as *Hall*'s search for a "federal rule of law implicit in the Constitution." And while *Hall* failed to identify such a rule, both the analysis detailed above and this Court's more recent, better-reasoned sovereign immunity precedents make clear that there is an enforceable federal rule that guarantees the States the sovereign immunity they enjoyed at the Framing.

B. *Hall* Cannot Be Reconciled With This Court's More Recent, Better-Reasoned Precedents.

The Court's post-*Hall* jurisprudence confirms that *Hall*—incorrect the day it was decided—cannot survive. These precedents have rejected almost every rationale on which *Hall* was based. Since *Hall* was decided, State sovereign immunity is now recognized as a "fundamental postulate[] implicit in the constitutional design," *Alden*, 527 U.S. at 729, and a "presupposition of our constitutional structure," *Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 779 (1991). The Court has repeatedly acknowledged the "structural understanding" that "States entered the Union with their sovereign immunity intact" and "retained their traditional

immunity from suit, 'except as altered by the plan of the Convention or certain constitutional amendments.'" *Va. Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1637-38 (2011) (quoting *Alden*, 527 U.S. at 713). As such, in determining "the scope of the States' constitutional immunity from suit," the Court looks to "'history and experience, and the established order of things,'" which "reveal the original understanding of the States' constitutional immunity from suit." *Alden*, 527 U.S. at 726-27. The reasoning of these decisions not only thoroughly undermines the foundation of *Hall*, but also supplies the "federal rule of law implicit in the Constitution" that *Hall* believed missing.

Hyatt barely acknowledges these precedents. When he does, he contends only that they "address[ed] quite different questions about the States' immunity in federal tribunals and their own courts." Hyatt Br.35. But suits in federal courts and suits in another State's courts are similar in the relevant respects. In both cases, States enjoyed immunity from comparable suits before ratification. In both cases, States cannot rely on their power over their own state courts to ensure that their sovereign immunity is protected. And in both cases, States are not reduced to the only means of enforcement available in other courts pre-ratification (*i.e.*, via comity and diplomacy), but have an enforceable immunity of constitutional dimension (*i.e.*, via the "federal rule" deemed both critical and absent in *Hall*).

Hyatt maintains that none of the Court's more recent decisions "discussed, let alone disavowed, the principles of *Schooner Exchange*." *Id.* at 12. Just so.

But that only underscores that *Schooner Exchange* is irrelevant to the question at hand. Indeed, even *Hall* recognized that it need not "disavow[]" *Schooner Exchange* (which governed relationships between independent sovereigns) if it identified a "federal rule of law implicit in the Constitution" to govern the sovereign immunity of the States of the new Union. That rule—that States enjoy their pre-existing sovereign immunity as an enforceable federal constitutional right that cannot be displaced even by a federal statute, unless the immunity is inconsistent with a specific constitutional provision or the plan of the Convention—is what these more recent cases provide, in spades.

The Court's more recent decisions also answer Hyatt's complaint (at 34) that FTB's evidence and arguments mirror those in Justice Rehnquist's *Hall* dissent. The same could be said for virtually every one of this Court's post-*Hall* sovereign immunity decisions.

Hyatt effectively concedes that his position would result in multiple doctrinal anomalies. First, it would undercut *Alden*, which held that States are shielded from federal-law suits in their own courts by sovereign immunity of a constitutional dimension that Congress cannot abrogate via Article I powers. Under Hyatt's theory, the plaintiffs' mistake in *Alden* was suing Maine in Maine state court. If only they had sued Maine in New Hampshire state court, Maine would have no federally enforceable immunity to invoke. Second, even if Maine were somehow immune from such a federal-law suit in New Hampshire court, it would nonetheless be subject to suit under New

Hampshire law in New Hampshire court. Thus, a State cannot be bound by supreme federal law, but can be bound by a sister State's law. That is a "tremendous anomaly," as Justice Breyer rightly observed during the *Hyatt I* oral argument. *See* J.A.182. Third, as Justice Kennedy noted in that same argument, it is "very odd," to say the least, to conclude that a State "can't be sued in its own courts and it can't be sued in a federal court, but it can be sued" in a sister State's courts, which have "the least interest in maintaining the dignity of" the defendant State. J.A.180-181; *see also* FTB Br.49-50 (noting scholars' similar views). Fourth, as Hyatt does not dispute, preserving *Hall* would mean that Indian tribes enjoy broader immunity than States, despite the "qualified nature of Indian sovereignty." *Bay Mills*, 134 S. Ct. at 2030-31; FTB Br.48.

C. Hyatt's Remaining Arguments Do Not Save *Hall*.

Hyatt claims, remarkably, that despite exposing sovereign States to suit without their consent and threatening them with crushing liability, *Hall* "is of little importance to effective operation of state governments." Hyatt Br.36. At least 45 States beg to differ. *See* States' Br.21-31; S.C. Br.2-4, 17-20; *see also* Br. of Council of State Governments *et al.*16-20. While this suit is an especially egregious example, suits against non-consenting sovereign States in sister States' courts are nowhere near as "rare" as Hyatt imagines. *See, e.g.*, States' Br.23-26. All of these suits threaten the dignity and respect of the sovereign State and seek either money from the State treasury or changes to State policy, dictated by out-of-state juries

and judges.[6] Indeed, multiple suits have recently been filed against FTB in other States. *See* FTB Br.52. State taxing authorities like FTB are a particularly easy target for lawsuits, given their inherent unpopularity. It is not difficult for a disgruntled taxpayer to obtain local jurisdiction over an out-of-state taxing authority. Multistate Tax Comm'n Br.6-8. Yet, as Hyatt's own case demonstrates, such suits have an especially pernicious impact on the fundamentally sovereign function of tax collection, and they disrupt the multistate cooperation that is essential to enforcement of state taxes. *Id.* at 8-21.

Hyatt also insists that the "doctrine of comity" provides sufficient protection to States, pointing to the fact that the Nevada Supreme Court did grant *some* protections to FTB. Hyatt Br.35; *see also id.* at 15, 37, 47-48. But this only underscores the utter arbitrariness and unpredictability the States must endure under *Hall*. Make no mistake, Hyatt's position is that the modicum of sovereign immunity afforded by Nevada was entirely a matter of grace. It was neither an entitlement dictated by the scope of Nevada's waiver of sovereign immunity for its own state agencies, nor predictable based on the contours of that waiver or anything else. And FTB needed to spend sixteen years in litigation—expending untold

[6] Even suits that do not proceed to final judgment have these undesirable consequences. For example, Nevada recently settled a suit against it in the California courts by agreeing to pay $400,000 and to alter state policy. *See* FTB Br.55; Janie Har, *San Francisco OKs Patient-Dumping Lawsuit Settlement*, Associated Press, Oct. 27, 2015, http://perma.cc/7uy4-xc8y.

amounts of time, effort, and taxpayer money—just to secure that small measure of protection.

Hyatt further contends that there is no need to overturn *Hall* because States could "enter into bilateral or multilateral agreements to provide immunity in each others' courts" or petition Congress to resolve the problem. *Id.* at 37-41. But the States already entered into a multilateral agreement to provide federally-enforceable rights to immunity—namely, the United States Constitution. There is no need for them to meet again to protect sovereign immunity that pre-existed the Constitution and was not altered by that document, but only confirmed by both the unamended Constitution and the Eleventh Amendment.

While Hyatt is correct that there is room under our Constitution for States to negotiate over the circumstances in which they are subject to suit in each others' courts, he gets the default rule exactly backwards. There is a long tradition of sovereigns agreeing to waive their sovereign immunity in their own courts or in each others' courts as a matter of mutual consent. There is no comparable tradition of assuming that the States have waived their pre-existing sovereign immunity by entering the Union and forcing them to recapture that immunity through a new multistate compact.

Hyatt mistakenly suggests that overruling *Hall* would leave individuals "without any redress" against States. Hyatt Br.40; Professors' Br.13-14. But the Court has heard similar complaints before and has found the possibility insufficient to trump sovereign immunity preserved and guaranteed by the

Constitution. If the need for a remedy could not overcome the constitutional basis for immunity when it comes to suits in the defendant State's own courts or the neutral federal courts, it should not suffice to create remedies in *another* State's courts, which have "the least interest in maintaining the dignity of" the defendant State. J.A.180-181.

Moreover, as a practical matter, Hyatt possesses, and is pursuing, avenues for judicial recourse in the California courts. While FTB has understandably not opened itself up to tort suits like this, Hyatt is challenging FTB's audits and assessments in administrative proceedings and will have the opportunity to challenge them in California courts. *See* FTB Br.5 & n.3. California law also provides a cause of action in the California courts against FTB for the alleged breaches of confidentiality and privacy underlying his suit. *See, e.g.*, Cal. Civ. Code §1798.45. It further provides a cause of action against "any officer or employee" of FTB who "recklessly disregards board published procedures." Cal. Rev. & Tax Code §21021(a). Those partial waivers of sovereign immunity are a product of legislative judgment, not judicial whim, and they make clear that Hyatt is not without a remedy in California court.

Hyatt does quite emphatically lack a remedy in Nevada court. Like Chisholm before him, Hyatt cannot hale an unconsenting sovereign into court against its will. Indeed, not even Chisholm thought the appropriate reaction to the Eleventh Amendment was to sue Georgia in South Carolina court. That *Hall* would have permitted Chisholm's state-law suit is a testament that it was incorrect the day it was decided.

Stare decisis is not an inexorable command, and the relevant considerations cannot save *Hall*. There are no meaningful reliance interests on *Hall*, and subsequent decisions have undermined its foundations and have proved the decision anomalous, unworkable, and plainly erroneous. If ever there were a "special justification" for overturning a precedent, it is present here. The issue at hand is too important to our basic constitutional structure to leave *Hall*'s manifest error uncorrected.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted,

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November 23, 2015

EXHIBIT 78

136 S.Ct. 1277
Supreme Court of the United States

FRANCHISE TAX BOARD
OF CALIFORNIA, Petitioner
v.
Gilbert P. HYATT.

No. 14–1175.
|
Argued Dec. 7, 2015.
|
Decided April 19, 2016.

Synopsis

Background: Nevada taxpayer brought action against Franchise Tax Board of California, alleging intentional torts and bad-faith conduct during audits. The Nevada Supreme Court denied in part Board's petition for writ of mandamus, ordering Clark County District Court to dismiss negligence claim for lack of jurisdiction but finding that intentional tort claims could proceed to trial. Certiorari was granted. The United States Supreme Court, 538 U.S. 488, 123 S.Ct. 1683, 155 L.Ed.2d 702, affirmed. Following remand, and jury trial on remaining claims, the District Court, Clark County, Jessie Elizabeth Walsh, J., entered judgment in favor of taxpayer and awarded damages, Board appealed. The Supreme Court of Nevada, Hardesty, J., —— Nev. ——, 335 P.3d 125,affirmed in part, reversed in part, and remanded. Certiorari was granted.

Holdings: The Supreme Court, Justice Breyer, held that:

[1] for an equally divided court, Nevada courts had jurisdiction over Board, and

[2] Nevada court applied special and discriminatory rule, and thus violated Full Faith and Credit Clause, by awarding one million dollars in damages to taxpayer.

Vacated and remanded.

Justice Alito concurred in judgment.

Chief Justice Roberts dissented and filed opinion in which Justice Thomas joined.

West Headnotes (5)

[1] States
Tax matters
360 States
360VI Actions
360k191 Liability and Consent of State to Be Sued in General
360k191.9 Particular Actions
360k191.9(6) Tax matters

Nevada courts had jurisdiction over Franchise Tax Board of California in Nevada taxpayer's suit against Board, alleging abusive audit and investigation practices, despite lack of California's consent. (Per Justice Breyer for an equally-divided court.)

Cases that cite this headnote

[2] States
Full faith and credit in each state to the public acts, records, etc. of other states
360 States
360I Political Status and Relations
360I(A) In General
360k5 Relations Among States Under Constitution of United States
360k5(2) Full faith and credit in each state to the public acts, records, etc. of other states

In Nevada taxpayer's suit against Franchise Tax Board of California related to allegedly abusive audit and investigation practices, Nevada court applied special and discriminatory rule, and thus violated Full Faith and Credit Clause, by awarding one million dollars in damages to taxpayer under Nevada law, which amount exceeded maximum that could have been awarded in similar circumstances against Nevada agencies, where Nevada's Supreme Court ignored both Nevada's typical rules of immunity, which capped damages against Nevada agencies at $50,000, and California's immunity-related statutes, which were consistent with Nevada law by prohibiting monetary recovery greater than amount of maximum recovery under Nevada law in similar circumstances. U.S.C.A. Const. Art. 4, § 1;

West's Cal.Gov.Code § 860.2; West's NRSA 41.035(1).

6 Cases that cite this headnote

[3] States

Full faith and credit in each state to the public acts, records, etc. of other states

360 States
360I Political Status and Relations
360I(A) In General
360k5 Relations Among States Under Constitution of United States
360k5(2) Full faith and credit in each state to the public acts, records, etc. of other states

Statute is a "public act" within the meaning of the Full Faith and Credit Clause. U.S.C.A. Const. Art. 4, § 1; 28 U.S.C.A. § 1738.

5 Cases that cite this headnote

[4] States

Full faith and credit in each state to the public acts, records, etc. of other states

360 States
360I Political Status and Relations
360I(A) In General
360k5 Relations Among States Under Constitution of United States
360k5(2) Full faith and credit in each state to the public acts, records, etc. of other states

Full Faith and Credit Clause does not require a state to substitute for its own statute, applicable to persons and events within it, the statute of another state reflecting a conflicting and opposed policy. U.S.C.A. Const. Art. 4, § 1.

6 Cases that cite this headnote

[5] States

Full faith and credit in each state to the public acts, records, etc. of other states

360 States
360I Political Status and Relations
360I(A) In General
360k5 Relations Among States Under Constitution of United States
360k5(2) Full faith and credit in each state to the public acts, records, etc. of other states

Under the Full Faith and Credit Clause, a state need not substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate. U.S.C.A. Const. Art. 4, § 1.

6 Cases that cite this headnote

***1278** *Syllabus* [*]

[*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Respondent Hyatt claims that he moved from California to Nevada in 1991, but petitioner Franchise Tax Board of California, a state agency, claims that he actually moved in 1992 and thus owes California millions in taxes, penalties, and interest. Hyatt filed suit in Nevada state court, which had jurisdiction over California under *Nevada v. Hall,* 440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed.2d 416, seeking damages for California's alleged abusive audit and investigation practices. After this Court affirmed the Nevada Supreme Court's ruling that Nevada courts, as a matter of comity, would immunize California to the same extent that Nevada law would immunize its own agencies and officials, see *Franchise Tax Bd. of Cal. v. Hyatt,* 538 U.S. 488, 499, 123 S.Ct. 1683, 155 L.Ed.2d 702, the case went to trial, where Hyatt was awarded almost $500 million in damages and fees. On appeal, California argued that the Constitution's Full Faith and Credit Clause, Art. IV, § 1, required Nevada to limit damages to $50,000, the maximum that Nevada law would permit in a similar suit against its own officials. The Nevada Supreme Court, however, affirmed $1 million of the award and ordered a retrial on another damages issue, stating that the $50,000 maximum would not apply on remand.

Held :

1. The Court is equally divided on the question whether *Nevada v. Hall* should be overruled and thus affirms the Nevada courts' exercise of jurisdiction over California's state agency. P. 1280.

2. The Constitution does not permit Nevada to apply a rule of Nevada law that awards damages against California that are greater than it could award against Nevada in similar circumstances. This conclusion is consistent with this Court's precedents. A statute is a "public Act" within the meaning of the Full Faith and Credit Clause. While a State is not required "to substitute for its own statute ... the statute of another State reflecting a conflicting and opposed policy," *Carroll v. Lanza,* 349 U.S. 408, 412, 75 S.Ct. 804, 99 L.Ed. 1183, a State's decision to decline to apply another State's statute on this ground must not embody a "policy of hostility to the public Acts" of that other State, *id.,* at 413, 75 S.Ct. 804. Using this approach, the Court found no violation of the Clause in *Carroll v. Lanza* or in *Franchise Tax Bd.* the first time this litigation was considered. By contrast, the rule of unlimited damages applied here is not only "opposed" to California's law of complete immunity; it is also inconsistent with the general principles of Nevada immunity law, which limit damages awards to $50,000. Nevada explained its departure from those general principles by describing California's own system of controlling its agencies as an inadequate remedy for Nevada's citizens. A State that disregards its own ordinary legal principles on this ground employs a constitutionally impermissible " 'policy of hostility to the public Acts' of a sister State." 538 U.S., at 499, 123 S.Ct. 1683. The Nevada Supreme Court's decision thereby lacks the "healthy ***1279** regard for California's sovereign status" that was the hallmark of its earlier decision. *Ibid.* This holding does not indicate a return to a complex "balancing-of-interests approach to conflicts of law under the Full Faith and Credit Clause." *Id.,* at 496, 123 S.Ct. 1683. Rather, Nevada's hostility toward California is clearly evident in its decision to devise a special, discriminatory damages rule that applies only to a sister State. Pp. 1280 – 1283.

130 Nev. ——, 335 P.3d 125, vacated and remanded.

BREYER, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., concurred in the judgment. ROBERTS, C.J., filed a dissenting opinion, in which THOMAS, J., joined.

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Opinion

Justice BREYER delivered the opinion of the Court.

[1] In *Nevada v. Hall,* 440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed.2d 416 (1979), this Court held that one State (here, Nevada) can open the doors of its courts to a private citizen's lawsuit against another State (here, California) without the other State's consent. In this case, a private citizen, a resident of Nevada, has brought a suit in Nevada's courts against the Franchise Tax Board of California, an agency of the State of California. The board has asked us to overrule *Hall* and hold that the Nevada courts lack jurisdiction to hear this lawsuit. The Court is equally divided on this question, and we consequently affirm the Nevada courts' exercise of jurisdiction over California. See, *e.g., Exxon Shipping Co. v. Baker,* 554 U.S. 471, 484, 128 S.Ct. 2605, 171 L.Ed.2d 570 (2008) (citing *Durant v. Essex Co.,* 7 Wall. 107, 112, 19 L.Ed. 154 (1869)).

California also asks us to reverse the Nevada court's decision insofar as it awards the private citizen greater damages than Nevada law would permit a private citizen to obtain in a similar suit against Nevada's own agencies. We agree that Nevada's application of its damages law in this case reflects a special, and constitutionally forbidden, " 'policy of hostility to the public Acts' of a sister State," namely, California. U.S. Const., Art. IV, § 1 (Full Faith and Credit Clause); *Franchise Tax Bd. of Cal. v. Hyatt,* 538 U.S. 488, 499, 123 S.Ct. 1683, 155 L.Ed.2d 702 (2003) (quoting *Carroll v. Lanza,* 349 U.S. 408, 413, 75 S.Ct. 804, 99 L.Ed. 1183 (1955)). We set aside the Nevada Supreme Court's decision accordingly.

I

Gilbert P. Hyatt, the respondent here, moved from California to Nevada in the early 1990's. He says that he moved to Nevada in September 1991. California's Franchise Tax Board, however, after an investigation and tax audit, claimed that Hyatt moved to Nevada later, in April 1992, and that he

consequently owed California ***1280** more than $10 million in taxes, associated penalties, and interest.

Hyatt filed this lawsuit in Nevada state court against California's Franchise Tax Board, a California state agency. Hyatt sought damages for what he considered the board's abusive audit and investigation practices, including rifling through his private mail, combing through his garbage, and examining private activities at his place of worship. See App. 213–245, 267–268.

California recognized that, under *Hall,* the Constitution permits Nevada's courts to assert jurisdiction over California despite California's lack of consent. California nonetheless asked the Nevada courts to dismiss the case on other constitutional grounds. California law, it pointed out, provided state agencies with immunity from lawsuits based upon actions taken during the course of collecting taxes. Cal. Govt.Code Ann. § 860.2 (West 1995); see also § 860.2 (West 2012). It argued that the Constitution's Full Faith and Credit Clause required Nevada to apply California's sovereign immunity law to Hyatt's case. Nevada's Supreme Court, however, rejected California's claim. It held that Nevada's courts, as a matter of comity, would immunize California where Nevada law would similarly immunize its own agencies and officials (*e.g.,* for actions taken in the performance of a "discretionary" function), but they would not immunize California where Nevada law permitted actions against Nevada agencies, say, for acts taken in bad faith or for intentional torts. App. to Pet. for Cert. in *Franchise Tax Bd. of Cal. v. Hyatt,* O.T. 2002, No. 42, p. 12. We reviewed that decision, and we affirmed. *Franchise Tax Bd., supra,* at 499, 123 S.Ct. 1683.

On remand, the case went to trial. A jury found in Hyatt's favor and awarded him close to $500 million in damages (both compensatory and punitive) and fees (including attorney's fees). California appealed. It argued that the trial court had not properly followed the Nevada Supreme Court's earlier decision. California explained that in a similar suit against similar Nevada officials, Nevada statutory law would limit damages to $50,000, and it argued that the Constitution's Full Faith and Credit Clause required Nevada to limit damages similarly here.

The Nevada Supreme Court accepted the premise that Nevada statutes would impose a $50,000 limit in a similar suit against its own officials. See 130 Nev. ——, ——, 335 P.3d 125, 145–146 (2014); see also Nev.Rev.Stat. § 41.035(1) (1995). But the court rejected California's conclusion. Instead, while setting aside much of the damages award, it nonetheless 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. In doing so, it stated that "damages awarded on remand ... are not subject to any statutory cap." 130 Nev., at ——, 335 P.3d, at 153. The Nevada Supreme Court explained its holding by stating that California's efforts to control the actions of its own agencies were inadequate as applied to Nevada's own citizens. Hence, Nevada's "policy interest in providing adequate redress to Nevada's citizens [wa]s paramount to providing [California] a statutory cap on damages under comity." *Id.,* at ——, 335 P.3d, at 147.

California petitioned for certiorari. We agreed to decide two questions. First, whether to overrule *Hall*. And, second, if we did not do so, whether the Constitution permits Nevada to award Hyatt damages against a California state agency that are greater than those that Nevada would award in a similar suit against its own state agencies.

***1281** II

[2] In light of our 4–to–4 affirmance of Nevada's exercise of jurisdiction over California's state agency, we must consider the second question: Whether the Constitution permits Nevada to award damages against California agencies under Nevada law that are greater than it could award against Nevada agencies in similar circumstances. We conclude that it does not. The Nevada Supreme Court has ignored both Nevada's typical rules of immunity and California's immunity-related statutes (insofar as California's statutes would prohibit a monetary recovery that is greater in amount than the maximum recovery that Nevada law would permit in similar circumstances). Instead, it has applied a special rule of law that evinces a " 'policy of hostility' " toward California. *Franchise Tax Bd., supra,* at 499, 123 S.Ct. 1683 (quoting *Carroll v. Lanza, supra,* at 413, 75 S.Ct. 804). 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." Art. IV, § 1.

[3] **[4]** The Court's precedents strongly support this conclusion. A statute is a "public Act" within the meaning of the Full Faith and Credit Clause. See, *e.g., Carroll v. Lanza, supra,* at 411, 75 S.Ct. 804; see also 28 U.S.C. § 1738 (referring to "[t]he Acts of the legislature" in the full faith and

credit context). We have said that the Clause "does not require a State to substitute for its own statute, applicable to persons and events within it, the statute of another State reflecting a conflicting and opposed policy." *Carroll v. Lanza,* 349 U.S., at 412, 75 S.Ct. 804. But when affirming a State's decision to decline to apply another State's statute on this ground, we have consistently emphasized that the State had "not adopt[ed] any policy of hostility to the public Acts" of that other State. *Id.,* at 413, 75 S.Ct. 804.

In *Carroll v. Lanza,* the Court considered a negligence action brought by a Missouri worker in Arkansas' courts. We held that the Arkansas courts need not apply a time limitation contained in Missouri's (but not in Arkansas') workman's compensation law. *Id.*, at 413–414, 75 S.Ct. 804. In doing so, we emphasized both that (1) Missouri law (compared with Arkansas law) embodied "a conflicting and opposed policy," and (2) Arkansas law did not embody "any policy of hostility to the public Acts of Missouri." *Id.,* at 412–413, 75 S.Ct. 804. This second requirement was well established in earlier law. See, *e.g., Broderick v. Rosner,* 294 U.S. 629, 642–643, 55 S.Ct. 589, 79 L.Ed. 1100 (1935) (New Jersey may not enforce a jurisdictional statute that would permit enforcement of certain claims under New Jersey law but "deny the enforcement" of similar, valid claims under New York law); *Hughes v. Fetter,* 341 U.S. 609, 611–612, 71 S.Ct. 980, 95 L.Ed. 1212 (1951) (invalidating a Wisconsin statute that "close[d] the doors of its courts" to an Illinois cause of action while permitting adjudication of similar Wisconsin claims).

We followed this same approach when we considered the litigation now before us for the first time. See *Franchise Tax Bd.,* 538 U.S., at 498–499, 123 S.Ct. 1683. Nevada had permitted Hyatt to sue California in Nevada courts. See *id.,* at 497, 123 S.Ct. 1683 (citing *Hall,* 440 U.S., at 414–421, 99 S.Ct. 1182). 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. But in doing so, we emphasized both that (1) the Clause ***1282** does not require one State to apply another State's law that violates its "own legitimate public policy," *Franchise Tax Bd., supra,* at 497–498, 123 S.Ct. 1683 (citing *Hall, supra,* at 424, 99 S.Ct. 1182), and (2) Nevada's choice of law did not "exhibi[t] a 'policy of hostility to the public Acts' of a sister State." *Franchise Tax Bd., supra,* at 499, 123 S.Ct. 1683 (quoting *Carroll v. Lanza, supra,* at 413, 75 S.Ct. 804). Rather, Nevada had evinced "a healthy regard for California's sovereign status," we said, by "relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis." *Franchise Tax Bd., supra,* at 499, 123 S.Ct. 1683.

The Nevada decision before us embodies a critical departure from its earlier approach. 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. With respect to damages awards greater than $50,000, the ordinary principles of Nevada law do not "conflic[t]" with California law, for both laws would grant immunity. *Carroll v. Lanza,* 349 U.S., at 412, 75 S.Ct. 804. Similarly, in respect to such amounts, the "polic [ies]" underlying California law and Nevada's usual approach are not "opposed"; they are consistent. *Id.,* at 412–413, 75 S.Ct. 804.

But that is not so in respect to Nevada's special rule. That rule, allowing damages awards greater than $50,000, is not only "opposed" to California law, *ibid.*; it is also inconsistent with the general principles of Nevada immunity law, see *Franchise Tax Bd., supra,* at 499, 123 S.Ct. 1683. The Nevada Supreme Court explained its departure from those general principles by describing California's system of controlling its own agencies as failing to provide "adequate" recourse to Nevada's citizens. 130 Nev., at ——, 335 P.3d, at 147. It expressed concerns about the fact that California's agencies " 'operat[e] outside' " the systems of " 'legislative control, administrative oversight, and public accountability' " that Nevada applies to its own agencies. *Ibid.* (quoting *Faulkner v. University of Tenn.,* 627 So.2d 362 (Ala.1992)). 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. A constitutional rule that would permit this kind of discriminatory hostility is likely to cause chaotic interference by some States into the internal, legislative affairs of others. Imagine, for example, that many or all States enacted such discriminatory, special laws, and justified them on the sole basis that (in their view) a sister State's law provided inadequate protection to their citizens. Would each affected sister State have to change its own laws? Entirely? Piece-by-piece, in order to respond to the new special laws enacted by

every other State? It is difficult to reconcile such a system of special and discriminatory rules with the Constitution's vision of 50 individual and equally dignified States. In light of the "constitutional equality" among the States, *Coyle v. Smith,* 221 U.S. 559, 580, 31 S.Ct. 688, 55 L.Ed. 853 (1911), Nevada has not offered "sufficient policy considerations" to justify the application of a special rule of Nevada law that discriminates against its sister States, *Carroll v. Lanza, supra,* at 413, 75 S.Ct. 804. In our view, Nevada's rule lacks the "healthy regard for California's sovereign status" that was the hallmark of its earlier decision, and it reflects a constitutionally impermissible " 'policy of hostility ***1283** to the public Acts' of a sister State." *Franchise Tax Bd., supra,* at 499, 123 S.Ct. 1683 (quoting *Carroll v. Lanza, supra,* at 413, 75 S.Ct. 804).

[5] In so holding we need not, and do not, intend to return to a complex "balancing-of-interests approach to conflicts of law under the Full Faith and Credit Clause." *Franchise Tax Bd.,* 538 U.S., at 496, 123 S.Ct. 1683. Long ago this Court's efforts to apply that kind of analysis led to results that seemed to differ depending, for example, upon whether the case involved commercial law, a shareholders' action, insurance claims, or workman's compensation statutes. See, *e.g., Bradford Elec. Light Co. v. Clapper,* 286 U.S. 145, 157–159, 52 S.Ct. 571, 76 L.Ed. 1026 (1932); *Carroll v. Lanza, supra,* at 414–420, 75 S.Ct. 804 (Frankfurter, J., dissenting) (listing, and trying to classify, nearly 50 cases). We have since abandoned that approach, and we continue to recognize that a State need not " '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., supra,* at 496, 123 S.Ct. 1683 (quoting *Pacific Employers Ins. Co. v. Industrial Accident Comm'n,* 306 U.S. 493, 501, 59 S.Ct. 629, 83 L.Ed. 940 (1939)). But here, we can safely conclude that, in devising a special—and hostile—rule for California, Nevada has not "sensitively applied principles of comity with a healthy regard for California's sovereign status." *Franchise Tax Bd., supra,* at 499, 123 S.Ct. 1683; see *Thomas v. Washington Gas Light Co.,* 448 U.S. 261, 272, 100 S.Ct. 2647, 65 L.Ed.2d 757 (1980) (plurality opinion) (Clause seeks to prevent "parochial entrenchment on the interests of other States"); *Allstate Ins. Co. v. Hague,* 449 U.S. 302, 323, and n. 10, 101 S.Ct. 633, 66 L.Ed.2d 521 (1981) (Stevens, J., concurring in judgment) (Clause is properly brought to bear when a State's choice of law "threatens the federal interest in national unity by unjustifiably infringing upon the legitimate interests of another State"); cf. *Supreme Court of N.H. v. Piper,* 470 U.S. 274, 288, 105 S.Ct. 1272, 84 L.Ed.2d 205 (1985) (Privileges and Immunities Clause prevents the New Hampshire Supreme Court from promulgating a rule that limits bar admission to state residents, discriminating against out-of-state lawyers); *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.,* 486 U.S. 888, 894, 108 S.Ct. 2218, 100 L.Ed.2d 896 (1988) (Commerce Clause invalidates a statute of limitations that "imposes a greater burden on out-of-state companies than it does on [in-state] companies").

For these reasons, 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. We vacate its judgment and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice ALITO concurs in the judgment.

Chief Justice ROBERTS, with whom Justice THOMAS joins, dissenting.

Petitioner Franchise Tax Board is the California agency that collects California's state income tax. Respondent Gilbert Hyatt, a resident of Nevada, filed suit in Nevada state court against the Board, alleging that it had committed numerous torts in the course of auditing his California tax returns. The Board is immune from such a suit in California courts. The last time this case was before us, we held that the Nevada Supreme Court could apply Nevada law to resolve the Board's claim that it was immune from suit in Nevada as well. Following our decision, the Nevada Supreme Court upheld a $1 million jury award against the Board after ***1284** concluding that the Board did not enjoy immunity under Nevada law.

Today the Court shifts course. It now holds that the Full Faith and Credit Clause requires the Nevada Supreme Court to afford the Board immunity to the extent Nevada agencies are entitled to immunity under Nevada law. Because damages in a similar suit against Nevada agencies are capped at $50,000 by Nevada law, the Court concludes that damages against the Board must be capped at that level as well.

That seems fair. But, for better or worse, the word "fair" does not appear in the Full Faith and Credit Clause. The Court's decision is contrary to our precedent holding that the Clause

does not block a State from applying its own law to redress an injury within its own borders. The opinion also departs from the text of the Clause, which—when it applies—requires a State to give *full* faith and credit to another State's laws. The Court instead permits partial credit: To comply with the Full Faith and Credit Clause, the Nevada Supreme Court need only afford the Board the same limited immunity that Nevada agencies enjoy.

I respectfully dissent.

I

In 1991 Gilbert Hyatt sold his house in California and rented an apartment, registered to vote, and opened a bank account in Nevada. When he filed his 1991 and 1992 tax returns, he claimed Nevada as his place of residence. Unlike California, Nevada has no state income tax, and the move saved Hyatt millions of dollars in California taxes. California's Franchise Tax Board was suspicious, and it initiated an audit.

In the course of the audit, employees of the Board traveled to Nevada and allegedly peered through Hyatt's windows, rummaged around in his garbage, contacted his estranged family members, and shared his personal information not only with newspapers but also with his business contacts and even his place of worship. Hyatt claims that one employee in particular had it in for him, referring to him in antisemitic terms and taking "trophy-like pictures" in front of his home after the audit. Brief for Respondent 3. As a result of the audit, the Board determined that Hyatt was a resident of California for 1991 and part of 1992, and that he accordingly owed over $10 million in unpaid state income taxes, penalties, and interest.

Hyatt protested the audit before the Board, which upheld the audit following an 11–year administrative proceeding. Hyatt is still challenging the audit in California court. In 1998, Hyatt also filed suit against the Board in Nevada state court. In that suit, which is the subject of this case, Hyatt claimed that the Board committed a variety of torts, including fraud, intentional infliction of emotional distress, and invasion of privacy. The Board is immune from suit under California law, and it argued that Nevada was required under the Full Faith and Credit Clause to enforce California's immunity law.

When the case reached the Nevada Supreme Court, that court held, applying general principles of comity under Nevada law, that the Board was entitled to immunity for its negligent but not intentional torts—the same immunity afforded Nevada state agencies. Not satisfied, the Board pursued its claim of complete immunity to this Court, but we affirmed. We ruled that the Full Faith and Credit Clause did not prohibit Nevada from applying its own immunity law to the dispute. *Franchise Tax Bd. of Cal. v. Hyatt,* 538 U.S. 488, 498–499, 123 S.Ct. 1683, 155 L.Ed.2d 702 (2003).

***1285** On remand, the trial court conducted a four-month jury trial. The jury found for Hyatt, awarding him $1 million for fraud, $52 million for invasion of privacy, $85 million for emotional distress, and $250 million in punitive damages. On appeal, the Nevada Supreme Court significantly reduced the award, concluding that the invasion of privacy claims failed as a matter of law. Applying principles of comity, the Nevada Supreme Court also held that because Nevada state agencies are not subject to punitive damages, the Board was not liable for the $250 million punitive damages award. The court did hold the Board responsible for the $1 million fraud judgment, however, and it remanded for a new trial on damages for the emotional distress claim. Although tort liability for Nevada state agencies was capped at $50,000 under Nevada law, the court held that it was against Nevada's public policy to apply that cap to the Board's liability for the fraud and emotional distress claims. The Board sought review by this Court, and we again granted certiorari. 576 U.S. ——, 135 S.Ct. 2940, 192 L.Ed.2d 975 (2015).

II

A

The Full Faith and Credit Clause provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. Const., Art. IV, § 1. The purpose of the Clause "was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation." *Milwaukee County v. M.E. White Co.,* 296 U.S. 268, 276–277, 56 S.Ct. 229, 80 L.Ed. 220 (1935).

The Full Faith and Credit Clause applies in a straightforward fashion to state court judgments: "A judgment entered in one State must be respected in another provided that the first State had jurisdiction over the parties and the subject matter." *Nevada v. Hall,* 440 U.S. 410, 421, 99 S.Ct. 1182, 59 L.Ed.2d

416 (1979). The Clause is more difficult to apply to "public Acts," which include the laws of other States. See *Carroll v. Lanza,* 349 U.S. 408, 411, 75 S.Ct. 804, 99 L.Ed. 1183 (1955). State courts must give full faith and credit to those laws. But what does that mean in practice?

It is clear that state courts are not always required to apply the laws of other States. State laws frequently conflict, and a "rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own." *Alaska Packers Assn. v. Industrial Accident Comm'n of Cal.,* 294 U.S. 532, 547, 55 S.Ct. 518, 79 L.Ed. 1044 (1935). Accordingly, this Court has treated the Full Faith and Credit Clause as a "conflicts of law" provision that dictates when a State must apply the laws of another State rather than its own. *Franchise Tax Bd.,* 538 U.S., at 496, 123 S.Ct. 1683; see also *Hall,* 440 U.S., at 424, 99 S.Ct. 1182 (California court is not required to apply Nevada law).

Under the Full Faith and Credit Clause, "it is frequently the case" that "a court can lawfully apply either the law of one State or the contrary law of another." *Franchise Tax Bd.,* 538 U.S., at 496, 123 S.Ct. 1683 (internal quotation marks omitted). As we have explained,

> "the very nature of the federal union of states, to which are reserved some of the attributes of sovereignty, precludes ***1286** 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 Employers Ins. Co. v. Industrial Accident Comm'n,* 306 U.S. 493, 501, 59 S.Ct. 629, 83 L.Ed. 940 (1939).

This Court has generally held that when a State chooses "to apply its own rule of law to give affirmative relief for an action arising within its borders," the Full Faith and Credit Clause is satisfied. *Carroll,* 349 U.S., at 413, 75 S.Ct. 804; see *Hall,* 440 U.S., at 424, 99 S.Ct. 1182 (California court may apply California law consistent with the State's interest in "providing full protection to those who are injured on its highways" (internal quotation marks omitted)).

A State may not apply its own law, however, if doing so reflects a "policy of hostility to the public Acts" of another State. *Carroll,* 349 U.S., at 413, 75 S.Ct. 804. A State is considered to have adopted such a policy if it has "no sufficient policy considerations to warrant" its refusal to apply the other State's laws. *Ibid.* For example, when a State "seeks to exclude from its courts actions arising under a foreign statute" but permits similar actions under its own laws, the State has adopted a policy of hostility to the "public Acts" of another State. *Ibid.*; see *Hughes v. Fetter,* 341 U.S. 609, 611–613, 71 S.Ct. 980, 95 L.Ed. 1212 (1951). In such cases, this Court has held that the forum State must open its doors and permit the plaintiff to seek relief under another State's laws. See, *e.g., id.,* at 611, 71 S.Ct. 980 ("Wisconsin cannot escape [its] constitutional obligation to enforce the rights and duties validly created under the laws of other states by the simple device of removing jurisdiction from courts otherwise competent").

B

According to the Court, the Nevada Supreme Court violated the Full Faith and Credit Clause by applying "a special rule of law that evinces a policy of hostility toward California." *Ante,* at 1280 (internal quotation marks omitted). As long as Nevada provides immunity to its state agencies for awards above $50,000, the majority reasons, the State has no legitimate policy rationale for refusing to give similar immunity to the agencies of other States. The Court concludes that the Nevada Supreme Court is accordingly required to rewrite Nevada law to afford the Board the same immunity to which Nevada agencies are entitled. In the majority's view, that result is "strongly" supported by this Court's precedents. *Ibid.* I disagree.

Carroll explains that the Full Faith and Credit Clause prohibits a State from adopting a "policy of hostility to the public Acts" of another State. 349 U.S., at 413, 75 S.Ct. 804. But it does not stop there. *Carroll* goes on to describe what adopting a "policy of hostility" means: A State may not refuse to apply another State's law where there are "*no* sufficient policy considerations to warrant such refusal." *Ibid.* (emphasis added). Where a State chooses a different rule from a sister State in order "to give affirmative relief for an action arising within its borders," the State has a sufficient policy reason for applying its own law, and the Full Faith and Credit Clause is satisfied. *Ibid.*

In this case, the Nevada Supreme Court applied Nevada rather than California immunity law in order to uphold the "state's policy interest in providing adequate redress to Nevada citizens." 130 Nev. ——, ——, 335 P.3d 125, 147 (2014). This Court has long recognized that "[f]ew matters could be

deemed more appropriately the ***1287** concern of the state in which the injury occurs or more completely within its power" than "the bodily safety and economic protection" of people injured within its borders. *Pacific Employers Ins. Co.,* 306 U.S., at 503, 59 S.Ct. 629; see *Hall,* 440 U.S., at 424, 99 S.Ct. 1182. Hyatt alleges that the Board committed multiple torts, including fraud and intentional infliction of emotional distress. See 130 Nev., at ——, 335 P.3d, at 130. Under *Pacific Employers Insurance* and *Carroll,* there is no doubt that Nevada has a "sufficient" policy interest in protecting Nevada residents from such injuries.

The majority, however, does not regard that policy interest as sufficient justification for denying the Board immunity. Despite this Court's decision to get out of the business of "appraising and balancing state interests under the Full Faith and Credit Clause," *Franchise Tax Bd.,* 538 U.S., at 498, 123 S.Ct. 1683 the majority concludes that Nevada cannot *really* have a state policy to protect its citizens from the kinds of torts alleged here, because the State capped its own liability at $50,000 in similar situations. See *ante,* at 1281 – 1283. But that fails to credit the Nevada Supreme Court's explanation for why a damages cap for Nevada state agencies is fully consistent with the State's policy of protecting its citizens.

According to the Nevada Supreme Court, Nevada law treats its own agencies differently from the agencies of other States because Nevada agencies are "subject to legislative control, administrative oversight, and public accountability" in Nevada. 130 Nev., at ——, 335 P.3d, at 147 (internal quotation marks omitted). The same is not true of other litigants, such as the Board, who operate "outside such controls." *Ibid.* (internal quotation marks omitted). The majority may think that Nevada is being unfair, but it cannot be said that the State failed to articulate a sufficient policy explanation for its decision to apply a damages cap to Nevada state agencies, but not to the agencies of other States.

As the Court points out, the Constitution certainly has a "vision of 50 individual and equally dignified States," *ante,* at 1282, which is why California remains free to adopt a policy similar to that of Nevada, should it wish to do so. See *Coyle v. Smith,* 221 U.S. 559, 567, 31 S.Ct. 688, 55 L.Ed. 853 (1911) (The Union "was and is a union of States, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself"). Nevada is not, however, required to treat its sister State as equally committed to the protection of Nevada citizens.

It is true that this Court in the prior iteration of this case found no Full Faith and Credit Clause violation in part because the "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.,* 538 U.S., at 499, 123 S.Ct. 1683. But the Nevada court adhered to its policy of sensitivity to comity concerns this time around as well. In deference to the Board's sovereignty, the court threw out a $250 million punitive damages award, on top of its previous decision that the Board was not liable at all for its negligent acts. That is more than a "healthy regard" for California's sovereign status.

Even if the Court is correct that Nevada violated the Full Faith and Credit Clause, however, it is wrong about the remedy. The majority concludes that in the sovereign immunity context, the Full Faith and Credit Clause is not a choice of law provision, but a create-your-own-law provision: ***1288** The Court does not require the Nevada Supreme Court to apply either Nevada law (no immunity for the Board) or California law (complete immunity for the Board), but instead requires a new hybrid rule, under which the Board enjoys partial immunity.

The majority's approach is nowhere to be found in the Full Faith and Credit Clause. Where the Clause applies, it expressly requires a State to give *full* faith and credit to another State's laws. If the majority is correct that Nevada has no sufficient policy justification for applying Nevada immunity law, then California law applies. And under California law, the Board is entitled to *full* immunity. Or, if Nevada has a sufficient policy reason to apply its own law, then Nevada law applies, and the Board is subject to *full* liability.

I respectfully dissent.

All Citations

136 S.Ct. 1277, 194 L.Ed.2d 431, 84 USLW 4210, 14 Cal. Daily Op. Serv. 4077, 2016 Daily Journal D.A.R. 3700, 26 Fla. L. Weekly Fed. S 90

EXHIBIT 79

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Appellant/Cross-Respondent,
vs.
GILBERT P. HYATT,
Respondent/Cross-Appellant.

No. 53264

FILED

JUN 24 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER DIRECTING SUPPLEMENTAL BRIEFING

Appellant/cross-respondent Franchise Tax Board has filed a motion requesting leave to file a motion for supplemental briefing with excess pages. A response and reply have been filed. We grant the motion and direct the clerk of this court to file the proposed motion for supplemental briefing received in this court on May 23, 2016. Further, we grant the motion for supplemental briefing. *See* NRAP 27(b) (noting that this court may grant a procedural motion without waiting for a response). As part of the supplemental briefs, the parties shall address the scope of the United States Supreme Court's opinion concerning what portions of this court's prior opinion should be reconsidered on remand from the Supreme Court.

Franchise Tax Board shall have 30 days from the date of this order to file and serve an opening supplemental brief. Gilbert Hyatt shall have 30 days from service of the supplemental opening brief to file and serve a supplemental answering brief. Franchise Tax Board shall then

have 15 days following service of the supplemental answering brief to file and serve any supplemental reply brief.

It is so ORDERED.

_____, A.C.J.

cc: McDonald Carano Wilson LLP/Reno
Lemons, Grundy & Eisenberg
Hutchison & Steffen, LLC
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EXHIBIT 80

IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 53264

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,

Appellant/Cross-Respondent,

v.

GILBERT P. HYATT,

Respondent/Cross-Appellant

APPEAL FROM JUDGMENT – EIGHTH JUDICAL 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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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.
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> * * *
>
> [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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EXHIBIT 81

IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF CALIFORNIA, Appellant/Cross-respondent, v. GILBERT P. HYATT, Respondent/Cross-appellant.	)	Supreme Court 53264 District Case No. A382999

APPEAL

from the Eighth Judicial District Court, Clark County
THE HONORABLE JESSIE WALSH, District Judge

RESPONDENT GILBERT P. HYATT'S SUPPLEMENTAL ANSWERING BRIEF FOLLOWING MANDATE FROM THE SUPREME COURT OF THE UNITED STATES

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NRAP 26.1 DISCLOSURE

I certify that the following are persons and entities described in NRAP 26.1, that must be disclosed:

Gilbert P. Hyatt is an individual.

The attorneys who have appeared on behalf of respondent Hyatt in this Court and in district court are:

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DATED this 24 day of October, 2016.

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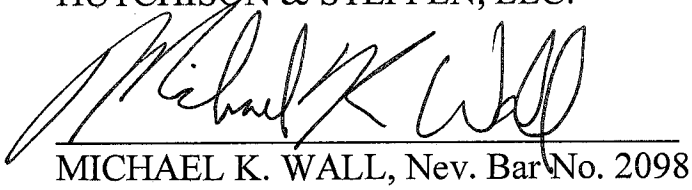

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SUPPLEMENTAL ANSWERING BRIEF FOLLOWING MANDATE FROM THE SUPREME COURT OF THE UNITED STATES

Pursuant to this Court's order of June 24, 2016, Respondent Gilbert P. Hyatt ("Respondent" or "Hyatt") submits this Supplemental Answering Brief in response to Appellant Franchise Tax Board of the State of California's ("Appellant" or "FTB") Supplemental Opening Brief Following Mandate From the Supreme Court of the United States.

I. Introduction.

The U.S. Supreme Court in *Hyatt II*[1] accepted review and ruled on only two issues: (I) whether to reverse *Nevada v. Hall*, 440 U.S. 410 (1979) and (ii) whether the amount of damages affirmed by this Court violated the prior U.S. Supreme Court decision in this case. The U.S. Supreme Court did not reverse *Nevada v. Hall* but did reverse this Court's *2014 Opinion*[2] on the single issue of the amount of damages that may be awarded against Appellant FTB, an agency of the State of

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[1] *Franchise Tax Board of California v. Hyatt*, __U.S. __, 136 S.Ct. 1277 (2016)("*Hyatt II*"). For the Court's convenience given the substantial procedural history in this case, Hyatt has submitted herewith a Supplemental Appendix (Volume 1) of Prior United States Supreme Court and Nevada Supreme Court Opinions in This Case ("Supp. Append Vol. 1"). *Hyatt II* is attached to Supp. Append. Vol. 1, at Tab 5.

[2] *Franchise Tax Board of California v. Hyatt*, 335 P.3d 125 (Nev. 2014)(the "*2014 Opinion*"). *2014 Opinion* is attached to Supp. Append. Vol 1, at Tab 3.

California. All that is left now for this Court to do is to re-issue its *2014 Opinion* modifying the amount of damages awarded in accord with *Hyatt II* and prior FTB argument in this appeal that damages are limited to $75,000 per claim. That is all that is intended by the U.S. Supreme Court's decision and all that is procedurally proper.

No other issue from this Court's *2014 Opinion* is implicated by *Hyatt II*. In suggesting otherwise, FTB disregards constitutional law and procedural rules. Indeed, *Hyatt II* did not create any new law, it merely reinforced the first U.S. Supreme Court decision in this case from 2003, *Hyatt I*.[3] FTB argued in *Hyatt II* that this Court failed to follow *Hyatt I* by affirming damages to Hyatt in excess of what would be allowed against a Nevada state agency. The U.S. Supreme Court agreed and enforced the holding of *Hyatt I*.

FTB did not argue in its appeal before this Court or to the U.S. Supreme Court that this Court's *2014 Opinion* violated *Hyatt I* in any other way. Yet, now citing *Hyatt II,* FTB seeks reconsideration of the unrelated issues on which it lost in the *2014 Opinion*. It is too late for FTB to make such arguments, and in any event FTB already lost on the merits of the unrelated issues it now attempts to re-

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[3] *Franchise Tax Board of California v. Hyatt*, 538 U.S. 488, 123 S.Ct. 1683 (2003) ("*Hyatt I*"). *Hyatt I* is attached to the Supp. Append. Vol. I, at Tab 1.

raise.

Despite the myriad of issues addressed and decided by this Court in its *2014 Opinion*, the U.S. Supreme Court accepted review only on the two narrow and focused issues described above. The Court ruled in favor of FTB only on this second issue and concluded by stating, "We vacate [the Nevada Supreme Court's] judgment and remand the case for further proceedings not inconsistent with this opinion."[4]

FTB nonetheless now argues all issues decided and resolved by this Court in its *2014 Opinion* are fair game in light of *Hyatt II*. How can that be? *Hyatt II* held only that this Court's damage award violated *Hyatt I*. If FTB asserts that any other issue addressed in this Court's *2014 Opinion* violated *Hyatt I*, it should have made those arguments to this Court in its appeal from the judgment and then sought review of those issues from the U.S. Supreme Court. FTB did not. It has therefore waived any right for review of the issues it now raises, and in some cases re-raises.

Indeed, most if not all of the issues FTB now raises are also barred by the law-of-the-case doctrine. This Court already determined in its *2014 Opinion* and,

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[4] *Hyatt II*, at 1283.

in some cases, in its *2002 Opinion*,[5] each point FTB now raises. FTB is asking for nothing short of reconsideration of these issues under the guise of the limited holding from *Hyatt II*. While this Court may have discretion to revisit and review issues unrelated to the *Hyatt II* damages issue, there is no reason to do so here. It would also be bad public and judicial policy to set a precedent that long resolved issues can be revisited by this Court after a case is reviewed by the U.S. Supreme Court on an unrelated issue.

Specifically, FTB now attempts to reargue the following issues. First, in seeking to avoid the liability findings against it in regard to the fraud and IIED claims, FTB blatantly re-argues the discretionary function immunity issue despite no new law or facts. FTB lost this issue in the *2014 Opinion*, and the U.S. Supreme Court specifically refused to review this issue. FTB therefore asks this Court to revisit the discretionary function immunity issue based on *Hyatt II* even though FTB was denied review of this very issue by the U.S. Supreme Court.[6]

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[5]April 4, 2002 Order Granting Petition For Rehearing, Vacating Previous Order, Granting Petition for Writ of Mandamus In Part In Docket No. 36390, And Granting Petition For A Writ Of Prohibition In Part In Docket No. 35549 (the "*2002 Opinion*"). The *2002 Opinion is* attached to Supp. Append. Vol. 1, at Tab 1.

[6] *Franchise Tax Board of the State of California v. Hyatt*, United States Supreme Court Case No. 14-1175, Petition for Writ of Certiorari, at 15-20, filed March 23, 2015 ("FTB Cert. Pet."); *Franchise Tax Board of California v. Hyatt*, 576 U.S. __, Order List at 13 (Jun. 30, 2015)(granting review of Questions 2 and 3 but denying

Discretionary function immunity is therefore an issue FTB cannot in good faith argue was implicated by *Hyatt II*.

Further, in seeking reconsideration of the liability findings made against it, FTB grossly misstates this Court's holding in *Falline v. GNLV Corp.*, 107 Nev. 1004, 823 P.2d 888 (1991), even substituting words in a quote from that decision to falsely portray the holding as supporting FTB's new IIED argument. As is clear from the decision, *Falline* did not hold that IIED claims cannot be brought against Nevada state agencies. *Falline* was a worker's compensation case. It held that an emotional distress claim cannot be brought in worker's compensation cases. The decision did not address whether IIED claims can be brought against state agencies. Case law in fact confirms that state agencies can be sued for IIED.

Moreover, FTB never argued below that IIED claims cannot be brought against Nevada state agencies. FTB has therefore waived this argument. Indeed, the law of the case is the exact opposite of what FTB now argues. In this Court's *2002 Opinion*, Hyatt argued specifically that intentional torts, including IIED as described in detail in his briefing, could be brought against state agencies. This

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review of Question 1 which sought review of the discretionary function immunity issue), attached to Supp. Append. Vol. 1, at Tab 4.

Court so found in its *2002 Opinion*, and that has been the law of the case since that time for both the IIED and fraud claims.

As to Hyatt's fraud claim, FTB now also argues for the first time that no precedent allows such a claim – while citing no case to support its position. FTB conveniently forgets this Court's *2002 Opinion*, which found that intentional torts including fraud can be pursued against state agencies in accord with *Falline*. The law-of-the-case doctrine holds that Hyatt can bring such claim. *Hyatt II* does not change this. And case law in other jurisdictions is consistent with this Court's ruling that fraud claims can be brought against state agencies.

Further as to the fraud claim, FTB re-asserts the same arguments it previously made in attacking the judgment as to the sufficiency of the evidence. This Court rejected those arguments in its *2014 Opinion*. Nothing in *Hyatt II* provides a basis for reconsideration of this issue. Similarly, FTB re-argues whether the evidentiary errors were harmless as to the liability findings for the IIED and fraud claims. Nothing in *Hyatt II* provides a basis for this Court to revisit that issue.

Finally, FTB's argument on exhaustion of administrative remedies is also barred by the law-of-the-case doctrine in accord with this Court's *2002 Opinion*. This issue is in no way implicated by *Hyatt II*. FTB again misconstrues the cases

it cites for exhaustion of administrative remedies because those cases involved attempts to stop or circumvent an administrative process. In this case, the Nevada courts have kept strictly separate this tort case and the still ongoing California administrative process. This case does not stop or interfere with the California administrative process. The two matters have always been and remain two different trains traveling on separate tracks.

In sum, this Court previously reviewed lengthy briefing and heard oral arguments on two occasions before issuing the *2014 Opinion*. Nothing warrants revisiting that decision now except to modify the damage award in accord with *Hyatt II*. FTB's request now for reconsideration of unrelated claims should be denied. This Court should therefore re-issue its *2014 Opinion* with a modified damages amount for the fraud claim to conform with Nevada's statutory damages cap, which FTB's prior briefing in this case specified is $75,000 per claim. In addition, for the IIED claim the Court should either (I) allow Hyatt to re-try the claim in the district court as ordered in the *2014 Opinion* or (ii) direct the district court to enter judgment on the IIED claim in favor of Hyatt for the $75,000 statutory maximum as previously argued by FTB, thereby allowing a final judgment to be entered with no further proceedings before the district court (other than entry of the judgment and as necessary to enforce judgment).

II. Statement of the issues.

1. In light of *Hyatt II*, is current review limited to modifying the damages awarded to Hyatt?

2. Is FTB barred by waiver from arguing that this Court's *2014 Opinion* violated *Hyatt I* other than as to the damages awarded?

3. Is FTB barred by the law-of-the-case doctrine from arguing that Hyatt may not bring a fraud or IIED claim against the FTB?

4. Under Nevada substantive law as already decided by this Court, is there any bar to bringing a fraud or IIED claim against a state agency?

III. Statement of the case.

This Court issued a decision in this case on April 4, 2002 (the "*2002 Opinion*"), affirming the ruling of the district court that the FTB was not entitled to immunity under California law for the bad faith conduct and intentional torts at issue in this Nevada tort action. The U.S. Supreme Court then granted the FTB's petition for certiorari, but then unanimously affirmed this Court's decision in *Hyatt I*.

This Court issued a decision in this case on September 18, 2014 (the "*2014 Opinion*") that affirmed in part and reversed in part the judgment entered by the

district court. This Court's *2014 Opinion* addressed and resolved the following issues:

Discretionary function immunity

This Court determined that "FTB was not immune from suit under comity because discretionary-function immunity in Nevada does not protect Nevada's government or its employees from intentional torts and bad-faith conduct."[7] Indeed, the Court spent multiple pages discussing how a Nevada agency would be treated. This Court then applied the holding from *Hyatt I* and determined that because tort claims as alleged and proven by Hyatt could be brought against a Nevada government agency, FTB could be sued by Hyatt for intentional torts. It therefore ruled in its *2014 Opinion* entirely consistently with *Hyatt I*. *Hyatt II* therefore provides no basis for reconsideration of this issue.

Invasion of privacy causes of action

This Court found that Hyatt did not establish the elements of his invasion of privacy claims. The Court therefore reversed the judgment as to these causes of action.[8] *Hyatt II* provides no basis for reconsideration of this issue.

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[7] *2014 Opinion*, at 134-39.
[8] *2014 Opinion*, at 139-42.

Breach of confidential relationship claim

This Court found that Hyatt cannot as a matter of law establish the type of confidential relationship with FTB that is needed to sustain this claim. It therefore reversed the judgment as to this cause of action.[9] *Hyatt II* provides no basis for reconsideration of this issue.

Abuse of process claim

This Court found that Hyatt did not establish the elements of abuse of process. It therefore reversed the judgment as to this cause of action.[10] *Hyatt II* provides no basis for reconsideration of this issue.

Fraud claim - liability

After discussion of the necessary elements under Nevada law and the evidence presented by Hyatt, this Court affirmed the jury verdict that Hyatt established all necessary elements of this cause of action.[11] *Hyatt II* provides no basis for reconsideration of this issue.

Fraud claim - damages

This is the issue, and the only issue, upon which the U.S. Supreme Court reversed this Court's *2014 Opinion.*

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[9] *2014 Opinion*, at 142-43.
[10] *2014 Opinion*, at 143-44.
[11] *2014 Opinion*, at 144-45.

The *2014 Opinion* addressed the FTB's argument that Nevada's damages cap for state agencies (NRS 41.035) limited Hyatt's damages to $75,000 per claim. This Court decided that it need not apply Nevada's damages cap on the basis that Nevada had a paramount interest in providing adequate redress for Nevada citizens. This Court therefore denied FTB's request for comity to FTB on this issue, *i.e.* for application of the holding in *Hyatt I*.[12] The U.S. Supreme Court disagreed and reversed the *2014 Opinion* on this single point.

The *2014 Opinion* must therefore be modified in accord with the prior FTB argument in this appeal that Nevada's statutory damages cap limits Hyatt's recovery to $75,000 per claim (NRS 41.035), or in this Court's discretion the current cap of $100,000. That is all that is necessary to conform the *2014 Opinion* to the holdings in *Hyatt I* and *Hyatt II*.

Intentional infliction of emotional distress claim - liability

After discussion of the necessary elements under Nevada law and the evidence presented by Hyatt, this Court affirmed the jury verdict that Hyatt established all necessary elements of this cause of action.[13] *Hyatt II* provides no basis for reconsideration of the liability issue for this cause of action.

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[12] *2014 Opinion*, at 146-47.
[13] *2014 Opinion*, at 147-49.

As addressed below, this Court went on to find that evidentiary errors required a new trial on damages only for this cause of action.

Evidentiary and jury instruction errors warrant new trial on damages only for the IIED claim

This Court addressed multiple evidentiary errors by the district court at trial. These included certain evidence the district court improperly admitted, as well as other evidence the district court excluded which FTB had sought to introduce on the basis that it may have been an alternative cause of Hyatt's emotional distress.[14] The Court concluded "that substantial evidence exists to support the jury's finding as to liability against FTB on Hyatt's IIED claim regardless of these errors, but we conclude that the errors significantly affected the jury's determination of appropriate damages, therefore, these errors were prejudicial and require reversal and remand for a new trial as to damages."[15] *Hyatt II* provides no basis for reconsidering this issue.

Recoverable damages on remand for IIED

This Court referenced its discussion of fraud damages and similarly determined that it would not apply Nevada's damages cap for retrial of the amount

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[14] *2014 Opinion*, at 149-53.
[15] *2014 Opinion*, at 153.

of damages for the IIED claim.[16] *Hyatt II* therefore also reversed on the amount of recoverable damages for Hyatt's IIED claim.

The *2014 Opinion* must therefore be modified on this point in accord with the prior FTB argument in this appeal that Nevada's statutory damages cap limits Hyatt's recover to $75,000 per claim. This modification would conform the *2014 Opinion* to the holdings in *Hyatt I* and *Hyatt II*. As a result, if the total amount awarded by a jury in the re-trial exceeds $75,000, the Court should direct that the amount of the recoverable damages be limited to $75,000.

Alternatively, and to bring this long-running case to the most efficient resolution possible, the Court has discretion to rule that more than sufficient admissible evidence was introduced to establish that Hyatt suffered emotional distress damages of at least $75,000. Indeed, the fact that Hyatt suffered emotional distress damages was affirmed by this Court in finding that Hyatt established all elements of the IIED claim.[17] $75,000 damages, in light of the damages cap, would be an efficient conclusion to this claim.

This case has been hotly-contested from its inception, and the costs and fees of any retrial of the IIED claim will easily exceed the maximum $75,000 recovery.

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[16] *2014 Opinion*, at 153.
[17] *2014 Opinion*, at 147-49.

When the additional time and resources of the district court are taken into consideration, a retrial is simply inefficient to determine the amount of IIED damages, which were previously determined to be $52 million but would now be capped at $75,000. Even accounting for the evidentiary errors found by this Court, more than sufficient admissible evidence was adduced at trial to support IIED damages in excess of $75,000.[18]

As a result, in lieu of a re-trial on damages for the IIED, the Court can alternatively modify its *2014 Opinion* to direct that judgment be entered in favor of Hyatt on both the fraud and IIED claims and each in the amount of the $75,000, for a total of $150,000. This will save the Nevada courts and the parties valuable time and resources, and moot a re-trial and possible appeal on the amount of IIED damages that Hyatt should recover.

Punitive damages

This Court determined that Hyatt could not be awarded punitive damages from FTB because Nevada does not allow such damage against its own government agencies. In short, the Court granted comity to FTB on this issue, in

[18] *See* NRCP 1 and discussion of sufficient fraud and IIED liability evidence, *infra*, at 30-31.

accord with *Hyatt I* and its corollary *Hyatt II*.[19] *Hyatt II* provides no basis for reconsideration of this issue.

Costs

This Court reversed the cost award, finding the district court should determine after entry of a new judgment whether Hyatt is still entitled to costs, and if so, what costs are recoverable.[20] *Hyatt II* provides no basis for reconsideration of this issue.

Hyatt's cross-appeal

This Court affirmed the district court's dismissal of Hyatt's claim for economic damages, finding Hyatt did not present sufficient evidence at summary judgment to support such a claim.[21] *Hyatt II* provides no basis for reconsideration of this issue.

IV. Statement of facts.

This Court is no doubt familiar with the facts of this case. FTB's Supp. Brief referenced its statement of facts from prior briefing. Hyatt also references here but does not repeat his Statement of Facts that can be found at pages 9 to 51 of Respondent Hyatt's Answering Brief ("RAB").

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[19] *2014 Opinion*, at 153-54.
[20] *2014 Opinion*, at 154-55.
[21] *2014 Opinion* , at 155-56.

V. Summary of argument.

FTB's attempt to re-argue and seek reconsideration of virtually every issue on which it lost in the *2014 Opinion* is procedurally improper and not supported by the U. S. Supreme Court decision in *Hyatt II.* FTB mischaracterizes the decision in *Hyatt II*, this Court's *2014 Opinion*, and particularly this Court's key precedent, *Falline.*

FTB raises no issue for which this Court should amend or correct the *2014 Opinion* other than modifying the amount of damages Hyatt may recover for his fraud and IIED claims. The amount of damages which Hyatt may recover for each of his fraud and IIED claims is $75,000 for each claim, as FTB previously argued in this appeal.[22] This Court should reissue its *2014 Opinion* with corrected damages and direct the district court to enter a judgment in favor of Hyatt for $150,000 plus costs as determined by the district court.

VI. Argument.

A. In light of *Hyatt II*, this Court should re-issue its *2014 Opinion* in its entirety after correcting the amount of damages awarded for each the fraud and IIED claims.

Hyatt II provides no basis for this Court to revisit every issue on which it ruled against the FTB in the *2014 Opinion.* FTB's petition for U.S. Supreme

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[22] *See* discussion of prior FTB briefing, *infra* at 16-17.

Court review, FTB's merits briefing submitted to the U.S. Supreme Court, its oral argument in support thereof, and the decision in *Hyatt II* related only to the award of damages against FTB for Hyatt's fraud and IIED claims. The Court has already considered the issues now raised by FTB, and rejected FTB's arguments, or FTB failed to previously make such arguments.

1. Prior FTB briefing in this appeal arguing violation of *Hyatt I* was limited to the damages cap issue.

The only argument FTB raised in its briefing before this Court in regard to the district court violating *Hyatt I* was that the award of compensatory damages to Hyatt was in excess of the statutory damages cap under NRS 41.035 that can be awarded against a Nevada state agency.[23] Specifically, on pages 100 to 102 of FTB's opening brief and pages 109 to 115 of its reply brief in this Appeal FTB argued the damages awarded against it violated *Hyatt I*.[24] FTB did not argue as to any other issue that the district court had failed to abide by *Hyatt I,* and certainly did not make the circular argument it now offers in regard to the effect of *Hyatt II* on the liability findings for the fraud and IIED claims. FTB has not previously argued that a Nevada citizen cannot sue Nevada agencies for those specific torts (a conclusion which Hyatt rebuts below).

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[23] *See* Appellant's Opening Brief ("AOB") and Appellant's Reply Brief ("ARB").
[24] *Id.*

Indeed, *Hyatt I*, affirming this Court's *2002 Opinion*, held that Hyatt could pursue fraud and IIED claims on the very rationale argued by FTB above. Yet, in the most circular of arguments, FTB now argues that *Hyatt II*, which simply enforced *Hyatt I*, requires that this Court not allow Hyatt to pursue his fraud and IIED claims against FTB.

2. Review of this Court's *2014 Opinion* by the U.S. Supreme Court in *Hyatt II* was limited to the amount of damages awarded in violation of *Hyatt I*.

There were two discreet issues reviewed by the U.S. Supreme Court in *Hyatt II*: (I) whether the Court should affirm or overturn its prior decision *Nevada v. Hall* and (ii) whether the *2014 Opinion* in accord with *Hyatt I* must apply the statutory damages cap as to the FTB.

Starting with FTB's petition for certiorari filed with the U.S. Supreme Court, through its briefing on the merits and then oral argument, the second issue was laser-focused on the Nevada damages cap. FTB's petition for certiorari argued:

> As *Hyatt I* establishes, it is one thing for Nevada to refuse FTB the absolute immunity it would enjoy under California law, but it is altogether different and impermissibly hostile for Nevada to refuse to apply the immunity granted by California even to the extent

consistent with Nevada law—that is, to refuse FTB the same protection *against unlimited damages* that a Nevada entity would enjoy.[25]

FTB's briefing to the U.S. Supreme Court similarly argued and focused on the amount of damages awarded by the Nevada court as a violation of *Hyatt I*. In the opening two paragraphs of its merits brief FTB stated that Hyatt claimed "*hundreds of millions of dollars in damages*" and the Nevada jury returned a verdict that "dramatically demonstrates the dangers of having a sovereign State haled into another State's courts against its will: The jury found for Hyatt on every one of his claims and awarded him *nearly half a billion dollars in damages,*" and that after appellate review this Court "*still awarded a million dollars in damages* while denying FTB the benefit of the damages cap Nevada extends to its own government entities."[26]

The U.S. Supreme Court ruled in favor of FTB on the damages cap issue, finding *Hyatt I* required Nevada to apply the cap here. But now FTB seeks to expand that limited and narrow review and reversal of this Court's *2014 Opinion*

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[25] FTB's Cert. Pet., p. 23 (emphasis added).

[26] *Franchise Tax Board of the State of California v. Hyatt*, United States Supreme Court Case No. 14-1175, Brief for Petitioner, at 1(emphasis added), filed September 3, 2015.

to a review of virtually every ruling that has been made in this case, even wrongly arguing its Supplemental Opening Brief that the U.S. Supreme Court "vacated the *2014 Opinion* in its entirety so that it carries no further legal force or effect."[27] That is not what the U.S. Supreme Court did in *Hyatt II*. Rather, it concluded its opinion with the same language it uses in virtually every case: "We vacate the judgment and remand the case for further proceedings not inconsistent with this opinion."[28]

Similar to the language used by this Court when returning a matter to a lower court instructing it to proceed "consistent with" the opinion issued, such language by the U.S. Supreme Court does not open up all issues thus far decided in the case.[29] It is clear on the face of the U.S. Supreme Court's opinion, as well as the briefing, that the U.S. Supreme Court intended that this Court modify its *2014 Opinion* to reduce the damages awarded consistent with the Nevada law applicable to Nevada government agencies. That is all.

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[27] FTB Supp. Brief, at ix.
[28] *Hyatt II*, at 1283.
[29] The cases cited by FTB on pages 9-10 of its Supplemental Brief in which FTB argues *Hyatt II* requires this Court reconsider all issues addressed in the *2014 Opinion* are not on point. The cases address the general proposition of appellate law that require lower courts to follow the decision of the reviewing court. None of the cited cases support the expansive re-review of unrelated issues now sought by FTB.

Further, as addressed below, the issues now asserted by FTB have all been previously addressed and adjudicated by this Court and/or have been waived by FTB and are in no way implicated by *Hyatt II*. FTB is blatantly seeking second and third bites on issues that have been definitively decided in this case. FTB is not entitled to this disguised petition for re-hearing on fully adjudicated and decided issues.

3. *Hyatt I's* comity holding, as affirmed in *Hyatt II*, does not provide a basis to review all issues on which FTB lost in the *2014 Opinion*.

FTB argues that the Court should reconsider any part of the *2014 Opinion* "that might be tainted by Sister-State Hostility."[30] There is no other part of the *2014 Opinion* that fails to treat the FTB as a Nevada state agency would be treated. But even if there were, FTB does not set forth the correct standard as articulated in *Hyatt II*, nor does it address the case law upon which Hyatt relies in interpreting the Full Faith and Credit clause in this context. Despite FTB's protestations, a state need not treat a sister state agency exactly the same as it would treat its own agencies in every instance. In *Hyatt II* the U.S. Supreme found that "Nevada has not offered 'sufficient policy considerations' to justify the application of a special rule . . ." *Hyatt II*, at 1282 (quoting *Carroll v. Lanza*, 349

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[30] FTB Supp. Brief, at 9.

U.S. 408, 413, 75 S.Ct. 804 (1955)).

As the dissent emphasized, the determinative issue in *Hyatt II* was whether "Nevada has a 'sufficient' policy interest in protecting Nevada residents from such injuries" to justify not applying Nevada's damages cap to FTB in this case. *Hyatt II*, at 1287. The majority found the policy interest expressed by Nevada to be insufficient to deviate from Nevada's damages cap in this case. This analysis and conclusion does not address or apply to the myriad of other issues upon which FTB now seeks to apply the holding from Hyatt II.

Indeed, FTB merely argues there is an "Anti-California Hostility" in the *2014 Opinion* and thereby concludes all issues can and should be reconsidered.[31] To support its assertion of a hostility toward California, FTB misquotes decisions from this Court (as discussed below) and unapologetically reargues points on which it lost which have no relation to the holding in *Hyatt II* (also discussed below). The absurdity of FTB's position is seen from its attempt to re-argue every issue in the *2014 Opinion* without application of the actual standard set forth in *Hyatt II*.

For example, FTB brazenly re-argues discretionary function immunity, asserting the same arguments and citing the same cases it did in losing the issue in

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[31] FTB Supp. Brief, at 12, *et seq.*

the *2014 Opinion.*[32] FTB's current brief does not even make a subtle attempt to argue that *Hyatt II* has resulted in some change in law that requires a reconsideration of this Court's discretionary function immunity ruling in the *2014 Opinion.* Indeed, FTB previously viewed this issue as wholly unrelated to the damages cap issue addressed in *Hyatt II,* as FTB sought separate review of the discretionary function immunity issue from the U.S. Supreme Court but was denied review.[33] *Hyatt II* therefore provides no basis to re-review the issue in light of this record.

Similarly, FTB's attempts to reargue the issues of exhaustion of administrative remedies and sufficiency of the evidence for the fraud claim, each of which are also unrelated to the issues addressed in *Hyatt II.* Again, *Hyatt II* provides no basis to review these issues.

4. The only correction to the *2014 Opinion* that should be made is to the amount of damages recoverable by Hyatt for each of the two claims on which he prevailed.

FTB's opening and reply briefs for this appeal, on the precise point on which it ultimately prevailed in the U.S. Supreme Court, sought that the damages

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[32] *See* FTB Supp. Brief, at 17-22, compared to AOB, at 34-52.

[33] FTB's Cert. Pet., p. 23 (emphasis added),; *Franchise Tax Board of California v. Hyatt*, 576 U.S. ___, Order List at 13 (Jun. 30, 2015), attached to Supp. Append. Vol. 1, at Tab 4.

awarded Hyatt should be capped at $75,000 per claim in accord with NRS 41.035.

FTB's Opening brief

The district court denied FTB's request to apply comity and to limit compensatory damages to $75,000 per claim, which would be the limit for a Nevada government entity. 92 AA 22965; NRS 41.035(1). . . . Nevada's statute allows damages against a government entity up to $75,000; (3) California's immunity statute must be applied, to the same extent that a Nevada entity would receive immunity, and as such Hyatt's damages are capped at $75,000. . .[34]

FTB's Reply brief:

For the reasons articulated at pages 100-101 of the opening brief, all compensatory damages should have been capped at $75,000 per claim. . . . . Regarding compensatory damages California allows no recovery against FTB, but Nevada allows tort plaintiffs to recover up to $75,000 per claim against government entities. See NRS 41.035(1). Therefore, California's complete immunity statute for FTB would only offend Nevada's policy to the extent that plaintiffs are deprived of the ability to recover up to $75,000 per claim. . . . Accordingly, the

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[34] AOB, at 100-02.

compensatory damages award against FTB, if allowed to stand at all, should be capped at $75,000 per claim.[35]

FTB's repeated argument for a cap of $75,000 per claim under NRS 41.035 recognizes Hyatt's claim for bad faith delay of the protests did fully accrue until late 2007 when the case was on the eve of trial. This Court in its *2014 Opinion* cited the 11 year bad faith delay in the protest process as part of the significant evidence in affirming the fraud claim and IIED claim on liability in Hyatt's favor.[36] This issue, however, but did not become a part of the case until the discovery commissioner cited the long delay and approved discovery on the issue in 2005.[37] Discovery was then taken including depositions of the protest officers in 2005 and 2006 that confirmed an intentional hold was put on the protests as referenced in internal FTB documents.[38] Most significantly, not until late in 2007 did FTB issue a final decision in the protest process essentially rubber stamping the audit decisions from eleven years earlier.[39] At that point, the 11 year delay in

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[35] ARB, at 110-11, 115-116.
[36] *2014 Opinion*, at 144-46, 148-49.
[37] 14 RA 00 3262-3276.
[38] 76 AA 18980, 18992; 85 RA 021224, 021240; RT June 17, 91:1 - 92:5 (as discussed in RAB, at 45-46); *see also* RT June 16, 72:9-13; 56:14 - 57:3, 58:7 - 60:4, 61:14-25, 75:18 - 77:6.
[39] 54 AA 13330, 13404-13406, 88 RA 021826 (as discussed in RAB, at 42).

deciding the protests ended. At that time, the damages cap was $75,000 per claim.[40]

FTB also acknowledged in its prior briefing that where, as here, there are separate causes of action that can be separately maintained against the government entity, NRS 41.035 provides for recovery by the plaintiff on each claim up to the statutory cap. *See State of Nevada, ex rel., Department of Transportation v. Hill*, 114 Nev. 810, 818, 963 P. 2d 480 (1998)("The *Webster* court reasoned that 'the term 'action' [as used in NRS 41.035] is the wrong done, not the measure of compensation or the character of the relief sought[.]'")(*quoting State v. Webster*, 88 Nev. 690, 695 , 504 P. 2d. 1316, 1320 (1972)).

Here, this Court confirmed in the *2014 Opinion* that separate damages were to be awarded for the fraud and IIED claims, affirming the jury's separate award of damages for fraud and ordering retrial for the amount of the separate IIED damages.[41] There can be no dispute, therefore, that Hyatt is entitled to a separate award of damages for each claim up to the statutory damages cap.

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[40] The current damages cap under NRS 41.035 is $100,000 per claim. The Court should consider using its considered discretion to impose the higher cap given the long-running nature of this case.

[41] *2014 Opinion*, at 145-47, 149-50.

Hyatt II therefore requires only that this Court's *2014 Opinion* be modified so that the damages are limited to $75,000 per claim.[42] Specifically, the fourth paragraph of the *2014 Opinion* (on page 131 of the Pacific Reporter version) that starts with "In connection with . . ." must be stricken and replaced with a discussion that based on *Hyatt II* the jury's award of $1,085,282.56 in damages for the fraud claim must be capped at the Nevada statutory damage limit of $75,000, and that upon re-trial of the damages issue for the IIED claim, the damages award must be similarly capped at $75,000 even if the jury in a new trial awards an amount in excess of $75,000.

As noted above, the Court should consider directing judgment in Hyatt's favor on the IIED claim in the statutory maximum amount of $75,000. Just as sufficient evidence from the prior trial supports the liability finding for the IIED claim, and notwithstanding the evidentiary errors noted by this Court in the *2014 Opinion* that required the $52 million damage award be vacated, sufficient evidence supports an award of at least $75,000 (or even the current cap of

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[42] To the extent the Court views application of the damages cap per claim as anything beyond a mechanical application to the two claims on which Hyatt prevailed, Hyatt requests that the Court order additional briefing on this issue or return the matter to the district court for a determination and application of the damages cap issue.

$100,000) for the IIED claim. Such an award is also in the interests of justice and efficiency.[43]

The following sections of the *2014 Opinion* must also be so modified: the entire discussion under the heading "Fraud damages" (on pages 145-47 of the Pacific Reporter version); the entire discussion under the heading "Recoverable damages on remand" (page 153 of the Pacific Reporter version); and the two sentences under heading "Conclusion" (page 157 of the Pacific Report version) that start "We uphold the amount of damages awarded . . ." and "Any damages awarded on remand . . ."

No other correction of the *2014 Opinion* was intended by the U.S. Supreme Court's decision in *Hyatt II*, nor is any other correction needed or warranted.

B. FTB waived any right to argue any additional portions of the *2014 Opinion* violated *Hyatt I.*

"[P]arties may not raise a new theory for the first time on appeal, which is inconsistent with or different from the one raised below." *Schuck v. Signature Flight Support of Nevada, Inc.*, 126 Nev. 434, 437, 245 P.3d 542 (2010) (affirming grant of summary judgment and ruling that appellant waived factual

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[43] Hyatt refers the Court to pages 147-49 of the *2014 Opinion* that discuss the evidence from trial that supported Hyatt's IIED claim. *See also* discussion, *infra., at* 22-25.

and legal arguments in opposition to summary judgment that were not raised below; comma error in original); *Tupper v. Kroc.*, 88 Nev. 146, 150, 494 P.2d 1275 (1972) (ruling that appellant waived argument that the respondent was required to prove that the sale of appellant's partnership interest was necessary before a sale could be ordered; "Upon the rule . . . that a party on appeal cannot assume and [sic] attitude or accept a theory inconsistent with or different from that at the hearing below, we will not consider that issue.") (internal citations omitted); *see also Valley Health Sys., LLC v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark*, 127 Nev. 167, 172, 252 P.3d 676 (2011) ("[a] point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal."); *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P2d 981 (1981) (same).

In a similar vein, this Court will not consider arguments raised for the first time in a party's reply papers. *See State Dep't of Taxation v. Kawahara*, 131 Nev. Adv. Op. 42, 351 P.3d 746, 748 (2015) ("[T]he Department did not argue priority based on this statute and, indeed, did not mention the statute until the reply brief. We therefore decline to consider any argument regarding the statute."); *Edelstein v. Bank of New York Mellon*, 128 Nev. Adv. Op. 48, n. 13, 286 P.3d 249, 261 (2012) ("[Edelstein] does not make this argument in his opening brief thus, we do

not consider it."); *Bongiovi v. Sullivan*, 122 Nev. 556, 569, n.5, 138 P.3d 433, 443 (2006) (declining to consider argument raised for the first time in an appellant brief.).

In the context of this case, the same principal must be applied when a case returns after review by the U.S. Supreme Court. If FTB failed to make an argument in its appeal before this Court, it should not be allowed to do so now where it is not related to or implicated by the decision of the U.S. Supreme Court.

The U.S. Supreme Court's opinion in *Hyatt II* was limited to amount of damages. There is no reason for this Court to read more into the opinion than is there. In analogous situations, this Court would not expect or want a trial court doing what the FTB advocates here in terms of re-arguing and re-deciding unrelated issues fully addressed and resolved by this Court. *See, e.g., Wheeler Springs Plaza, LLC v. Beemon*, 119 Nev. 260, 263–64, 71 P.3d 1258 (2003) ("When a reviewing court determines the issues on appeal and reverses the judgment specifically directing the lower court with respect to particular issues, the trial court has no discretion to interpret the reviewing court's order; rather, it is bound to specifically carry out the reviewing court's instructions."); *see also Cooney v. Goldberg*, 124 Nev. 1459, 238 P.3d 803 (2008) ("[T]he trial court has no discretion to interpret the reviewing court's order; rather, it is bound to

specifically carry out the reviewing court's instructions.") (alterations in original) (quoting *Wheeler Springs Plaza, LLC,* 119 Nev. at 263–64).

As a result, FTB's attempt to now argue the comity issue addressed in *Hyatt I* and affirmed in *Hyatt II* – outside the issue of the application of Nevada's statutory damages cap – should not be considered by this Court. Specifically, FTB's prior (and extensive) briefing to this Court limited its argument that the *2014 Opinion* violated *Hyatt I* to the issue of Nevada's statutory damages cap.[44]

At no point did FTB argue that under *Hyatt I* and its application of comity and the Full Faith and Credit clause that this Court erred in its *2014 Opinion* in allowing Hyatt to pursue his fraud and IIED claims, or in finding Hyatt adduced sufficient evidence to establish his fraud claim, or in rejecting FTB's failure to exhaust administrative remedies, or any other argument FTB now makes. FTB made arguments on different grounds for the fraud and IIED claims.[45] Nor did FTB make the exhaustion of administrative remedies argument it now makes. Instead, FTB argued the district court violated that prior ruling that allowed the intentional tort claims to proceed.[46] FTB therefore waived its right to now argue *Hyatt II* provides some basis for this Court to review these issues at this time.

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[44] AOB, at 100-102; ARB, at 109-11.
[45] AOB, at 33-52, 70-71, and 93-95.
[46] AOB, at 54-60.

C. Under the law-of-the-case doctrine, FTB is precluded from rearguing whether Hyatt may pursue the fraud and IIED claims against the FTB.

1. The law-of-the-case doctrine is well established under Nevada law.[47]

"[T]he law of a first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same." *Clem v. State*, 119 Nev. 615, 620, 81 P.3d 521 (2003); *Geissel v. Galbraith*, 105 Nev. 101, 103 (1989) (holding modified by *Willerton v. Bassham, by Welfare Div., State, Dep't of Human Res.*, 111 Nev. 10, 889 P.2d 823 (1995) ("[W]here an appellate court states a principal or rule of law in deciding a case, that rule becomes the law of the case and is controlling both in the lower courts and on subsequent appeals, so long as the facts remain substantially the same.")).

In order for the law-of-the-case doctrine to apply to an issue, the "appellate court must [have] actually address[ed] and decide[d] the issue explicitly *or by necessary implication*." *Dictor v. Creative Management Services, LLC*, 126 Nev. 41, 44, 1223 P.3d 332, 334 (2010) (emphasis added); *see also, Fergason v. LVMPD*, 131 Nev. ___, 364 P.3d 592, 597 (Adv. Op. 94, December 24, 2015) ("Application of the doctrine requires that the appellate court actually address and

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[47] FTB is well familiar with the law-of-the-case doctrine having argued it in its appeal to this Court. *See* AOB, at 54-60.

decide the issue explicitly or by necessary implication.") (internal quotation marks and citations omitted).

This Court has repeatedly observed that the law-of-the-case doctrine prevents further litigation of this issue and "cannot be avoided by a more detailed and precisely focused argument." *See Hall v. State*, 91 Nev. 314, 316, 535 P.2d 797 (1975); *see also*, *State v. Haberstroh*, 119 Nev. 173, 188–89, 69 P.3d 676, 686 (2003) ("The law of a first appeal is the law of the case in all later appeals in which the facts are substantially the same, and that law cannot be avoided by more detailed and precisely focused argument made after reflecting upon previous proceedings.") (internal citations omitted).

This Court "will depart from [its] prior holdings only where [it] determine[s] that they are so clearly erroneous that continued adherence to them would work a manifest injustice." *See Clem*, 199 Nev. at 620; *see also*, *Hsu v. Cty of Clark*, 123 Nev. 625, 630–31, 173 P.3d 724 (2007) ("Nevertheless, as the U.S. Supreme Court has noted, absent those extraordinary circumstances, a court should be loath to revisit its prior decisions.") (internal citations and quotation marks omitted). Alternatively, the law of the case doctrine does not apply when there is a change of law that occurs during the pendency of the appeal. *See Hsu*, 123 Nev. at 632 ("[T]he doctrine of the law of the case should not *apply* where, in

the interval between two appeals of a case, there has been a change in the law by . . . a judicial ruling entitled to deference."). (emphasis added). Neither circumstance exists here.

2. This Court has already determined, twice, that fraud and IIED claims can be asserted against FTB because intentional torts may be pursued against a Nevada government agency.

The procedural history of this case in this Court is telling and contradicts the relief now sought by FTB. In this Court's *2002 Opinion*, after several rounds of briefing and after issuing and vacating its own initial decision, this Court unambiguously held that Nevada government agencies do not have immunity for "intentional torts committed within the course and scope of employment" citing *Falline v. GNLV Corp*, 107 Nev. 1004, 1009 (1991), and other cases.[48]

It is indisputable that Hyatt's fraud and IIED claims were encompassed within this Court's *2002 Opinion* that Hyatt could pursue intentional tort claims. Hyatt's briefing before the Court set forth intentional torts he had alleged and even outlined the evidence gathered to that date to support the claims asserted. Fraud was a focus of the briefing on that point, while much the same evidence discussed

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[48] *2002 Opinion*, at 5 and 8.

also supported the outrage claim, *i.e.,* IIED.[49] FTB's briefing argued against these claims on the grounds Hyatt did not set forth sufficient evidence.[50] Notably, FTB did not argue at that time, or later, that these two claims could not be brought against Nevada government agencies.[51]

Similarly, when FTB raised and briefed issues for this appeal it did not argue or assert that fraud and IIED claims could not be brought against a Nevada government agency. Instead, FTB argued for clarity on discretionary function immunity and sought to overturn *Falline*.[52] This Court rejected FTB's arguments and reaffirmed *Falline*, holding that FTB could be sued for intentional torts.[53] In its decision, this Court explicitly discussed Hyatt's fraud and IIED claims against FTB, upholding the liability finding in favor of Hyatt and against FTB as to both.[54]

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[49] Hyatt Petition For Rehearing from 2001, at 6-10, attached to Supp. Append. Vol. 2, at Tab 1. For the Court's convenience Hyatt has also submitted herewith a Supplemental Appendix (Volume 2) of select prior briefing from this Court's first consideration of this case ("Supp. Append Vol. 2").

[50] FTB Response to Petition for Rehearing, at 6, attached Supp. Append. Vol. 2, at Tab 3.

[51] *Id.*

[52] AOB, at 34-52, 70-77, and 93-96.

[53] *2014 Opinion*, at 134-39.

[54] *2014 Opinion*, at 144-45, 147-49.

On two occasions in this case, therefore, this Court has considered and decided that fraud and IIED claims can be pursued against FTB because Nevada state agencies are not immune from intentional torts.

3. FTB's discretionary function immunity argument was not addressed or altered by *Hyatt II.*

The first issue addressed and decided by this Court in its *2014 Opinion* was rejection of FTB's discretionary function immunity argument. The specific finding of this Court was that "FTB is not immune from suit under comity because discretionary-function immunity in Nevada does not protect Nevada's government or its employees from intentional torts and bad faith conduct."[55] This Court then explained its decision in a detailed, five page discussion of the issue.[56]

FTB's petition for certiorari to the U.S. Supreme Court sought review of this issue.[57] But the Court denied that portion of the petition, declining to review this Court's ruling that FTB does not have discretionary function immunity in regard to Hyatt's fraud and IIED claims.[58]

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[55] *2014 Opinion,* at 134.
[56] *Id.*, at 134-39.
[57] FTB's Cert. Pet., at 15-20.
[58] *Franchise Tax Board of California v. Hyatt*, 576 U.S. __, Order List at 13 (Jun. 30, 2015)(granting review of Questions 2 and 3 but denying review of Question 1 which sought review of the discretionary function immunity issue), attached to Supp. Append. Vol. 1, at Tab 4.

With no new law, and no new facts, FTB nonetheless now begs this Court to again address the issue as applied to this case and specifically Hyatt's fraud and IIED claims. FTB's arguments in its supplemental brief are remarkably similar to its prior briefing. As a matter of procedure the Court should not re-visit this issue. As also discussed below, substantively, there is no basis for the Court to reverse its prior, well-reasoned decision in this case on discretionary function immunity.

As a result, the procedural history of this case prohibits FTB from now re-arguing the same issue this Court has decided twice in this case.

4. Falline does not bar IIED claims against Nevada government agencies, nor does any other authority.

The cornerstone of FTB's argument seeking that the Court reconsider its prior ruling on discretionary function immunity is FTB's complete misstatement of the holding in *Falline*.[59] *Falline* indisputably arose out of the workers

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[59] Hyatt extensively briefed the discretionary function immunity issue in his Answering Brief. While FTB repeats much of its prior briefing on this issue, Hyatt will not repeat his briefing but instead directs the Court to Hyatt's Answering Brief to the extent the Court determines it is necessary to review Hyatt's prior briefing. (RAB, at 54-67.) It is clear that the Court understood (and accepted) Hyatt's prior briefing and arguments as the Court stated in its *2014 Opinion* addressing the discretionary function immunity issue: "Hyatt maintains that the *Martinez* case did not alter the exception created in *Falline* and that discretionary immunity does not apply to bad-faith misconduct because an employee does not have discretion to undertake intentional torts or act in bad faith." (*2014 Opinion*, at 135.) *Martinez* refers to *Martinez v. Maruszczak*, 123 Nev. 433, 168 P.3d 720 (2007), which the Court also extensively discussed in the *2014 Opinion*, at pp. 134-139.

compensation context and bars a plaintiff in that context from making an IIED claim:

> Moreover, recognizing a cause of action for emotional distress in the workmen's compensation context raises the specter of "almost every emotion-based case turning up as some kind of tort suit."

Falline, at 1013 (citation omitted).

FTB nonetheless makes repeated misstatements about this holding in *Falline* and then punctuates its inaccuracy by intentionally misstating the above quoted language from the decision. Specifically, FTB misstates on pages 4 and 13 of its Supp. Brief that *Falline* holds that an IIED claims "is prohibited by law" and "will not lie" against a Nevada government actor." (FTB Supp. Brief, at 4, 13.) FTB then recasts the above quote from *Falline* out of context and substitutes the words "[an administrative]" context for the actual words "the workmen's compensation" context. Indeed, FTB prefaces its erroneous quote with a false description of the *Falline* holding. According to FTB:

> In *Falline*, the Court summarily dismissed the IIED claim because no such claim could be brought against a government agency:
>
> 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."[60]

Neither in the *Falline* opinion itself, nor in the Court's decisions in this case discussing *Falline,* has this Court held or intended to convey that *Falline* bars IIED claims against government actors. To the contrary, this Court has approvingly cited *Falline* in twice finding that Hyatt's IIED claim is not barred by either FTB's claimed immunity under California law or this Court's application of Nevada's discretionary function immunity for government actors.

In the *2002 Opinion*, this Court cited *Falline* and other cases in holding that Nevada does not provide immunity to its state agencies for acts taken in bad faith or for intentional torts.[61] In its *2014 Opinion*, this Court extensively discussed *Falline* in addressing the discretionary function immunity argument of FTB. The Court rejected FTB's argument in affirming *Falline*: "We therefore affirm our 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."[62]

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[60] FTB Supp. Brief, at 14 (emphasis added).
[61] *2002 Opinion*, at 5.
[62] *2014 Opinion*, at 139.

The Court then went on and approved the liability finding against FTB on the IIED claim.[63] There is no basis for FTB's wishful but erroneous interpretation and assertion of the holding from *Falline.* An IIED claim can be sustained against a Nevada government agency when, as here, the conduct at issue constituted an intentional tort or was carried out in bad faith. Here, both qualifications were met as FTB committed an intentional tort and acted in bad faith in so doing.[64]

5. Other case law reaffirms that IIED claims may be brought against Nevada government agencies.

Pre-*Martinez* this Court's rulings demonstrated that IIED claims could be brought against government agencies. *See Posadas v. City of Reno*, 109 Nev. 448, 450, 851 P.2d 438, 440 (1993)(reversing grant of summary judgment for city for various causes of actions by plaintiff, including IIED, thereby allowing the claims to proceed to trial and holding specifically that factual issues precluded summary judgment on the IIED claim); *see also Nunez v. City of N. Las Vegas*, 116 Nev. 535, 541, 1 P.3d 959, 963 (2000) (reversing dismissal of IIED claim against the city "to allow discovery on these claims to proceed. The merits of the emotional distress claims may be revisited thereafter either by pre-trial motion or at trial."); *Plaza v. City of Reno*, 111 Nev. 814, 815, 898 P.2d 114 (1995) (reversing grant of

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[63] *2014 Opinion*, at 147-49.
[64] *2014 Opinion*, at 147-49.

summary judgment in favor of city for claims including IIED because "there are still genuine issue of material fact, and summary judgment was therefore inappropriate.")

California similarly allows IIED claims against its state agencies and officials. *See Catsouras v. Dept. of California Highway Patrol*, 181 Cal. App. 4th 856, 875 (2010); *Asgari v. City of Los Angeles*, 15 Cal. 4th 744, 760 (1997).

As a result, IIED claims against Nevada government agencies are not barred by *Falline*, *Martinez* or any other case. This is entirely consistent with the law of this case as already determined by this Court. FTB has no basis to now re-argue to the contrary.

6. Case law also affirmatively supports that a fraud claim can be brought against government agencies.

FTB suggests there is also no precedent for allowing a fraud claim against a Nevada government agency. Again, not true. Beyond and in addition to the *2014 Opinion* and *Falline*, case law in other jurisdictions supports holding government agencies liable for fraud. *See Doe ex rel. Christina H. v. Medford Sch. Dist. 549C*, No. 10-3113-CL, 2011 WL 1002166, at *9 (D. Or. Feb. 22, 2011), report and recommendation adopted, No. CIV. 10-3113-CL, 2011 WL 976463 (D. Or. Mar. 18, 2011) (Oregon) (denying school district's motion to dismiss state law claims

including fraud claim); *Del Vecchio By Del Vecchio v. Nassau Cty.*, 118 A.D.2d 615, 617, 499 N.Y.S.2d 765, 767 (1986) (New York) (allowing misrepresentation claims against city to proceed); *Burr v. Bd. of Cty. Comm'rs of Stark Cty.*, 23 Ohio St. 3d 69, 78, 491 N.E.2d 1101, 1109 (1986) (Ohio) (affirming judgment for fraud against county); *see also Canyon del Rio Inv'rs, L.L.C. v. City of Flagstaff*, 227 Ariz. 336, 344, 258 P.3d 154, 162 (Ct. App. 2011) (Arizona) (affirming dismissal of misrepresentation claim on the basis of failure to file notice of claim as required by statute, not because of governmental immunity.); *Benedict Realty Co. v. City of New York*, 45 A.D.3d 713, 714, 846 N.Y.S.2d 294, 295 (2007) (New York) (affirming summary judgment on fraud claim in favor of City because Plaintiff failed to raise triable issue of fact—not because of governmental immunity).

D. Even if the Court entertains FTB's attempt to reargue the sufficiency of the fraud evidence, more than sufficient evidence was presented at trial to sustain the jury's verdict on the fraud claim.

Again, there is no basis for this Court to reconsider its prior ruling affirming the jury's finding that the FTB committed fraud directed at Hyatt. In finding sufficient evidence in the record to support Hyatt's fraud claim, this Court held in its *2014 Opinion* that FTB falsely promised to protect Hyatt's confidential information and treat him courteously and cited the following evidence in support of the jury's finding of fraud:

- *Massive disclosure of confidential information:* "At trial, Hyatt presented evidence that FTB disclosed his social security number and home address to numerous people and entities and that FTB revealed to third parties that Hyatt was being audited. In addition, FTB sent letters concerning the 1991 audit to several doctors with the same last name, based on its belief that one of those doctors provided Hyatt treatment, but without first determining which doctor actually treated Hyatt before sending the correspondence."[65]
- *Bad faith delay of protests. "Hyatt showed that FTB took 11 years to resolve Hyatt's protests of the two audits. Hyatt alleged that this delay resulted in $8,000 in interest per day accruing against him for the outstanding taxes owed to California."*[66]
- *Auditor's Anti-Semitic remarks: "Hyatt presented evidence through Candace Les, a former FTB auditor and friend of the main auditor on Hyatt's audit, Sheila Cox, that Cox had made disparaging comments about Hyatt and his religion . . ."*[67]
- *FTB intent on assessing: "Cox essentially was intent on imposing an*

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[65] *2014 Opinion*, at 144-45; *see also* RAB, at 35-42.
[66] *2014 Opinion*, at 145; *see also* RAB, at 43-51.
[67] *2014 Opinion*, at 145; *see also* RAB, at 15-17.

assessment against Hyatt, and that FTB promoted a culture in which tax assessments were the end goal whenever an audit was undertaken."[68]

Hyatt II does not alter any of the analysis used by the Court to affirm the jury's finding that FTB committed fraud.[69] The singular issue in *Hyatt II* was the amount of damages this Court affirmed in favor of Hyatt. The reduction of the amount of damages Hyatt can recover on his fraud claim from the $1,085,281.56 to $75,000 as argued by FTB does not provide a basis for FTB to reargue the liability finding made against it on the fraud claim. There is no reason for the Court to reconsider and essentially re-weigh the fraud evidence.

E. FTB is also precluded from rearguing exhaustion of administrative remedies, which argument in any event fails as this tort case is wholly separate from the California administrative tax process.

Again, nothing in *Hyatt II* relates or provides a basis to re-argue FTB's failure to exhaust administrative remedy defense. More fundamentally, FTB now tries to re-argue the very exhaustion of administrative remedy argument it lost on in the *2002 Opinion*. In sum, as first decided by then Judge Saitta (now former Justice Saitta), this tort action is separate from the California administrative

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[68] *2014 Opinion*, at 145; *see also* RAB, at 32-35.

[69] This Court cited much of the same evidence in affirming the liability finding for the IIED claim. (*2014 Opinion*, at 147-49.)

process that will decide the tax dispute.[70] This tort case will not decide the tax case, nor will resolution of the tax case address and resolve the issues put forth in this tort case. This Court affirmed this ruling and the separateness of the two proceedings in its *2002 Opinion*:

> Preliminary, we reject Franchise Tax Board's arguments that the doctrines of sovereign immunity, full faith and credit, choice of law, or *administrative exhaustion* deprive the district court of subject matter jurisdiction over Hyatt's tort claims. . . . Hyatt's tort claims, although arising from the audit, are separate from the administrative proceeding, and the exhaustion doctrine does not apply.[71]

Indeed, the separateness of the two proceeding was the basis of some of the evidentiary errors found by this Court to have been committed by the district court during the trial. This Court found that certain evidence should not have been admitted because it went only to the issue of whether taxes were owed, not whether a tort was committed.[72]

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[70] 2 AA 357-419, 420-421.
[71] *2002 Opinion*, at 6 (emphasis added).
[72] *2014 Opinion*, at 149-50 (evidence challenging audit conclusions as improper), 150-51 (evidence of audit determinations).

FTB now attempts to reargue that there should not even have been a tort action. But the cases cited by FTB are inapposite. They all involve an attempt by the plaintiff to stop or alter an administrative proceedings. The descriptions of the cases discussed by FTB on pages 33-35 of its Supp. Brief establish this very point. FTB does not cite a case involving a tort claim separate from the administrative proceeding.

FTB's retread of its administrative exhaustion argument must again be rejected by the Court. The Court has ruled on this, and it is the law of this case. Further, the issue is in no way implicated by *Hyatt II*.

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VII. Conclusion.

For all of the foregoing reasons, the relief sought by FTB should be denied. The Court should re-issue its *2014 Opinion* after correcting the amount of damages awarded to the $75,000 maximum per claim as FTB argued in its prior briefing in this appeal.

DATED: October 24, 2016.

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ATTORNEY'S CERTIFICATE

1. I 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 it has been prepared in a proportionally spaced typeface using WordPerfect X4 in 14 point Times New Roman font.

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains10,539 words.

3. Finally, I certify that I have read this appellate 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)(1), which requires every assertion in the brief 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 the

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accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 24 day of October, 2016.

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CERTIFICATE OF SERVICE

I certify that I am an employee of HUTCHISON & STEFFEN, LLC and that on this date **RESPONDENT GILBERT P. HYATT'S SUPPLEMENTAL ANSWERING BRIEF FOLLOWING MANDATE FROM THE SUPREME COURT OF THE UNITED STATES** was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

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EXHIBIT 82

IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 53264

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,

Appellant/Cross-Respondent
v.

GILBERT P. HYATT
Respondent/Cross-Appellant

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

APPELLANT'S SUPPLEMENTAL REPLY BRIEF FOLLOWING MANDATE FROM THE SUPREME COURT OF THE UNITED STATES

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I. INTRODUCTION

In its 2014 Opinion this Court fashioned a special judge-made rule of law that held FTB to a different standard than a Nevada agency. *See Franchise Tax Bd. of Calif. v. Hyatt* ("2014 Opinion"), 130 Nev. Adv. Op. 71, 335 P.3d 125, 147 (2014). The United States Supreme Court rejected this sister-state hostility and vacated the 2014 Opinion as unconstitutional. *Franchise Tax Bd. of Cal. v. Hyatt*, 136 S.Ct. 1277, 1282 (2016) ("*Hyatt II*"). According to FTB's research, just a handful of times in history, absent some intervening new law, has a Nevada Supreme Court decision been thrown out by the country's highest court.[1] Given this rare circumstance, the Supreme Court's mandate to comply with the Full Faith and Credit Clause should not be taken lightly. Rather, the Court must issue a new judgment that is free from sister-state hostility in all respects.

The Court justified the 2014 Opinion's anti-California discrimination with its belief that California's system to control its own agencies did not provide "adequate" recourse to Nevada's citizens. 335 P.3d at 147. According to the 2014 Opinion, California's agencies purportedly "operate[] outside" the systems of "legislative control, administrative oversight, and public accountability" that

[1] *See Powell v. Nevada*, 511 U.S. 79, 85 (1994) (vacating and remanding "for further proceedings not inconsistent with this opinion"); *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1058 (1991) (reversing without remanding); *Brooks v. Dewar*, 313 U.S. 354, 362 (1941) (reversing and remanding with instructions); *Crandall v. Nevada*, 73 U.S. 35 (1867) (reversing and remanding with instructions).

Nevada has for its own agencies. *Id.* (quoting *Faulkner v. Univ. of Tenn.*, 627 So.2d 362, 366 (Ala.1992)).

Hyatt II repudiated this rationale, declaring that this Court's explanation for its sister-state hostility "amount[ed] to little more than a conclusory statement disparaging California's own legislative, judicial, and administrative controls." 136 S.Ct. at 1282. Such disparagement "cannot justify the application of a special and discriminatory rule." *Id.*

Notwithstanding this language, Hyatt contends that *Hyatt II* still allows Nevada to discriminate against FTB so long as it can articulate a constitutionally allowable policy for doing so. (Suppl. AB 21-22). But the only policy reason articulated by this Court was the disparagement of California's legislative, judicial and administrative controls that the Supreme Court deemed unconstitutional. *Hyatt II*, 136 S.Ct. at 1282, quoting 2014 Opinion, 335 P.3d at 147. Nowhere in the 2014 Opinion did the Court otherwise justify its failure to treat FTB the same as Nevada's Department of Taxation, and Hyatt offers no additional policy reasons for the Court's consideration.

As to the numerous instances of sister-state hostility that FTB identifies, Hyatt provides only a procedural, rather than substantive, response. Hyatt makes the internally contradictory arguments that FTB is allegedly relitigating issues, yet purportedly waived those same issues by not raising them earlier. Having argued

all along for comity, FTB preserved its right to request that this Court's new judgment comply with the Full Faith and Credit Clause in all respects. And where the Supreme Court agreed with FTB that the 2014 Opinion contained unjustified discriminatory animus towards California, FTB is not seeking to relitigate closed issues.

Hyatt does not address – and therefore does not dispute – dispositive arguments made in FTB's supplemental opening brief. For example, Hyatt provides no response to the cases and statutes cited by FTB that give deference to the Nevada Department of Taxation's fact finding and legal conclusions and immunity for its audit work. Therefore, FTB was entitled to that same immunity and deference. Likewise, Hyatt does not dispute that intent to defraud cannot be proven by statements the legislature requires the Nevada Department of Taxation to make through the Taxpayers' Bill of Rights. Therefore, FTB could not be found to possess fraudulent intent in sending a legislatively mandated notice to Hyatt. Hyatt's silence confirms the merits of FTB's arguments.

Where this Court failed to articulate a constitutionally allowable policy for treating FTB differently than a Nevada agency, the Court cannot simply "modify or correct" the 2014 Opinion with the elementary interlineations offered by Hyatt. (Suppl. AB 27-28). The Court must comply with the letter and spirit of the Supreme Court's mandate and cannot look elsewhere to determine its next steps.

Reviewing the facts and applying the law as if FTB were Nevada's Department of Taxation, the Court should conclude that FTB cannot be liable to Hyatt.

II. ARGUMENT

A. Hyatt Asks This Court To Disregard The Supreme Court's Mandate And Enter A New Judgment That Is Unconstitutional.

1. To Comply With The Mandate, The Court's New Judgment Must Be Free Of Sister-State Hostility.

Hyatt improperly asks this Court to ignore language from the Supreme Court's mandate that bars any anti-California discrimination. "After the appeal had been taken, the power of the court below over its own decree was gone. **All it could do after that was to obey [the Supreme Court's] mandate when it was sent down**." *Durant v. Essex Co.*, 101 U.S. 555, 556-57 (1879) (emphasis added).

Here, the Supreme Court's mandate broadly attacked every unconstitutional aspect of the 2014 Opinion:

> **[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). Hyatt's supplemental answering brief ignores this bolded language. (Suppl. AB 3, 20).

The only judgment that would be consistent with the Supreme Court's mandate is one that is free of sister-state hostility in all respects. Therefore, the

Court cannot, as Hyatt argues, simply reissue the 2014 Opinion with the damages cap inserted. (Suppl. AB 16). If this Court were to enter a new judgment that retains any of the 2014 Opinion's anti-California hostility, that new judgment would be "inconsistent" with *Hyatt II* and therefore in violation of the Full Faith and Credit command. *Hyatt II*, 136 S.Ct. at 1283.

To the extent this Court failed to treat FTB as it would Nevada's taxing authority – whether by allowing IIED and fraud verdicts based on California's legislatively mandated statements and FTB's discretionary audit decisions; failing to cloak FTB with the same immunities that would protect Nevada's Department of Taxation; failing to defer to FTB's fact finding and legal conclusions; and permitting Hyatt to sidestep the California administrative process – the 2014 Opinion violated the Full Faith and Credit clause.

2. The Court Must Look At The Supreme Court's Mandate, Not Simply The Issues Presented, To Determine The Scope Of Its Authority On Remand.

Contrary to Hyatt's assertion (Suppl. AB 1-2), this Court can look only to the mandate itself, not the issues presented to the Supreme Court, to guide its post-remand decision making. "[W]here the directions contained in the mandate are precise and unambiguous, it is the duty of the subordinate court to carry it into execution, ***and not to look elsewhere to change its meaning***." *Cook v. Burnley*, 78 U.S. 672, 674 (1870) (emphasis added). The Supreme Court's "power to decide is

not limited by the precise terms of the question presented." *Procunier v. Navarette*, 434 U.S. 555, 559 n.6 (1978). Rather, the Supreme Court has discretion to issue a mandate that is broader in reach than the issues presented. *See City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 214 n.8 (2005); *see also Haynes v. United States*, 390 U.S. 85, 101 (1968) (holding that the Supreme Court has "plenary authority under 28 U.S.C. §2106 to make such disposition of the case as may be just under the circumstances") (internal quotation omitted).

In light of these authorities, this Court cannot second guess the breadth of the Supreme Court's mandate by looking at the scope of FTB's arguments to the Supreme Court. *See Cook*, 78 U.S. at 674. If the Supreme Court wanted this Court to simply apply the statutory cap, it could have said so in its mandate and vacated the damages award only. *See* 28 U.S.C. §2106. It did not. *See Hyatt II*, 136 S.Ct. at 1283. It also did not identify the damages award as the sole reason why the 2014 Opinion was unconstitutional. *See id.* Instead, the mandate clearly specified that **any aspect** of the 2014 Opinion that was hostile to a sister state was unconstitutional. *See id.* at 1282-83.

3. This Court Must Rectify All Of The Sister-State Hostility Expressly And Impliedly Rejected By The Supreme Court's Mandate.

On remand, a lower court must tailor its new judgment to conform to any matter that the Supreme Court has disposed of either expressly or impliedly. *See*

Kashner Davidson Sec. Corp. v. Mscisz, 601 F.3d 19, 24 (1st Cir. 2010). "[T]he power of a [lower] court to act in any litigation after the issuance of a mandate on appeal is limited by an obligation to ***do nothing contrary to either the letter or the spirit of the mandate***, as explained or elucidated by the opinion." *Goldwyn Pictures Corp. v. Howells Sales Co.*, 287 F. 100, 102 (2d Cir. 1923) (emphasis added); *see also Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979) (looking to whether post-mandate conduct of lower court was consistent "with either the spirit or the express terms of our decision"); *In re Coudert Bros. LLP*, 809 F.3d 94, 99 (2d Cir. 2015) (holding that the lower court "must follow both the specific dictates of the remand order as well as the broader spirit of the mandate") (internal quotations and citations omitted). Hyatt summarily brushed aside this proposition and the supporting legal authorities cited by FTB. (Suppl. AB 20, n.29).

Embodied in the *Hyatt II* opinion is an extensive discussion of the Full Faith and Credit requirements. 136 S.Ct. at 1280-83. As the Supreme Court emphasized, a state may not "adopt any policy of hostility to the public Acts of that other State." *Id.* at 1281, *quoting Carroll v. Lanza*, 349 U.S. 408, 413 (1955). The Supreme Court expounded at length regarding why this Court's discriminatory conduct was unconstitutional:

> 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… [A] State that disregards its own

> ordinary legal principles [based on the presumption that the sister state's legislative, judicial and administrative controls will be ineffective] *is* hostile to another State. A constitutional rule that would permit this kind of discriminatory hostility is likely to cause chaotic interference by some States into the internal, legislative affairs of others. Imagine, for example, that many or all States enacted such discriminatory, special laws, and justified them on the sole basis that (in their view) a sister State's law provided inadequate protection to their citizens. Would each affected sister State have to change its own laws? Entirely? Piece-by-piece, in order to respond to the new special laws enacted by every other State? It is difficult to reconcile such a system of special and discriminatory rules with the Constitution's vision of 50 individual and equally dignified States. In light of the constitutional equality among the States, … Nevada has not offered sufficient policy considerations to justify the application of a special rule of Nevada law that discriminates against its sister States. *Id.* at 1282 (internal quotations omitted).

This language broadly admonished the Court that no sister-state hostility of any kind can persist in a new judgment. *See id.*, *citing* 2014 Opinion, 335 P.3d at 145.

B. Hyatt's Supplemental Answering Brief Fails To Offer Justification For The Numerous Examples Of Sister State Hostility Identified By FTB.

Rather than address the multiple instances of anti-California discrimination identified by FTB, Hyatt makes the unfounded assertion that "[t]here is no other part of the 2014 Opinion [other than failure to apply the damages cap] that fails to treat FTB as a Nevada state agency would be treated." (Suppl. AB 21). Hyatt's contention is wrong, and by resting on this bald assertion without analysis, Hyatt concedes the merits of FTB's arguments.

1. Hyatt Does Not Dispute That The Court Did Not Give FTB The Deference It Gives To The Nevada Department Of Taxation's Fact Finding And Legal Conclusions.

Hyatt does not dispute a dispositive argument advanced by FTB: the Court would defer to the Nevada Department of Taxation's fact finding and legal conclusions. (*See* Suppl. OB 26-36 and cases cited therein).

> [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.

See Int'l Game Tech., Inc. v. Second Jud. Dist. Ct., 122 Nev. 132, 157-58, 127 P.3d 1088, 1093, 1106 (2006) (internal quotation omitted). Hyatt makes no effort to distinguish this case or justify how the Nevada tort case could proceed without giving deference to FTB's audit findings and conclusions.

2. Hyatt Does Not Dispute That The Nevada Department of Taxation Would Be Immune From Hyatt's Attack On The Administrative Process.

Hyatt's supplemental answering brief is also silent and therefore concedes that Hyatt's tort case would have never proceeded against the Nevada Department of Taxation because Nevada affords its revenue agencies special immunities (beyond discretionary function immunity) that other agencies do not share. *See* NRS 360.140(3); NRS 372.670; NRS 375B.370; *see also Wells Fargo and Co. v. Dayton*, 11 Nev. 161, 168 (1876). The underlying purpose of this immunity is to prevent interference with the tax collecting process:

> 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*, 11 Nev. at 168, *citing Dows vs. The City of Chicago*, 78 U.S. 108, 110 (1870).

By failing to cloak FTB with Nevada's statutory immunities, the 2014 Opinion did not treat FTB the same way Nevada treats its own Department of Taxation.

3. Hyatt Presents No Cogent Argument Why *Falline*'s Prohibition On IIED Claims In the Workers' Compensation Context Would Not Apply In All Administrative Proceedings.

Hyatt's attempt to limit *Falline*'s bar on IIED claims to just workers' compensation proceedings is nonsensical. *Falline* held that, like punitive damages,